



Institute for International Law
and Justice

IILJ International Legal Theory Colloquium Interpretation and Judgment in International Law

NYU Law School

Professors Benedict Kingsbury and Joseph Weiler
Pollack Colloquium Room, FH 9th Floor, 245 Sullivan St.
Thursdays 4.00pm-5.50pm

Provisional Semester Program - Attached Paper is shown in Bold

- January 17 – Jeremy Waldron, NYU Law School
Topic: *"Partly Laws Common To All Mankind": Foreign Law In American Courts*
- January 24 - Catharine MacKinnon, University of Michigan Law School
Topic: *Women's Status, Men's States*
- January 31 - Beth Simmons, Harvard University Government Department
Topic: *Explaining Variation in State Commitment to and Compliance with International Human Rights Treaties*
- February 7 - Richard Stewart, NYU Law School
Topic: *Accountability, Participation, and the Problem of Disregard in Global Regulatory Governance*
- February 14 - Joseph Weiler, NYU Law School
Topic: *Prolegomena to a Meso-theory of Treaty Interpretation at the Turn of the Century*
- February 21 - NO COLLOQUIUM
- February 28 - Sungjoon Cho, Chicago-Kent College of Law
Topic: *Constitutional Adjudication in the WTO*
- March 6 - Robert Howse, University of Michigan Law School
Topic: *Beyond Compliance: Rethinking Why International Law Really Matters*
(paper co-authored with Ruti Teitel)
- March 13 - Martti Koskenniemi, University of Helsinki/NYU Law School
Topic: *International Law and Raison D'état; Rethinking the Prehistory of International Law*

Note: March 14 and 15, the Program in the History and Theory of International Law convenes in the same room a conference on Roman Law and Imperialism in the Foundations of Modern International Law (all welcome – see iilj.org)

- March 20 - NO COLLOQUIUM – Spring Break
- March 27 - Jose Alvarez, Columbia University Law School
Topic: *The Argentine Crisis and Foreign Investors: A Glimpse into the Soul of the Foreign Investment Regime* (paper co-authored with Kathryn Khamsi)
- April 3 - Ryan Goodman, Harvard Law School
Topic: *Sociological Theory Insights into International Human Rights Law*
- April 10 - Sally Engle Merry, NYU Anthropology Dept & Law and Society Institute
Topic: *Indicators in Global Governance*
NOTE: This session will meet in Furman Hall, Room 210
- April 17 - Christopher McCrudden, Oxford University/U. of Michigan Law School**
Topic: *Human Dignity in Human Rights Interpretation*
- April 24 - Stephen Gardbaum, University of California at Los Angeles Law School
Topic: *Is U.S. Constitutional Rights Jurisprudence Exceptional?*

Program and papers available at: <http://iilj.org/courses/2008IILJColloquium.asp>

HUMAN DIGNITY AND THE JUDICIAL INTERPRETATION OF HUMAN RIGHTS

*Christopher McCrudden**

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

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*So many roads, so much at stake
So many dead ends, I'm at the edge of the lake
Sometimes I wonder what it's gonna take
To find dignity¹*

INTRODUCTION

The 60th Anniversary of the Universal Declaration of Human Rights² provides a suitable opportunity to reflect on one of the key concepts that underpins and informs the human rights enterprise. Due significantly to its centrality in the Universal Declaration, the concept of “human dignity” now plays a central role in human rights discourse.³ According to both the United Nations Charter,⁴ and the Universal Declaration of Human Rights, recognition of the inherent dignity and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights both state that all human rights derive from the inherent dignity of the human person.⁵ Dignity is becoming commonplace in the legal context in many jurisdictions. It is used frequently in judicial decisions, for example justifying the removal of restrictions on abortion in the United States,⁶ in the imposition of restrictions on dwarf throwing in France and Germany,⁷ in overturning laws prohibiting sodomy,⁸ and in the consideration of physician-assisted suicide.⁹ But what does dignity mean? Can it be a basis for human rights, a right in itself, or is it simply a synonym for human rights? In particular, what role does the concept of dignity play in the context of human rights adjudication?

I. FINDING HUMAN DIGNITY IN THE HISTORY OF IDEAS

The incorporation of the concept of “human dignity” in the Universal Declaration was the culmination of a significant historical evolution and use of the concept. Although the story is

¹ Bob Dylan, *Dignity* (1963)

² Universal Declaration of Human Rights, 1948, Preamble: “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . . , Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedoms . . .”. Article 1 provides: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

³ See generally, Kretzmer and Klein, 2002.

⁴ Charter of the United Nations, 1945, Preamble: “We the Peoples of the United Nations determined . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . .”

⁵ International Covenant on Economic, Social and Cultural Rights; Economic Covenant on Civil and Political Rights.

⁶ Casey

⁷ Dwarf throwing cases

⁸ Lawrence

⁹ Glucksberg; Pretty

complex, for present purposes we can identify, since Roman times, several main (overlapping) developments of dignity as a Western philosophical-cum-political concept.¹⁰

A. Dignity as honour and status

The concept of *dignitas hominis* in classical Roman thought largely meant “status”. Honour and respect should be accorded to someone who was worthy of that honour and respect because of a particular status that he or she had. So, appointment to particular public offices brought with it *dignitas*. As Cancik writes, the term “denotes worthiness, the outer aspect of a person’s social role which evokes respect, and embodies the charisma and the esteem presiding in office, rank or personality.”¹¹ Indeed, *dignitas* was not confined to humans and applied to institutions and the state itself.

This concept of dignity has long been incorporated in some legal systems in the private law context as the basis for providing protection for dignity in the sense of “status,” “reputation,” and “privileges”. The English Bill of Rights of 1689, for instance, referred to “the Crown and royal dignity”.¹² In legal systems based on Roman law, dignity was seen as a right of personality and status, and criminal and civil remedies were frequently provided if dignity in this sense was infringed.¹³ In South Africa, for example, it was recognised in the private-law sphere, deriving from Roman-Dutch law, that “[I]nfringement of a person’s *dignitas* constituted a delict and compensation could be claimed with the *actio iniuriarum*.”¹⁴ In the French Revolution of the 18th Century, “dignities” (in the sense of aristocratic privileges) were extended to every citizen by the Declaration of the Rights of Man and of the Citizen.¹⁵ In the international sphere, this concept of “dignity” was frequently used to refer to the status of sovereign states¹⁶ and, by extension, to the status of ambassadorial and consular staff serving their countries abroad.¹⁷

B. Dignity as an attribute of human beings as such

Only in scattered Classical Roman writing was a second, broader, concept of dignity present, particularly in Cicero, where *dignitas* was used as referring to the dignity of human beings as human beings, not dependent on any particular additional status. In this use of dignity, man is contrasted with animals: “... It is vitally necessary for us to remember always how vastly superior is man’s nature to that of cattle and other animals; their only thought is for bodily satisfactions Man’s mind, on the contrary, is developed by study and reflection From this we may learn

¹⁰ I found the entry by Kurt Bayertz, *Menschenwürde*, in *Enzyklopädie Philosophie* (ed. Hans Jörg Sandkühler (Felix Meiner Verlag, Hamburg, 1999, Band 1, 824-826, particularly helpful. I am grateful to Michael Rosen for drawing it to my attention.

¹¹ Hubert Cancik, ‘Dignity of Man’ and ‘Personal’ in *Stoic Anthropology: Some Remarks on Cicero, De Officiis I 105-107*, in Kretzmer and Klein, 19 at 19.

¹² The Bill of Rights (Act) 1689 Cap. II (36.), Article II. Cp The Act of Settlement 1701

¹³ Arthur Chaskalson, *Human Dignity as a Constitutional Value*, in Kretzmer and Klein, 133, at 135.

¹⁴ I.J. Kroeze, *Human Dignity in Constitutional Law in South Africa*, in Montpelier, 87 at p. 88.

¹⁵ Declaration of the Rights of Man and of the Citizen, 1789, Article 6: “Law is the expression of the general will. Every citizen has a right to participate personally, or through his representative, in its foundation. It must be the same for all, whether it protects or punishes. All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents.”

¹⁶ Article

¹⁷ Vienna Convention on Diplomatic Relations, 1961, Article 22, 29.

that sensual pleasure is wholly unworthy of the dignity of the human race.”¹⁸ Taken in this way, where human beings are regarded as having a certain worth by virtue of being human, the concept of human dignity raises important questions such as “What kind of beings are we? How do we appropriately express the kind of beings we are?”¹⁹ Radically different answers are possible, of course, and therein lies the root of the problem with the concept of human dignity.

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

C. Dignity due to man as created in the image of God

During the Middle Ages, with the ferment of debate in intellectual circles about the relationship between God and man, the idea of dignitas came to be used as the way of distinguishing between man and other creatures, as it had in Cicero. The humanists attempted to reconcile classical and dogmatic theology by emphasizing the idea of mankind as having dignity because man is made in the image of God, distinguishing man from other species. As Arieli has argued, “The expression ‘the inherent dignity of man’ ... defines the ontological status of man which derives ultimately from the fundamental conceptions of the West created by the fusion of Jewish-Christian monotheism with those derived from classical and humanistic conceptions of man”²⁰ The Catechism of the Catholic Church incorporates this idea of man as made in the image of God as central to its conception of human dignity.²¹

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

We can identify an interesting example of the practical uses to which the emerging idea of dignity as inherent in man, and thus worthy of protection, was put. In *On the Law of War and Peace*,

¹⁸ Cicero, *De Officiis*, I, 30.

¹⁹ Ron DiSanto, *The Threat of Commodity-Consciousness to Human Dignity*, in Regis Duffy, OFM and Angelus Gambatese, OFM, *Made in God's Image: The Catholic Vision of Human Dignity* (Paulist Press, 1999, 54 at 57.

²⁰ Yehoshua Arieli, *On the Necessary and Sufficient Conditions for the Emergence of the Dignity of Man and His Rights*, in Kretzmen and Klein, 1 at 9.

²¹ The Catechism of the Catholic Church, Part One: The Profession of Faith, Section 2: The Profession of the Christian Faith, Chapter 1, Article 1, paragraph 6, 356-7

published in 1625,²² Grotius considered how we should treat the remains of slain enemies and this resulted in a long excursus on why funeral rites were important. In an important passage, he concludes:

“There are some, who think that the custom of burial was bequeathed to us by our first parents as a testamentary hope of a resurrection. (...) And Christians in particular have frequently ascribed the custom of decent burial to the same hope. (...) But the most obvious explanation is to be found in the dignity of man, who surpassing other creatures, it would be a shame, if his body were left to be devoured by beasts of prey. (...) For to be tore by wild beasts (...) is to be robbed of those honours, in death, which are due to our common nature. (...) Consequently the rights of burial, the discharge of which forms one of the offices of humanity, cannot be denied even to enemies, whom a state of warfare has not deprived of the rights and nature of men.”²³

D. Dignity and human reasoning as the gift of God

As we can see from this passage, being made in the image of God meant that man was endowed with gifts that distinguished man from animals. The humanists of the Renaissance identified dignity as an important bridge between classical Roman thinking and Church doctrine in another important way. They argued that one of the most important of the gifts of God to man was the gift of reason. Using reason, therefore, came to be closely connected with the idea of dignity. In his famous and influential²⁴ oration “On the Dignity of Man”, published in 1486, Pico della Mirandola argues that at the root of man’s dignity is the ability to choose to be what he wants to be, and that this is a gift from God. “It is given to him to have that which he chooses and to be that which he wills.”²⁵ The idea of dignity as now divorced from office and hierarchy became central to the use of dignity in this tradition.

E. Dignity, human reason, and autonomy

The further development of dignity drew substantially on the importance of man as having the capacity of reason, whilst dropping the religious elements of humanist writings such as those of Pico. We now move more squarely to “the central existential claim of modernity – man’s autonomy, his capacity to be lord of his fate and the shaper of his future.”²⁶ In the Enlightenment, the dignity of man in this sense came to be developed philosophically, and used as the basis, most famously, of Kant’s use of the concept. It would be rash, indeed, for a non-Kantian scholar to purport to get fully to grips with Kant’s use of the idea, since it is notoriously contested territory,

²² De Jure Belli ac Pacis. by Hugo Grotius. Translated by A. C. Campbell London, 1814, Book II, chapter 19.

²³ In Book II, chapter 19. Compare the provisions in international bi-lateral agreements relating to the preservation of the dignity and aesthetic character of the cemeteries by the state in which the cemeteries are located, where the cemeteries contain the war dead of another state. E.g. Netherlands – US Agreement on American Military Cemeteries, 1970, TIAS 6979; US-Panama Agreement Concerning the Use of Corozal Cemetery, 1999

²⁴ Yehoshua Arieli, On the Necessary and Sufficient Conditions for the Emergence of the Dignity of Man and His Rights, in Kretzman and Klein, 1 at 10.

²⁵ Pico Della Mirandola, On the Dignity of Man, translated by Charles Glenn Wallis (ed. Hackett Publishing Company, 1965, with an Introduction by Paul J.W. Miller), at p. 5

²⁶ Yehoshua Arieli, On the Necessary and Sufficient Conditions for the Emergence of the Dignity of Man and His Rights, in Kretzmer and Klein, 1 at 12.

but several aspects of Kant's use of the term seem clear. First, although it is anything but clear what exactly he intended, a passage in which the term is used in the *Metaphysics of Morals* has become the best-known source for the subsequent belief that Kant argued that human dignity required that individuals should be treated as ends and not simply as means to an end.²⁷ Second, over time, this connection between dignity and Kant has become probably the most often cited non-religiously based conception of dignity. Some, indeed, regard him as "the father of the modern concept of human dignity."²⁸ Third, whether rightly or wrongly, the conception of dignity most closely associated with Kant is the idea of dignity as autonomy, that is the idea that to treat someone with dignity is to treat them as autonomous individuals able to choose their destiny.

F. Dignity and (French) republicanism

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

G. Dignity and 19th Century social movements

The concept of dignity came to be used as a rallying cry for a variety of social and political movements advocating specific types of social reform during the Nineteenth Century. One of Schiller's epigrams "Würde des Menschen" (1798) puts well the connection between dignity and social conditions which was beginning to develop: "Give him food and shelter;/ When you have

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

²⁸ Giovanni Bognetti, *The Concept of Human Dignity in European and U.S. Constitutionalism*, in *Science and Techniques*, 75 at 79.

²⁹ Carozza, *Latin American*, at p. 300.

³⁰ "When I contemplate the natural dignity of man, when I feel (for Nature has not been kind enough to me to blunt my feelings) for the honour and happiness of its character, I become irritated at the attempt to govern mankind by force and fraud, as if they were all knaves and fools, and can scarcely avoid disgust at those who are thus imposed upon." Thomas Paine, *Rights of Man: Part the First* (1791).

³¹ *The Prelude* (1805), Book Thirteenth, lines 76-88.

³² Charles Renouvier, *Manuel Républicain de l'homme et du citoyen*. 1848, introduction by Maurice Agulhon (Paris: Éditions Garnier Frères, 1981), p. 93. I am most grateful to Rebecca Scott for drawing my attention to this reference.

covered his nakedness, dignity will follow by itself.”³³ In Europe and in Latin America, dignity came to be particularly associated with the abolition of slavery. Simon Bolivar, the Latin American military leader, statesman, and icon, justified the abolition of slavery as a “shameless violation of human dignity” and laws perpetuating it as “sacrilege.”³⁴ One of the decrees of the French Republic established as a result of the revolution of 1848 abolished slavery as “an affront to human dignity.”³⁵ The idea of the “dignity of labour” was used to encapsulate some of the egalitarian ambitions of these social movements, as well as providing a rallying cry by the growing Labour Movement to mobilize the working classes and argue for the state to provide social welfare. Ferdinand Lassalle (1825-1864), a leading socialist and founder of Germany’s Social Democratic Party, argued, for example, that the state had the duty to “improve the situation of the lower classes, who had fallen into poverty and starvation, and thus provide a true humane existence for everyone.”³⁶

The prevalence of the use of dignity in European political discourse during the 19th Century was not without its critics, both from the left and the right. Schopenhauer’s 1837 critique of Kant condemned the use of “human dignity” as contentless: “... this expression ‘Human Dignity,’ once it was uttered by Kant, became the shibboleth of all perplexed and empty-headed moralists. For behind that imposing formula they concealed their lack, not to say, of a real ethical basis, but of any basis at all which was possessed of an intelligible meaning; supposing cleverly enough that their readers would be so pleased to see themselves invested with such a ‘dignity’ that they would be quite satisfied.”³⁷ In 1847, Marx denounced the use of dignity by a fellow socialist as a “refuge from history in morality.”³⁸ In 1872, Nietzsche railed against the ideas of the “dignity of man” and the “dignity of labour” judging them to be merely the outpourings of a sentimental egalitarianism used to persuade those who toiled to continue to do so. For Nietzsche, individuals only had dignity when they are used as tools to serve the genius of the artist: “every human being ... only has dignity in so far as he is a tool of the genius, consciously or unconsciously; from this we may immediately deduce the ethical conclusion, that ‘man in himself’, the absolute man possesses neither dignity, not rights, nor duties; only as a wholly determined being serving unconscious purposes can man excuse his existence.”³⁹

H. Dignity and Catholic social teaching

In light of these attacks, it is noteworthy that the Catholic Church adopted “human dignity” as the rallying cry for the social teaching it developed at the end of the 19th Century. The threat that socialism was seen as posing, particularly with the development of Communism by Marx and the fear of radical redistribution, class war, and totalitarianism, contributed to the adoption of dignity as central to an all-encompassing Catholic social doctrine, beginning with the Pope Leo XIII’s Encyclical *Rerum Novarum* at the end of the Nineteenth Century, and developed further

³³ Herbert Cancik, *Some Remarks on Cicero ...*, in Kretzmer and Klein, at 36.

³⁴ Simón Bolívar, *Message to the Congress of Bolivia* (Lima, May 25, 1826, quoted in Carozza, *Latin American*, at p. 301.

³⁵ Decree of April 27, 1848, Preamble.

³⁶ Joern Eckert, *Legal Roots of Human Dignity in German Law*, in Kretzmer and Klein, 41 at 47.

³⁷ Schopenhauer, Arthur; translated with an introduction and notes by A.B. Bullock (2005). *The basis of morality*. Mineola, N.Y: Dover Publications, Part II. *Critique of Kant’s Basis of Ethics*,

³⁸ Karl Marx, *Moralising Criticism and Critical Morality*, *A Contribution to German Cultural History*_Contra Karl Heinzen, *Deutsche-Brüsseler-Zeitung* Nos. 86,87,90,92 and 94; October 28 and 31; November 11, 18 and 25, 1847.

³⁹ *The Greek State*,

throughout the Twentieth Century by Pius XI and Pius XII. This was further developed and refined in Pope John XXIII's encyclical *Pacem in Terris* and in a key document of the Second Vatican Council *Gaudium et Spes*. Dignity was also a significant feature of Pope John Paul II's writings. The approach to dignity developed in this context emphasised the limits of rights in being able to capture the full range of what was necessary to human well-being, the dangers of a conflictual politics, and the need for solidarity between the different interests in society, resulting in a more communitarian conception of human dignity. But dignity was not simply a conception of man as a political and social animal, and the creation of man in the image of God remained a key element in its formulation and understanding.

A particularly influential exemplar of this approach was Jacques Maritain, a prominent French Catholic philosopher, and a well-known presence at that time of the drafting of the Charter and the Universal Declaration. He was active in promoting a philosophy that applied the theology of Aquinas to modern conditions. Central to this philosophy, as developed by Maritain, was the concept of human dignity. It was Maritain, above all, who attempted to combine all but the original Roman meaning of dignity together and made it central to his view not only of human rights, but also of political life and human relations, and brought it into practical politics. His position as a man of affairs as well as an academic enabled him to ensure that this message was heard widely in the circles that were at that time engaged in the construction of the post-War global architecture, not least the United Nations. This was a view of human rights that viewed rights not as espousing radical ethical individualism but rather as essential for the promotion of the common good, giving an important communitarian tinge to their meaning and function.

I. Dignity and 20th Century social movements

Since then, human dignity has played an important role in several social and political movements of the Twentieth Centuries. It has been shaped most by the reaction against Nazi ideology and practice before and during the Second World War, culminating in the horrors of the Holocaust. It has been a central organizing concept in the Civil Rights Movement in the United States, in the articulation of feminist demands concerning the role of women (echoing Mary Wollstonecraft), in the area of reproductive rights, in campaigns on the issue of the appropriate treatment at the end of life, and in movements for gay rights. It has been drawn on extensively in the international political context, most notably in critiques of Communism, and as the moral basis for attacking global poverty.⁴⁰ Nelson Mandela, in his Trafalgar Square speech in 2005, argued that “[o]vercoming poverty is not a gesture of charity. It is an act of justice. It is the protection of a fundamental human rights, the right to dignity and a decent life.” More generally, dignity has increasingly passed into vernacular use in a variety of very different contexts and circumstances.⁴¹

⁴⁰ Nelson Mandela, in his Trafalgar Square speech in 2005, argued that “[o]vercoming poverty is not a gesture of charity. It is an act of justice. It is the protection of a fundamental human rights, the right to dignity and a decent life.” Nelson Mandela, Trafalgar Square, 3 February 2005.

⁴¹ Here are a few. Vice Admiral Thad Allen, the federal officer in charge of recovering the dead after the Hurricane Katrina told a news conference: “We are mindful of the dignity needed to be afforded each [of the dead].” A report on the eviction of Kalahari Bushmen from their ancestral lands in Botswana (July 25, 2005) included an interview with a young Bushman who had been forced to live in a settlement outside his ancestral lands. He said “There is nothing here for me. My land is my dignity.” (I am grateful to Michael Rosen for drawing this to my attention.)

II. FINDING HUMAN DIGNITY IN HUMAN RIGHTS TEXTS

A. *Human dignity in national constitutional texts*

It was not until the first half of the twentieth century, however, that dignity began to enter legal, and particularly constitutional and international legal discourse, in any sustained way. The use of dignity in legal texts, in the sense of referring to human dignity as inherent in man, comes in the first three decades of the Twentieth Century. Several countries in Europe and the Americas incorporated the concept of dignity in their constitutions:⁴² in 1917 Mexico;⁴³ in 1919 Weimar Germany⁴⁴ and Finland;⁴⁵ in 1933 Portugal;⁴⁶ in 1937 Ireland;⁴⁷ and in 1940 Cuba.⁴⁸ It seems clear that the combination of the Enlightenment, republican, socialist/social democratic, and the Catholic uses of dignity together contributed significantly to these developments, with each being more or less influential in different countries. So, for example, in Finland the socialist influence was clear. In the Irish context the Catholic influence was dominant, as it was in Portugal⁴⁹ and Spain -- in 1945 the Basic Law of Spain included a reference to dignity.⁵⁰ In the Central and South American context, the social democratic/socialist influence and the Catholic influence were both significantly present.⁵¹ Though growing, this constitutional use of dignity remained pretty marginal, however, until the end of the Second World War. Nor was it surprising that of the new national constitutions that incorporated dignity between 1945 and 1950, three (Japan, Italy, and Germany) were the defeated nations of the Second World War responsible for a substantial part of the horrors that the human rights movement was aiming to eradicate. In 1946 Japan,⁵² in 1948 Italy,⁵³ and in 1949 West Germany⁵⁴ incorporated dignity in the constitutional documents. The movement to incorporate dignity into new constitutions was by no means confined to European and Latin American states. In 1950 the Constitution of India did likewise.⁵⁵ When Israel declared independence in 1948, the Declaration of Independence referred to how “[s]urvivors of the Nazi holocaust in Europe, as well as Jews from other parts of the world, continued to migrate to *Eretz-*

⁴² Teresa Iglesias, *Bedrock Truths and the Dignity of the Individual*, *Logos: A Journal of Catholic Thought and Culture* 4.1 (2001) 114-134

⁴³ Article 3c.

⁴⁴ Reich Constitution of August 11th 1919, Article 151.

⁴⁵ Part I; General Provisions.

⁴⁶ Constitution of Portugal, 1933, Article 45.

⁴⁷ Preamble: “. . . so that the dignity and freedom of the individual may be assured. . . .”

⁴⁸ Article 32.

⁴⁹ “Salazar used *Quadragesimo Anno* as a blueprint for his government.” “*Une Messe est Possible*”: The Imbroglia of the Catholic Church in Contemporary Latin Europe, p. 10, www.ces.fas.harvard.edu/publications/ManuelMott.pdf.

⁵⁰ “The Spanish State proclaims as a guiding principle of its acts, respect for the dignity, integrity and freedom of the human person. . . .”

⁵¹ Constitution of the Republic of Costa Rica, 1949, Article 33, Article 56.

⁵² Article 24.

⁵³ The Constitution of the Italian Republic, 1948, Article 3, Article 27, Article 41

⁵⁴ Chapter 1, Article 1(1).

⁵⁵ Preamble.

Israel, undaunted by difficulties, restrictions and dangers, and never ceased to assert their right to a life of dignity, freedom and honest toil in their national homeland.”⁵⁶

Of these national constitutional references to dignity, we shall see subsequently that much the most influential was the incorporation of dignity into the West German constitution. The influence of Catholic, social democratic, and Kantian thinking on the drafting of the constitution is well known and dignity has the most prominent place of all in the Basic Law that emerged in 1949. The debate over the drafting of the provision was intense, focusing on whether the dignity of the human person should be based explicitly on natural law. The final text, however, avoided any reference to “a specific philosophical or ethical concept of human dignity and remains open to different approaches,”⁵⁷ providing (in English translation) “The dignity of man is inviolable. To respect and to protect it shall be the duty of all public authority.”⁵⁸

B. Human dignity in the UN Charter and the UDHR

Much of the inspiration for the use of dignity in international and regional human rights texts derives not from these constitutional developments but from the use of dignity in the Universal Declaration of Human Rights (UDHR). The Preamble mentions dignity in two places: “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world ...”, and a little later: “Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedoms ...”. Article 1 takes up this theme and provides: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” There are also several more specific uses of dignity in the remainder of the text. Article 22, on the right to social security, provides: “Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.” Article 23(3), set in the context of right to work, provides, that “Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.”

C. Explaining the inclusion of “human dignity” in the UN Charter and the UDHR: a drafting history

Central to the development of dignity in the UDHR was the earlier incorporation of the concept of dignity in the Preamble to the Charter of the United Nations. It would be most satisfactory to be able to tell a nicely researched story of how the term came to be included in the UN Charter but it is shrouded in some mystery and we can only speculate as to the precise source of the proposal. What is clear is that the originator of much of the Preamble was Jan Christian Smuts, the South African general and former member of the British War Cabinet. It was his draft that formed the basis for the existing Preamble, and incorporated the important reference to human rights as a foundational principle of the new United Nations. However, his draft did not include a

⁵⁶ The Declaration of the Establishment of the State of Israel, 1948.

⁵⁷ Christian Walter, *Human Dignity in German Constitutional Law*, in Montpellier, p. 24 at p. 26.

⁵⁸ Grundgesetz, Article 1(1).

reference explicitly to human dignity. That phrase appeared only after an unminuted committee discussion, and I have been unable to identify, precisely, from where it originated.

All that can be said, without further evidence, is that the phrase was by then in such common use in the circles devising the new United Nations global architecture that it was unsurprising that it emerged from the drafting Committee. The International Labour Organization had already incorporated the language of dignity as early as 1944 in the Philadelphia Declaration, which effectively re-established the aims and purposes of the ILO, originally established in 1919 in the Versailles Treaty.⁵⁹ Part II of the Declaration brought the concept of dignity centre stage: “Believing that experience has fully demonstrated the truth of the statement in the Constitution of the International Labour Organisation that lasting peace can be established only if it is based on social justice, the Conference affirms that: (a) all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity ...” A few months after the incorporation of “dignity” in the Charter, it also played a prominent role in the Preamble of the treaty establishing the United Nations Educational, Scientific and Cultural Organization.⁶⁰

In contrast to the dearth of information on the inclusion of dignity in the Preamble to the United Nations Charter, we can be somewhat clearer in how the term human dignity came to be included in the Universal Declaration of Human Rights. There has long been a debate over the relative importance of Rene Cassin and John Humphrey in the drafting of the Declaration. The better view, according to the most thorough scholarly literature, is that Humphrey was considerably more important than he has often been given credit for, producing (effectively) the first draft of the Declaration. Whilst that is no doubt true, the incorporation of the concept of dignity, was not due to Humphrey but to Cassin. Humphrey’s first draft did not include any reference to dignity, and it was included first by Cassin when he redrafted Humphrey’s draft. The inclusion of dignity in the Declaration obviously drew on its inclusion already in the Preamble to the United Nations Charter, of course, but it nevertheless was controversial. Humphrey himself, for example, clearly considered the reference to dignity did not add anything at all and that its incorporation as Article 1 of the Declaration was mere rhetoric. For others, however, it was a vital attempt to articulate their understanding of the basis on which human rights could be said to exist. Somewhat strangely, perhaps, although the rest of Article 1 was subject to considerable debate, the term human dignity itself appears to have been unquestioned, and, as we have seen, it was included in the final Declaration in five different places, twice in the Preamble, most prominently in Article 1, and twice in those articles setting out socio-economic rights (Articles 22 and 23).

D. Dignity in previous international and regional human rights texts and proposals

Dignity had been incorporated in several drafts of earlier proposals for a international Bill of Rights. Even before the Second World War, the Dijon Declaration of 1936 referred to “respect for human dignity and civilised behaviour.”⁶¹ The American Jewish Committee’s Declaration of Human Rights (1944) had provided “All that we cherish must rest on the dignity and inviolability of the person, of his sacred right to live and to develop under God, in whose image he was

⁵⁹ Declaration concerning the aims and purposes of the International Labour Organisation (Declaration of Philadelphia), May 1944.

⁶⁰ 3 Bevans 1311.

⁶¹ The Dijon Declaration, 1936, translated in HG Wells, *The Rights of Man or What Are We Fighting For?* (1940). I am grateful to Brian Simpson for providing many of the references in the following paragraph.

created.”⁶² Unsurprisingly, the Catholic Bishops in the United States in 1946 had included “dignity” in the text of their proposed Declaration of Rights. The term had also been proposed by the Uruguayan Government in its detailed suggestions for what should be included in the Charter. The Cuban Declaration of Human Rights of 1946 included that every human being had the “right to life, to liberty, to personal security and to respect for his dignity as a human being.”⁶³ Georges Gurvitch’s Bill of Social Rights of 1946 referred to the need for society to protect “liberty and human dignity.”⁶⁴ The American Federation of Labor’s Preamble to its international Bill of Rights proposal in 1946 stipulated that the “dynamic motive of a truly democratic society is to foster and enhance the worth and dignity of the individual human being ...” and provided in Article 1: “Every human being – irrespective of race, colour, creed, sex or national origin – has the right to pursue his or her work and spiritual development in conditions of freedom and dignity.”⁶⁵ Even the United Kingdom’s International Bill of Rights of 1947 included in the Preamble a reference to “fundamental human rights and ... the dignity and worth of the human person.”⁶⁶ The United States proposals for a human rights convention in 1947 provided that “It shall be unlawful to subject any person to torture, or to cruel or inhuman punishment, or to cruel or inhuman indignity.”⁶⁷

At the regional level, dignity was included in the American Declaration of the Rights and Duties of Man, the first international human rights instrument of a general nature, predating the Universal Declaration of Human Rights by more than six months.⁶⁸ The Preamble provided: “All men are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience, they should conduct themselves as brothers one to another.” The first chapter established a catalogue of rights, whilst the second chapter contained a list of corresponding duties. Dignity played an important role in both. As explained in the preamble: “The fulfillment of duty by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty.” The treaty establishing the Organization of American States referred in chapter VII to the importance of dignity as a basis for social legislation. The text of the Bill of Rights of the European Movement of May 1948, by which time the UN draft declaration was available, provided in Article 1: “All men are born free and equal in dignity,”⁶⁹ and in Article 29 that “every one has a right that his dignity and health shall be preserved through the provision of a diet, of clothing, of housing and of medical requirements up to a standard corresponding to the resources of the European Union in relation to vital necessities.”

E. Human dignity in international humanitarian law texts

Apart from some scattered references during the 19th Century to dignity in national provisions

⁶² Cited in Klaus Dicke, *The Founding Function of Human Dignity in the Universal Declaration of Human Rights*, in Kretzmer and Klein, p. 111 at 113.

⁶³ E/HR/1, 22.4.46. Original in Spanish.

⁶⁴ Georges Gurvitch, *The Bill of Social Rights* (New York, 1946), Article 1.

⁶⁵ American Federation of Labor, E/CT.2/2 of 20.8.46

⁶⁶ YBHR 1947, 488

⁶⁷ United States Proposals for a Human Rights Convention (November 1947), E/CN.4/37

⁶⁸ It was adopted by the nations of the Americas at the Ninth International Conference of American States in Bogotá, Colombia, in April 1948, the same meeting that adopted the Charter of the Organization of American States and thereby created the OAS.

⁶⁹ Text of Bill of Rights of European Movement, 4 May 1948

relating to the treatment of prisoners,⁷⁰ and in a draft treaty provisions prior to the Second World War relating to the treatment of civilian populations,⁷¹ the major boost in international humanitarian law to the use of dignity also came after the Second World War in the drafting of the Geneva Conventions. The importance of dignity as the basis for the approach adopted was clear from the outset. The International Committee of the Red Cross proposed to the Powers assembled at Geneva the text of a Preamble, which was to be identical in each of the four Conventions: “Respect for the personality and dignity of human beings constitutes a universal principle which is binding even in the absence of any contractual undertaking. Such a principle demands that, in time of war, all those not actively engaged in the hostilities and all those placed ‘hors de combat’ by reason of sickness, wounds, capture, or any other circumstance, shall be given due respect and have protection from the effects of war, and that those among them who are in suffering shall be succored and tended without distinction of race, nationality, religious belief, political opinion or any other quality ...”⁷² The text of the Conventions, as adopted, incorporated “dignity” most prominently in Common Article 3 of the Conventions, which prohibits *inter alia* “outrages upon personal dignity, in particular humiliating and degrading treatment.”⁷³ Such acts “are and shall remain prohibited at any time and in any place whatsoever” with respect to persons protected by the Conventions.

Subsequently, Additional Protocol I of the Conventions relating to the protection of victims of international armed conflicts prohibited “outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault” in Article 75 (relating to “fundamental guarantees”).⁷⁴ Article 85 provided that certain acts “shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol” including “(c) practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination”.⁷⁵ Article 4 of the Second Additional Protocol prohibited “(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form or indecent assault.”⁷⁶ Since then, the statutes of ad hoc international criminal tribunals, and the Rome Statute establishing the International Criminal Court have incorporated similar references to “outrages upon personal dignity”.⁷⁷

⁷⁰ Instructions for the Government of Armies of the United States in the Field (Lieber Code). 24 April 1863, Art. 75.

⁷¹ First draft Convention adopted in Monaco (Sanitary cities and localities), 27 July 1934, Art.3.

⁷² See “Remarks and Proposals submitted by the International Committee of the Red Cross”. Document for the consideration of Governments invited by the Swiss Federal Council to attend the Diplomatic Conference of Geneva (April 21, 1949), Geneva, February 1949, page 8.

⁷³ Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949: Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, Article 3.

⁷⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977

⁷⁵ Ibid.

⁷⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

⁷⁷ See, e.g. the Agreement for and Statute of the Special Court for Sierra Leone, 16 January 2002, Article 3, prohibiting “Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault”; Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, Article 4; Rome Statute of the International Criminal Court, 17 July 1998, Article 8,

F. Dignity and international human rights texts following the UDHR

Since the relatively dramatic increase in the use of dignity in the international human rights law context during the 1940s, dignity has become commonplace in new international human rights and humanitarian law instruments. At the international level, dignity is now routinely incorporated in human rights charters, both general and specific. Unsurprisingly, given the role that dignity played in abolitionist politics, the preamble to the Slavery Convention of 1956 refers to the UN Charter's reaffirmation of the Member's "faith in the dignity and worth of the human person." So too, dignity is referred to, periodically, in the Preambles to several ILO Conventions, although without any apparent explanatory pattern being perceptible.⁷⁸ Three of the core international human rights conventions concluded during the 1960s confirmed that dignity would continue to play a significant role in human rights texts. The international covenants on civil and political rights, on economic social and cultural rights, and on the elimination of racial discrimination all included dignity language both in their Preambles,⁷⁹ and in the text of several Articles, relating to the treatment of those subject to a deprivation of their liberty through imprisonment or detention,⁸⁰ and the right to education.⁸¹ This pattern of including references to dignity in the Preambles of major international human rights texts has continued since then and is reflected in the Preambles of the international conventions regarding discrimination against women (1979),⁸² the prevention of torture (1984).⁸³

prohibiting "outrages upon personal dignity, in particular humiliating and degrading treatment".

⁷⁸ C156 Workers with Family Responsibilities Convention, 1981; C122 Employment Policy Convention, 1964; C111 Discrimination (Employment and Occupation) Convention, 1958; C107 Indigenous and Tribal Populations Convention, 1957; C104 (Shelved) Abolition of Penal Sanctions (Indigenous Workers) Convention, 1955.

⁷⁹ International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Preamble, The States Parties to this Convention, Considering that the Charter of the United Nations is based on the principles of the dignity and equality inherent in all human beings, ... Considering that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin, ... Considering that the United Nations Declaration on the Elimination of All Forms of Racial Discrimination of 20 November 1963 (General Assembly Resolution 1904 (XVIII)) solemnly affirms the necessity of speedily eliminating racial discrimination throughout the world in all its forms and manifestations and of securing understanding of and respect for the dignity of the human person ...; International Covenant on Economic, Social and Cultural Rights (CESCR), Preamble: The States Parties to the present Covenant, __Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Recognizing that these rights derive from the inherent dignity of the human person ...; International Covenant on Civil and Political Rights (CCPR), Preamble: The States Parties to the present Covenant, Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Recognizing that these rights derive from the inherent dignity of the human person

⁸⁰ International Covenant on Civil and Political Rights (CCPR), Article 10.

⁸¹ International Covenant on Economic, Social and Cultural Rights (CESCR), Article 13.

⁸² Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Preamble: The States Parties to the present Convention, Noting that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women, Noting that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of

By 1986, dignity had become so central to United Nations' conceptions of human rights that the UN General Assembly provided in its guidelines for new human rights instruments that such instruments should, *inter alia*, be "of fundamental character and derive from the inherent dignity and worth of the human person".⁸⁴ Since then, not surprisingly, the major conventions on the rights of children (1989),⁸⁵ the rights of migrant workers (1990),⁸⁶ protection against forced disappearance,⁸⁷ and the rights of disabled persons (2007)⁸⁸ have all included preambular references to dignity asserting the centrality of dignity to human rights in general and (often) its centrality to the specific right in play in that convention. But, in addition, international instruments in other spheres as far apart as those dealing with the right to food,⁸⁹ and the death penalty⁹⁰ have also adopted dignity language in their preambles.

any kind, including distinction based on sex, (...) Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity

⁸³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Preamble: The States Parties to this Convention, Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Recognizing that those rights derive from the inherent dignity of the human person (...)

⁸⁴ GA Res. 41/120, 4 December 1986, quoted in Andrew Clapham, *Human Rights Obligations of Non-State Actors*, at 538.

⁸⁵ Convention on the Rights of the Child (CRC), Preamble: The States Parties to the present Convention, Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom

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⁸⁸ Convention on the Rights of Persons with Disabilities (CRPD), Preamble: The States Parties to the present Convention, __ (a) Recalling the principles proclaimed in the Charter of the United Nations which recognize the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world, (...) h) Recognizing also that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person, (...) y) Convinced that a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities will make a significant contribution to redressing the profound social disadvantage of persons with disabilities and promote their participation in the civil, political, economic, social and cultural spheres with equal opportunities, in both developing and developed countries,

⁸⁹ The Preamble to the Agreement establishing the International Fund for Agricultural Development of 1977 recognizes "that the continuing food problem of the world is afflicting a large segment of the people of the developing countries and is jeopardizing the most fundamental principles and values associated with the right to life and human dignity."

⁹⁰ Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (CCPR-OP2): Preamble: The States Parties to the present Protocol, Believing that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights ...

A further major fillip to the use of dignity in the international sphere was given by the adoption of dignity as the central organizing principle of the Vienna World Conference on Human Rights in 1993. The Declaration and Programme of Action adopted dignity as foundational not only to human rights in general,⁹¹ but also adopted the concept of dignity in their provisions dealing with particular areas of human rights, such as the treatment of indigenous peoples,⁹² the prohibition of torture,⁹³ the prohibition of gender-based violence and harassment,⁹⁴ the abolition of extreme poverty,⁹⁵ and the issue of biomedical ethics.⁹⁶ Increasingly, the role of dignity has expanded beyond the Preamble of international human rights documents and into the text of their substantive articles. References to dignity have expanded to include not only rights relating to conditions of (and treatment during) detention,⁹⁷ and the right to education,⁹⁸ but also other rights, particularly the right not to be discriminated against,⁹⁹ the right not to be tortured or subject to other inhuman or degrading treatment,¹⁰⁰ rights in the criminal justice process,¹⁰¹ workers' rights,¹⁰² rights to be provided minimum conditions of welfare,¹⁰³ the right to health,¹⁰⁴ the right of disabled persons to be treated as autonomous individuals,¹⁰⁵ the right of children to be treated with dignity following abuse,¹⁰⁶ rights to reputation,¹⁰⁷ rights of indigenous cultures,¹⁰⁸ rights to control access and use of personal data,¹⁰⁹ and the conduct of biomedical experimentation.¹¹⁰

⁹¹ Vienna Declaration (VDPA), Preamble: (...) Recognizing and affirming that all human rights derive from the dignity and worth inherent in the human person, and that the human person is the central subject of human rights and fundamental freedoms, and consequently should be the principal beneficiary and should participate actively in the realization of these rights and freedoms(...)Recalling the Preamble to the Charter of the United Nations, in particular the determination to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, and in the equal rights of men and women and of nations large and small

⁹² Vienna Declaration (VDPA), Article 20.

⁹³ Vienna Programme of Action (VDPA), Article 55.

⁹⁴ Vienna Declaration (VDPA), Article 18.

⁹⁵ Vienna Declaration (VDPA), Article 25.

⁹⁶ Vienna Declaration (VDPA), Article 11.

⁹⁷ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Article 17.

⁹⁸ Convention on the Rights of the Child (CRC), Article 28; Convention on the Rights of Persons with Disabilities (CRPD), Article 24.

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¹⁰¹ Convention on the Rights of the Child (CRC), Article 37; Convention on the Rights of the Child (CRC), Article 40.

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¹⁰³ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Article 70.

¹⁰⁴ Convention on the Rights of Persons with Disabilities (CRPD), Article 25.

¹⁰⁵ Convention on the Rights of Persons with Disabilities (CRPD), Article 16.

¹⁰⁶ Convention on the Rights of the Child (CRC), Article 39; Convention on the Rights of Persons with Disabilities (CRPD), Article 3; Convention on the Rights of Persons with Disabilities (CRPD), Article 1.

¹⁰⁷ Convention on the Rights of Persons with Disabilities (CRPD), Article 8; International Convention for the Protection of All Persons from Enforced Disappearance (CED); Article 24; Convention on the Rights of the Child (CRC), Article 23.

¹⁰⁸ C107 Indigenous and Tribal Populations Convention, 1957, Article 2; United Nations Declaration on the Rights of Indigenous Peoples, Adopted by General Assembly Resolution 61/295 on 13 September 2007, Article 15, Article 43.

¹⁰⁹ C185 Seafarers' Identity Documents Convention (Revised), 2003, para 8; International Convention for the Protection of All Persons from Enforced Disappearance (CED), Article 19.

G. Dignity in regional human rights texts

The use of dignity is not restricted to the sphere of international human and humanitarian rights texts. Increasingly, dignity language has become embedded in the texts of regional human rights instruments. Dignity is central to the Preambles of the principal Inter-American,¹¹¹ Arab,¹¹² African,¹¹³ and (some) European¹¹⁴ human rights instruments, thus appearing to demonstrate a remarkable degree of theoretical convergence on dignity as a central organizing principle. Although it is not included in the text of the ECHR, it is included prominently in several subsequent Council of Europe conventions, notably the European Social Charter and the Convention dealing with biomedical ethics. The aim of the Convention on Human Rights and Biomedicine, which was opened for signature on 4 April 1997 in Oviedo and came into force on 1 December 1999, is to protect the dignity and identity of human beings and to guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine. It protects the dignity of everyone, including the unborn, and its main concern is to ensure that no research or intervention may be carried out that would undermine respect for the dignity and identity of the human being. It is not surprising that dignity also features prominently in the new European Union Charter of Fundamental Rights.

So too, the use of dignity in the context of specific textual provisions of the conventions shows a remarkable degree of consistency between the regional human rights instruments, and between these instruments and the international instruments we have examined in the previous section. Thus we find dignity used in the context of specific provisions dealing with slavery and forced labour,¹¹⁵ persons with disabilities,¹¹⁶ treatment of children,¹¹⁷ rights of women at work,¹¹⁸

¹¹⁰ Dignity was also heavily drawn on in the drafting of instruments both international and regional in the highly contested field of biomedical ethics. The UNESCO Declaration on the Human Genome gave a central role to the idea of human dignity, for example.

¹¹¹ Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women "Convention of Belem do Para" (IACVAW), Preamble; Inter-American Convention to Prevent and Punish Torture (IACT), Preamble; American Declaration of the Rights and Duties of Man (IADRDM), Preamble.

¹¹² League of Arab States, Revised Arab Charter on Human Rights, May 22, 2004, reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005): "Based on the faith of the Arab nation in the dignity of the human person whom God has exalted ever since the beginning of creation and in the fact that the Arab homeland is the cradle of religions and civilizations whose lofty human values affirm the human right to a decent life based on freedom, justice and equality ..."

¹¹³ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (ACHPR-P2), Article 3; African Charter on Human and Peoples' Rights (ACHPR), Preamble; Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (ACHPR-P1), Preamble; African Charter on the Rights and Welfare of the Child (ACRWC), Preamble.

¹¹⁴ Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR-P13), Preamble.

¹¹⁵ African Charter on Human and Peoples' Rights (ACHPR), Article 5; American Convention on Human Rights (IACHR), Article 6.

¹¹⁶ African Charter on the Rights and Welfare of the Child (ACRWC), Article 13; League of Arab States, Revised Arab Charter on Human Rights, May 22, 2004, reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005), entered into force March 15, 2008, Article 40.

treatment of those incarcerated,¹¹⁹ freedom from torture,¹²⁰ education,¹²¹ forced disappearances,¹²² violence against women,¹²³ and biomedical research.¹²⁴

H. Dignity in domestic constitutional texts more recently

The term human dignity might be thought to have passed into the corpus of international human rights texts and from that into domestic constitutional law more broadly, and that is partly what happened. Clearly one of the influential sources for the subsequent incorporation of human dignity into national constitutions was the influence of the international texts. The incorporation of dignity into the Charter and the Universal Declaration thus took place at the same time as human dignity was being incorporated into other regional human rights instruments and national constitutions. There appears to have been an injection of the concept of dignity throughout the world at that time. Identifying which particular document influenced which other document is thus a somewhat pointless enterprise as the concept was so much in the political ether, as it were, that it tended to crop up all over the place. The impulse to incorporate dignity was clearly strongest in those circles that were influenced by Catholic or socialist thinking, and probably most strongly in those circles where both influences were present.

As regards constitutional rights at the domestic level, the most dramatic increase in its textual use since the 1940s came in the 1990s following the fall of the Berlin Wall and the transition to democracy in central and eastern Europe. The desire to draft new national constitutions and the incorporation of human rights in these documents led to discussions as to which existing constitutions might be a suitable model. Frequently, the German constitution and its interpretation by the German Constitutional Court was a prime influence in the drafting of these

¹¹⁷ African Charter on the Rights and Welfare of the Child (ACRWC), Article 20; African Charter on the Rights and Welfare of the Child (ACRWC), Article 21; League of Arab States, Revised Arab Charter on Human Rights, May 22, 2004, reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005), Article 17; Article 33.

¹¹⁸ Legislation in the EU has also drawn on the idea of dignity as supporting a non-discrimination norm generally. In addition, the European Community's prohibition of sexual harassment is essentially based on the need to promote the dignity of the individual in the workplace. References to dignity are not confined to harassment, however, and extend to its inclusion in the recitals, applying dignity to discrimination issues generally.

¹¹⁹ American Convention on Human Rights (IACHR), Article 5; African Charter on the Rights and Welfare of the Child (ACRWC), Article 17.

League of Arab States, Revised Arab Charter on Human Rights, May 22, 2004, reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005), Article 20.

¹²⁰ Cairo Declaration on Human Rights in Islam, Aug. 5, 1990, U.N. GAOR, World Conf. on Hum. Rts., 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993) [English translation], Article 20.

¹²¹ Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (IACHR-P1), Article 13; African Charter on the Rights and Welfare of the Child (ACRWC), Article 11.

¹²² Inter-American Convention on Forced Disappearance of Persons (IACFDP), Preamble.

¹²³ Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women "Convention of Belem do Para" (IACVAW), Article 4, Article 8.

¹²⁴

constitutions generally, explaining the extent to which dignity also became incorporated in these new instruments, such as in Hungary. The German influence extended beyond central and eastern Europe, however, playing a major role in the drafting of the new South African constitution post-apartheid, bringing with it a central place for dignity in South African jurisprudence. The German influence is also apparent in the drafting of Israel's Basic Law on Human Dignity, which was to serve as the basis for a Bill of Rights.

I. Dignity as place holder in the UDHR and other human rights texts

We need, at this point, to step back from the detail. It is clear that the idea of dignity has become a central organizing principle in the idea of universal human rights. The interesting question is "why?" The significance of human dignity, at the time of the drafting of the UN Charter and the UDHR (and since then in the drafting of other human rights instruments), was that it supplied a theoretical basis for the human rights movement, in the absence of any other basis for consensus. We need to remember the global context in which the UDHR was being negotiated. To achieve a successful outcome, it was necessary to persuade states of vastly different ideological hue that the Declaration was consistent with their conceptions of human rights. What would a theory of human rights have to consist of for it to be a successfully theory in this context? It would need, probably, to be one (i) that gives a coherence to the concept of human rights so that the whole is greater than simply the sum of its parts and not just a ragbag collection of separate unconnected rights, (ii) that is not rooted in any particular region of the globe and appeals across cultures, but is sensitive to difference, (iii) that places importance on the person rather than the attributes of any particular person, but that also places the individual within a social dimension, (iv) that is not dependent on human rights originating only from the exercise of state authority (not least because what the state gives, the state can also take away), (v) that is non-ideological (in the sense that it transcends any particular conflicts, such as between capitalism and communism), (vi) that is humanistic (in the sense that it was not based on any particular set of religious principles or beliefs but is nevertheless consistent with them), and (vii) that is both timeless, in the sense that it embodies basic values that are not subject to change, and adaptable to changing ideas of what being human involves.¹²⁵ Such a theory has long been the Holy Grail of human rights.

At the time of the drafting of the Charter and the Universal Declaration, there was no shortage of theories seeking to support human rights, but none by themselves would satisfy the need to have sufficient consensus in order to move forward. A significant role in trying to achieve an intellectual and ideological consensus on the basis for human rights was given by UNESCO to the philosopher, Jean Jacques Maritain, whose own political philosophy (as we have seen) was strongly based on Catholic social teaching, according dignity a central role. Maritain's strategy, however, was not to attempt to get agreement on anything as divisive as a theoretical basis for human rights. He advised that in order to get agreement on any international declaration of human rights, those negotiating it should concentrate on what particular practices they could agree were necessary or should be prohibited. They should agree, for example, that torture should be prohibited but should put to one side any consideration of why torture was wrong. To go further than simply agree on the prohibition of the practice was to court interminable delays and ultimate failure.

Those drafting the Charter and the Universal Declaration largely adopted this strategy. Whether intentionally or not, human dignity was a placeholder for any more fundamental explanation of the theoretical basis for human rights. A theory of human rights was a necessary starting point

¹²⁵ David N. Weisstub, Honor, Dignity, and the Framing of Multiculturalist Values, in Kretzmer and Klein, 263 at 263.

for the enterprise that was being embarked upon. Dignity was included in that part of any discussion or text where the absence of a theory of human rights would have been embarrassing. Its utility was to enable those participating in the debate to insert their own theory. Everyone could agree that human dignity was central, but not why or how. As Shultziner puts it: “There is a major advantage to this approach, for the abstention from a philosophical decision regarding the source and cause for rights and duties paves the way for a political consent concerning the specific rights and duties that ought to be legislated and enforced in practice without waiving or compromising basic principles of belief. Thus, the different parties that take part in a constitutive act can conceive human dignity as representing their particular set of values and worldview. In other words, human dignity is used as a linguistic-symbol that can represent different outlooks, thereby justifying a concrete political agreement on a seemingly shared ground.”¹²⁶ Unlike in linguistics, however, where a placeholder carries no semantic information, dignity carried an enormous amount of content, but different content for different people. As we have seen, human dignity was a rallying cry in intellectual debate across the political and philosophical spectrum. At the same as Maritain, the Catholic philosopher, was publicising his conception of human dignity, Jean Paul Sartre was arguing that genuine human dignity could only be achieved through existentialism.¹²⁷ Although coming from opposite ends of the philosophical spectrum, they agreed, apparently, that the proper objective was human dignity.

III. FINDING HUMAN DIGNITY IN JUDICIAL DISCOURSE ON RIGHTS

A. Dignity is drawn on by judges in a wide range of different jurisdictions

Dignity language might have come to be restricted to being used in human rights texts as a placeholder, in order to help secure political agreement, but in this section of the article, it will become clear that this is far from the case. Instead, we shall see that dignity has come to be used extensively in the *judicial* interpretation and application of international, regional, and domestic rights guarantees. Given the very diversity of the use of dignity throughout the judicial world, this section cannot claim to be comprehensive. Instead, I shall seek to support my argument by drawing on examples at the international, regional and domestic levels.

International Court of Justice

At first sight, the International Court of Justice appears to be an exception to the trend of courts resorting to dignity language. It is true that the concept of dignity appears not infrequently in the judgements of the Court, but these uses are confined to dignity as referring to the dignity of nation states, and by extension to the dignity of ambassadorial and consular officials, rather than in the human rights context. So far as I have been able to discover, the Court has not used the concept of dignity. However, on closer inspection, there has been a significant use of dignity (in the human rights context) in concurring and (more often) dissenting opinions by individual members of the ICJ. Thus, we find dignity being drawn on by Judge Tanaka¹²⁸ and Vice President

¹²⁶ Shultziner, Human Dignity, text at fn 18.

¹²⁷ Jean Paul Sartre, *L’Existentialisme est un humanisme* (1946).

¹²⁸ Dissenting Opinion of Judge in South West Africa Case: “In any case, as we have seen above, all human beings are equal before the law and have equal opportunities without regard to religion, race, language, sex, social groups, etc. As persons they have the dignity to be treated as such. This is the principle of equality which constitutes one of the fundamental human rights and freedoms which are universal to all mankind. (...) The Respondent probably being aware of the unreasonableness in such hard cases, tries to explain it as a necessary sacrifice which should be paid by individuals for the maintenance of social security. But it is unjust to require a sacrifice for the sake of social security when this sacrifice is of such importance as humiliation of the dignity of the personality.”

Ammoun¹²⁹ in the 1971 South West Africa Case to support their argument that the practices of racial discrimination and apartheid were contrary to international law, by Judge de Castro¹³⁰ and Vice President Ammoun¹³¹ to inform how administrative procedures should operate where they were applied to employees in the 1973 case reviewing a decision of the United Nations Administrative Tribunal, by Judge Shahabuddeen¹³² to support his 1996 conclusion that the use of nuclear weapons was contrary to human rights guarantees, by Judge Weeramantry in 1996 as part of his argument relating to the application of the crime of genocide,¹³³ in 2002 by Judge Ranjeva regarding the attempted exercise by Belgium of universal jurisdiction,¹³⁴ by Judge Elaraby in 2004 regarding the mutual obligations of Israelis and Palestinians in the context of the disputed security fence erected by Israel in occupied Palestinian territory,¹³⁵ and by Judge Koroma to underscore the importance of the international obligations which he held Uganda had violated in its armed activities in the Democratic Republic of the Congo.¹³⁶

¹²⁹ Separate Opinion of Vice-President Ammoun (translation), Separate Opinion, 21/06/1971, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970): "It is not by mere chance that in Article 1 of the Universal Declaration of the Rights of Man there stands, so worded, this primordial principle or axiom: "All human beings are born free and equal in dignity and rights." From this first principle flow most rights and freedoms. Of all human rights, the right to equality is far and away the most important. It is also the one which has been longest recognized as a natural right: it may even be said that the doctrine of natural law was born in ancient times with the concept of human equality as its first element."

¹³⁰ Dissenting Opinion of Judge de Castro (translation), Dissenting Opinion, 12/07/1973, Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, para 42.

¹³¹ Dissenting Opinion of Vice-President Ammoun (translation), Dissenting Opinion, 12/07/1973, Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal.

¹³² Dissenting Opinion of Judge Shahabuddeen, Dissenting Opinion, 08/07/1996, Legality of the Threat or Use of Nuclear Weapons.

¹³³ Separate Opinion of Judge Weeramantry, Separate Opinion, 11/07/1996, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro): "One of the principal concerns of the contemporary international legal system is the protection of the human rights and dignity of every individual. The question of succession to the Genocide Convention raises one of the most essential aspects of such protection." (...) "The promotion and encouragement of respect for human rights is, according to Article 1 (3) of the United Nations Charter, one of the Purposes of the United Nations, and the reaffirmation of faith in fundamental human rights and the dignity and worth of the human person are among the foremost objects that the peoples of the United Nations set before themselves "to save succeeding generations from the scourge of war". Genocide attacks these concepts at their very root and, by so doing, strikes at the foundations of international stability and security. A State's guarantees of human rights to its subjects in terms of even such a Covenant as the International Covenant on Civil and Political Rights are thus a matter which does not concern that State alone, but represent a contribution to human dignity and global stability - as distinguished, for example, from a commercial or trading treaty. This aspect is all the more self-evident in a treaty of the nature of the Genocide Convention."

¹³⁴ Declaration of Judge Ranjeva (translation), Declaration, 14/02/2002, Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium).

¹³⁵ Separate opinion of Judge Elaraby, Separate Opinion, 09/07/2004, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.

¹³⁶ Declaration by Judge Koroma, Dissenting Opinion, 19/12/2005, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda).

European Court of Human Rights and the European Court of Justice

In the European context, an apparent exception to the incorporation of dignity in human rights texts after the Second World War is to be found in the European Convention on Human Rights. Subsequently, however, interpretations of the European Commission and Court of Human Rights, particularly the Article 3 ECHR prohibition of torture and inhuman and degrading treatment and punishment, have drawn extensively on the concept of human dignity as a basis for their decisions. The first references to human dignity appeared in the decision of the Commission in the East African Asian case where the racial discrimination the applicants were subjected to constituted an infringement of their human dignity, which in the particular circumstances of the case amounted to degrading treatment. The first reference by the Court to human dignity was in *Tyrer v UK* in which corporal punishment, administered as part of a judicial sentence, was held to be contrary to Article 3 on the grounds that it was an assault “on precisely that which it is one of the main purposes of Article 3 to protect, namely a person’s dignity and physical integrity.”¹³⁷ Since then, it has been drawn on in the context of the right to a fair hearing,¹³⁸ the right not to be punished in the absence of a legal prohibition,¹³⁹ the prohibition of torture,¹⁴⁰ and the right to private life.¹⁴¹ The Court now regards human dignity as underpinning all of the rights protected by the Convention.¹⁴²

Human dignity has also been incorporated judicially as a general principle of European Community law, deriving from the constitutional traditions common to the Member States. Advocate General Jacobs stated in 1993 that “the constitutional traditions of the Member States in general allow for the conclusion that there exists a principle according to which the State must respect not only the individual’s physical well-being, but also his dignity, moral integrity and sense of personal identity.”¹⁴³ In a second case, interpreting the Community Directive prohibiting sex discrimination in employment, in which it was held that the Directive prohibited a dismissal from employment on the basis of that person’s transsexuality, the Court stated that “to tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard.”¹⁴⁴ More recently, the Court held that “the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law.”¹⁴⁵

Domestic judicial interpretation of rights

The judiciary in several jurisdictions enthusiastically further the incorporation and use of dignity in international and domestic rights discourse.¹⁴⁶ The concept of dignity was introduced into United States Supreme Court jurisprudence by the two justices most influenced by labour thinking (Frankfurter, and Murphy) and Catholic thinking (Murphy) in the immediate post-War

¹³⁷ *Tyrer*, para. 33.

¹³⁸ *Bock v Germany*, 29 March 1989.

¹³⁹ *SW v UK; C v UK*, 22 November 1995.

¹⁴⁰ *Ireland v UK*

¹⁴¹ *Dudgeon*

¹⁴² [citations]

¹⁴³ *Christos Konstantinidis*, 30 March 1993, Case 168/91.

¹⁴⁴ *P v S and Cornwall County Council*, Case 13/94, 30 April 1996.

¹⁴⁵ *Omega*, 14 October 2004, Case 36/02.

¹⁴⁶ In addition to those jurisdictions considered subsequently, the Indian Supreme Court has held that the Preamble to the Constitution, which includes a reference to dignity, may be used in the interpretation of the enumerated fundamental rights in the Constitution. *Keshavavanda v State of Kerala* (1973) SC 1461, cited in Chaskelson, *op cit* at 134.

period. Indeed, that tradition continued most prominently in the opinions of Brennan, who was also strongly influenced by both Catholic and labour thinking, and is also the justice most associated with the concept of dignity. Since then, the Supreme Court has used the concept of human dignity in the interpretation of the Eighth Amendment, the Due Process Clause, the extent of privacy rights in the abortion context, and in First Amendment free speech cases. Most recently, justices have referred to “personal dignity” in striking down legal prohibitions on homosexual sodomy,¹⁴⁷ and the “dignity of man” in prohibiting the execution of those who were mentally retarded.¹⁴⁸

Even in countries where dignity had been earlier incorporated but removed (such as in the Canadian Bill of Rights), the courts continued to use the idea of dignity to interpret the new Charter of rights, indeed building it into a central principle of adjudication. In other jurisdictions, the courts anticipated the introduction of human dignity into legal texts. In Israel, human dignity was frequently invoked by the Supreme Court prior to the adoption of the Basic Law on human dignity. Where it was not explicitly written into the text of the constitutions that emerged in central Europe from the first wave of constitutional revisions in the 1990s, several constitutional courts inferred it anyway, for example in Poland,¹⁴⁹ anticipating its subsequent incorporation in the text of the 1997 Constitution.¹⁵⁰ So too in other European states, such as France, the concept of dignity was been drawn on in important Conseil d’Etat and Conseil Constitutionnel decisions. In one of its judgments the CC held that: “The preamble to the 1946 Constitution reaffirmed and proclaimed rights, freedoms and constitutional principles, declaring ... ‘In the morrow of the victory achieved by the free peoples over the regimes that had sought to enslave and degrade humanity, the people of France proclaim anew that each human being, without distinction of race, religion or creed, possesses sacred and inalienable rights’; it follows that the protection of human dignity against all forms of enslavement or degradation is a principle of constitutional status.”¹⁵¹

B. Dignity is increasingly present in the interpretation of particular substantive rights

Dignity is not only drawn on in a wide range of different jurisdictions, often without explicit textual support, but is also increasingly found in the interpretation of a wide range of substantive rights in these jurisdictions.

Discrimination and equality

The principle of human dignity is often drawn on as one of several values that anti-discrimination norms further. We have seen already that Judge Tanaka and Vice President Ammoun drew on dignity in the SW Africa case to explain the underlying wrong that apartheid occasioned. Some have argued, indeed, that the concept of dignity is the most appropriate normative basis for viewing anti-discrimination law generally. Réaume argues, for example, that discrimination law reflects an expansion in the concept of human dignity. One function of dignity in the equality context is that it purports to provide a deontological basis for responding to rights based claims,

¹⁴⁷ Lawrence v. Texas.

¹⁴⁸ Atkins v Virginia.

¹⁴⁹ Polish Constitutional Tribunal, judgment of 17 March 1993, referred to by B. Lewaszkiewicz-Petrykowska, *The Principle of Respect for Human Dignity*, in *Montpellier Proceedings*, p. 15 at p. 17.

¹⁵⁰ Polish Constitution, 1997, Article 30.

¹⁵¹ CC decision no. 94/343/344 DC, 27 JULY 1994, <http://www.conseil-constitutionnel.fr/langues/anglais/a94343dc.pdf>.

of universal significance, true across space and time, and thus meeting arguments such as those of Alexander that regard anti-discrimination claims as deeply cultural, and time bound.

There has been a particular increase in the use of dignity arguments in the judicial interpretation of constitutional and statutory equality and anti-discrimination requirements in several jurisdictions.¹⁵² We have already seen examples in the context of the interpretation of Article 3 by the ECtHR as applied to racial discrimination. The European Commission of Human Rights in *East African Asians v United Kingdom*, held that “publicly to single out a group of persons for differential treatment on the basis of race might, in certain circumstances, constitute a special form of affront to human dignity,”¹⁵³ a decision applied very recently in *Moldovan v Romania*,¹⁵⁴ where the ECtHR upheld the claim of a number of Roma that their rights had been breached under Article 14. In addition to providing a theoretical underpinning to constitutional and statutory equality guarantees, dignity has been drawn on heavily as a theoretical underpinning by judges in interpreting prohibitions against sexual harassment, both in Europe and the United States.¹⁵⁵

Dignity has also come to play an increasingly important foundational role in the judicial interpretation of the meaning of constitutional anti-discrimination prohibitions in Canada¹⁵⁶ and South Africa.¹⁵⁷ Indeed, the purpose of the right to equality in the Canadian Charter, according to the Supreme Court of Canada, is to: “... prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and deserving of concern, respect and consideration.” In *Law v. Canada (Minister of Employment and Immigration)*,¹⁵⁸ Iacobucci J., writing for a unanimous court, described the importance of human dignity: “Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.” Equally, the South African Constitutional Court’s interpretation of the Constitution’s equality guarantee has relied on a dignity-based approach, beginning with *President of the Republic of South Africa v. Hugo*. Justice Goldstone has stated that the prohibition of discrimination was intended to contribute to “the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership in particular groups.”¹⁵⁹

¹⁵² Equality and non-discrimination law encompass a wide variety of different measures, of course. In the context of this discussion, I will confine myself to discussing the role that dignity plays in the context of what has been termed “status equality”, as it is in that context that the role of dignity is most prevalent.

¹⁵³ (1973) 3 EHR 76, 86, para 207

¹⁵⁴ Application Nos 41138/98 and 64320/01, (unreported) 12 July 2005

¹⁵⁵ see Ehrenreich

¹⁵⁶ Mendes

¹⁵⁷ Huscroft, Chaskalson, Sachs

¹⁵⁸ [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1, at p. 530 S.C.R.

¹⁵⁹ For discussions of the South African approach, see Kende, 2000; Ackermann, 2000; Chaskalson, 2000.

Torture and inhuman and degrading treatment and punishment

Dignity has figured prominently in decisions concerning the meaning and scope of prohibitions on torture and cognate terms, such as inhuman or degrading treatment. In the separate opinion of Judge Sir Gerald Fitzmaurice in *Ireland v United Kingdom*,¹⁶⁰ Judge Fitzmaurice identified the concept of human dignity as central to the idea of what constituted “degrading” treatment under Article 3 ECHR: “In the present context it can be assumed that it is, or should be, intended to denote something seriously humiliating, lowering as to human dignity, or disparaging, like having one's head shaved, being tarred and feathered, smeared with filth, pelted with muck, paraded naked in front of strangers, forced to eat excreta, deface the portrait of one's sovereign or head of State, or dress up in a way calculated to provoke ridicule or contempt ...”. So too, in the separate opinion of Judge Evrigenis in the same case, dignity is regarded as central to what is protected by prohibitions on inhuman treatment.¹⁶¹ “By adding to the notion of torture the notions of inhuman and degrading treatment, those who drew up the Convention wished ... to extend the prohibition in Article 3 ... of the Convention - in principle directed against torture ... to other categories of acts causing intolerable suffering to individuals or affecting their dignity rather than to exclude from the traditional notion of torture certain apparently less serious forms of torture and to place them in the category of inhuman treatment which carries less of a “stigma” - to use the word appearing in the judgment. The clear intention of widening the scope of the prohibition in Article 3 ... by adding, alongside torture, other kinds of acts cannot have the effect of restricting the notion of torture.”

Since then, the ECtHR has increasingly resorted to the use of dignity language in interpreting Article 3. In *Selmouni v France*¹⁶² the Court “reiterates that, in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3.” In *Pretty v United Kingdom*, the court said: “As regards the types of ‘treatment’ which fall within the scope of article 3 of the Convention, the court's case law refers to ‘ill-treatment’ that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering. Where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of article 3.”¹⁶³ So too, the Israeli Supreme Court has held that the concept of dignity was squarely implicated by similar interrogation methods adopted by the Israeli security forces.¹⁶⁴

Privacy and autonomy

Dignity has been central to the approach that several jurisdictions take to the woman's interest in deciding whether to have an abortion. In the case of *Thornburg v American College of Obstetricians and Gynaecologists*¹⁶⁵ Blackmun J explained the fundamental nature of the privacy of a woman's decision to terminate her pregnancy: “Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a

¹⁶⁰ (1978) 2 EHRR 25, para 27.

¹⁶¹ *Ibid.*, para

¹⁶² (1999) 23 EHRR 403, para 99

¹⁶³ 35 EHRR 1, 33, para 52.

¹⁶⁴ *Public Committee Against Torture in Israel v. State of Israel* H.C. 5100/94, H.C. 4054/95, H.C. 6536/95, H.C. 5188/96, H.C. 7563/97, H.C. 7628/97, H.C. 1043/99, para 18 ff (President Barak)

¹⁶⁵ (1986) 476 US 747 at 772

woman's decision - with the guidance of her physician and within the limits specified in Roe - whether to end her pregnancy. A woman's right to make that choice freely is fundamental." So too, in *Planned Parenthood v Casey*,¹⁶⁶ both the plurality opinion of Justices Kennedy, O'Connor and Souter, and the individual opinion of Justice Stevens used dignity language to support the woman's right to choose. In the plurality opinion, the woman's autonomy interest in making the abortion decision is seen as only one of several spheres in which dignity required state abstention:

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

Justice Stevens also considered the relationship between dignity and privacy to be a close one: "The woman's constitutional liberty interest also involves her freedom to decide matters of the highest privacy and the most personal nature. (...) The authority to make such traumatic and yet empowering decisions is an element of basic human dignity." So, too, in the decision of the Hungarian Constitutional Court regarding abortion, the Court considered that the issue of dignity was engaged: "It has been constantly stated by the Constitutional Court that among the rights to be weighed against the State's duty to give increased protection to foetal life, the mother's right to self-determination – as part of the right to human dignity – is the most important one."

Right to life

In cases dealing with the use of lethal force by the security forces, the German Constitutional Court has emphasised the importance of reading the protection of the right to life and the protection of dignity as mutually reinforcing.¹⁶⁷ The Court held that provisions of the Aviation Security Act which authorised the armed forces to shoot down aircraft that were intended to be used as weapons in crimes against human lives, was incompatible with the Basic Law and hence void. These provisions were incompatible with the fundamental right to life and with the guarantee of human dignity to the extent that the use of armed force affected persons on board the aircraft who were not participants in the crime. By the state's using their killing as a means to save others, they were treated as mere objects, which denied them the value that was due to a human being for his or her own sake. So too, the Israeli Supreme Court in its decision on the use of targeted assassination by the Israeli security services in the Occupied Territories,¹⁶⁸ considered that "unlawful combatants are not beyond the law. They are not 'outlaws'. God created them as

¹⁶⁶ 505 U.S. 833

¹⁶⁷ Aviation Security Act Case, BVerfG, 1 BvR 357/05 of 15 February 2006 (Germany); Bundesverfassungsgericht, Press release no. 11/2006 of 15. February 2006.

¹⁶⁸ Public Committee against Torture in Israel v. Government of Israel, HCJ 769/02 (Supreme Court of Israel Sitting as the High Court of Justice) [December 11 2005]

well in his image; their human dignity as well is to be honored; they as well enjoy and are entitled to protection ...”.

Death penalty

Dignity has frequently been used by courts in the context of considering the death penalty. Justice Brennan of the United States Supreme Court perhaps started the trend in *Furman v Georgia*.¹⁶⁹ In considering the application of the Eighth Amendment’s prohibition on cruel and unusual punishments, he summed up the previous jurisprudence on the Amendment as “prohibit[ing] the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is “cruel and unusual,” therefore, if it does not comport with human dignity.” In *Gregg v Georgia*,¹⁷⁰ he considered that “[t]he fatal constitutional infirmity in the punishment of death is that it treats ‘members of the human race as nonhumans, as objects to be toyed with and discarded. [It is] thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.’”

So, too, the Canadian Supreme Court has recognized that capital punishment constitutes a serious impairment of human dignity in *Kindler v Canada*.¹⁷¹ Three of the seven Judges who heard the cases expressed the opinion that the death penalty was cruel and unusual: “It is the supreme indignity to the individual, the ultimate corporal punishment, the final and complete lobotomy and the absolute and irrevocable castration. [It is] the ultimate desecration of human dignity...” Three other Judges were of the opinion that: “(t)here is strong ground for believing, having regard to the limited extent to which the death penalty advances any valid penological objectives and the serious invasion of human dignity it endangers, that the death penalty cannot, except in exceptional circumstances, be justified in this country.” The Hungarian Constitutional Court has also considered that capital punishment imposes a limitation on the essential content of the fundamental rights to life and human dignity, eliminating them irretrievably. As such it was unconstitutional. The Court stressed the relationship between the rights of life and dignity, and the absolute nature of these two rights taken together. Together they were the source of all other rights.

These approaches strongly influenced the approach adopted by Chaskalson P in the South African *Makwanyane* case,¹⁷² in which dignity also played a major role leading to the decision that the death penalty was unconstitutional. The carrying out of the death penalty, he wrote, “destroys life, which is protected without reservation under section 9 of our Constitution, it annihilates human dignity which is protected under section 10, elements of arbitrariness are present in its enforcement and it is irremediable.”¹⁷³ The rights to life and dignity were “the most important of all human rights, and the source of all other personal rights ...”¹⁷⁴ By “committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does, including the way it punishes criminals. This is not achieved by objectifying murderers and putting them to death to serve as an example to others in the expectation that they might possibly be deterred

¹⁶⁹ 408 U.S. 238; 92 S. Ct. 2726; 1972

¹⁷⁰ 428 U.S. 153; 96 S. Ct. 2909; 1976

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¹⁷² 1995 (6) BCLR 665 (CC).

¹⁷³ Para 95.

¹⁷⁴ Para 144.

thereby.”¹⁷⁵ Mokgoro J also emphasized the importance of dignity in this context, and sought to link the concept of dignity with the native African concept of “ubuntu”: “Generally, ubuntu translates as humaneness. In its most fundamental sense, it translates as personhood and morality. Metaphorically, it expresses itself in umuntu ngumuntu ngabantu, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.”

Freedom of speech

Several courts have viewed the right to freedom of expression as underpinned by the concept of human dignity. Dickson CJ, in the Canadian Supreme Court decision in *Keegstra*, explained the point as follows: “The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity. The state therefore cannot act to hinder or condemn a political view without to some extent harming the openness of Canadian democracy and its associated tenet of equality for all.”

Socio-economic rights

Both the Hungarian Constitutional Court and the South African Constitutional Court have drawn on dignity to support their decisions regarding socio-economic rights. As regards the former, in its Decision 32/1998 (VI. 25.) AB, the Constitutional Court, in a case considering the characteristics and requirements regarding the right to social security, stated that (respecting the minimum level of benefits) “the right to social security contained in Article 70/E of the Constitution entails the obligation of the State to secure a minimum livelihood through all of the welfare benefits necessary for the realisation of the right to human dignity.”¹⁷⁶ In Decision 42/2000 (XI. 8.) AB,¹⁷⁷ the Constitutional Court reiterated that “the benefits to be offered in the framework of social institutions should secure a minimum level guaranteeing the enforcement of the right to human dignity. In case of services not reaching the above minimum level, the right to social security may not be deemed enforced.” This required that “in case of homelessness, the State obligation to provide support shall include the provision of a shelter when an emergency situation directly threatens human life. The State obligation to provide shelter does not correspond to guaranteeing the “right to have a place of residence”. Thus, the State shall be responsible for securing a shelter if homelessness directly threatens human life. Therefore, only in case of such an extreme situation is the State obliged to take care of those who themselves cannot provide for the fundamental preconditions of human life.”

¹⁷⁵ Para 144.

¹⁷⁶ ABH 1998, 251, 254.

¹⁷⁷ Decision 42/2000 (XI. 8.) AB, Constitutional Court file number: 5/G/1998, published in the Official Gazette (Magyar Közlöny) MK 2000/109.

A similar approach was taken by the Constitutional Court of South Africa in the Grootboom case,¹⁷⁸ in which Yacoob J also emphasised the connection between dignity and socio-economic rights: “Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.”¹⁷⁹ The right to adequate housing “is entrenched because we value human beings and want to ensure that they are afforded their basic human needs. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.”¹⁸⁰

Sexual orientation

There has been a significant relationship in several jurisdictions between dignity and the granting of rights to gays and lesbians, beginning with claims that the criminalization of sodomy was contrary to human rights principles, and continuing most recently in the context of claims to permit marriage between same-sex partners. In the 1998 South African case of *National Coalition for Gay and Lesbian Equality v Minister of Justice*,¹⁸¹ Ackermann J stressed the extent to which the common-law offence of sodomy was an infringement of the rights to dignity, as well as equality.

“At its least, it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society. The common-law prohibition on sodomy (...) punishes a form of sexual conduct which is identified by our broader society with homosexuals. Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a significant proportion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being human. Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 of the Constitution. (...) The

¹⁷⁸ *Government of the Republic of South Africa and Others v Grootboom and Others*, 2000 Constitutional Court 2000 (11) BCLR 1169 (CC)

¹⁷⁹ Para 23

¹⁸⁰ Para 44.

¹⁸¹ 6 BHRC 127 (CC, 1998), 1998 (12) BCLR 1517 (CC).

harm caused by the provision can, and often does, affect his ability to achieve self-identification and self-fulfilment. The harm also radiates out into society generally and gives rise to a wide variety of other discriminations, which collectively unfairly prevent a fair distribution of social goods and services and the award of social opportunities for gays.”¹⁸²

Dignity has also been drawn on in order to support decisions that declared legal restrictions on marriage between same-sex couples to be unconstitutional. In *Halpern v Attorney General*,¹⁸³ the Court of Appeal for Ontario recognized the relationship between dignity and access to the institution of marriage:

“Marriage is, without dispute, one of the most significant forms of personal relationships. For centuries, marriage has been a basic element of social organization in societies around the world. Through the institution of marriage, individuals can publicly express their love and commitment to each other. Through this institution, society publicly recognizes expressions of love and commitment between individuals, granting them respect and legitimacy as a couple. This public recognition and sanction of marital relationships reflect society's approbation of the personal hopes, desires and aspirations that underlie loving, committed conjugal relationships. This can only enhance an individual's sense of self-worth and dignity.”

Exclusion from marriage of same sex couples “perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships. In doing so, it offends the dignity of persons in same-sex relationships.” Similarly, in the South African case of *Minister of Home Affairs v Fourie*,¹⁸⁴ Sachs J argued that “there can only be one answer to the question as to whether or not such couples are denied equal protection and subjected to unfair discrimination. Clearly, they are, and in no small degree. The effect has been wounding and the scars are evident in our society to this day. By both drawing on and reinforcing discriminatory social practices, the law in the past failed to secure for same-sex couples the dignity, status, benefits and responsibilities that it accords to heterosexual couples. Although considerable progress has been made in specific cases through constitutional interpretation, and, as will be seen, by means of legislative intervention, the default position of gays and lesbians is still one of exclusion and marginalisation.”

C. Dignity as the basis for transnational dialogue

We have seen the importance of transnational political influences as explaining the growth of dignity at both the international and domestic constitutional levels. We saw how Catholic, social democratic, and German influences have been particularly important in securing the adoption of dignity in constitutional and international legal texts. We saw how the judiciary in several jurisdictions have significantly contributed to the use of dignity in their own legal systems. There is, however, an additional feature of the use of dignity in several jurisdictions that is noticeable. In applying dignity, judges in several jurisdictions draw on the judicial interpretation of dignity in other jurisdictions as well as their own, sometimes explicitly, sometimes without attribution. The German Constitutional Court has been particularly influential in Hungary and Israel, for example. Judges in the common law tradition have become prominent in the spreading of dignity through their use of comparative jurisprudence, joining the older German and German-influenced tradition. Canadian and South African courts, in particular, are beginning to influence British courts and encourage greater use of dignity in their judgments. There is also a significant cross

¹⁸² See also Kennedy, J. in *Lawrence v Texas*, 123 S. Ct. 2472 (2003)

¹⁸³ 2003 65 O.R. (3d) 161 Court of Appeal for Ontario.

¹⁸⁴ 2006 (3) BCLR 355 (Constitutional Court)

fertilization between the German-influenced and the common law in this respect. German and Hungarian judicial decisions have influenced South African jurisprudence. One of the attractions of dignity in the human rights context is the idea that different jurisdictions share a sense of what dignity requires and this enables a dialogue to take place between judges on the interpretation of human rights norms, based on a supposedly shared assumption.

One of the best examples of this is to be found in the decision of the United States Supreme Court in the case of *Roper v. Simmons*,¹⁸⁵ in which the Supreme Court held that the imposition of the death penalty on offenders under 18 was unconstitutional under the Eighth Amendment. In his opinion for the Court, Kennedy J drew on “foreign” material, apparently demonstrating “that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty”,¹⁸⁶ to support a determination that such uses of capital punishment are unconstitutional under the U.S. Constitution.¹⁸⁷ He stressed, too, that such information has relatively frequently been used by the Court “as instructive for its interpretation of the Eighth Amendment’s prohibition of ‘cruel and unusual punishments’”.¹⁸⁸

No doubt anticipating an attack on his use of these sources, the relevant section of his opinion ended with his reflection on the question whether the use of “foreign” material in some way undermined the independent role of the Court in interpreting the Constitution. He sought to dampen down concerns that it might. “Over time, from one generation to the next, the Constitution has come to earn the high respect and even, as Madison dared to hope, the veneration of the American people. (...) The document sets forth, and rests upon, innovative principles original to the American experience, such as (...) broad provisions to secure individual freedom and preserve human dignity. These doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national identity.(...) It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.”¹⁸⁹ The “overwhelming weight of international opinion” against the juvenile death penalty, “while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”¹⁹⁰ The guarantees in the Constitution are “original to the American experience,” “central to the American experience,” and “essential to our present-day self-definition and national identity”¹⁹¹

There was a strong dissent in *Roper* concerning the use of “foreign” material, as well as the substantive finding of unconstitutionality. Although O’Connor J. also dissented on the issue of constitutionality, she made clear her general support for the use of “foreign” material. She disagreed with the contention, advanced by Scalia J. in dissent, that foreign and international law “have no place in our Eighth Amendment jurisprudence.”¹⁹² Over the course of nearly half a century, the Court had, she said, “consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency.”¹⁹³ Unlike the majority, however, she saw the use of comparative material in the interpretation of the Eighth Amendment as particularly

¹⁸⁵ 125 S. Ct. 1183 (2005)

¹⁸⁶ Kennedy, J., in *Roper*, 1198

¹⁸⁷ Kennedy, J., in *Roper*, 1198

¹⁸⁸ Kennedy, J., in *Roper*, 1199

¹⁸⁹ Kennedy, J., in *Roper*, 1200 (emphasis added).

¹⁹⁰ Kennedy, J., in *Roper*, 1200

¹⁹¹ Kennedy, J., in *Roper*, 1200

¹⁹² O’Connor, J., in *Roper*, 1215

¹⁹³ O’Connor, J., in *Roper*, 1215

appropriate, “reflect[ing its] special character” which “draws its meaning directly from the maturing values of civilized society.”¹⁹⁴ The United State’s “evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement ... that a particular form of punishment is inconsistent with fundamental human rights.”¹⁹⁵ The results of such an inquiry into these international values, and here she agrees with the majority, “do not dictate the outcome of our Eighth Amendment inquiry”, but where “an international consensus of this nature” exists, this “can serve to confirm the reasonableness of a consonant and genuine American consensus.”¹⁹⁶ That is not the only role that she seems to envisage an inquiry into international consensus playing, since she also considers whether the international consensus would “confirm” other arguments of principle that the majority advances.

Paolo Carozza’s 2003 discussion of this phenomenon in the context of capital punishment adjudication considered that there was a “common enterprise” across different jurisdictions in these cases, viz the “concrete specification of the principles of natural law ...” He continues: “the tendency of courts in the death penalty cases ... to consistently place their appeal to foreign sources on the level of the shared premise of the fundamental value of human dignity is a paradigmatic example of naturalist foundations at work. Despite differences in positive law, in historical and political context, in religious and cultural heritage, there is the common recognition of the worth of the human person as a fundamental principle to which the positive law should be accountable. The “common enterprise” ... is, first and foremost, the working out of the practical implications, in differing concrete contexts, of human dignity for the rights to life and physical integrity.”¹⁹⁷ It certainly seems to be the case, as Carozza clearly demonstrates, that judges in several jurisdictions see dignity as giving them a licence to draw on decisions from other jurisdictions. There is clearly a perception that the conception of dignity is common to these jurisdictions and the use of dignity in one judicial decision justifies the use of that jurisprudence by courts interpreting the concept of dignity in another jurisdiction. Carozza’s argument thus seems supported by judicial practice. Not only is the enterprise of human rights interpretation seen to be common, so too there seems to be a common understanding of what dignity is, at a deep level.

D. Can we identify an emerging consensus on the meaning of dignity?

On the basis of this analysis, we can identify several understandings that those using dignity language seem to have. In one use, dignity is seen as providing the basis for human rights in general, in the sense of providing a key argument as to why humans should have rights, and what the limits of these rights may be. In this sense, dignity is the basis for human rights to exist, and there are thinner and thicker variations of this approach.¹⁹⁸ In the thinnest approach, dignity is viewed as simply another way of expressing the idea of human rights.¹⁹⁹ Dignity neither adds to, nor detracts from, rather it is coterminous with human rights and therefore adds little to the debate as to what rights there are, or how they should be interpreted.²⁰⁰ Others adopt a somewhat thicker

¹⁹⁴ O’Connor, J., in Roper, 1215

¹⁹⁵ O’Connor, J., in Roper, 1215-6

¹⁹⁶ O’Connor, J., in Roper, 1216

¹⁹⁷ Carozza, at 1081-2.

¹⁹⁸ Schultziner, around fn. 28.

¹⁹⁹ which also has several modern philosophical exponents such as Joel Feinberg and Jim Griffin,

²⁰⁰ So, Feinberg, for example, writes: “Respect for persons may simply be respect for their rights, so that there cannot be the one without the other; and what is called ‘human dignity’ may simply be the

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

Dignity can, additionally, be seen as itself a right or obligation with specific content, and not only as the basis for human rights in general. This multi-faceted approach to the role of dignity is well captured in *Dawood v Minister of Home Affairs*.²⁰¹ “The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis.” The Court continues: “[D]ignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.”

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

“concern for human dignity has at least four aspects:

- (1) the prohibition of all types of inhuman treatment, humiliation, or degradation by one person over another;

recognizable capacity to assert claims. To respect a person then, or to think of him as possessed of human dignity simply is to think of him as a potential maker of claims.”

²⁰¹ [2000] 5 LRC 147 at para 35.

- (2) the assurance of the possibility for individual choice and the conditions for “each individual’s self-fulfilment”, autonomy, or self-realization;
- (3) the recognition that the protection of group identity and culture may be essential for the protection of personal dignity;
- (4) the creation of the necessary conditions for each individual to have their essential needs satisfied.”²⁰²

E. Universalism, naturalism, and dignity

Carozza’s explanation is one that sees the interpretation of dignity as a search for the universal. The universality of human rights is often thought to be central to a valid conceptions of human rights. In this, Carozza can be identified as aligning himself not only with a strong ideological position that regards human rights as normatively universal, but also with those in comparative law theory who see the function of comparative law as being to explore what is common between legal jurisdictions, even sometimes going so far as to view comparative law as the basis for identifying the “best” approach with the ultimate aim of securing its universal adoption. He differs from some traditional universalists in comparative law, however, by being willing to see this universalist consensus as not one that is simply *found* but one that is *constructed*. In this, he appears to share some common ground with that strand of comparative law theory that stresses the importance of dialogue. This theorizes the comparative method “as a dynamic interpretive and discursive practice.”²⁰³ In the context of comparative constitutionalism in particular, “the dialogical approach focuses on the processes of constitutional interpretation. (...) Comparative exchange is not bound in path-dependent or hierarchic ways. Rather, it poses a comity-based “transjudicial[]” enterprise -- a decentered view of constitutional practices deriving from pluralist sources, with the possibility of ‘cross fertilization.’”²⁰⁴

IV. FINDING SIGNIFICANT DIFFERENCES IN THE JUDICIAL DISCOURSE ON HUMAN DIGNITY

The previous section advances what, for some, may be a normatively attractive vision of the role that dignity might play in judicial interpretation. In light of the wide variety of different functions that dignity plays, it would be surprising if judges used it consistently with each other. And in practice they do not; far from it. There are significantly differing expressions of the relationship between human rights and dignity, for example, and significant variations between jurisdictions in how dignity affects similar substantive issues. We should not, however, reject the more universalistic analysis of Carozza simply because there may be differences between jurisdictions at any one point in time. A principled interpretation of a grand principle often seems to call for agreement on what the effect of applying the principle is, whilst nevertheless disagreeing on what a full theoretical basis for the principle might be. Cass Sunstein has described the process of deciding cases on their facts without necessarily agreeing on any particular theory supporting the decision as giving rise to “incompletely theorized” agreements. Such agreements exist where individuals can agree on a specific result, even if they do not agree on all the aspects of the specific theory justifying that result.²⁰⁵ But my argument in this part of the article will be that there are such profound differences between jurisdictions using the concept of dignity that this explanation just does not seem descriptively convincing. When we dig deeper, such significant differences appear to arise that a somewhat different story must be told. Unfortunately, perhaps,

²⁰² Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP, 2006), 545-6.

²⁰³ Teitel, *op cit*, 2584-5.

²⁰⁴ Teitel, *op cit*., 2586

²⁰⁵ Cass R. Sunstein, *Legal Reasoning and Political Conflict* (New York, OUP, 1996)

Carozza's preferred normative function of dignity does not seem to be supported by judicial practice.

A. Pluralism and relativism

Claims to universalism and naturalism in human rights discourse have proven deeply controversial, with some arguing that the inclusion of common principles in these texts or judicial decisions merely camouflages profound disagreement on their application as well the theory supporting them. Lord Hoffman, for example, has stated: “[O]f course we share a common humanity. ... Nevertheless ... the specific answers, the degree to which weight is given to one desirable objective rather than another, will be culturally determined. Different communities will, through their legislature and judges, adopt the answers which they think suit them.”²⁰⁶ All that is left of dignity, it might be said, is an empty shell of principle and when the principle comes to be applied, the appearance of commonality disappears, and human dignity (and with it human rights) are exposed as culturally relative, deeply contingent on local politics and values. Is this a better explanation for what is happening to the interpretation of dignity in judicial interpretation of human rights norms?

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

B. Differences in dignity in human rights texts

We can begin, briefly, to support this more pluralistic, culturally relative approach to the meaning of human dignity by looking briefly at some of the differences in the use of dignity language between the regional texts, and between the regional texts and the international texts. There are significant differences relating to the extent to which dignity should be regarded as related to national liberation and self-determination,²⁰⁷ as an appropriate limit on freedom of speech,²⁰⁸ as

²⁰⁶ Lord Hoffman, *Human Rights and the House of Lords*, 62 *Modern Law Review* 159 (1999), 000.

²⁰⁷ League of Arab States, *Revised Arab Charter on Human Rights*, May 22, 2004, reprinted in 12 *Int'l Hum. Rts. Rep.* 893 (2005), entered into force March 15, 2008, Article 2(3): “All forms of racism, Zionism and foreign occupation and domination constitute an impediment to human dignity and a major barrier to the exercise of the fundamental rights of peoples; all such practices must be condemned and efforts must be deployed for their elimination.” See also *African Charter on Human and Peoples' Rights* (ACHPR), Preamble.

²⁰⁸ *Cairo Declaration on Human Rights in Islam*, Aug. 5, 1990, U.N. GAOR, World Conf. on Hum. Rts., 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993) [English translation], Article 22: “ (...) Information is a vital necessity to society. It may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical values or disintegrate, corrupt or harm society or weaken its faith.”

grounding a basis for protecting honour and reputation,²⁰⁹ as grounding individual duties to the community as well as rights,²¹⁰ as requiring the provision of socio-economic rights in general (or particular socio-economic rights such as workplace rights, or the right to property),²¹¹ as related to the role of dignity in the context of rights of women,²¹² and as relevant to freedom of religion.²¹³

²⁰⁹ American Convention on Human Rights (IACHR), Article 11(1): “Everyone has the right to have his honour respected and his dignity recognized.”

²¹⁰ The Protocol of Amendment to the Charter of the Organization of American States (Protocol of Buenos Aires) provides in Article XXX, that “All human beings, without distinction as to race, sex, nationality, creed, or social condition, have a right to material well-being and to their spiritual development, under circumstances of liberty, dignity, equality of opportunity, and economic security.” As regards the relationship between employment, “work is a right and a social duty, it gives dignity to the one who performs it ...” Protocol of Amendment to the Charter of the Organization of American States (Protocol of Buenos Aires), TIAS 6847; American Declaration of the Rights and Duties of Man (IADRDM), Preamble: “The fulfilment of duty by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty.”

²¹¹ American Declaration of the Rights and Duties of Man (IADRDM), Article 23: “Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home;” European Social Charter (revised) (ESC rev), Article 26: “With a view to ensuring the effective exercise of the right of all workers to protection of their dignity at work, the Parties undertake, in consultation with employers' and workers' organisations: 1. to promote awareness, information and prevention of sexual harassment in the workplace or in relation to work and to take all appropriate measures to protect workers from such conduct; 2. to promote awareness, information and prevention of recurrent reprehensible or distinctly negative and offensive actions directed against individual workers in the workplace or in relation to work and to take all appropriate measures to protect workers from such conduct.” European Social Charter ... Preamble: “(...) The Parties accept as the aim of their policy, to be pursued by all appropriate means both national and international in character, the attainment of conditions in which the following rights and principles may be effectively realized (...) 26. All workers have the right to dignity at work.” Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (IACHR-P1), Preamble: “(...) Considering the close relationship that exists between economic, social and cultural rights, and civil and political rights, in that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person, for which reason both require permanent protection and promotion if they are to be fully realized, and the violation of some rights in favour of the realization of others can never be justified...”

²¹² Cairo Declaration on Human Rights in Islam, Aug. 5, 1990, U.N. GAOR, World Conf. on Hum. Rts., 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993) [English translation], Article 6(a): “Woman is equal to man in human dignity, and has her own rights to enjoy as well as duties to perform, and has her own civil entity and financial independence, and the right to retain her name and lineage. (b) The husband is responsible for the maintenance and welfare of the family.” League of Arab States, Revised Arab Charter on Human Rights, May 22, 2004, reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005), Article 3(3): “Men and women are equal in respect of human dignity, rights and obligations within the framework of the positive discrimination established in favour of women by the Islamic Shariah, other divine laws and by applicable laws and legal instruments. Accordingly, each State party pledges to take all the requisite measures to guarantee equal opportunities and effective equality between men and women in the enjoyment of all the rights set out in this Charter.”

²¹³ Cairo Declaration on Human Rights in Islam, Aug. 5, 1990, U.N. GAOR, World Conf. on Hum. Rts., 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993) [English translation], Article 1(a): “All human beings form one family whose members are united by their subordination to Allah and descent from Adam. All men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the basis of race, colour, language, belief, sex, religion,

What emerges from these differences is that some jurisdictions use dignity as the basis for (or another way of expressing) a comprehensive moral viewpoint, “a whole moral world view,” which seems distinctly different from region to region.²¹⁴ In this sense, to speak of human dignity is a shorthand way of summing up how a complex, multifaceted set of relationships involving man is, or should be, governed: relationships between man and man, man and God, man and animals, man and the natural environment, man and the universe. The classic examples of this use of dignity are to be found in Catholic and Islamic doctrine. Legally, this use can be seen in some of the more general references to dignity in several constitutional texts, most notably those whose drafting was most influenced by Catholic social teaching in the 1920s and 1930s, such as Ireland’s 1937 Constitution, and the human rights texts emerging from the Arab world. This use is seldom (if ever) explicitly reflected in judicial pronouncements, not least because the extent to which it would severely challenge the plurality of moral opinions and personal autonomy in the area of moral decision-making that modern liberal democracies cherish. However, important as these textual differences are, it is the differences in *judicial* approaches that I want to emphasise, and it is to these that I now turn. Here, too we shall find such significant differences in understanding dignity that Carozza’s universalistic naturalism seems overly optimistic as description. As a result, very different outcomes are derived from the application of dignity arguments. This is startlingly apparent when we look at the differing role that dignity has played in different jurisdictions in several quite similar factual contexts: abortion, incitement to racial hatred, obscenity, and socio-economic rights. In each, the dignity argument is often to be found on both sides of the argument, and in different jurisdictions supporting opposite conclusions.

C. Differences in the concept of dignity in judicial interpretation

Weight and status of dignity

There are significant variations between jurisdictions on the legal status and weight of human dignity. Does human dignity have a status superior to other human rights (as in Germany generally,²¹⁵ and in Hungary when combined with the right to life²¹⁶), in the sense that it is the highest constitutional principle neither subject to other rights, nor to restrictions of the type that one would find applying to human rights? Thus, in Germany, “human dignity has an absolute effect. There is, according to the jurisprudence of the courts, no way to balance other legal interests, be they of other individuals or of the community, with the dignity of a person. The principle of proportionality does not come into play as long as an intrusion upon human dignity has been established.”²¹⁷ Or, on the other hand, is dignity less important in the hierarchy of human rights and not superior to other rights, as Kriegler J appears to say in the South African Makwanyane case,²¹⁸ and is subject to the same types of limitations that apply to other rights, as in Hungary when dignity is not combined with the right to life,²¹⁹ and in Israel, where human

political affiliation, social status or other considerations. The true religion is the guarantee for enhancing such dignity along the path to human integrity.”

²¹⁴ Schultziner, Human Dignity at fn. 24.

²¹⁵ D. Kammers, The Constitutional Jurisprudence of the Federal Republic of Germany (Duke, 1997), at 32.

²¹⁶ Death Penalty case.

²¹⁷ Klein in Kretzmer and Klein, p. 149

²¹⁸ Para 214: “[I]n the hierarchy of values and fundamental rights guaranteed [by the Interim Constitution], I see [human dignity, inter alia] as ranking below the right to life. Indeed, [it is] subsumed by that most basic of rights.”

²¹⁹ Dupré, in Montpellier at 72; Dupré, Importing, p. 108, 111

dignity “may be limited so as to accommodate other interests and rights,”²²⁰ thus allowing the state to justify acts that violate dignity on utilitarian grounds? The French Conseil Constitutionnel’s Abortion Decision of 2001 reveals that although dignity may be a constitutionally protected principle, dignity is not an inviolable or a supreme principle. The CC’s willingness to balance dignity against the freedom of the women demonstrates that dignity is not inviolable or accorded a higher status than other constitutionally protected principles or rights.

Individualistic versus communitarian conceptions of dignity

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

The German Constitutional Court’s judgment in the Lifetime Imprisonment Case illustrates well a more communitarian approach: “The constitutional principles of the Basic Law embrace the respect and protection of human dignity. The free person and his dignity are the highest values of the constitutional order. The state in all of its forms is obliged to respect and defend it. This is based on the conception of man as a spiritual-moral being endowed with the freedom to determine and develop himself. *This freedom within the meaning of the Basic Law is not that of an isolated and self-regarding individual but rather of a person related to and bound by the community.* In the light of this community-boundedness it cannot be ‘in principle unlimited’. *The individual must allow those limits on his freedom of action that the legislature deems necessary in the interest of the community’s social life;* yet the autonomy of the individual has to be protected.”²²¹

Despite the fact that Hungary has borrowed so extensively from Germany, Dupré has argued that the importation of dignity has resulted in Hungary in “the development of a very different picture of the human person in Hungarian case law”, one where the person is envisaged as someone “considered in isolation and fighting against the state to protect her rights.”²²² In Hungary, “human dignity is focused on individuality and autonomy.”²²³ The court’s approach, at least up to 1998, was one in which “human dignity is limited to the individual considered in his singularity. It empowers the individual to take control over his life without any interference, or indeed any help, from others or from the state. Human dignity ... does not essentially facilitate interaction and relationships between people. Instead, human dignity surrounds the individual in a sort of protective sphere, and thus isolates individuals from each other.”²²⁴ The Casey and Lawrence cases, considered previously, illustrate a similar individualistic approach adopted in the United States Supreme Court. Another example, in a different context, is to be found in *Rice v. Cayetano*, where Justice Kennedy held that an affirmative action measure, using classifications

²²⁰ Kretzmer, in Klein and Kretzmer, p. 169.

²²¹ Kommers, 307-308 (emphasis added).

²²² Dupré, Importation, p. 122.

²²³ Dupré, Importation, p. 123.

²²⁴ Dupré, Importation, p. 125.

based on race, were unconstitutional because “it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.”²²⁵

These differences in approach are particularly important in the context of socio-economic rights, where the crucial question is how far, if at all, the state is under a positive duty to safeguard human dignity. We saw earlier that, in South Africa, socio-economic rights are regarded judicially as “rooted in respect for human dignity.”²²⁶ In Poland, in the context of unemployment, human dignity requires that the state “ensure that individuals out of work are able to exercise their rights to existence and to freedom” and the Constitutional Tribunal has held, therefore, that “social security benefits guaranteed to the unemployed by the state should at least guarantee them a basic level of social welfare.”²²⁷ In Germany, the Constitutional Court initially “refused to derive [from human dignity] an individual right to public welfare, [and then] left the question explicitly open.”²²⁸ More recently, that Court has held that human dignity, in combination with other rights, “imposes an obligation on the state to provide at least minimal subsistence to every individual.”²²⁹ In Italy, the Constitutional Court has “‘discovered’ that human dignity requires that decent housing be secured for all citizens as a constitutional ‘social right’.”²³⁰

In Hungary, on the other hand, human dignity “does not serve as a basis for recognizing social rights.”²³¹ Rather, it served as the basis for questioning and reinterpreting the scope of social rights enacted under the Communist regime,²³² allowing a switch to be made to a more economically liberal, individualistic conception of rights. In *Chapman v United Kingdom*,²³³ echoing earlier case law, the ECtHR considered that Article 8 “does not in terms give a right to be provided with a home. Nor does any of the jurisprudence of the court acknowledge such a right. While it is clearly desirable that every human being has a place where he or she can live in dignity and which he or she can call home, there are unfortunately in the contracting states many persons who have no home. Whether the state provides funds to enable everyone to have a home is a matter for political not judicial decision.” And in the Canadian Supreme Court’s decision in *Gosselin*,²³⁴ a highly individualistic approach is taken by the Chief Justice. The issue was whether a provincial workfare scheme that provided social benefits below the poverty line for those aged below thirty was unconstitutional, particularly on grounds of discrimination. As we have seen, in the Canadian context, part of the test of what constitutes discrimination depends on whether the individual’s dignity has been damaged. The majority of the Court held that there was no discrimination. The Chief Justice held that it was not discriminatory in part because there was

²²⁵ Contrast approaches in India and South Africa, where affirmative action is regarded as a major method of fulfilling dignity.

²²⁶ Hugh Corder, Comment, in *Science and Techniques*, p. 117, quoting Chaskalson, *Human Dignity*, at 204.

²²⁷ Lewaszkiwicz-Petrykowska, *op cit.* at p. 21.

²²⁸ Walter, *op cit.* at p. 29. Similarly in Belgium, see Court of Arbitration, judgment No. 66/97 of 6 November 1997, quoted in F. Delpérée, *The Right to Human Dignity in Belgian Constitutional Law*, in Montpelier, p. 57 at 62

²²⁹ Giovanni Boggetti, *The Concept of Human Dignity in European and U.S. Constitutionalism*, in *Science and Techniques*, 75 at 83; Christian Starck, *The Religious and Philosophical Background of Human Dignity and its Place in Modern Constitutions*, in Kretzmer and Klein, p. 179 at 189

²³⁰ Giovanni Boggetti, *The Concept of Human Dignity in European and U.S. Constitutionalism*, in *Science and Techniques*, 75 at 85.

²³¹ C. Dupré, *The Right to Human Dignity in Hungarian Constitutional Case-Law*, Montpelier, 68 at 69.

²³² Dupré, *Importation*, p. 146-7.

²³³ (2001) 33 EHRR 399, para 99

²³⁴ *Gosselin v. Quebec*, 2002 SCC 84 Supreme Court of Canada.

no breach of the individual's dignity; rather, the reverse: "The evidence shows that the regime set up under the Social Aid Act sought to promote the self-sufficiency and autonomy of young welfare recipients through their integration into the productive work force, and to combat the pernicious side effects of unemployment and welfare dependency. The participation incentive worked towards the realization of goals that go to the heart of the equality guarantee: self-determination, personal autonomy, self-respect, feelings of self-worth, and empowerment. These are the stuff and substance of essential human dignity."

Rights-supporting, or rights-constraining dignity

This discussion leads into the identification of another vital function that dignity controversially plays in some jurisdictions. We saw earlier that dignity has been seen as a principled basis of support for the human rights enterprise. In practice, however, dignity has come to be used as a major constrain on (some) rights. This can arise because dignity is used by both sides of a dispute to support their particular rights claims. In the Pretty case, involving the "right to die", the European Court of Human Rights has been seen as having adopted the view that that "the dignity of humanity expressed in its most universal and objective form so as to protect life is given force over and above the individual and subjective dignity of the person seeking assistance to terminate a state of personal suffering."²³⁵ Increasingly, the rhetoric of dignity is used to support restrictions on civil liberties as part of the "war on terrorism", using the argument that the state has a duty to protect the dignity of individuals who will be adversely affected by such terrorism. As early as 1988, the Preamble to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, with Related Protocol, 1988 referred to the "world-wide escalation of acts of terrorism in all its forms, which endanger or take innocent human lives, jeopardize fundamental freedoms and seriously impair the dignity of human beings ..." Since then, the use of dignity language in this context has increased significantly.²³⁶

Additionally, dignity may function as a justification for limiting the protection of rights or obligations, similar to a public order or public morals exception, allowing the state to place limits on what particular rights would otherwise require. In the Israeli context, human dignity has been developed not only as a basis for rights but also as a constraint on rights, leading to decisions in which pornographic films could legitimately be censored where they were regarded as degrading to human dignity, especially the dignity of women. When the Film Censorship Board insisted on the deletion of scenes degrading to women the Supreme Court of Israel, in *Station Film Co. v. Public Council for Film Censorship*,²³⁷ expressly recognized that the artistic value of the film had to be weighed against the need to protect human dignity.²³⁸ In another case, the Court has held that racism is an affront to human dignity and speech that promotes racial hatred can thus legitimately be prohibited.²³⁹ Indeed, these two areas, where free speech principles come into

²³⁵ Susan Millns, *German Law Journal*, at para. 8.

²³⁶ President George W. Bush in his 2005 speech to the United Nations spoke of how it was necessary, in the context of countering terrorism "to raise up the failing states and stagnant societies that provide fertile ground for the terrorists. We must defend and extend a vision of human dignity, and opportunity, and prosperity ..."

²³⁷ *Station Film Co. v. Public Council for Film Censorship* (1994) 50 P.D. (5) 661.

²³⁸ Kretzmer, *supra* note 32 at 169.

²³⁹ Kretzmer, in Kretzmer and Klein, at p. 169. Cp US-Federal Republic of Germany Agreement on Cultural Property, 1986, section 130 prohibits "assail[ing] the human dignity of others" "in a manner likely to disturb the public peace" by, for example, provoking hatred against sections of the population, or vilifying, maliciously disparaging, or defaming them.

conflict with the interests of others, have proven a rich ground for conflict over the appropriate role for dignity arguments.

Several courts, in considering how far to permit restrictions on obscene materials and indecent behaviour, have considered dignity to be relevant. In a Supreme Court of Canada decision, *R. v. Labaye*,²⁴⁰ the judgment of the majority, delivered by McLachlin CJ, considered a conviction for keeping a “common bawdy-house” for the “practice of acts of indecency”. The issue was whether the acts committed in this establishment were acts of indecency. The Court drew on the idea of human dignity as part of its assessment as to what “indecency” involved: “Conduct or material that perpetuates negative and demeaning images of humanity is likely to undermine respect for members of the targeted groups and hence to predispose others to act in an anti-social manner towards them. Such conduct may violate formally recognized societal norms, like the equality and dignity of all human beings, which is protected by the Canadian Charter of Rights and Freedoms and similar fundamental laws such as the provincial human rights codes.”

In *De Reuck v Director of Public Prosecutions*,²⁴¹ the Constitutional Court of South Africa considered whether the conviction of a film producer, under criminal provision relating to child pornography was unconstitutional. The decision by Langa DCJ for the Court considered the objective of the legislation: “The purpose of the legislation is to curb child pornography, which is seen as an evil in all democratic societies. Child pornography is universally condemned for good reason. It strikes at the dignity of children, it is harmful to children who are used in its production, and it is potentially harmful because of the attitude to child sex that it fosters and the use to which it can be put in grooming children to engage in sexual conduct.” In deciding to uphold the legislation, Langa J. continued: “Children’s dignity rights are of special importance. The degradation of children through child pornography is a serious harm which impairs their dignity and contributes to a culture which devalues their worth. Society has recognised that childhood is a special stage in life which is to be both treasured and guarded. The state must ensure that the lives of children are not disrupted by adults who objectify and sexualise them through the production and possession of child pornography. There is obvious physical harm suffered by the victims of sexual abuse and by those children forced to yield to the demands of the paedophile and pornographer, but there is also harm to the dignity and perception of all children when a society allows sexualised images of children to be available. The chief purpose of the statutory prohibitions against child pornography is to protect the dignity, humanity and integrity of children.”²⁴²

So too, the area of incitement to racial and other forms of group hatred has given rise to a similar use of dignity arguments. In *Faurisson v France*²⁴³ the concurring opinion of Prafullachandra Bhagwati in the Human Rights Committee decision emphasised that the restrictions in French law relating to denial of the holocaust (the Gayssot Act) were justified in part on the basis that the restrictions upheld human dignity. “Was the restriction on the author’s freedom of expression imposed under the Gayssot Act necessary for respect of the rights and interests of the Jewish community? The answer must obviously be in the affirmative. If the restriction on freedom of expression in the manner provided under the Gayssot Act had not been imposed and statements denying the Holocaust and the extermination of Jews by asphyxiation in the gas chamber had not been made penal, the author and other revisionists like him could have gone on making

²⁴⁰ 2005 SCC 80 (Supreme Court of Canada)

²⁴¹ (2003) 17 BHRC 710 (Constitutional Court of South Africa).

²⁴² Para 63.

²⁴³ Communication 550/1993, (1996) 2 BHRC, UN HR Committee

statements similar to the one which invited the conviction of the author and the necessary consequence and fall-out of such statements would have been, in the context of the situation prevailing in Europe, promotion and strengthening of anti-semitic feelings, as emphatically pointed out by the state party in its submissions. Therefore, the imposition of a restriction by the Gaysot Act was necessary for securing respect for the rights and interests of the Jewish community to live in society with full human dignity and free from an atmosphere of anti-semitism.”

A very similar approach has been taken by the Canadian Supreme Court in *Kreegstra*.²⁴⁴ Dickson CJ, for the majority, explained how, in his view, hate propaganda was contrary to human dignity. “In my opinion, a response of humiliation and degradation from an individual targeted by hate propaganda is to be expected. A person's sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded the groups to which he or she belongs The derision, hostility and abuse encouraged by hate propaganda therefore have a severely negative impact on the individual's sense of self-worth and acceptance. This impact may cause target group members to take drastic measures in reaction, perhaps avoiding activities which bring them into contact with non-group members or adopting attitudes and postures directed towards blending in with the majority. Such consequences bear heavily in a nation that prides itself on tolerance and the fostering of human dignity through, among other things, respect for the many racial, religious and cultural groups in our society.” So, too, McLachlin J., dissenting, agreed that hate speech implicated the dignity of the targeted group: “The evil of hate propaganda is beyond doubt. It inflicts pain and indignity upon individuals who are members of the group in question.”²⁴⁵

The Hungarian Constitutional Court has also adopted a very similar approach.²⁴⁶ “In addition to the historical and contemporary experiences proving the extreme damaging effects of raising hatred, one has to count with the everyday threats that result from the unlimited expression of ideas and concepts suitable for raising hatred. Such expression prevents the living together of human communities with other groups in a harmonic way. By intensifying emotional and social tensions within a smaller or bigger community, this can destroy ties within society, strengthen extremities, and increase prejudice and intolerance. All the above results in the diminution of the chances of creating a tolerant and multicultural society acknowledging pluralism and the right to be different, as well as accepting the equal dignity of all people, where discrimination is not regarded as a value.”²⁴⁷

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

²⁴⁴ [1990] 3 S.C.R. 697 (Supreme Court of Canada)

²⁴⁵ See also *Taylor v. Canadian Human Rights Commission* [1990] 3 S.C.R. 892 (S.C.C.) Dickson C.J.

²⁴⁶ Decision 30/1992 (V. 26.) AB, Constitutional Court file number: 1358/B/1991, Published in the Official Gazette (Magyar Közlöny) MK 1992/53 Hungarian Constitutional Court

²⁴⁷ See also *Islamic Unity Convention v Independent Broadcasting Authority*, 2002 (5) BCLR 433 (Constitutional Court).

So, too, dignity has come to be seen as equally controversial in the equality context. The Canadian Supreme Court has effectively incorporated an additional barrier that applicants must surmount; that the individual or the group with the victim identifies or is identified has been subject to discrimination of such a type that dignity has been under attack. Dignity has enabled courts to build in limits to the reach and depth of the equality principle, limiting both the group of “victims” who may legitimately claim and limiting the distributive justice implications of the equality principle. Although this approach has been the subject of much supportive academic comment,²⁴⁸ attempts to establish the utility of dignity as a foundational norm for equality at other than the rhetorical level have also provoked a wave of criticism.²⁴⁹ Grabham offers some support for the view that the Canadian approach limits the opportunity to base equality arguments on distributive justice in her interpretation of the limited approach taken by the Canadian Supreme Court to the interpretation of human dignity under the Canadian Charter. For some the divorce of anti-discrimination law from distributive justice in this way is desirable. Indeed, dignity is regarded as desirable precisely because it provides an alternative rationale to distributive justice in the equality context. Such an approach, Réaume maintains, can explain many of the advances in modern anti-discrimination law without resorting to end-state distributive principles.²⁵⁰ For others, however, this is anathema. Post has picked up the potential limits that dignity arguments may introduce and argues that modern American anti-discrimination law should not be conceived, as is commonly supposed, as protecting the dignity of individuals but, rather, as attempting to transform social practices that define and sustain potentially oppressive categories such as race or gender.²⁵¹

A similar issue arises in the more specific context of sexual harassment. Dignity has played an important role in the development of legal remedies for sexual harassment across several jurisdictions, but here too there is extensive debate and much unease about the use to which dignity is put. For some, there is more than a suspicion that dignity leads to the downplaying of the discrimination aspects of sexual harassment, and the playing up of the honour aspects. The debate turns on how far the law should focus on the sexual nature of the conduct, or whether it should focus on the extent to which harassment is used to continue the subordination of women in work. Schultz argues that the obsessive focus by courts on sexual conduct (and with it, dignity) deflects attention from the way in which sexual harassment is part of a general pattern of activity by which work is ‘gendered’ to the disadvantage of women.²⁵²

Waiving dignity?

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

In Germany, the Constitutional Court has held that “human dignity means not only the individual dignity of the person but the dignity of man as a species. Dignity is therefore not at the disposal

²⁴⁸ Mendes, 2000

²⁴⁹ Gibbins, 2000

²⁵⁰ see also Réaume, 2001

²⁵¹ 2001

²⁵² 0000, 1998, 2001

of the individual.”²⁵³ The obligation on the state to protect human dignity may justify limiting the rights of the person whom the state seeks to protect, irrespective of the preferences of the individual.²⁵⁴ The Federal Administrative Court, for example, has held that the dignity of women who work in “peep-shows” exposing themselves to men for payment is violated and they can legitimately be prohibited from doing so.²⁵⁵ A prohibition on dwarf-throwing, as part of a commercial entertainment, by a local authority in France was upheld by both the Conseil d’État²⁵⁶ and, subsequently, by the Human Rights Committee on the ground that the restriction was justified on the basis of human dignity.²⁵⁷

In Canada, the position seems more ambiguous. Consent may be relevant but is “not determinative”. In the Butler case,²⁵⁸ from which this approach derives, the issue was the constitutionality of restrictions on pornographic material. Sopinka J concluded: “Among other things, degrading or dehumanizing materials place women (and sometimes men) in positions of subordination, servile submission or humiliation. They run against the principles of equality and dignity of all human beings. In the appreciation of whether material is degrading or dehumanizing, the appearance of consent is not *necessarily* determinative. Consent cannot save materials that otherwise contain degrading or dehumanizing scenes. Sometimes the very appearance of consent makes the depicted acts even more degrading or dehumanizing.”²⁵⁹ In South Africa, the position is, again, ambiguous and context dependent. Whilst a strongly anti-paternalist approach is adopted, as we have seen, in the context of the gay rights cases discussed earlier, a very different approach is adopted in the case of prostitution. In the Jordan case,²⁶⁰ the Constitutional Court upheld the criminalization of prostitution. The justification offered by O’Regan and Sachs JJ seems out of keeping with their earlier strongly autonomy-based approach in the gay rights cases: “The very nature of prostitution is the commodification of one’s body. Even though we accept that prostitutes may have few alternatives to prostitution, the dignity of prostitutes is diminished (...) by their engaging in commercial sex work. The very character of the work they undertake devalues the respect that the Constitution regards as inherent in the human body.”

Dignity, from whose point of view?

Jurisdictions also differ, therefore, on whether dignity is to be interpreted from the point of view of the victim or “objectively”. One can sympathize with the difficulty courts have in this context. On the one hand, for the court to say that the appropriate approach is to adopt a particular individual’s own judgment to what seems to breach his or her dignity, is to risk putting in place an unmanageable and unworkable standard. On the other hand, adopting an entirely court-centred view of what constitutes a breach of dignity seems patronizing. In Poland, both the subjective feelings of the person seeking legal protection and the objective reactions to those claims are taken into account.²⁶¹ In Canada, the approach taken also seems to indicate that the courts want to have it both ways. In *Halpern v Attorney General*,²⁶² the Court of Appeal for Ontario summed up

²⁵³ Klein in Kretzmer and Klein, at p. 148

²⁵⁴ Klein in Kretzmer and Klein, at p. 157-159

²⁵⁵ BverfGE 64, 274 (279-280). Although Klein, Kretzmer and Klein p. 158 notes that in a subsequent decision this approach was not adopted.

²⁵⁶ 27 octobre 1995, Commune de Morsang-sur-Orge – Rec. Lebon, p. 372.

²⁵⁷ Wackenheim v France, CCPR/C/75/D/854/1999: France, 26/07/2002, para.7.4.

²⁵⁸ R. v. Butler [1992] 1 S.C.R. 452 (Supreme Court of Canada).

²⁵⁹ Emphasis added.

²⁶⁰ Jordan v The State, para 74.

²⁶¹ Lewaszkiwicz-Petrykowska, op cit at p. 24.

²⁶² 2003 65 O.R. (3d) 161, Court of Appeal for Ontario, para 79.

the Canadian approach thus: “The assessment of whether a law has the effect of demeaning a claimant's dignity should be undertaken from a subjective-objective perspective. The relevant point of view is not solely that of a ‘reasonable person’, but that of a ‘reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the group of which the rights claimant is a member’ (...). This requires a court to consider the individual’s or group’s traits, history, and circumstances in order to evaluate whether a reasonable person, in circumstances similar to the claimant, would find that the impugned law differentiates in a manner that demeans his or her dignity (...).” Whilst it is understandable that the court would want to have it both ways, this hardly seems a particularly stable approach and in practice has led to it either sliding into pure subjectivism, for example in some sexual harassment cases, in others to an almost entirely objective approach, where the court imposes its own views, as in the Gosselin case.

An even more radical difference between jurisdictions can be identified. Who should make the decision as to whether dignity should be accorded to a particular entity, and who should decide whether the balance between dignity and other values is appropriate? The Hungarian Constitutional Court, did not consider that the right to human dignity would limit abortion in ways equivalent to those found by the German court, unless *Parliament* had recognized the foetus as a human person.²⁶³ In the French Conseil Constitutionnel’s Abortion Decision, referred to above, the constitutionality of three amendments liberalizing French abortion law were challenged. One amendment in particular, which widened the permissible window for abortions from 10 to 12 weeks where the woman was in distress was challenged as violating the “principle of safeguard of human dignity against any form of deterioration”²⁶⁴ because of the risk of resulting eugenic practices. Deciding that the amendments were constitutional, the Court expressed that the new 12 week limit had not upset the “balance that the Constitution requires between safeguarding human dignity...and the freedom of women.”²⁶⁵ The CC explained that it is not for the court to decide the appropriate balance between the freedom of the woman and the dignity of the foetus; that is exclusive province of the legislature. In other words, the opinion implies that the job of the Court is merely to ensure that the legislature is balancing, not to police how they are balancing.

Who, or what, is protected by a claim to human dignity?

In some jurisdictions, human dignity is recognized as a right enforceable by an individual in the same way as any other right. In others, human dignity is a principle that stands behind other individual rights but does not give rise to enforcement by an individual. In Germany, there is a continuing academic debate as to what particular status human dignity has in this respect,²⁶⁶ although in that context the significance of the debate may be less than it appears since “[i]n all cases before the Constitutional Court in which questions of human dignity arose the alleged violation of human dignity went along with alleged violations of other individual rights so that access to the Court never depended on the qualification of human dignity as an individual right.”²⁶⁷

²⁶³ Dupré, *Importation*, p. 116.

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²⁶⁶ Eckart Klein, *Human Dignity in German Law*, in Kretzmer and Klein, 145 at 147.

²⁶⁷ Walter, *op cit.*, at p. 27.

Does human dignity apply only to a live, sentient person? Apparently not. In Israel, dignity attaches to those who have died, as well as to the living.²⁶⁸ In Germany, human dignity may also protect the dead, or at least their reputation.²⁶⁹ In Hungary, the Constitutional Court has gone one stage further and “seems to recognize ... that certain legal entities can ... enjoy the right to dignity, which is no longer regarded as an exclusively human quality therefore.”²⁷⁰ But the greatest unresolved difference between jurisdictions over the application of human dignity arises over the question of whether a foetus has dignity. It is clear that the foetus is under the protection of human dignity in Germany. In the context of abortion, the German Constitutional Court “used the human dignity clause to underline the constitutional requirement for protection of unborn life.”²⁷¹ According to the First Abortion Decision of the German Constitutional Court, “developing life also enjoys the protection which Article 1(1) accords to the dignity of man. Wherever human life exists it merits human dignity; whether the subject of this dignity is conscious of it and knows how to safeguard it is not of decisive moment. The potential capabilities inherent in human existence from its inception are adequate to establish human dignity.”²⁷² The important point is that this and other decisions reject a view of human dignity that views it as attaching only to those with the capacity to make autonomous decisions. In France, the Conseil Constitutionnel has recognized the principle of human dignity but has decided that “it does not require that the respect due to the life of all human beings be extended to the foetus.”²⁷³ In the United States, there is no mention of the “dignity” of the foetus until, in *Gonzales v Planned Parenthood Federation of America, Inc.*,²⁷⁴ Justice Kennedy, giving the opinion of the Court, described the rationale for the prohibited (so-called “partial birth”) abortion procedure at issue in that case as “express[ing] respect for the dignity of human life.” In the European Court of Human Rights, even after thirty years of litigation, it is still uncertain whether dignity applies to the foetus, and if not, why not. In *Tysiak v Poland*,²⁷⁵ the dissenting opinion of Judge Borrego Borrego regarded dignity as directly engaged, but the Court did not take up this challenge.

In Hungary, as we saw above, the Hungarian Constitutional Court, did not consider that the right to human dignity would limit abortion in ways equivalent to those found by the German court, unless Parliament had recognized the foetus as a human person.²⁷⁶ The dissenting opinion by Dr. Tamás Lábady, however, regarded the issue as one to be decided by the Court, and not left to Parliament: “According to Article 54 para. (1) of the Constitution in the Republic of Hungary every human being has the inherent right to life and to human dignity of which no one shall be arbitrarily deprived. In the interpretation of the Constitutional Court, the right to life and human dignity is an absolute subjective right, i.e. it cannot be restricted and reduced, since it is a

²⁶⁸ Kretzmer, in Kretzmer and Klein, p. 168

²⁶⁹ Mephisto case, BverfGE 30, 173; Kommers, at 301.

²⁷⁰ Dupré, Montpellier, p. 72; Dupré, Importation, pp. 112-3

²⁷¹ Walter, op. cit. at p. 28.

²⁷² Abortion Case (1975), 39 BverfGE R 1; D. P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd ed., Duke, 1997. p. 338. This was confirmed in the Second Abortion decision.

²⁷³ Giovanni Boggetti, *The Concept of Human Dignity in European and U.S. Constitutionalism*, in *Science and Techniques*, 75 at 86.

²⁷⁴ 127 S. Ct. 1610; 167 L. Ed. 2d 480 (2007) (Supreme Court of the United States)

²⁷⁵ [2007] ECHR 5410/03 (European Court of Human Rights), dissenting opinion of Judge Borrego Borrego, para 15.

²⁷⁶ Dupré, Importation, p. 116.

fundamental right which must be left intact by the law. Since in a biological sense, the foetus is a human, i.e. a genetically fully developed individual human being, and since the term “inherent right to life” means (...) a right not gained through birth, but one “formed” together with the man, i.e. a right that originates in the existence, the humanity of the man, the lack of human dignity and having no right to life cannot be justified by the Constitution in case of a foetus not yet born.” Dupré writes that the decision of the majority is in “stark contrast” to the approach adopted in Germany,²⁷⁷ and that the “gap between the two interpretations of human dignity appears to be even wider because it originates from constitutional provisions which are very similar, as well as from legal issues expressed in very similar terms.”²⁷⁸

D. The failure of dignity to serve as the basis for a consensual substantive theory of human rights

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

Few courts acknowledge that the conception of human dignity that they apply is different from that applied in other countries. Indeed, to do so would appear to undermine a legitimizing function of human dignity. A possibly significant breach in the dyke has now appeared, however. In the Omega case, the European Court of Justice seems to have accepted that human dignity has potentially significantly different meanings from country to country. The German authorities had prohibited Omega, a commercial enterprise, from operating a laserdrome where players try to “kill” other players by firing a laser beam at a sensory tag placed on their jackets. The company argued that because the game was lawful in other Member States, Community law required that it be allowed in Germany on the basis that Community law protected the freedom to provide services in the Community. The German government argued that the prohibition was justified on the same grounds that peepshows and dwarf throwing were prohibited, namely on ground of human dignity. The company argued in rebuttal that a restrictive measure based on the protection of fundamental rights must be based on a *common* conception of those fundamental rights under European Community law across the Community. The ECJ disagreed; it was not indispensable for the restrictive measure adopted by a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or interest is to be protected.²⁷⁹ By implication, the German approach to dignity was not a conception of dignity common to the Member States.

The account given in this Part of the article seems to show that dignity as a concept with particular content has contributed little of substance to solving the most profound issues in the

²⁷⁷ Dupré, *Importation*, p. 116.

²⁷⁸ Dupré, *Importation*, p. 117.

²⁷⁹ Omega, paras. 34-37.

judicial resolution of human rights claims: the appropriate balance between the individual and the community, including such questions as the appropriate limits on individual freedom; the appropriateness of the use of state power to ensure basic standards of material security; how to balance rights that may appear to conflict; what rights should be attributed at the beginning of life and at the end of life; and how far we have responsibilities to each other and to the community. Nor, in the words of Weisstub, does it “inform us about whether the core and substance of human dignity is best articulated through a consensus morality, if it can be located alternatively among the professional elite of the judiciary, or whether it can only be articulated over a long process through the amalgamation and interaction with other rights, values, principles and rules established nationally and trans-nationally in law and legislation.”²⁸⁰ We are left, then with an apparently descriptively more accurate, but normatively disappointing, conclusion that in the judicial interpretation of human rights there is no common substantive core to dignity.

V. FINDING THE UTILITY OF DIGNITY

We seem to be confronted with two irreconcilable positions. We are asked to believe (on the basis of the arguments in Part III) that dignity expresses what is universal, timeless and inherent in what it means to be human, or we are asked to believe (on the basis of the argument in Part IV) that dignity is only a place holder for the absence of agreement not only in the political but also in the judicial context. But, perhaps, it is too ambitious to assess the utility of dignity in human rights adjudication on the basis of whether it either creates or instantiates a theory of substantive human rights. Perhaps we should think more modestly and ask whether dignity plays a different role. My argument in this part of the article is that the “common enterprise” which Carozza and I both agree is occurring is not “the working out of the practical implications, in differing concrete contexts, of human dignity ...,” as Carozza would have it,²⁸¹ but rather the establishment of a recognizably workable system of judicial interpretation and application of human rights. In this context, the use of the concept of human dignity is to provide a useful, but limited, mechanism with which to address certain institutional difficulties that human rights adjudication gives rise to.

Although dignity has failed to assist in providing a shared *substantive* basis for decision-making, dignity has, therefore, provided something of real benefit to human rights adjudication: a shared institutional basis for decision-making. Weisstub provides a useful starting point: “[W]hat is interesting about human dignity is how it colours differently, depending upon the social needs in question. Its centrality and attractiveness for global ethics may be, thereby, its malleability rather than the tightness of its logic. (...) To say this in no way throws into question the rhetorical value or *even the constitutional attractiveness* of the claims or projections about human dignity”²⁸² Wherein lies this constitutional attractiveness? I will argue in the remainder of this article that we can identify from the previous analysis a distinctively useful *institutional* function that dignity plays in judicial interpretation, one that fulfils a need occasioned by the institutional characteristics of judicial decision making in human rights adjudication. In other words, dignity plays an important legal-institutional function. I am not arguing that all judicial decision-making should be seen from the functionalist perspective that this particular argument presents. My more limited argument in this concluding part of the article is that the judicial use of dignity in human rights adjudication should not be seen simply from the perspective of universalistic naturalism or from the perspective of pluralistic cultural relativism. Rather, we should see the role that dignity plays in adjudication at least partly from a *functionalist* perspective. If this analysis is correct, one

²⁸⁰ Weisstub, in Kretzmer and Klein, at 274.

²⁸¹ Carozza, at 1081-2.

²⁸² Weisstub in Kretzmer and Klein, at p. 265 (emphasis added).

implication would be that the function of dignity in human rights adjudication may, therefore, be rather different from its function in other contexts and social systems.

Ruti Teitel has helpfully described functionalism in comparative law scholarship as an approach that “treats comparative law as a technique of problem solving. The subject of comparative analysis is the legal problem”²⁸³ She goes on to characterise functionalism as considering “the relevant unit of analysis” to be “the problem and its legal solution.”²⁸⁴ Functionalism was probably the dominant approach to comparative law scholarship and still retains an important influence in comparative law circles, although it has long been under significant pressure from other comparative law approaches, particularly perhaps in the human rights context, and is now relatively unfashionable. In the context of discussing the role of dignity in human rights adjudication, however, it seems to me to be the most convincing explanation for the utility of dignity in present day judicial decision-making.

A. Judicial review’s institutional problems

At least since the Second World War, courts have increasingly been given (or taken on) a role in interpreting and applying constitutional and human rights, sometimes in specially created constitutional courts, sometimes in courts of general jurisdiction, and sometimes in administrative courts. Such adjudication usually involves the judiciary being asked to adjudicate on disputes that involve an allegation of a breach of a claimed right by a public body such as a department of government, or by the legislature itself. This role of the courts is controversial not least because it runs the risk of creating tension with other constitutional principles, such as the separation of powers. Where judicial review involves judges striking down legislation on the ground that it breaches constitutional or human rights, it is particularly controversial because a body of unelected judges calls into question the decision of a democratically elected body, leading to the so-called “counter-majoritarian difficulty.” These tensions have led to a continuing debate about the legitimacy of judicial review, particularly of this strong type, and how far it is compatible with notions of democratic self-government. In all the jurisdictions which have adopted dignity in their judicial decision-making, judicial review in the human rights context is more or less controversial, constantly aiming to justify itself, its methods, and its reasoning.

There are at least three particular institutional problems that are commonly identified with human rights adjudication that dignity helps courts deal with. The first arises from the need to decide how to resolve conflicts of rights, and conflicts between rights and other values. The second arises from the need to decide how far the rights that are to be interpreted should be seen as instantiating international standards as opposed to how far they should be seen as protecting more national or local concerns, where there is a conflict. The third arises from the need to decide how far the text of the national (or regional, or international) Bill of Rights should be seen as determinative, and how to react when the text appears to “run out” and there is a strong judicial desire to intervene. In each of these situations, we see dignity has an important function in easing, but not “solving”, the problem that the court faces. I’ll consider each in turn.

B. Conflicts of values and the problem of incommensurability

I begin with the problem of how to handle conflicts of rights and conflicts between rights and other values. A key feature of this problem is the issue of whether these rights and other values

²⁸³ Ruti Teitel, Book Review: Comparative Constitutional Law in a Global Age, 117 Harv. L. Rev. 2570 (2004), 2574.

²⁸⁴ Ibid.

can be “balanced” against each other. To engage in “balancing” is clearly a metaphor in this context. We can balance an amount of sugar against an amount of flour because both have mass and weight and we therefore have a common measure to compare them by. Frequently, however, rights and other values are said to be incommensurable. Incommensurability is essentially the theory, first popularized by Isaiah Berlin,²⁸⁵ that some values cannot be compared against each other, and this has been taken up in the legal context. Alder, for example, argues that there is no single, ultimate scale or principle against which to compare conflicting values – no “moral slide-rule” or universal unit of measurement.²⁸⁶

The Evans case in the ECtHR was a prime example of an intra-rights conflict being seen to give rise to a problem of incommensurability. Mrs Evans was diagnosed with cancer in both ovaries and they had to be removed. The hospital advised her that it would be possible to “harvest” her eggs, fertilize them with the gametes of her husband, and freeze them so that they might have a child in future. Her relationship with her husband broke down, and he asked for the gametes to be destroyed. The British legislation allowed the withdrawal of consent at any time pre-implantation. Mrs Evans wanted the gametes preserved so that she could have a baby. Legally, the case was presented as involving a conflict between Mrs E’s article 8 right to found a family and her former husband’s Article 8 right to protection of his private life. Before the issue reached the ECtHR, the English Court of Appeal rejected Mrs Evan’s claim, Sedley LJ stating that the claim would “require a balance to be struck between two entirely incommensurable things. Whatever decision was arrived at might be capable of being explained but would be practically impossible to justify.” Arden LJ similarly stated that the court had no point of reference by which to make such a decision. The Grand Chamber accepted much of the Court of Appeal’s reasoning, quoting Arden LJ.

One approach to conflicts of this kind is to say that resolving such conflicts is not a role for the courts. So, for example, Alder argues that when we reach the stage where values conflict, we must employ human emotions to resolve the conflict. The legislature, Alder argues, is the best forum for discovery and application of such emotions. The courts have no special place, no special insight and a legislature is ultimately more suited. Translated into court-talk, courts should defer to the legislature. Effectively, this is what the ECtHR did in Evans. Another possible approach is for the Court to resort to utilitarian balancing. Consider the A case,²⁸⁷ involving the issue of whether detention of alleged terrorists without trial was contrary to Articles 5 and 6 of the ECHR. We could convert the argument to a purely utilitarian form, something like the greatest good for the greatest number, asking the court to consider whether the damage of holding a person in a prison without allowing him to plead his innocence in a court is greater than the potential effect on national security of letting him free. Apart from the fact that this seems to be the type of decision that legislatures (perhaps even the Executive) is better able to make than courts, there is another problem. If we take liberty as not being a utilitarian consideration but as an intrinsic value, valuable in and of itself, then it seems difficult to perform the utilitarian balancing act between the two.

There are various other ways of addressing the problem of such conflicts. An approach that is often, perhaps increasingly, adopted is for the court to adopt proportionality as a tool by which the court can structure its analysis of the conflict. There are many variations in the ways courts formulate proportionality,²⁸⁸ but for my purposes nothing hangs on these differences. Essentially,

²⁸⁵ I. Berlin ‘Liberty’

²⁸⁶ J Alder [2006] Public Law 697–721.

²⁸⁷ A v Secretary of State for the Home Department [2004] UKHL 56; [2005] 2 W.L.R. 87, HL

²⁸⁸ Silver and Others v. UK, 25 March 1983

each formulation has several common elements: first, where a limit is placed on a claimed right, the court should first establish whether that limit furthers a legitimate aim; second, the court should consider whether the means chosen to achieve this aim are rationally connected to that aim; third, the court should consider whether the measure is proportionate in the strict sense, meaning that the court should consider whether there are any means available to achieve the objective which are less restrictive of the claimed right, and do the benefits of restriction outweigh the harms.

A problem that is commonly identified with proportionality analysis, however, is that the proportionality test requires the injection of a significant element of value judgment in at least two particular parts of the test: in determining whether the aim of the restrictive measure furthers a *legitimate* objective, and in carrying out the final balancing exercise. Courts applying the proportionality test will need to determine what constitutes a legitimate aim and its “weight”, and what the “weight” of the right is that is being limited by the challenged measure. Rather than solving the problem of incommensurability, the court is still faced with the problem and the courts resort to similar techniques described in the previous paragraphs: deference to legislative judgment, creating a hierarchy of rights, engaging in crude utilitarian balancing or, as Waldron²⁸⁹ identifies, requiring that reasons be given explaining the considerations upon which the governmental decision was arrived at and scrutinizing the adequacy of such reasons.

The use of dignity is particularly associated with those jurisdictions that have adopted proportionality analysis, whether that word is used or not. That is not coincidental, I think. One important institutional function for dignity is to provide a language in which courts can indicate clearly the weighting given to particular rights and other values in this context. When a particular right or other value is described as engaging dignity, this indicates that the court considers that considerable (even in some cases overwhelming) weight should be attributed to it. Let’s reconsider the First Abortion Case in this light. The German Constitutional Court addressed the constitutionality of the Abortion Reform Act of 1974, which liberalized some restrictions on abortion. The Act was challenged as unconstitutional. In deciding the case, the FCC identified the conflicting interests at stake as the mother’s right to personality under Article 2(1) and the state’s duty to protect life under Article 2(2). Faced with balancing the mother’s rights and the state’s duty to protect life, the FCC turned to dignity. The court identified dignity as the supreme value in German law stating that “[i]n the ensuing balancing process, both constitutional values must be perceived in their relation to human dignity as the centre of the Constitution’s value system.” Although this statement implies that dignity is a superior value guiding the interpretation of the scope of both rights, the FCC went on to heavily emphasize dignity’s connection to the life interest declaring that “[h]uman life . . . is the vital basis of human dignity and the prerequisite of all other basic rights.”²⁹⁰ By associating dignity with the state’s duty to protect life, dignity became more than just a value or guiding principle. It became a technique whereby the court was able to apply stricter scrutiny to derogations from the state’s duty to protect life and consequently restrict the rights of the mother. Once dignity entered the balancing calculus on the side of the life interest, the conclusion that the protection of the foetus’s life must receive priority over the women’s freedom was inevitable. Thus, the FCC relied heavily on dignity to tip the scales in favour of finding the act unconstitutional, and restrict the rights of the mother.

²⁸⁹ Waldron, ‘Fake Incommensurability’, (1994) 45 HLJ 813

²⁹⁰ *Id.* The court emphasized the life interest as a community value rather than an individual right belong to the fetus, although the court did recognize that “[t]he potential capabilities inherent in human existence from its inception are adequate to establish human dignity.”

So too, in the Aviation Security Act Case, dignity performed a similar function to the one it played in the First Abortion Case. In this case, the FCC addressed the constitutionality of a law that empowered the Minister of Defence to shoot down a hijacked passenger plane where it was being used as a guided bomb similar to the way in which the planes were used on 9/11. The FCC decided that despite its potential to avert a major disaster and save thousands of lives, the law was impermissible because it infringed upon the guarantee of human dignity, to the extent that it allowed the lives of innocent people to be taken to save the lives of others. The FCC's use of dignity here resembles the use of dignity in the First Abortion Case because in both cases the FCC invoked dignity in conjunction with the right to life in order to imbue that right with a weight that justified the application of strict scrutiny when assessing whether incursions into the right were acceptable, and found that they were not.²⁹¹ When the court deems that dignity is not a factor, however, less weight is attributed to the life interest and hence incursions into rights can once again be justified. Thus, the FCC concluded that, if terrorists are alone on the plane, shooting the plane down would be proportionate because the criminal, are not being treated as objects; "[o]n the contrary, it corresponds to the position of the aggressor as a subject to make him accountable for the consequences of his autonomous actions."

So, too, when the FCC in the Second Abortion decision wanted to give greater weight to the rights of the woman, the Court began using the concept of dignity to describe those rights, thus indicating that they should be accorded greater recognition than in the First Abortion decision. In the Second Abortion decision, the FCC departed from its technique of attributing dignity solely to the life interest in the foetus. Instead, the court placed dignity on both sides of the rights-balancing equation stating "[w]here the woman's constitutional rights, namely her right to free development of her personality...and to the protection of her dignity, collides with the duty to protect the unborn, the conflict must be solved in accordance with the principle of proportionality."²⁹² Unlike in the First Abortion case, the woman's right to personality, and not just foetal life, was seen to engage dignity. Dignity was no longer used to tip the scales in favour of the life interest. Rather, dignity's association with both sides of the conflict resulted in the decision that the state's duty to protect life and the women's basic rights must be balanced.²⁹³ Consequently, the character of the opinion was decidedly more respectful of the woman's rights and reflected a more even-handed balancing overall.

The Second Abortion decision also illustrates the use of dignity as providing a common metric within which balancing of apparently incommensurable values can take place, and a metric that is not simply expressed as utilitarian. This, too, is a common practice in other courts that use proportionality. So, for example, in the South African Port Elizabeth Municipality case,²⁹⁴ the city sought an eviction order against a group of individuals occupying private land. Although the City proposed that the group move to a different piece of land, the individuals rejected the offer because the proposed site of relocation was crime-ridden, crowded, and would not offer them security from another eviction. The City had housing to serve the needs of the poor, but contended that allowing individuals to receive priority in the allocation of this housing was tantamount to rewarding them for illegally occupying land. The Court found itself in a situation of conflicting rights: the right of the landowners not to suffer arbitrary or unlawful deprivation of

²⁹¹ See Kai Moller, *On Treating Persons as Ends: The German Aviation Security Act, Human Dignity, and the FCC*, pg. 33.

²⁹² *Id.*

²⁹³ It is not clear whether the FCC conceived that woman's dignity here is affiliated solely with the right to life or from her right to personality, but the FCC appears to be associating dignity with both rights.

²⁹⁴ *Port Elizabeth Municipality v Various Occupiers*, 2004 (12) BCLR 1268 (Constitutional Court of South Africa).

their land, and the right of the squatters to have access to adequate housing. Sachs J was clearly unwilling simply to use a utilitarian approach to resolve the conflict: “In a society founded on human dignity, equality and freedom it cannot be presupposed that the greatest good for the many can be achieved at the cost of intolerable hardship for the few, particularly if by a reasonable application of judicial and administrative statecraft such human distress could be avoided.” Instead, in deciding the case, the Court emphasized that the “starting and ending point of the analysis must be to affirm the values of human dignity, equality, and freedom.”²⁹⁵ The Court made no attempt to identify dignity with only one side of the conflict, but rather concluded that both rights pertained to property and were underpinned by dignity. Given that they were commensurate, and the Court’s role was to seek the solution that would best comport with dignity. When the Court decided that it would not uphold the eviction order, it justified its decision to limit the right of the landowners to be free from unlawful deprivation of their land as being the choice more congruent with dignity.

Consider the similar role of dignity in the context of freedom of expression in the Canadian Supreme Court cases considering obscenity and hate speech. Traditionally, in both these contexts, other jurisdictions (perhaps particularly the United States) have contrasted the right to freedom of expression against the mere “interests” of the government, and have come down heavily in favour of freedom of speech. In contrast, in the Canadian cases, the interests of the government were reformulated in dignity terms, and the result was markedly different. Thus, in *Keegstra*,²⁹⁶ we saw earlier that Dickson C.J. conceptualized the protection accorded by the legal restrictions on hate speech as heavily engaging dignity. The majority considered that the right to freedom of speech was also underpinned by dignity. “Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity.” Since dignity is engaged on both sides of the conflict, therefore, dignity again provides a metric common to both and thus the solution must be that which most comports with dignity. In this case, according to the majority, since the speech is one that undermines dignity, the dignity-based reasons why speech ordinarily should be protected from interference are substantially reduced. “I am very reluctant to attach anything but the highest importance to expression relevant to political matters. But given the unparalleled vigour with which hate propaganda repudiates and undermines democratic values, and in particular its condemnation of the view that all citizens need be treated with equal respect and dignity so as to make participation in the political process meaningful, I am unable to see the protection of such expression as integral to the democratic ideal so central to the ... rationale [for protecting free speech]. (...) [T]his conclusion leads me to disagree with the opinion of [the dissent] that the expression at stake in this appeal mandates the most solicitous degree of constitutional protection. In my view, hate propaganda should not be accorded the greatest of weight in the [proportionality] analysis.”

C. Domesticating and contextualizing human rights

We can turn now to consider the second issue: how far rights are to be seen as instantiating international or local standards. There is an inherent tension in international human rights law between affirming a universal vision of human rights and respecting the diversity of cultural perspectives. Understanding and implementing human rights in a global context requires judges

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²⁹⁶ *R. v. Keegstra*, [1990] 3 S.C.R. 697 (Supreme Court of Canada)

to struggle with this conflict. The concept of dignity gives judges a device to mediate between the poles of cultural relativism and universality in this global context. For example, it allowed the South African court in Port Elizabeth to contextualize its decision in light of the history of apartheid.²⁹⁷ It allowed the Supreme Court of Canada to pick and choose what it regards as discriminatory, based on local perceptions of what was contrary to dignity.²⁹⁸ As the Chief Justice explained in *Gosselin*: “To determine whether a distinction made on an enumerated or analogous ground is discriminatory, we must examine its context. (...) In each case, we must ask whether the distinction, viewed in context, treats the subject as less worthy, less imbued with human dignity, on the basis of an enumerated or analogous ground.” It enabled the South African Constitutional Court to decide when “equality” requires equal treatment and when it doesn’t. As Sachs J explained in *Minister of Home Affairs v Fourie*,²⁹⁹ “It is precisely sensitivity to context and impact that suggest that equal treatment does not invariably require identical treatment. (...) The crucial determinant will always be whether human dignity is enhanced or diminished and the achievement of equality is promoted or undermined by the measure concerned.”

Indeed, some scholars have argued that this function of dignity has been vital in particular jurisdictions not just in the context of individual cases but more generally. In Hungary, Dupré has argued that the Constitutional Court’s use of dignity can best be explained as “being used first and foremost to break with the socialist law.”³⁰⁰ Given the resistance during the transition to democracy to any resurrection of the despised egalitarianism of Communist ideology, it is not surprising that a non-distributive justice approach to equality should be adopted. Dignity was ideally placed to supply an alternative theory in this context and we should not be surprised, therefore to find it heavily used by the Court. Dupré argues convincingly that the “task of negating and destroying the former domestic [Communist] legal system has gone hand in hand, in constitutional case-law, with the foundation of a new order based on non-indigenous elements.” Human dignity allowed the court to import these non-indigenous elements into Hungarian law, primarily from German constitutional law, but only to the extent that this was perceived as suiting the local need “to reorient the conception of fundamental rights ... from a communist concept of rights to a liberal one”.³⁰¹ In order to accomplish this switch, the Court “used imported law in its early case law as a modern substitute for natural law, in that enabled the Court to base its reasoning on new supra-constitutional values, while presenting them in a legal guise. At the same time, the use of imported law is couched in a discourse of globalization or *ius commune*, in which the Court presents itself as an active participant.”³⁰²

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

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²⁹⁸ *Gosselin v. Quebec*, 2002 SCC 84, Supreme Court of Canada, para 24 (McLachlin, CJ)

²⁹⁹ 2006 (3) BCLR 355 (Constitutional Court), para 152 (Sachs J).

³⁰⁰ Dupré, *Montpellier* at p. 72

³⁰¹ Dupré, *Importation*, p. 6

³⁰² Dupré, *Importation*, p. 157.

such an approach undermines the predictability necessary to create a functioning approach to human rights and in extreme forms allows for total derogation from human rights norms by tolerating all deviations. I am not, here, defending the approach, merely attempting to describe the way that dignity functions, in practice.

D. Gap filling when the text runs out

The third function of dignity arises in the context of how courts react when the text of the Bill of Rights (or its equivalent) “runs out” and there is a strong judicial desire to intervene. Dignity has functioned as a source from which new rights may be derived, and existing rights extended. In the Israeli context, for example, human dignity has been seen as providing a basis on which to import rights that had not, intentionally, been included in the text of the Basic Law: Human Dignity and Liberty. As Kretzmer observes, “the Basic Law does not mention many of the fundamental rights that are protected under most constitutions and international human rights instruments The most blatant exclusions are equality, freedom of religion and conscience and freedom of speech.”³⁰³ There were excluded because of the inability to generate a consensus among the parties in the Knesset that they should be included. Notably, several of the religious parties objected to their inclusion. Given that the self-perceived role of the Israeli Supreme Court is to assist in the building of an Israel that is committed to the broad range of human rights, that was unsatisfying. Conceptualizing human dignity as a general value “has enabled the Court to resort to the concept to create rights in various situations,” including in those contexts where the excluded rights would otherwise have been expected to operate.³⁰⁴ In some cases, the Court has used this method to recognize precisely those rights that were deliberately omitted from the Basic Law because of the lack of political consensus.³⁰⁵ For example, in the Hupert case, the Court asserted that the right to equality can be derived from human dignity and as a consequence merited constitutional protection.³⁰⁶ Other rights that have been derived from dignity in a similar manner include freedom of religion, the right to strike, the right of minors not to be subject to corporal punishment, and the right to know the identity of one’s parents.³⁰⁷

A somewhat similar approach can be identified in the UK House of Lords’ *Limbuela* decision, in which the claims of three asylum seekers who applied for judicial review of the Nationality, Immigration, and Asylum Act were considered under the Human Rights Act 1998, which effectively incorporated the ECHR into domestic UK law. The ECHR does not provide for most of what are commonly termed socio-economic rights, such as rights to basic welfare, yet in *Limbuela* the House of Lords appeared to find just such a right. The challenged legislation had revoked the authority of the Secretary of State to provide support for asylum seekers who did not make a recorded claim for asylum as soon as reasonably practicable after arriving in the UK. Nor were such asylum seekers permitted to work, even where they were destitute. The asylum seekers contended that the regime diminished their human dignity and violated Article 3 of the European Convention of Human Rights, which provided an absolute prohibition on torture, and inhuman or degrading treatment. Dignity was the standard for determining whether treatment rose to the level of inhuman or degrading treatment for the purposes of Article 3. Discussing the types of treatment falling within Article 3, Lord Craighead wrote: “Where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish, ... it may be characterized as degrading and also fall within the

³⁰³ Kretzmer, *Human Dignity in Israeli Jurisprudence*, in Kretzmer and Klein, p.161 at 162.

³⁰⁴ Kretzmer, in Kretzmer and Klein, at p. 172.

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

prohibition of article 3.” The Court agreed that the statutory regime violated Article 3, because by denying the asylum seekers state support, at the same time as effectively cutting off self-support measures (applicants could not work without permission, which took a minimum of 12 months to obtain), the state actions resulted in treatment that was severe enough to be considered inhuman or degrading.

CONCLUSION

Dignity has undoubtedly played a pivotal political role in enabling different cultures with vastly different conceptions of the state, differing views on the basis of human rights, and differing ethical and moral viewpoints, to put aside these deep ideological differences and agree instead to focus on the specific practices of human rights abuses that should be prohibited, as Maritain suggested. Dignity has helped achieve this by enabling all to agree that human rights were founded on dignity without needing to go further, but with each major group conceptualizing the meaning and implications of dignity differently.

Although a common theory was not necessary for the political acceptance of the Charter and the Universal Declaration, and attempts to generate one would have been counter-productive, this did not help much when it came to the interpretation of those specific rights that were enacted. When judges read their texts and found that these rights were founded on human dignity, or found that there was a right to dignity as such, it was not surprising that some considered that dignity should be given substantive content. This might have led to the development, through discussion among judges nationally and transnationally, to the judicial development of an agreed transnational, transcultural, non-ideological, humanistic, non-positivistic, individualistic-yet-communitarian theory of human rights that was absent when the Charter and the Declaration were being drafted. I understand Carozza to be arguing that this is what is currently underway. But, although we see judges often speaking in terms of “common principles for a common humanity,” in practice this is rhetoric, however well intentioned and sincere.

I am not arguing that there is no coherent meaning that *could* be given to the concept of dignity. Nor am I arguing that there is no coherent extra-legal concept of dignity that could form the basis of a common transnational legal approach. The problem is rather the opposite: as the historical examination of the development of dignity indicated, there are several meanings that dignity can have, but one cannot coherently hold all of them at the same time. Dignity only appears to become other than incoherent when it is tethered to a coherent community of interpretation. It could be, therefore, that the interpretation of dignity within Catholic social doctrine, or within a social democratic framework, or within an Islamic framework, or within the Jewish tradition, or based on Kant, might fulfill this role. But none of these currently provide a consensus meaning to the transnational legal use of dignity and I am sceptical whether any of these could really provide a secure foundation for its meaning in the future. When any one of these approaches is adopted, dignity loses its attractiveness as a basis for generating consensus with those who do not share that tradition.

So far, the use of the concept of human dignity has not given rise to a detailed universal interpretation, nor even particularly coherent national interpretations. No one jurisdiction has a coherent judicially interpreted concept of dignity across the range of rights, and no coherent conception of dignity emerges transnationally. But that does not mean that dignity has no useful role to play in the judicial interpretation of human rights. Rather than expecting it to provide substantive meaning, its primary functions are institutional: providing weight to rights, domesticating and contextualizing them, and providing a basis for gap filling. It is a modest role, and a different one from that played in philosophical, religious and political debate, but it seems

to me to explain its current, and future, judicial popularity, and its actual function in existing human rights adjudication.