PART A: ARTICLES

THE ROLE OF HUMAN DIGNITY IN A WORLD OF PLURAL VALUES AND ETHICAL COMMITMENTS

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Abstract

The concept of human dignity plays a central role in many legal and political theories. The concept also occupies a prominent place in numerous national and international legal documents as well as judicial decisions. Yet, it is not always clear what the concept means or entails. ‘Human dignity’ is one of those phrases that carries unspoken assumptions and connotations that can powerfully influence the discourse they permeate while escaping critical scrutiny. This article subjects the phrase to critical scrutiny to see which or what understanding (among many) is defensible and credible as a matter of legal and political practice. After examining some of the currently prominent approaches to dignity and finding them unsatisfactory, the article defines and defends an understanding of human dignity that develops from the bottom up rather than from the top down. Such a notion of dignity will necessarily be political in a sense that it develops through our works and conversations within and among traditions and systems. It emerges from an ‘overlapping consensus’ of various traditions and systems as to what it means to dignify humans or conversely to subject them to indignities. The article argues that only a notion of dignity developed and adopted in that manner will serve as a practical guide in a world of plural values and ethical commitments. The idea

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here is to establish human dignity as a norm within a global public enterprise which guides the actions of individuals and governmental entities both within and across communities. The article argues that the standards of human dignity developed here set limits to the sovereignty of States in that their violation (whether actual or anticipated) will be sufficient reason to authorise outside intervention, whether coercive or non-coercive.

Keywords: autonomy; Habermas; human dignity; human rights; incompleteness; Kant; overlapping consensus

1. INTRODUCTION

The concept of human dignity plays a central role in many legal and political theories. In some legal theories, human dignity is the singular purpose or end to which law should be oriented. And some commentators have claimed that human dignity is the only absolute value in a world of plural values and commitments. The concept also occupies a prominent place in numerous national and international legal

1 The most recent work of political theory that puts dignity as a central organizing principle is Ronald Dworkin, *Justice for Hedgehogs* (Harvard 2011). For another recent work of political theory which sets out ‘to defend the idea of “human dignity” as an “existential” rather than a moral value see George Kateb, *Human Dignity* (Harvard 2011). ‘My aim is to defend the idea of human dignity.’ ibid at 1; and ‘Human dignity is an existential value.’ Ibid at 10.

2 Here I am thinking of the New Haven School of international law. In a 1959 lecture entitled *Perspectives for an International Law of Human Dignity*, Myres McDougal, one of the founders of the school, argued that achieving human dignity is the highest aspiration of the law. McDougal defines an international law of human dignity as one ‘in which [a certain number of enumerated] values are shaped and shared’ widely. Myres S McDougal, *Perspectives for an International Law of Human Dignity* (1959) 53 Proceedings of ASIL 107. The public order of human dignity ‘seeks to promote the greatest production and widest possible sharing…of all values among all human beings.’ ibid at 107. To be sure, the New Haven School views law as an instrument for achieving and maintaining two public orders: minimum public order – where unauthorized violence to settle disputes is minimized – and optimum public order in which human dignity is maximally protected. I am here focusing on the optimum public order. See also Adeno Addis, ‘Law as a Process of Communication: Reisman Meets Habermas’ in Mahnoush H. Arsanjani, Jacob Katz Cogan, Robert D. Sloane, and Siegfried Wiessner (eds.), *Looking to the Future: Essays in Honor of W. Michael Resiman* (Martinus Nijhoff 2011) 33, 47–50. See also Patrick Capps, *Human Dignity and the Foundations of International Law* (Hart 2009). Capps reconstructs various philosophical resources (Kant, Rousseau, Hobbes, Weber, Aristotle, and others) to argue that international law should be understood to be founded on, and as an instrument of pursuing, respect for human dignity. Ibid at 16, 106–08, 211–12, and chapter 10 generally.

3 See for example Henk Botha, ‘Human Dignity in Comparative Perspective’ (2009) 2 Stell L. Rev. 171: ‘Consider, for instance, the claim made by a German law professor that dignity is the only absolute value in a world of relative values – a fixed star which provides orientation amidst life’s uncertainties’ (citation omitted).
documents as well as judicial decisions. Yet, it is not always clear what the concept means or actually entails. It is one of those phrases that 'carry unspoken assumptions and connotations' that can powerfully influence the discourse they permeate while escaping critical scrutiny.

Generally speaking, the current discourse on human dignity starts with two seemingly contradictory assumptions. Human dignity is the dignity that humans have by virtue of the fact that they are humans, irrespective of who they are and where they come from. In this sense, human dignity aspires to universal validity. This is what David Luban in another context has referred to as ‘humanness’. On the other hand, however, to be human is not to be an abstract being. It is to lead a situated life. One is located in a particular environment and culture and lives in a particular time and a particular life. This means, to understand the scope of human dignity is to understand and specify it in a particular context and at a particular time. Somehow, therefore, the universal has to be localised and the seemingly transhistorical must be historicised. But how does it get localized without it losing its universal aspiration? That is, how do we simultaneously hold the views that human dignity is about the

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4 See infra, Part 3.
5 See for example the decision of the French Supreme Administrative Court which held that a municipal order prohibiting dwarf-throwing games (when the adult dwarfs have consented to and are paid for the game) was valid to the extent that it is grounded on the principle of human dignity. Conseil d’Etat, Ass., 27 Oct. 1995, Cne de Morsang-sur-Orge, Recueil Lebon., at 372, available at www.conseil-etat.fr/fr/presentation-des-grands-arrets/27-october-1995-commune-de-morsang-sur-orge.html. See also Station Film Co. v. Public Council for Film Censorship (1994) 50 PD (5) 661. The Israeli Supreme Court upheld the decision by Israeli authorities to delete scenes that were considered to be degrading to women and hence violations of human dignity. See also infra notes 44, 129 and accompanying text.
6 Nancy Fraser and Linda Gordon, ‘A Genealogy of Dependency: Tracing a Keyword of the U.S. Welfare State’ (1994) 19 Signs 309, 310 (citations omitted). As you see in the title, the word that was the focus of Fraser’s and Gordon’s study is ‘dependency’ rather than the phrase ‘human dignity’. But the observation applies equally to human dignity. Ronald Dworkin has a less charitable account of how the notion of human dignity has been appropriated. See Ronald Dworkin, Justice for Hedgehogs (Harvard 2011) 204. ‘The idea of dignity has been strained by overuse and misuse. It appears regularly in human rights conventions and political constitutions and, with even less discrimination, in political manifestos. It is used almost thoughtlessly either to provide a pseudo-argument or just to provide an emotional charge’. See also George Kateb, Human Dignity (Harvard 2011) ix: ‘The idea [human dignity] is difficult, even though it is rather casually used in many kinds of ceremonial or more substantial public speech, especially when such speech involves praising human rights. The most charitable view about the clarity of the notion of dignity is that of Donna Hicks’. See Donna Hicks, Dignity: The Essential Role it Plays in Resolving Conflict (University of Pennsylvania Press 2011) 3: ‘Most of us have a gut feeling about the word dignity, but few of us have the language to describe it.’ See also Oscar Schachter, ‘Editorial Comment: Human Dignity as a Normative Concept’ (1983) 77 Am. J. Int’l L. 848, 849: ‘When [human dignity] has been invoked in concrete situations, it has been generally assumed that a violation of human dignity can be recognized even if the abstract term cannot be defined. ‘I know it when I see it even if I cannot tell you what it is.’’
recognition of the equal dignity of humans qua humans and that human dignity also recognises the authenticity of situated lives? After all, human dignity could be offended not only when one is treated as if he or she were not a full human being (for example, a slave) but also when a person is treated as if he or she were just one more (or generic) human being with no distinctiveness or uniqueness as a situated individual, an individual living in a particular societal culture.

I shall pursue two goals in this article. First, I shall subject the phrase ‘human dignity’ to critical scrutiny so as to see which or what understanding of the phrase (among many) is politically defensible and credible as a matter of practice. By that I mean that the particular understanding of human dignity is capable of reconciling the universal and particular aspect of what it means to be human. Second, I shall explore whether and how that understanding of human dignity can play a role in a world of plural moral values and ethical commitment. These two goals are, of course, not entirely separate. There cannot be a defensible and credible notion of human dignity unless the specific understanding of human dignity can be appropriated or cashed out in a globalised world of plural values and ethical commitments. Conversely, the idea of human dignity cannot be utilised across cultures and systems unless there is a general and coherent understanding of the concept.

The article is organised in a manner that is intended to facilitate an orderly examination of the issue. Section II gives a brief account of the history of the concept of human dignity. The purpose of this brief introduction is to indicate when and how the current understanding of human dignity broke off from the early (rank-motivated) understanding of dignity. Section III examines the many ways in which the concept has been codified in both national and international documents. Invariably, those codifications assumed but never articulated what precisely is meant to be captured by the idea of human dignity. Section IV is the heart of the article. The section examines some possible understandings of the notion of human dignity – human dignity as a collective label for human rights, human dignity as autonomy, human dignity as an expression of citizens self-creating political order – and finds them inadequate. It then sets out to define and defend an understanding of human dignity that develops from the bottom up rather than from the top down, whether philosophically or theologically.

8 The issue of who actually counts as human for this purpose is not beyond controversy. Is a fetus human? Does it have a dignity that we should show it by virtue of the fact that it is a human fetus? And even more starkly, do people who cannot exercise normative agency (such as infants and the mentally handicapped) deserve the same dignity as other human beings? And if so, what do they tell us about what the core elements of being human are? These are questions that those who base human dignity (or for that matter human rights as well) on some notion of normative agency or autonomy have difficulty answering. I will have something to say about this in a later part of the article.

9 I intend to use ‘ethics’ and ‘morals’ in the way that Ronald Dworkin uses them in his recent book: Ronald Dworkin, Justice for Hedgehogs (Harvard 2011). ‘Moral standards prescribe how we ought to treat others; ethical standards, how we ought to live ourselves.’ Ibid at 191. What I hope to do in this essay is find a way to integrate these two. And I claim that the notion of human dignity enables us to do that.
Such a notion of dignity will necessarily be political in a sense that it develops through our works and conversations within and among traditions and systems. It emerges from an ‘overlapping consensus’, to appropriate a Rawlsian phrase, of various traditions and systems as to what it means to dignify humans or conversely to subject them to indignities. Only a notion of dignity developed and adopted in that manner will serve as a practical guide in a world of plural moral values and ethical commitments. The idea here is to establish human dignity as a norm within a global public enterprise which guides the actions of individuals and governmental entities within communities (those with primary responsibility) and which give external agents (those with secondary responsibility) reasons to intervene in the event those with primary responsibility to promote and protect are unable or unwilling to do so.

2. HUMAN DIGNITY: A BRIEF HISTORY

Stephen Darwall has argued that there are two kinds of respect that we can show people. The first is what he refers to as ‘appraisal respect’ – the respect that we show people in virtue of their achievements and character. The second kind of respect is one that we show people simply by virtue of the fact that they are humans. Darwall refers to this second notion of respect as ‘recognition respect’. Human dignity deals with this second kind of respect, ‘recognition respect’. We respect a person’s dignity simply by virtue of the fact that he or she is human, nothing more and nothing less. The dignity is owed to the pacifist as well as to the terrorist; to the fool as well as to the wise; to the lazy as well as to the hardworking; and to the poor as well as to the wealthy. As Darwall notes, the object of recognition respect is not ‘excellence or merit’ or how we evaluate characteristics which make the entity or object deserving of positive appraisal, but rather it is how we should regulate our relationship to an object or entity with certain features (namely, being human). This is the notion of dignity as respect that will be the concern of this article.

10 See John Rawls, _A Theory of Justice_ (The Belknap Press of Harvard University Press 1971). As the reader will realize, I, of course, do not embrace the ‘veil of ignorance’, the condition under which Rawls develops his theory of justice. Behind Rawls’ veil of ignorance one is nowhere and hence potentially everywhere. That I think is no way to deal with the conditions of real people living real lives in specific places and cultures and at particular times. People are not exchangeable. Stripping them of the stuffs that make them who they are – location, culture, time – is to strip them of their very humanity.

11 Stephen L. Darwall, ‘Two Kinds of Respect’ (1997) 88 Ethics 36. Appraisal respect could also be taken to refer to respect that individuals have by virtue of the fact that they occupy a particular institutional position. Thus, for example, under international law diplomats are supposed to have certain inviolable dignity that the host country is expected to respect. They have this dignity not because of individual merit but because they occupy certain positions. See Vienna Convention on Diplomatic Relations, 23 U.S.T., T.I.A.S. No. 7502, 500 U.N.T.S. 95; Vienna Convention on Consular Relations, 21 U.S.T., T.I.A.S. No, 6820, 596 U.N.T.S. 261.

12 Darwall, ‘Two Kinds of Respect’ (n 11) at 38.

13 Ibid at 37–41.
The idea of human dignity in one version or another has a very long history.\textsuperscript{14} It has existed since antiquity. Some have reported that it was first used by a Hellenic aristocrat, Panaetius from Rhodes, in the first or second century BC.\textsuperscript{15} His text did not survive and it is through the works of Cicero that we learn of this first use and what it was meant to capture.\textsuperscript{16} The Stoic view of human dignity, expressed well by Panaetius and reported by Cicero, tied the notion of human dignity to what was believed to be that which distinguished humans from other creatures, their ability for high level of consciousness and capacity for moral decisions. All people have equal dignity, for all are endowed with reason that allows them this high level consciousness.\textsuperscript{17} Dignity here is a relational concept. Humans are superior to other creatures by virtue of possessing the capacity to reason and that elevation is what gives them dignity. A version of this argument has recently been made by George Kateb.\textsuperscript{18}

\textsuperscript{14} Here I am not referring to, nor am I interested in, the notion of dignity as rank – the aristocratic paradigm of dignity which can be seen in the ancient Roman \textit{dignitas} and referred to elevated position or rank of the ruling class. In the aristocratic usage dignity is a term of distinction and is not ascribed to all human beings. My short history here is about dignity that was attached to all human beings. For a description of dignity as rank see Jeremy Waldron, ‘Dignity and Rank: In Memory of Gregory Vlastos’ (2007) 2 Archives Europeennes de Sociologie 201; and Jeremy Waldron, \textit{Dignity, Rank and Rights} (The Belknap Press of Harvard University Press 2012).


\textsuperscript{16} Ibid at 19. Marcus Tullius Cicero, \textit{De Officiis}, (W. Miller trans. 1913), at I:105 (‘But it is essential to every inquiry about duty that we keep before our eyes how far superior man is by nature to cattle and other beasts: they have no thought except for sensual pleasure and this they are impelled by every instinct to seek; but man’s mind is nurtured by study and meditation.’). In I:107 Cicero makes clear what the essential element is that distinguishes humans and other animals such that we could talk about dignity for the former and not for the latter: ‘We must realize also that we are invested by Nature with two characters, as it were: one of these is universal, arising from the fact of our being all alike endowed with reason and with that superiority which lifts us above the brute. From this all morality and propriety are derived, and upon it depends the rational method of ascertaining our duty. The other character is the one that is assigned to individuals in particular.’ See also Marcus Tullius Cicero, \textit{De Officiis}, I, 105–106 (1913) [44 BCE] (‘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 the sensual pleasure is wholly unworthy of the dignity of the human race.’).

\textsuperscript{17} Cancik (n 16) at 20–21. But of course that is not quite true. There are members of various groups – infants, people with serious mental illness, etc – who may not have the high level consciousness and capacity for moral decision. It is not quite clear that Panaetius and Cicero meant to include them in the inclusive ‘all human beings.’

\textsuperscript{18} See George Kateb, \textit{Human Dignity} (Harvard 2011) 10: ‘Human dignity is an existential value; value or worthiness is imputed to the identity of the person or the species. I stipulate that when truth of identity is at stake, existence is at stake; the matter is existential. The idea of human dignity insists on recognizing the proper identity of individual or species; recognizing what a person is in relation to all other persons and what the species is in relation to all other species.’ Kateb actually argues that human dignity has two aspects to it: ‘the equal stats of all persons’ (ibid at 10) (the moral dimension) and the stature of the human ‘status’ as a whole, ‘the human species in its unique qualities’ (ibid), ‘humanity’s partial discontinuity with nature’ (ibid at 5). See also Stéphanie Hennette-Vaucher, ‘A Human Dignitas? Remnants of the Ancient Legal Concept in Contemporary Dignity Jurisprudence’
During the Renaissance, many thinkers appropriated the concept, but the notion of human dignity was explicitly tied to the idea that man was created in the image of God and given the authority to be the creator of his temporal existence. The dignity owed to man was based on the similarity he apparently has with his Creator.19 Leo the Great (Pope Leo I), who reigned from 440–461 and who is supposed to have been one of the earliest known users of the word dignity by a Christian thinker, preached that ’[o]ur race has the dignity of nature, so long as the figure of divine goodness continues to be reflected in us as in a kind of mirror’.20 In one famous passage, he says: ‘Realize, O Christian, your dignity. Once made a ’partaker in the divine nature’, do not return to your former baseness by a life unworthy [of that dignity]’.21 The Qur’ān also clearly affirms human dignity (karamah) when it declares: ‘We have bestowed dignity on the children of Adam (laqad karramna bani Adama) […] and conferred upon them special favors above the greater part of Our creation’.22 Of course, there are many current pronouncements that embrace this position. A good example is the declaration of the Israeli Supreme Court which reads thusly:

“The basis for the supreme principle of human dignity is that man was created in the image of G-d, and by virtue of this perspective, he too is commanded to protect his
dignity, since an affront to his dignity is an affront to the image of G-d, and every person is commanded in this regard, even a person who dishonours himself.23

In a world where the idea of god takes different forms, and even more where many do not even believe in a god in whatever form that god is conceived, the justification of dignity explicitly based on the notion of a god is unlikely to succeed in the diverse world in which we live.

In the post-Renaissance era, the phrase ‘human dignity’ was invoked and appropriated quite often and in multiple ways – from famous moral theorists24 and jurists25 to national texts – it is, however, only after World War II that the phrase acquired its current canonical status (dignity as a status of all human beings or of human beings as such) and found its way into international law, national constitutions and political and legal theories. Perhaps two events contributed to the prominence of human dignity in the post-WWII era. First, the horrendous destruction and crimes that occurred during WWII heightened people’s fear of and sensitivity to scales of indignities that can befall individuals and groups. Indeed, the preamble to the UN Charter which was adopted in 1945, not long after the war, announced that two of the factors that brought ‘We the Peoples of the United Nations’ together are the desire to save ‘succeeding generations from the scourge of war’ and ‘to reaffirm faith in fundamental human rights [and] in the dignity and worth of the human person’.26 The UN needed to ‘reaffirm faith’ in human dignity, for it was badly shaken during the war. The second event, if one can call it that, is technological developments such as biomedicine whose potential impact on what and how we think about humanness and its core has started to worry many people.27 Whatever the reasons, however, it is in the post-WWII era

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24 For example, Immanuel Kant [1724–1804]. We shall deal with Kant’s view in more detail later in this essay.

25 Samuel von Pufendorf [1632–1694]. See Samuel von Pufendorf, De iure [About the Law] (1672) (‘Magnificence of human dignity originates from his immortal soul, to which the light of perception, ability to make decisions and choices is characteristic… Due to his soul the human being is treated a more holy creature than other, he has ability to think and rule.’); See also Hugo Grotius, De jure beli ac pacis [On the Law of Peace and War] (trans. C. Campbell, 1814) Bk. II, chap. 19).

26 Pre-1945 international treaties and conventions, such as the 1907 Hague Regulations and 1929 Geneva Conventions, did not refer to ‘dignity’ although they occasionally refer to ‘honor’. Hague Regulations Respecting the Laws and Customs of War on Land (1907), Art. 46; Geneva Convention Relative to the Treatment of Prisoners of War (1929), art. 3.

27 Cloning, in vitro fertilization, sustaining life in vegetative state, etc. are some of the circumstances that have raised the issue of who is a human being and what is the dignity that is due to them. See for example UNESCO, Universal Declaration on the Human Genome and Human Rights (1997) ‘Recognizing that research on the human genome and the resulting applications open up vast prospects for progress in improving the health of individuals and of humankind as a whole, but emphasizing that such research should fully respect human dignity, freedom and human rights, as
that the notion of human dignity assumed its canonical status both as a rhetorical device and as codified norm.28

3. THE CODIFICATION OF HUMAN DIGNITY

In terms of legal codification of the concept, the constitutions of a number of countries explicitly refer to human dignity or its variations.29 Indeed, human dignity is now a standard ingredient of most constitutions. Thus, for example, the 1949 German Constitution or Basic Law (Grundgesetz) opens with a statement that ‘The dignity of man is inviolable. To respect and protect it shall be the duty of all state authority’.30 The German Constitution then makes the article in which this declaration is contained an unamendable part of the Constitution.31 The South African Constitution refers to human dignity as one of the founding principles of the Republic.32 The Russian Constitution provides that ‘the dignity of the person is protected by the State. Nothing may be used as a basis for its diminution’.33 The Constitution of Peru declares that well as the prohibition of all forms of discrimination based on generic characteristics [p]roclaims […] the principles that follow and adopts the present Declaration.’ (preamble). Article 1 declares: ‘The human genome underlies the fundamental unity of all members of the human family, as well as the recognition of their inherent dignity and diversity.’ The Declaration then goes to detail the rights of persons used in research and treatment and the conditions for the exercise of scientific activity. See also Article 11 (‘Practices which are contrary to human dignity, such as reproductive cloning of human beings shall not be permitted.’). See also Council of Europe’s convention on Human Rights and Biomedicine, which was released in 1997.

28 Prior to WWII, international law generally (with few minor exceptions) left States to treat their citizens or nationals as they saw fit. What States did to their own citizens was regarded as a matter of domestic jurisdiction and within their exclusive jurisdiction.

29 The Comparative Constitutional Project reports that ‘38% of the constitutions’ of the 701 constitutions ‘out of the roughly 800 constitutions in force since 1789’ make ‘reference to human dignity’, available at www.constitutionmaking.org, Option Reports: Human Dignity (January 2011). In terms of national constitutions, the same organization reports that in 2000 ‘about 70% of constitutions in force made reference to ‘dignity of man’ or human ‘dignity’.’ Reference to human dignity is most common in Eastern European and post-Soviet states, followed by states from Latin America, Sub-Saharan Africa, the Middle East, East Asia, South Asia, Western Europe/U.S./Canada, and the least common reference is in Oceania. I shall later speculate as to what the order might suggest to us.

30 See Grundgesetz [GG] [Constitution] Art. 1.

31 Ibid Art. 79 (3).

32 See Constitution of the Republic of South Africa Sec. 1. ‘The Republic of South Africa is one, sovereign democratic state founded on the following values: Human dignity, the achievement of equality and the advancement of human rights and freedoms…” If one were to take the order in which the founding principles are listed, one could reasonably speculate that human dignity is regarded as the leading, even perhaps as the supreme, value. Indeed, that is essentially the position Judge O’Regan of the South African Constitutional Court expressed in the well-known case of S. v Makwanyane: ‘[Human dignity] is the foundation of many of the other rights that are specifically entrenched in… [the Bill of Rights].’ S v. Makwanyane 1995 (6) BCLR 665 (CC); S v. Makwanyane (3) SA 391 (CC) (para 328).

protecting human dignity is the ‘supreme goal’ of the State.34 Greece,35 Japan,36 Italy,37
Israel,38 Mexico,39 Turkey,40 and Switzerland,41 among others, have also incorporated
the notion of dignity in their constitutional documents. If one were to glance through
the preambles of the constitutions of UN Member States, which essentially means all
countries, one would find that about 30 of them mention dignity or human dignity as
a guiding principle.42 And constitutional courts of some of those countries have used
the notion of human dignity as the supreme value through which other constitutional
values and rights are read and organised.43 It is not always clear, however, whether
human dignity is treated as a right or as a value.

34 Political Constitution of Peru Art. 1: ‘The protection of the individual and respect for his dignity are
the supreme goal of society and the government.’
35 The Constitution of Greece Art. 2(l).
38 Israel has no written constitution, but the separate Basic Laws have been declared by the Israeli
Supreme Court  substantive constitution. See C.A. 6821/93, Bank Hamizrachi Hameuhad Ltd. v
Migdal Cooperative Village, 49(4) P.D. 221 (cited in Liav Orgad, The Preamble in Constitutional
Interpretation, 8 Int’l Const. L. 714, 733 (2010)). Article 1A of Basic Law: Human Dignity and
Liberty provides: The purpose of this Basic Law is to protect human dignity and liberty, in order to
establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.’ See ibid.
39 The Political Constitution of the Mexican United States Art. 3(c).
40 Constitution of the Republic of Turkey art. 17: ‘No one shall be subjected to penalty or treatment
incompatible with human dignity.’
41 Federal Constitution of the Swiss Federation Art. 7: ‘Human dignity is to be respected and
protected.’
42 The Chinese Constitution stands alone in referring to dignity in its preamble not to affirm
the dignity of the human being, but to announce that people have the duty to uphold the dignity of the
Constitution.’ P.R.C Con. Pmbl.
43 The German and South African Constitutional Courts are examples. Let me give one example
for each at the moment. German: BverfG, 1 BvR 357/05 vom 15.02.2006, Absatz-Nr. 124.
English translation available at www.bundesverfassungsgericht.de/entscheidungen/rs20060215–
saflii.org/za/cases/ZACC/2002/22.pdf. In the South Africa case human dignity was used as a
defense of a 1957 statute prohibiting prostitution. Women sex workers challenged the statute on
various grounds – discrimination against women, privacy, freedom to engage in economic activity,
and human dignity etc. – but the Court used human dignity to uphold the statute. Here is what two
of the judges on the Constitutional Court, Albie Sachs and Kate O’Regan, said: ‘Our Constitution
values human dignity which inheres in various aspects of what it means to be a human being. One
of these aspects is the fundamental dignity of the human body which is not simply organic. Neither
is it something to be commodified. Our Constitution requires that it be respected. We do not believe
that [the prohibition] can be said to be the cause of any limitation on the dignity of the prostitute.
To the extent that the dignity of prostitutes is diminished, the diminution arises from the character
of prostitution itself.’ Ibid at para. 74. Even though there is no reference to human dignity in the
United States’ Constitution, some of the justices of the United States Supreme Court have referred
to the concept as a means of interpreting provisions of the Constitution. Thus, for example, Justice
Brennan in the context of interpreting the Eighth Amendment once observed: ‘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.’ Furman v
Georgia 408 U.S. 238, 270 (1972). See also the remarks of chief Justice Earl Warren in Trop v Dulles
356 U.S. 86, 100 (1958) (‘The basic concept underlying the Eight Amendment is nothing less than
Even though the phrase ‘human dignity’ is not included in its specific form, major international human rights documents also refer to a version of it. Thus, for example, the Universal Declaration of Human Rights, perhaps the most important and certainly the most famous, international human rights document,\textsuperscript{44} declares that ‘all human beings are born free and equal in dignity and rights’.\textsuperscript{45} It is important to note here that the Declaration does not say anything about what constitutes dignity, but whatever it is it is to be available equally to all. The International Covenant on Civil and Political Rights (ICCPR) notes in its preamble that the States Parties shall recognise ‘the inherent dignity and inalienable rights of all members of the human family’ and that such recognition is ‘the foundation of freedom, justice and peace in the world’.\textsuperscript{46} Not only does the ICCPR recognise that dignity is inherent in humans, but it claims that such recognition is the foundation of freedom, justice and peace. The recognition of human dignity is the source of other important values we mean to cultivate, according to the ICCPR. This last view is reinforced by another one of the three major international human rights documents that make up the International Bill of Rights – the International Covenant on Economic, Social and Cultural Rights (ICESCR). In its preamble, the ICESCR announces not only that rights are ‘derived from the inherent dignity of the human person’, but that ‘the inherent dignity and of the equal and inalienable rights of all the members of the human family’ is the foundation of ‘freedom, justice and peace in the world’.\textsuperscript{47} Thus, both the ICCPR and ICESCR declare that dignity is inherent in human beings and even more so it is the source of all other important values and rights we mean to affirm.

In addition, the view that human dignity is the source of all rights has been explicitly embraced by the General Assembly of the UN. In 1986 the Assembly declared in its guidelines for new human rights instruments that they be ‘of fundamental character and derive from the inherent dignity and worth of the human person’.\textsuperscript{48} Here the
General Assembly not only recognises human dignity but it also claims that human rights must derive from it. Thus, dignity is the supreme value from which other rights are apparently to be derived.

There are also a number of other international human rights documents where dignity plays a prominent role. At a regional level, the Charter of Fundamental Rights of the European Union asserts in its preamble that ‘the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity’. The Treaty of Lisbon, adopted seven years later, reaffirms that one of the values on which the Union is founded is human dignity. But there are some perceptible differences between the Charter and the Treaty. The Charter notes that the foundational values are indivisible. There is no such assertion in the Treaty. While the Charter asserts that the foundational values including human dignity are ‘universal’, the Treaty seems to be slightly more modest in its claim, for it simply says that these values are common to Member States.

Likewise, first human rights document in the Americas, in fact the first general human rights document in the world, the American Declaration of the Rights and Duties of Man, provides in its Preamble that ‘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’. Similarly, the African Charter on Human and Peoples’ Rights provides that ‘every individual shall have the rights to the respect of the dignity inherent in a human being’.

But, as I noted earlier, none of these documents (whether international or regional) explains what the idea of human dignity entails and how one would know whether it has been violated. It is as if the concept needs no explaining or defending. But the phrase’s popularity seems often inversely related to its clarity. The next

49 For a list of those documents see McCrudden, ibid at 670–71. See also Mohammad Hashim Kamali, The Dignity of Man: An Islamic Perspective (Islamic Texts Society 1999) ix. (‘Human rights are a manifestation of human dignity.’).

50 Charter of Fundamental Right of the European Union (2000/C 364/01), 0J (2000) C 364/1, Preamble. See also Art. 1 ‘Human Dignity is inviolable. It must be respected and protected, Art. 25 ‘The Union recognises and respects the rights of the elderly to lead a life of dignity...’, and Art. 31 [E]very worker has the right to working conditions which respect his or her health, safety and dignity.’

51 See Treaty of Lisbon (Amending the Treaty of European Union and the Treaty Establishing the European Community) (‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.’ Art. 1(a) (emphasis added).

52 See for example preamble 1(a).


55 Even in the United States where it had often appeared to play a marginal role, the concept of dignity is increasing in importance. For complaint that the concept of human dignity has not been utilized
section attempts to puzzle through various possible understandings of the concept. Before I start that task, however, let me reemphasise here what I noted earlier: the dignity with which I am concerned (however we derive it or whatever its source) is the respect or recognition that we are supposed to show humans by virtue of the fact that they are humans rather than by virtue of their achievements and character, what Stephen Darwall calls ‘recognition respect’.56 ‘Thus, for example, respecting a person’s autonomy to choose (if autonomy is said to be constitutive of human dignity) is different from respecting him for or by virtue of the choices he has made.

4. WHAT DOES HUMAN DIGNITY ENTAIL?

As we saw in the last section, human dignity is that which people are owed by virtue of the fact that they are humans. But that formulation does not tell us very much, at least not enough. What precisely are the things (or the dignity) that people are owed by virtue of being human? And how do we derive or identify them?

4.1. HUMAN DIGNITY AS A COLLECTIVE LABEL (THE VESSEL THEORY)

One way to understand human dignity might be to view it simply as a label for all of the rights that we believe humans should have in whatever way we develop the list of rights. Here, human dignity does not have a substantive content. It is a collective label for a catalogue of human rights, which may or may not be related to one another. It is like a vessel and we fill it with all the rights we determine are human rights at a given moment of time. Those rights might be thought to be derived empirically, as the New Haven School of international law claims to be the case.57 Or they may

sufficiently, see Jordan Paust, Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry Into Criteria and Content, 27 How. L. J. 145 (1984). For recent Supreme Court decisions that refer to human dignity see Lawrence v Texas, 539 U.S. 558 (2003), Atkins v Virginia, 536 U.S. 304 (2003), Roper v Simmons, 125 U.S. 1183 (2005). The latest decision of the Supreme Court on gay rights invokes dignity several times. But it is not quite clear what dignity entails other than it is a status or a rank (perhaps not inherent in the individual). See United States v Windsor 133 S.Ct. 2675 (2013). Justice Kennedy writing for the majority notes that New York’s decision ‘to give [gay couples] the right to marry conferred upon them a dignity and status of immense import.’ (at 2692). See also the following: ‘[B]y authorizing same-sex unions and same-sex marriages, New York sought to give further protection and dignity to that bond.’ (at 2692). See also at 2693. But then there are places where Justice Kennedy seems to imply that dignity is inherent in human beings: ‘Responsibilities, as well as rights, enhance the dignity and integrity of the person’ (at 2694).


57 The New Haven approach lists eight values (what they call ‘base values’) as constitutive of human dignity. Those values are said to be empirically verified as values that all humans want to shape and share. Those values are: power, enlightenment, wealth, well-being, skill, affection, respect, and rectitude. See W. Michael Reisman, Siegried Wiessner and Andrew Willard, ‘The New Haven School: A Brief Introduction’ (2007) 32 Yale J. Int’l L. 575, 576.
be thought to have their derivation from one or another version of natural law as the Stoics, Renaissance thinkers or religious institutions have done. Or they might simply be a creation of the positive law, as legal positivism would posit. Whatever the source of these rights, they might be thought to collectively define what human dignity entails. This seems to be the way that some current commentators understand the relationship between human rights and human dignity.

Based on this understanding, the concept of human dignity does not function as an independent ethical or moral standard. Rather, it is a convenient label for the collection of rights that we provide or think we should provide for individuals. It does not tell us how we should derive those rights or how we should determine what makes them rights that people are owed by virtue of the fact that they are humans.

There are a number of reasons why this view is entirely unpersuasive. First, the question arises as to why the label has assumed such a prominent role if it is in fact the case that it does not add anything to the list of rights we happen to recognise at a given time. Why not simply list the rights humans have or should have rather than introduce another concept if that concept does not contribute to our ethical or moral thinking or inquiry about rights or the person? Second, historically, as we saw in the views of the Stoics and Renaissance thinkers and those following them, the concept of human dignity had in fact established itself as an ethical and moral standard well before the concept of rights, in the way we currently understand them, had taken root. It entered political and legal discourse as a substantive concept (a value) rather than as a mere vessel for a catalogue of rights. Now, to be sure, the way that value has been conceived has changed over the years, but one thing that does not seem to have changed is that the idea that human dignity is substantive rather than simply procedural.

Third, not only has human dignity been viewed as an independent ethical and moral standard rather than a mere label for the collection of all rights we provide for humans, but it has also often been considered as a source of those rights. It is better to think of the concept of human dignity, some argue, as one from which a list of rights derives rather than the other way around where human dignity is viewed as a mere label around a collection of a list of human rights to whose emergence it has not contributed to at all.

58 Here I am thinking of the teaching of the Catholic Church. Among current scholars thinking about and writing on human rights in the United States Michael Perry is perhaps the most prominent defender of the proposition that the idea of inherent human dignity cannot be but religiously based. Michael Perry, *The Idea of Human Rights: Four Inquiries* (1998) 11–41. For Perry there is ‘no intelligible (much less persuasive) secular version of the conviction that every human being is sacred.’ Ibid at 5.

59 The great nineteenth century positivist, Jeremy Bentham, called natural rights ‘nonsense upon stilts.’ Jeremy Bentham, *Anarchical Fallacies* (1824) 489, 501. But clearly even Bentham would have had no difficulty with the idea of rights provided for through politically authorized process.


61 See for example ibid at 998. Sloane claims, I think with very little evidence, that ‘[h]istorically... human rights defined human dignity not vice versa’. Indeed, as I have argued earlier, the notion of human dignity emerged a long way before the idea of human rights took root.
Perhaps the German Constitution is a good example here, at least as the Constitutional Court has envisioned it. As Donald Kommers sees it, emphasis on human dignity in the German ‘constitutional court envisions the Basic Law as a unified structure of objective principles and rights crowned by the master value of human dignity.’ Indeed, the 2006 decision of the Constitutional Court in relation to the Aviation Security Act makes the point well. The German Parliament enacted a statute in the wake of the terrorist attack on the United States on September 11, 2001, to deal with similar circumstances in Germany if they were to arise. The statute authorised the armed forces to shoot down passenger airplanes that it believed to have been transformed into living missiles for the purpose of averting the threat of large destruction (including the loss of many lives) on the ground. The Constitutional Court declared that such shooting and the killing of passengers by agencies of the State under such circumstances would be unconstitutional, even though Article 2.2 of the Constitution imposes a duty on the State to protect the lives of potential victims of a terrorist attack. Why? Apparently, the Court concluded that the State’s duty under Article 2.2 is trumped by its duty to respect human dignity under Article 1. With an unmistakable Kantian approach to human dignity, an approach that I shall explore in more detail in the section immediately following this, the German Constitutional Court refused to allow the government to sacrifice innocent individuals as an instrument of saving other more numerous innocent individuals.

At the international level, The Helsinki Final Act of 1975 perhaps has one of the most direct assertions of the proposition that human dignity generates specific rights when it provided that human rights ‘derive from the inherent dignity of the human person.’ And as I noted earlier, the General Assembly’s 1986 guidelines for new human rights instruments clearly contemplates that the rights in those instruments

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62 July 1998, on the occasion of his receiving and honorary doctor of law degree from Ruprecht-Karls University, Heidelberg, Germany. Kommers had made the same point earlier in one of his writings on the constitutional jurisprudence of Germany. See Donald P. Kommers, Constitutional Jurisprudence of the Federal Republic of Germany (Duke, 2nd ed. 1997) 298. ‘In view of the Federal Constitutional Court, this clause expresses the highest value of the Basic Law, informing the substance and spirit of the entire document. While encompassing all guaranteed rights, the concept of human dignity also includes a morality of duty that may limit the exercise of a fundamental right.’ A similar sentiment was expressed by a member of the South African Constitutional Court, Judge Arthur Chaskalson. ‘Third Bram Fischer memorial Lecture’ (2000) SAJHR, at 204–205 ‘As an abstract value, common to the core values of our Constitution, dignity informs the consent of all the concrete rights and plays a role in the balancing process necessary to bring different rights and values into harmony.’ See also Arthur Chasekalson, ‘Human Dignity as a Constitutional Value’ in Kretzmer and Klein, The Concept of Human Dignity (n 16) at 133.


64 See Conference on Security and Cooperation in Europe: Final Act, Helsinki 1975, Section VII, para 2. (‘The participating States...will promote and encourage the effective exercise of civil and political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for his free and full development.’), ibid at paras 1 and 2.
should ‘derive from the inherent dignity of the human person’. Thus, the very international documents that were supposed to have been inspired by the idea of human dignity as a collective label in fact announce that the concept is not a mere label around a collection of rights but a source of those very rights as well.

In fact, those who argue for the generative power of human dignity contend that not only does it generate rights essential for human agency, but it also unifies them, shows them to be indivisible, as the Universal Declaration of Human Rights suggests them to be. Human dignity generates and unifies categories of rights. As the German Constitutional Court suggests, seemingly conflicting rights can be reconciled or properly ordered through the use of human dignity as an organising and interpretive concept. At least, that seems to be what the court had in mind when it treated human dignity as a ‘master value’. Under this view, the notion of human dignity plays both a generative and integrative role. In this sense, ‘the master value of human dignity’ appears to be analogous to the master rule in H.L.A. Hart’s theory of law – the ‘rule of recognition’. What the rule of recognition is to primary rules, human dignity is to human rights. I shall say more on that later.

Fourth, critics of the ‘vessel’ understanding of human dignity argue that to link tightly the concept of human dignity to a list of rights, whose source is likely to be contestable, is to undermine the appeal of the concept across cultural and political systems. While specific rights might be contested across cultural communities or ideological cleavages, the notion of human dignity is not. As Jürgen Habermas has noted, what has made it possible for the concept of human dignity to have led to overlapping consensus ‘for example during the founding of the United Nations, and more generally when negotiating human rights agreements and international legal conventions, and when adjudicating international legal disputes between parties from different cultures’ has been because of its independent appeal as an ethical standard which can be applied by people across cultures and systems.

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65 See GA Res. 41/120, 4 Dec. 1986 (n 49) at para 4(b). But other international human rights documents have a rather ambiguous view of the relationship between dignity and rights. Thus, the UDHR’s first sentence of its preamble lists dignity and rights side by side without indicating their relationship. The preamble reads: ‘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...now therefore the General Assembly proclaims this Universal Declaration of Human Rights’ (emphasis added). But see the preambles of the two human rights covenants constituting the international bill of rights. Both recognize that the rights listed in those covenants ‘derive from the inherent dignity of the human person.’

66 See Article 22, which reads that the protection of economic, social and cultural rights is premised on the proposition that they are ‘indispensable for [man’s] dignity and the free developing of his personality.’

67 See Kommer (n 63).

68 HLA Hart, The Concept of Law (Joseph Raz and Penelope Bullock eds. 2d ed. 1994).

69 Ibid.

70 See Jürgen Habermas, The Concept of Human Dignity and the Realistic Utopia of Human Rights, 41 Metaphilosophy (2010) 464, 467. See also Christopher McCrudden, ‘Human Dignity and Judicial
As I shall also explain later, the relationship between human dignity and human rights is not quite a one-way process. As human dignity is invoked to generate rights that are thought to be essential for human agency those specific applications of human dignity across various cultures and systems will in turn go to define the contours of human dignity as a general concept. But let me also note here, and I shall argue the case fully later, that whether you view the relationship between human dignity and human rights as a one-way affair (where rights are constituted through or derived from dignity) or somewhat dialectically as I do (dignity discourse generates rights as the application of those rights might also broaden and deepen the general concept of dignity), the notions of human dignity and human rights are not synonymous. Indeed, as I hope to show, the notion of human dignity cannot be the source of all rights that are provided or could be provided through legal texts. We could provide (and in my view have provided) more rights than can be generated from the concept of human dignity, but there is nothing wrong with that. Nothing says that rights should be limited to those that can only be reasonably generated from our understanding of human dignity.

4.2. HUMAN DIGNITY AS AUTONOMY

Another, and perhaps the most popular, understanding of human dignity is to think of it as a state-of-affairs in which individuals are able to act autonomously – humans have dignity to the extent that they are recognised as having the capacity to make their own choices and to determine their destinies and to have the conditions in which they could make those choices. The idea of dignity as autonomy is often associated with Immanuel Kant. Kant viewed morality as a system of categorical imperatives that we must fulfil whether we wish to or not. A central part of that system is the Categorical Imperative that that human beings should not act towards others (and even regarding themselves\(^\text{71}\)) in a way that treats them as means rather than as ends, for ‘man, and in general every rational being, exists as an end in himself, not merely as a means for arbitrary use by this or that will.’\(^\text{72}\) To think of humans as ends in

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\(^\text{71}\) Kant argues that one ought to respect not only others’ humanity but one’s own humanity as well. See Immanuel Kant, *Groundwork of the Metaphysics of Morals*, (H.J. Paton trans. New York, Harper & Row, 1964), at 96 (‘Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.’).

themselves is, for Kant, to view them as having internal worthiness, an absolute and priceless virtue, in other words a dignity that is inviolable. As he put it,

[In the kingdom of ends everything has either a price or a dignity. If it has a price, something else can be put in its place as an equivalent; if it is exalted above all price and so admits of no equivalent, then it has a dignity.]

Thus, to treat individuals as autonomous beings, able to choose their destiny and capable of moral reflection, is to acknowledge their dignity.

Let me recap what I understand to be the Kantian view of dignity and what it entails. Individuals are agents who pursue ends. That is how human beings can be intelligible. To think of human as full agents presupposes not only that they pursue ends but that they believe that those ends are valuable and that they have endorsed them. On this account, dignity is a second order value that we must assume in order to validate the notion that humans are agents that pursue values and ends (first order values) that they have endorsed. Dignity is the supreme value that validates the status and significance that values inescapably and commonly play in human life. Our identity is strongly tied to the projects, ends, and goals we pursue. And indeed we are intelligible only as sites of meaning, which we produce and in turn creates us. The supreme value that enables us to understand human beings as such is dignity.

As I noted earlier, dignity, on the Kantian account, also links our dignity with the dignity of others. We fully recognise our dignity only to the extent that we respect the dignity in others, the equal humanity and capacity to choose in others. To some extent Alan Gewirth makes a similar point when he argues that when one asserts, as will inevitably be the case, that one’s autonomy and agency be recognised by others, one is logically committing oneself to respecting the autonomy and agency of others. Dworkin makes a similar point. After claiming that two principles – the principles of self-respect and the principle of authenticity – define dignity (the idea of treating oneself as an end), Dworkin argues that the reason why we are morally required to respect the

73 See *Groundwork* (n 71) at 102. ‘[H]umanity so far as it is capable of morality is the only thing which has dignity.’

74 See Immanuel Kant, *Metaphysical Principles of the Doctrine of Right, in Practical Philosophy* (Mary Gregor ed. 1996) 237. There is ‘only one original right,’ which belongs ‘to every man by virtue of his humanity.’ That right, for Kant, is the right to be ‘our own master.’ Ibid at 238.


78 ‘Each person has a special, personal responsibility for identifying what counts as success in his own life.’ Ibid at 205.
dignity of others is because we value ourselves and our ends as being objectively, not subjectively, important to us. As he put it:

if the value you find in your life is to be truly objective, it must be the value of humanity itself. You must treat yourself as an end in yourself, and therefore, out of self-respect, you must treat all other people as ends in themselves as well.79

Treating ‘the success of [one’s] life as a matter of objective importance’80 entails ‘accept[ing] the equal objective importance of everyone’s life’.81

The notion of human dignity as a supreme and second-order value could, as I noted earlier, be analogised to H.L.A. Hart’s meta-rule that he called secondary rule, the rule of recognition, which authorises the adoption of primary rules.82 In the same way that primary rules owe their valid existence to the secondary rule, and they are made sense of through that rule, human rights (at least fundamental rights) could be said to be derived from and made sense of through the notion of human dignity.

The Kantian version of dignity as autonomy is a very important start for an understanding of a more defensible notion of human dignity. It links autonomy to freedom to pursue life projects but at the same time it disciplines freedom by requiring that one’s autonomy cannot be fully realised if one does not show the same respect to humanity itself. That is, one’s dignity is logically and perhaps even practically tied to his recognition of the dignity in others. Morally demeaning others is the other side of demeaning oneself.

When a person engages in torture, it is not simply that he uses an individual as a thing that can be controlled and manipulated as a means of achieving a certain goal (forcing information out of the person or of his relatives, satisfying some sadistic urge, sending a signal to others that they should not challenge his power, and so on), but he also chips at his own humanity bit by bit. The famous Russian writer, Alexander Solzhenitsyn, who was a victim of torture and harsh treatment by the Soviet security apparatus, makes the same point when he observed: ‘our torturers have been punished

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79 Ibid at 265.
80 Ibid at 255.
81 Ibid at 260. See also ibid at 265. ‘You must treat yourself as an end in yourself, and therefore, out of self-respect, you must treat all other people as ends in themselves as well.’ See also ibid at 266. Treating people with dignity means ‘at a minimum, […] we claim no right in ourselves that we do not grant others and suppose no duty for them we do not accept for ourselves.’ Jean-Francois Lyotard makes a similar point where he sees the injury to a person becomes an injury to the community. As he put it, ‘To kill a human being is not just to kill an animal of the species Homo sapiens but the human community present in the Other as both capacity and promise.’ See Jean-Francois Lyotard, ‘On Human Rights’ in Stephen Shut and Susan Hurley (eds.) The Oxford Amnesty Lectures (1993) 136. See also Patrick Capps, Human Dignity and the Foundation of International Law (Oxford, 2009) 123. ‘[A] dignified conduct is that which respects the dignity of others.’
82 HLA Hart, The Concept of Law (n 69).
most horribly of all: they are turning into swine; they are departing downward from humanity’.

Senator John McCain of the United States Senate, who had himself been a victim of torture in the hands of Vietnamese interrogators and a strong opponent of torture under any circumstance, made a similar point. During a debate as to whether torture is allowable in limited circumstances against terrorists, he maintained that our renunciation of torture even in relation to terrorist is not about the terrorists, it is about us.

The general point is made more directly by Friedrich Nietzsche, who counselled that ‘whoever fights monsters should see to it that in the process he does not become a monster. And when you look long into an abyss, the abyss also looks into you’. Indeed, this view of dignity signals to us that dignity is also about duty. To have the capacity to act freely or reason is to be required to act in a way that does not violate the dignity of others. Otherwise, one will be deemed not only to have violated the dignity of others but his dignity as well.

As I just noted, the Kantian view of human dignity is clearly a very useful starting point for the human rights theorist or activist who seeks to give content to the notion of human dignity that adorns many international and national legal texts. But it seems to me that the theory is not sufficiently clear to guide us in terms of how we ought to understand the relationship between the general concept of human dignity understood as autonomy and the various rights that are provided for in those texts. Does human dignity as autonomy justify or require all the rights that are recognised, say, in international human rights documents such as the Universal Declaration of Human Rights? If not, what are the criteria by which we determine whether a right is properly required by human dignity as autonomy?

Also, human dignity as autonomy, at least the Kantian version, is primarily a constraint on human behaviour – a negative duty not to treat others in a particular way. Human dignity will suffer only to the extent that human agents act in a way that morally demeans others and at times even themselves. But this understanding of autonomy does not fully capture the social nature of individuals and the importance of communities and networks in the flourishing of individuals and the values that sustain them. If an individual is to be fully autonomous, he needs not only the absence of constraint but the availability of the necessary conditions (material and institutional) for choosing, endorsing and pursuing values. Values and choices take significance for us within a particular culture and networks of communication.


84 McCain said: ‘[T]his is not about who they are. This is about who we are. These are the values that distinguish us from our enemies [the terrorists].’ The statement is part of a speech the Senator gave on the floor of the U.S. Senate, which was subsequently inserted into the Congressional Record. It is reprinted in 33 Human Rights 20 (2006).

85 Friedrich Nietzsche, Beyond Good and Evil; Prelude to a Philosophy of the Future (Walter Kaufman trans., 1989) 89.
simply, the view of human dignity as autonomy fails to account for the fact that our very humanity is possible or comprehensible only as part or in a context of networks of relationships. It does not tell us how precisely we should factor in this dimension of autonomy into the scheme. Is ‘dignity as autonomy’ consistent with respect for diversity of cultures? That is, is ‘dignity as autonomy’ premised on a particular notion of the good life that it will have difficulty commanding assent across cultures and systems?

As attractive as the Kantian notion of autonomy is as an organising concept for human dignity, it will not work. First, this is so because understood that way human dignity becomes too much of a metaphysical property of the individual (a metaphysical fact about human nature) rather than a property of relations among individuals. That is, there is insufficient emphasis on the relationship dimension of the concept. Emphasis on relationships will entail that people think about optimal institutional structures that will ensure the cultivation of the appropriate relationships. Relationships are matters of political and institutional concerns. They assume certain communicative networks.

Second, in a world of plural values and ethical commitments, what will work is not a metaphysical or foundational notion of human dignity (for there are too many and often controversial understandings of what relationships are essential for human flourishing), but a political understanding that somehow takes seriously the various comprehensive doctrines of human dignity but avoids relying on one comprehensive doctrine.

4.3. A POLITICAL CONCEPTION OF HUMAN DIGNITY: HABERMAS’S POLITICAL PROCEDURALISM

What institutional structures or communicative networks are conducive for ensuring that human dignity as a property of relationship is produced and sustained for the long haul? Habermas claims that the concept of human dignity:

performs the function of a seismography that registers what is constitutive for a democratic legal order, namely, just those rights that the citizens of a political community must

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86 It is also not clear to me that the Kantian emphasis on agency can deal effectively with the question as to whether those who cannot exercise full agency or cannot pursue a life plan for reasons of physical or mental handicap are entitled to dignity in the same way that physically and mentally able people are said to be.

87 See Michael Ignatieff, ‘Human Rights as Idolatry’ in Amy Gutmann (ed.) Human Rights as Politics and Idolatry (Princeton University Press, 2001) 53, 54: ‘It may be tempting to relate the idea of human rights to propositions like the following: that human beings have an innate or natural dignity, that they have a natural and intrinsic self-worth, that they are sacred. The problem with these propositions is that they are not clear and they are controversial. They are not clear because they confuse what we wish men and women to be with what we empirically know them to be…[T]hey are controversial because each version of them must make metaphysical claims about human nature that are intrinsically contestable.’.
grant themselves if they are to be able to respect one another as members of a voluntary association of free and equal persons. The guarantee of these human rights gives rise to the status of citizens who, are subjects of equal rights, have a claim to be respected in their human dignity.88

Thus, for Habermas the notion of equal respect that is inherent in the concept of human dignity is cashed out in positive law and democratic lawmaking ‘in such a way that their interplay could give rise to a political order founded upon human rights’.89 Habermas’s neo-Kantian view seems to recast the notion of ‘dignity as autonomy’ in political and legal terms. The moral concept of dignity is transformed into an institutional imperative that all of those who have entered into voluntary association could endorse. Citizens as individuals ‘are recognized by all other citizens as subjects of equal actionable rights’.90 The political set up that is fully consistent with that principle is one where citizens grant one another all the rights that are required for a voluntary association of free and equal persons to function. For Habermas, this is possible in (and perhaps only in) a democratic legal order where members of the political community view themselves as equal originators of the rules that will govern them – the rules are the rules of the ruled. The moral agent of natural law is here also understood as a political and social agent of positive law and democratic lawmaking. In contrast to theories which see human dignity and human rights as both prior and superior to democratic laws, Habermas considers private autonomy (the right to be left alone to pursue an ‘existential life project’91) and public autonomy (the rights of political participation) as both ‘co-original’ and ‘internally related’.92 Understood this way, human dignity, to use a Habermasian description of human rights, is ‘a realistic utopia’.93

88 Habermas, The Concept of Human Dignity (n 71) at 469 (emphasis in original).
89 Ibid.
90 Ibid at 472 (emphasis in original). See also ibid at 475 (‘[T]he point of the legal character of human rights [is] (…) that they protect a human dignity that derives its connotations of self-respect and social recognition from a status in space and time – the democratic citizenship.’).
91 Jürgen Habermas, ‘Between Facts and Norms: Contribution to a Discourse Theory of Law and Democracy’ 450–451 (William Rehg trans. 1996) (‘[S]elf-determination of citizens appears in a dual form of private and public autonomy … [Private autonomy] forms a protective cover for the individual’s ethical freedom to pursue his own existential life project or, in Rawls’s words, his current conception of the good.’).
92 Habermas, ibid at 275. See also David Dyzenhaus, ‘The Legitimacy of Legality’ (1996) 46 Univ. Toronto L. J. 129, 135: ‘co-original aspects of our basic commitment to each other as free and equal participants in a common life, a commitment which is presupposed by and made possible by the legal order of the democratic Rechtsstaat (the state bound by the rule of law.’
93 Habermas, The Concept of Human Dignity (n 71) at 476 (‘Human rights constitute a realistic utopia insofar as they no longer paint deceptive image of a social utopia that guarantees collective happiness but anchor the idea of a just society in institutions of constitutional states themselves’). The notion of a realistic utopia is also appropriated by John Rawls. See also Karl Popper, The Open Society and its Enemies (Routledge, 284–5, n. 2 (1966) [1945] [T]here is, from the ethical point of view, no symmetry between suffering and happiness, or between pain and pleasure (…). Instead
I agree with Habermas that the only way to make the notion of human dignity useful in the world we inhabit, with many comprehensive and often incompatible world views, is to conceive of it in political terms. Habermas’s political proceduralism also seems to deal with the issue of the expandability or non-exhaustibility of the conception of human dignity. To tie human dignity to a political process is to leave it to humans themselves in their daily construction of their lives and their relationships to determine the contours of what constitutes a dignity worthy of humans. Habermas makes the point this way: the framework of a constitutional State ‘must be created by the citizens themselves using the means of positive law and must be protected and developed under historically changing conditions. As a modern legal concept, human dignity is associated with the status that citizens assume in the self-created political order’.94

But in my view, the Habermasian move is ultimately not successful. First, Habermas’s political conception of human dignity seems to be tied to a particular form of governance (democracy) centered on a particular notion of equality each of which is far from being uncontested, at least across cultures and systems and in many ways even within cultures and systems. This will undermine the cross-cultural and cross-system appeal, application, and development of the idea of human dignity. That is, human dignity’s cross-cultural and cross-system appeal would be seriously undercut by tying it to a particular form of governance. As Habermas himself has recognised, the role human dignity played in forging consensus at the founding of the UN is precisely because it was not viewed as being tied to a particular system of governance. Historical evidence supports him on this matter.95

Under Habermas’s view of human dignity, it might be difficult to reach an ‘overlapping consensus’96 internationally or interculturally. Clearly, an international overlapping consensus cannot be and need not be complete, for different political and

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94 Habermas, ibid at 473 (emphasis in original).
96 Ibid (Glendon tells a story about Eleanor Roosevelt who chaired the U.N. Committee that drafted the Universal Declaration of Human Rights. Apparently, shortly after the process of drafting had begun, one night Roosevelt invited members of the committee for a tea in her New York apartment. Roosevelt reports in her diary that there was a vigorous debate between two members of the committee as to the philosophical foundation of human rights: one member favoring a pluralist approach and another was drawn to a more absolutist stand. Roosevelt reports that after a while the discussion became heavy and she was lost and did not participate. The moral of the story is that the Declaration was adopted not because there was a consensus on the foundation of human rights but because foundational questions were not asked. People acted on overlapping consensus.) See also Kamali (n 50) x. (‘The initial draft of the Declaration’s first article which stated that human beings were endowed with rights by nature, removed to avoid philosophical disagreements on the origin of rights.) See also Joshua Cohen, 'Minimalism About Human Rights: The Most We Can Hope For?' (2004) 12 J. Pol. Phil. 190, 193. (‘Jacques Maritain – perhaps the central figure in mid-20th century efforts to reconcile Catholic social thought with democracy and human rights, and who
ideological systems do not completely coincide but rather they converge. The task therefore is to determine what process leads to that convergence. I shall argue that this counsels that we should not explicitly tie the concept to a specific mode of political organising. It seems unreasonable to claim that societies that do not have a political culture akin to a Western conception of democratic participation would be deemed as violators of human dignity, as one would have to conclude on Habermas's view of human dignity.\(^97\) In some sense, Habermas's view of human dignity as a manifestation of democratic participation undermines his other general and important point that individuals' autonomy (determining their sense of the good) is constructed not egotistically or atomistically, but rather intersubjectively and dialogically. The assertion that only within a democratic process would autonomy and human dignity be achieved rules out the possibility of dialog among various systems and cultures through which the very idea of autonomy and dignity could be defined and refined. Every legal and social culture is ethically patterned. The people who make up citizens or members of this or that community are always embedded in a network of traditions and shared contexts experience and life and to claim, as Habermas seems to, that those ethical patterns will not be usefully deployed in the formulation of a transnational notion of dignity appears to me to be unhelpful.

Second, even if one were to accept Habermas's view that democratic legislation is the currency through which human dignity is cashed out politically, Habermas is not quite clear on how a majoritarian conception of human dignity could minimize or avoid the real risk of a systematic undervaluing of the dignity of a permanent minority.\(^98\) By 'permanent minorities' I mean to refer to minorities who, for various

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\(^97\) For a different view, see Thomas Christiano, 'An Instrumental Argument for a Human Right to Democracy' (2011) 39 Phil. & Pub. Affs. 142, 175. ('I have argued that there is a human rights to democracy understood as a minimally egalitarian democracy on the basis of two claims. First, there is strong moral justification for states to realize minimally egalitarian democracy because such democracies are normally necessary and reliable in protecting fundamental human rights of personal integrity. Second, there is moral justification for the international community to attempt to protect and promote these democracies because they protect fundamental human rights and because international protection of democracy is a plausible indirect strategy for the protection of the human rights to personal integrity.'). See also the observation of the Israeli Supreme Court in HCJ 70 15/02, Ajuri v Commander of IDF Forces in the West Bank (2002), reprinted in 'Judgments of the Israeli Supreme Court: Fighting Terrorism Within the Law.' ('Indeed, human rights and the restriction thereof derived from a common source, which concerns the right of a person in a democracy.').

\(^98\) Habermas understands the issue, for he refers to the need for 'struggle for recognition' where the self-understanding of the larger community does not reflect the self-understanding of the out group. See Jürgen Habermas, Struggles for Recognition in Democratic Constitutional State, in Amy Gutmann (ed.), Multiculturalism: Examining the Politics of Recognition (1994) 107. But it is not obvious to me what form that struggle should take and what avenues are available outside the democratic process. It is especially ambiguous when one realizes that Habermas embraces exclusive liberalism, that the constitutional state can tolerate only those life-forms that embrace the spirit of tolerance. ibid.

426 Intersentia
reasons (ethnic, racial or linguistic hostilities), are systematically excluded from entering into coalitions to be part of temporary majorities (majorities on specific issues).

Third, Habermas’s politically procedural view of human dignity seems to collapse, I think without his desire to do so, the notion of human dignity into human rights where the entire corpus of human rights is viewed as human dignity. This seems to me rather inconsistent with his useful distinction between human rights and human dignity earlier in his article on human dignity.99 To collapse human dignity into human rights is to make the notion of human dignity superfluous, or even worse, to trivialize it where every human right that has been recognised either through positive law or otherwise is considered as being constitutive of human dignity.

4.4. A POLITICAL CONCEPTION OF HUMAN DIGNITY: OVERLAPPING CONSENSUS AND JUSTIFICATORY MINIMALISM

A defensible political conception of human dignity will need to attend to a number of facts and propositions. First, human dignity cannot be founded on some epistemological or pre-social or pre-institutional notion of what constitutes dignity. Human dignity is not about an intrinsic individual essence but about relationships.100 Relationships by their very nature arise in specific circumstances, whether cultural, social or political. This does not mean however that every move within a particular culture or system is therefore a defensible reading of human dignity. The action or policy might not even be consistent with a considered view of the culture or system itself. Or it might even be outwardly and directly inconsistent with the requirements of the system or culture as reflectively understood. When cultures and systems engage one another, it would not be permissible for people from such cultures or systems to reply when challenged about a particular act or practice that ‘this is how we do things here’. The attitude captured by such response is one of contempt for other human beings who are engaged in the joint effort of developing a vision and practice of dignifying humans. This attitude or posture is inconsistent with the very

99 See Habermas, The Concept of Human Dignity (n 71) at 467: ‘[A]ppealing to the concept of human dignity undoubtedly made it easier to reach an overlapping consensus, for example during the founding of the United Nations, and more generally when negotiating human rights agreements and international legal conventions, and when adjudicating international legal disputes between parties from different cultures.’

100 As a basic matter, it is, of course, correct to say that human dignity is about essence. That is, it is partly about what people consider to be the distinction between the human species and other species and what the human species is owed by virtue of the fact that it is the human species. But that basic and relatively uncontroversial distinction is not what most theorists mean to refer to when they talk about essence. Human dignity is about ‘essence’ in another sense. The infringement is on what has been developed and accepted by communities and traditions as foundational of what it means to be treated (or not to be treated) as human. See John M. Coetzee, Giving Offense: Essays in Censorship (University of Chicago Press 1996) 14–15.
notion of human dignity. Cultures and systems may be presumed to have a valid way of understanding human dignity but that presumption does not imply that that includes the right to contemptuously dismissing the potential dialogue partner as unworthy of engagement. Dialogical openness, both within and across cultures, is the prerequisite for developing a notion of dignity that is both universal and specific. That is, while it is inevitable that partners to the dialogue will reason from within their cultures and traditions about the precise nature of human dignity, those dialogue partners must also commit themselves to finding overlapping consensus through comparison, translation, interpretation, and so on. And, of course, to put a moral duty on citizens and institutions both within and across culture not to desist from dialogue is not to be unmindful of the fact that under certain circumstances those dialogues may need to be interrupted or suspended because of constraints such as time, space, energy, and resources. My point is simply that no one should be able to dismiss a dialogue partner simply on the basis that the dialogue partner does not have the right idea or is of questionable rank or that his/her/its culture is inferior, and the like.

Second, given the first point that I just made, a more defensible notion of human dignity would need to take into account that different cultural and social systems embody different social relationships and therefore different notions of what it means to dignify human beings.

Third, given my point under two, the most promising way of conceptualising human dignity is in terms of an overlapping consensus that exists among various reasonable comprehensive cultural, philosophical and social systems as to what constitutes human dignity. The conception of human dignity should be independent of particular philosophical or religious traditions, capable of being shared by adherents of different traditions and systems both within and across national boundaries. Here, as I shall explain later, John Rawls’s notion of a political conception of justice would be a highly useful and instructive analogy.

Fourth, a defensible notion of human dignity in a world of plural values and ethical commitments would have to reconcile the two seemingly contradictory aspirations captured by the very concept: universality and particularity. That is, human dignity

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101 Donna Hicks who has used what she calls the ‘dignity approach’ to resolve conflicts makes a point that I think is correct. She lists ten essential elements of dignity one of which is giving people the benefit of doubt: ‘[s]tart with the premise that others have good motives and are acting with integrity.’ See Hicks (n 7) at 75. Those ‘others’ may be individuals within one’s own culture but also (and perhaps importantly so) individuals from other cultures.

102 These two dimensions of recognition were set out with a high degree of clarity by the political philosopher, Charles Taylor. See Charles Taylor, ‘The Politics of Recognition’, in Amy Gutmann (ed.), *Multiculturalism and the Politics of Recognition* (Princeton University Press 1992). Taylor distinguishes between two kinds of politics of recognition: the politics of equal dignity of all individuals and the politics of difference. Taylor associates the politics of equal dignity with autonomy and the politics of difference with authenticity. Autonomy here is conceived of as the ability of each person to decide for herself or himself a view of the good life. Ibid at 57. The idea of authenticity, on the other hand, is used to refer to the notion that each individual has a unique identity to which he or she must be faithful or true.
attempts to capture the dignity humans are owed by virtue of the fact that they are humans as well as being mindful of the fact that every human being is in large measure a creature of his or her location in life, whether cultural, social or political. The notion of ‘overlapping consensus’ might be one way (and perhaps the only way) to capture the two seemingly contradictory dimensions of human dignity’s aspiration.103

As I noted earlier, an account of a political conception of human dignity will benefit a great deal from Rawls’s political conception of justice that was meant to delink an account of justice from comprehensive (religious, philosophical, or moral) doctrines which may hold irreconcilable but reasonable conceptions of justice. Under Rawls’s account, a political conception of justice, independent of any particular comprehensive doctrine, will emerge from an ‘overlapping consensus’. An overlapping consensus is by its very nature partial rather than complete. Comprehensive doctrines do not completely coincide. It is also political, not moral or religious. Political here is not simply meant to refer to modus vivendi among irreconcilable worldviews that have to coexist, but it is meant to refer to a process of reasoned agreement that avoids reliance on deep philosophical or religious foundations. The reasons might be explicitly set out or simply implied from the practice itself and how members of the community talk about the practice.

In a similar way, human dignity cannot be based on a particular comprehensive doctrine whether it is religious or philosophical if the concept is to act as a principle of decision across various cultures and systems both within and across national borders or boundaries. As Avishai Margalit rightly notes, different societies represent different ways of dignifying humans.104 Human dignity has, therefore, to be informed by an overlapping consensus. This is a strategy that Joshua Cohen has referred to as ‘justificatory minimalism’105 when referring to an acceptable account of human rights.

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103 Here Michael Ignatieff’s observation about human rights is somewhat relevant to our discussion of human dignity. Ignatieff observes: ‘The universal commitments implied by human rights can be compatible with a wide variety of ways of living only if the universalism implied is self-consciously minimalist. Human rights can command universal assent only as a decidedly “thin” theory of what is right...’ See Michael Ignatieff, Human Rights as Politics and Idolatry (n 88) 56.


105 Joshua Cohen, ‘Minimalism About Human Rights: The Most We can Hope For?’ (2004) 12 J. Pol. Phil. 190, 213. (‘[J]ustificatory minimalism aims to avoid imposing unnecessary hurdles on accepting an account of human rights (and justice), by intolerantly tying its formulation to a particular ethical tradition.’) See also ibid at 193 (‘The central idea of justificatory minimalism is that a conception of human rights should be presented autonomously; that is independent of particular philosophical or religious theories that might be used to explain and justify its content.’). The idea of ‘justificatory minimalism’ seems to have empirical and normative assumptions to it. The empirical assumption is clear to see: the world is defined by cultural diversity of such considerable depth that it would be unlikely that there would be convergence on an ultimate philosophical grounding of human dignity. The normative dimension is that ‘political structures should track the reasoned consent of those they affect.’ See Pablo Gilabert, ‘Humanist and Political Perspectives on Human Rights’ (2011) 39 Political Theory 439, 451. It is within those assumptions that the notion of a ‘minimal’ practice of public justification makes sense.
In the *Law of Peoples*, Rawls deals with human rights (though not with human dignity) in a brief but highly instructive way. Rawls writes: "Human rights are a class of rights that play a special role in a reasonable Law of Peoples: they restrict justifying reason for war and its conduct and they specify limit to a regime’s internal autonomy." 106 Human dignity will be offended if these ‘special class of urgent rights’ 107 are violated. According to Rawls, these rights are ‘a necessary, though not sufficient, standard for the decency of domestic political and social institutions’, 108 and one might add for the decency of the international community as well. Considered this way, the rights that go on to define human dignity do not cover the gamut of the rights that are available or can be made available to citizens in constitutional liberal democracies, 109 contrary to what appears to be Habermas’s conclusion. 110 Rather, human dignity is defined by these ‘special class of urgent rights’ 111 whose existence is acknowledged, and which are regarded, as necessary for minimally decent relations among individuals and between individuals and institutions, whether private or public. That is, there is a consensus across systems and cultures both about their existence and their need to so exist if one were to plausibly talk about human dignity and a minimally decent society.

Now, consensus could manifest itself not only in the form of actual practice but also as publicly declared commitments as, even though such public commitments do not always result in actual consistent practice. A good example of this is the gap between public statements and actual practice of governments in relation to torture. As the United States Court of Appeals for the Second Circuit put it, ‘torture is often honored in the breach’ but that does not diminish the fact that there is a consensus about its prohibition, for no government (no matter how authoritarian) will ever admit that it tortures. 112 Indeed, every government official will condemn torture.

So, one aspect of the overlapping consensus is that there are convergences across cultures and systems both within and across national boundaries on a set of rights that are considered to be constitutive of human dignity. The consensus can manifest itself in general and consistent practice of refrain or action. Or, alternatively, it may come about in the form of general and consistent public declarations that one does not engage in the proscribed act or behaviour.

There is a second dimension of human dignity understood in terms of overlapping consensus. Since the existence of certain relationships is taken to suggest what it means

107 Ibid.
108 Ibid at 80.
109 Ibid at 81. ‘What I call human rights are, as I have said, a proper subset of the rights possessed by citizens in liberal constitutional democratic regimes.’
110 See infra Part 4.3.
111 Let me point out here that my agreement with Rawls is not necessarily on the specific list of urgent rights (although I agree with most) or on how he derived them, but on the fact that in a world of plural values and ethical commitments there are certain rights whose existence is acknowledged across cultures and systems as being central to dignity.
112 See *Filartiga v Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), at 884.
to dignify humanity, indignity (the non-existence of that state-of-affair we call dignity) in one part of the world becomes an indignity to humanity itself. As Dworkin, drawing from Kant, rightly notes, to the extent that we expect as individuals and as members of communities that we are owed certain rights as a full measure of our dignity, it is not because we are unique but because we share humanity with others. That being the case, the violation of human dignity in a consistent and systematic way in any part of the world should be a concern to the international community, individually or collectively, such that the community has a secondary responsibility to defend human dignity when the entities (usually States) with the primary responsibility to protect or defend human dignity within their jurisdictions are unable or unwilling to do so. As Rawls put it, these rights specify the limits of internal governmental autonomy as well as provide reasons for intervention. State sovereignty will not be a sufficient shield against intervention when the issue is one of human dignity.

Indeed, international law shows that to be the case in relation to certain rights. Two international legal principles – universal jurisdiction and the Responsibility to Protect (R2P) – indicate that there is wide consensus among members of the international community that certain rights are so essential to personal integrity (dignity as humans) that States are expected to defend and promote them within their jurisdictional realms. In the event that those with primary responsibility to defend and promote those rights are unwilling or unable to do so, the international community is said to shoulder a secondary responsibility to discharge that duty. Some refer to this as shared responsibility.

Universal jurisdiction is the principle under which any State is permitted to assert prescriptive and adjudicative jurisdiction over individuals who are alleged to have committed certain crimes whether the crimes were committed within the territory of the State and regardless of the nationality or residence of the victim or the perpetrator. That is, a State can prosecute and punish anyone who has committed certain

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114 Rawls, *The Law of Peoples* (n 107) at 80. (‘The fulfillment of these ‘special class of rights…is sufficient to exclude justified and forceful intervention by other people, for example, by diplomatic and economic sanctions, or in grave cases by military force.’) See also Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (Basic Books 3rd edition, 2000). Both Rawls and Walzer argue that a country justifiably go to war for two reasons: self-defense and serious and unamendable human rights violations – what I have called human dignity. As I shall argue in the next few pages, although there is no universal agreement on the idea of intervening in defense of human dignity, there is in fact rapidly growing consensus on the issue.

international crimes regardless of the lack of any connection between the crime and
the prosecuting State. Under customary international law (and some multilateral
treaties) certain crimes are deemed to be against humanity, not just against the
direct victims or the countries of which the victims are citizens or residents. Indeed,
those who commit these crimes are referred to as *hostis humani generis* – enemies of
all mankind. Those crimes include genocide, slavery or slave trade, crimes against
humanity, war crimes, torture, and the like. Most of these crimes have been codified
in the Rome Statute giving the International Criminal Court jurisdiction over any
individual who is accused of committing these crimes anywhere and against anyone
as long as the accused is a citizen of a signatory country.

What universal jurisdiction is supposed to deal with at the back end, R2P deals
with at the front end and essentially in relation to the same category of offenses. The
concept of R2P got its formal international introduction at the UN World Summit in
2005 where heads of States and governments affirmed the primary responsibility of
governments (hard responsibility) to protect their citizens from certain international
crimes. The concept of R2P was subsequently endorsed by the General Assembly
and the Security Council. These crimes are narrowly defined and largely mirror
the list of crimes for which States are said to have universal jurisdiction – genocide,
war crimes, ethnic cleansing, and crimes against humanity. The R2P list is almost
entirely included in the universal jurisdiction list. The only offense that is on the R2P
list but not on the universal jurisdiction list is ethnic cleansing, but I think it is fair to
say that ethnic cleansing is not entirely delinked from genocide.

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117 Crimes against humanity includes murder, enslavement, deportation, rape and other forms of
gross sexual violence, enforced disappearance and apartheid if they are committed against civilian
population in a systematic attack directed at civilians.

118 In fact, those crimes also form the jurisdictions of most of the ad hoc tribunals such as the Yugoslav
and Rwanda tribunals.


(20 Sept. 2005) ’Each individual state has the Responsibility to protect its population from genocide,
war crimes, ethnic cleansing and crimes against humanity.’ To be precise, the Summit adopted
the concept on the basis of a report by the International Commission on Intervention and State
to Protect: Report of the International Commission on Intervention and State Sovereignty*
ICISS%20Report.pdf.

121 Ethnic cleansing is ‘the forced migration of civilians.’ *Application of the Conventions on the
Prevention and Punishment of the Crime of Genocide (Serbia and Montenegro)*, International Court
of Justice, 18 Sept. 1993, Separate Reasons of Judge ad hoc Lauterpacht, at p. 431, para. 69. Ethnic
cleansing could be functionally equivalent to genocide if the removal of a group is intended to bring
about the demise of the group as a group by scattering members. Thus as ICJ indicated in *Bosnia
v Herzegovina v Serbia and Montenegro* (para. 190) ethnic cleansing may constitute genocide if
the intent is to destroy the group as such. But as Schabas has correctly noted, however, the two
What is it that makes these crimes international crimes such that there is a consensus that their commission is one not only against the specific individuals or countries of which the individuals are citizens or residents, but against the international community as a whole? Those who commit these crimes are considered to have done so against humanity itself – the person as a universal rather than a particular subject. I have argued in an earlier article that one way to understand universal jurisdiction, at least in its customary international law version, is to think of it as a process through which the international community is imagined and defended. One could say the same thing about R2P. But here I want to argue that the rights defended or vindicated through universal jurisdiction and R2P are constitutive of human dignity. Genocide and crimes against humanity make humans ‘superfluous’ qua humans, to use an Arendtian description. In some sense, slavery, another crime subject to universal jurisdiction, denies the slave’s very humanity. Slavery is social death. While genocide and crimes against humanity are about physical extermination, slavery is social extermination of a group on the basis of some characteristics that are taken as indicators of the less than human nature of members of a particular group. The ultimate denial of human dignity is to treat a person or groups of persons as if they were not, or do not deserve to be, members of humanity. That sentiment could be expressed either physically (genocide and crimes against humanity) or socially (slavery or slave trade).

As I noted earlier, torture is another example which strikes at the very core of human dignity. I have argued in an earlier work that ’torture robs the target of torture an important ingredient of being a human subject, the capacity for autonomy and will’. The person is turned into a physical object which is subject to the complete control of the torturer, fully manipulated or commandeered as if he or she were no different from an object. Indeed, the African Charter on Human and Peoples’ Rights makes the connection between slavery and torture by putting the two violations in the same article. Here is what the document provides: ‘All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman and degrading punishment shall be prohibited’.

often have two distinct intentions – displacement and destruction. William Schabas, Genocide in International Law (University of Cambridge 2000) 200.

See Addis, Imagining the International Community (n 117).

See Hanna Arendt, Vies Politiques 1 (Paris: Tel/Gallimard 1986); See also Hanna Arendt, Eichmann in Jerusalem: A Report on the Banality of Evil (revised and enlarged ed. Viking Press 1965) 268–69. As Arendt put it: genocide is an attack upon human diversity as such, that is, upon a characteristic of the “human status” without which the words “mankind” or “humanity” would be devoid of meaning.’ Eichmann in Jerusalem: A Report on the Banality of Evil, at 268–69.

See Addis, Imagining the International Community (n 117) at 147.

See Addis, ‘Torture as a Counterterrorism Strategy’ (2010) XLIV Revue de Droit Compare/Comparative Law 129, 143 As Alexander Solzhenitsyn put it, ‘our torturers have been punished most horribly of all: They are turning into swine; they are departing downwards from humanity.’

dignity but it also has a dehumanising and corrupting effect on the torturer himself. Surely, a person who has subjected another human being to such severe pain and suffering cannot but start to see other human beings as mere means to an end rather than as fellow human beings with certain dignity. As I noted earlier, torture (and rape, which is a form of torture) robs the torturer of an important ingredient of being human: the capacity for empathy. And even more, torture undermines the dignity of the exalted status of the human species of which the victim and victimizer are types or representatives. The United States Supreme Court makes a similar point in relation to the Eight Amendment and capital punishment when it observed that civilised societies feel 'natural abhorrence' when they execute an insane prisoner thinking that 'such an execution simply offends humanity'.

Almost all of these rights have also been made non-derogable by international and regional human rights documents even when 'in time of public emergency which threatens the life of the nation'. The ICCPR, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the American Convention of Human Rights all prohibit derogation of the following rights even when the life of the nation is threatened and public emergency is declared: right to life; freedom from slavery and servitude; freedom from torture, or cruel, inhuman and degrading treatment; freedom from ex post facto law. And two of the three conventions – the ICCPR and the American Convention – also prohibit derogation from right to 'juridical personality', that is, the right to be recognised as a person before the law; and freedom of conscience and religion. Indeed, the two covenants in fact explicitly prohibit acts that 'involve discrimination solely on the ground of race, colour, sex, language, religion or social origin' even in a circumstance when

127 See Addis, ‘Torture as a Counterterrorism Strategy’ (n 126) at 144. One could make a general point here. A violation of the dignity of the victim often affects the humanity of the victimizer and of even those who tacitly participate as spectators. This view is advanced by Jeffrie Murphy in a comment on Jeremy Waldron's view of dignity and responsibility. Using the French court decision on dwarf-tossing that I mentioned earlier, where the French court upheld the prohibition by French authorities the game of dwarf-throwing 'along paddle highways or corridors' to see how far big men could throw dwarfs with the consent of the adult dwarfs who were well paid for the game, Murphy argues that the prohibition is 'not simply to protect the dwarfs who are tossed but to avoid creating or reinforcing in spectators the vice of seeing dwarfs and other little people more as objects of amusement or even contempt than as full human persons.' Participant degradation is here viewed as a ground for moral disapproval. Jeffrie Murphy, ‘Human Dignity and the Law: A Brief Comment on Jeremy Waldron’s Dignity, Rights, and Responsibilities’ (2012 43 Ariz. St. L. J. 1273, 1279.


131 See Art. 4 ICCPR.
the life of the nation is threatened. There is an overlapping consensus that equality of persons whether in the legal (juridical equality), political or social realms, has become an important part of what it means to dignify humans. Any form of systematic discrimination and humiliation of persons is a violation of human dignity.

To summarise, the violations over which there is an international consensus are deemed to be injuries to all of us rather than simply injuries to the particular individual or to the country of which the direct victim is a citizen. They are thought of as such because they injure the person not just in his or her particularity but in his or her universality as well. The attacks chip at the very ingredients that make an individual a member of the human family. It is what we share as human beings that is targeted for degradation or destruction. Those rights are so central to the notion of being human such that even a threat to the life of the nation itself is said not to authorise their derogation. If one were to describe these rights one would say that they are about the integrity of the person – in the physical, mental, social and moral sense. Clearly, the right to life, freedom from genocidal attacks, and even torture are about the physical integrity of the person. Freedom from torture could also be viewed as directed at protecting the mental or psychological integrity of the person. Freedom from slavery and freedom from discrimination on the ground of immutable traits are about the integrity of the person as a social being, as is the requirement for juridical personality. Freedom of conscience and religion is about the moral integrity of the person. A person’s dignity is respected not only when his or her physical, mental and social integrity is respected but also when he or she is able to decide for himself or herself how to comprehend the afterlife or his or her relationship with the universe.

132 President of China Society of Human Rights made a similar point in his inaugural speech at the opening ceremony of the 4th Beijing Forum on Human Rights. Luo Hao Cai, Different Cultures Show Same Respect for Human Dignity, 21 Sept. 2011, reprinted in 11 Human Rights, Jan. 2012, 2–4. (‘In terms of content, dignity incorporates … the need to ensure equal treatment for everyone and oppose discrimination and unfair treatment.’) And as a matter of practical human response, humiliation ‘creates anger’ and that leads to a downward spiral of dignity-robbing acts and practices. The quoted phrase is taken from Hicks (n 7) at 60.

133 A modern day manifestation of this is human trafficking, which in my view ought to be treated as a serious attack on human dignity. This is especially so in relation to trafficking involving women and children for purposes of sexual exploitation, forced prostitution, and servitude. The international consensus on the evil of Apartheid and similar ethnic and racial caste systems is a clear indication that the international community views the various manifestations of slave-like conditions which are put in place to show functionally and symbolically that members of certain groups are not equally as human as other groups.

134 One might add here the freedom to belong. See Donald Horowitz, Ethnic Groups in Conflict (University of California Press 1985) 185: ‘If the need to feel worthy is a fundamental human requirement, it is satisfied in considerable measure by belonging to groups that are in turn regarded as worthy.’

135 See Planned Parenthood of Southern Pennsylvania v Casey, 505 U.S. 833, 851 (1990): ‘At the heart of liberty is the right to define one’s own concept of the 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 compulsions of the State.’ (plurality opinion). See also Lawrence v Texas,
Even though one could not assert that there is an overlapping consensus on the importance of a robust regime of freedom of expression, I argue that freedom of speech or expression is essential for the discursive constitution of dignity that I have argued for in this article. There cannot be a dialogic construction of dignity within and across cultures unless some degree of freedom of expression is respected. Indeed, there cannot be a defensible political conception of human dignity without the recognition that it is through free interactive process that what it means to dignify human beings or to subject them to indignity are developed and overlapping consensus created. Embodying in legal form a level of communicative freedom I believe is a necessary condition for developing shared and usable notions of dignity and indignity both within and across cultures and systems.

Now, some may object that my account of human dignity is too narrow and entirely ungenerous. Well, I concede it is narrower than what human rights scholars and activists have often used the phrase for. Essentially, for many human rights activists, human dignity has become another phrase for the entire corpus of human rights. I have argued that this view is indefensible as a conceptual, political or practical matter.

As a conceptual matter, it is very hard to claim that every possible human right is a question of human dignity. If a journalist is fined for publishing a critical article of either a government official or other parties, the fine might be inconsistent with a version of the right to freedom of expression, but it would be very difficult to conclude that this undermines the human dignity of the person fined. The picture would of course change if that person is tortured or raped. The bottom line is that not all rights that we grant or recognise are central to the protection of human dignity. The sooner we realise that the better it would be both for human rights and human dignity.

As a practical and political matter, human dignity has to be about a narrower set of rights than the spectrum of human rights that are provided or could be provided by States or other communities. This is so for a number of reasons. First, to say that human dignity is about central aspects of personal integrity is to necessarily narrow the universe of rights that would go on to define that dignity. Second, given that what constitutes human dignity could only develop through interaction within and across cultures and that overlapping consensus across cultures and systems is essential for a confident assertion of what is regarded as necessary for human dignity, the universe of rights and claims will necessarily be narrower than available or potential rights. Third, given the fact that as an initial matter the idea and practice of human dignity

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539, 573–574 (2003) (quoting Casey’s ‘mystery of life’ passage). See also Schachter, Human Dignity (n 71) at 850.

136 I thank Professor Michael Davis for raising this issue during the discussion period following the lecture I gave at University of Hong Kong School of Law. See also Michael C. Davis, ‘The Globalization of Constitutionalism: Democracy, Rights and Relativism’ (1998), 11 Harv. Hum. Rts. J.

137 But as I noted earlier, the existence of a level of free expression is essential for the process of discursive construction of the idea of human dignity that can ultimately lead to overlapping consensus within and across cultures and systems.
are explicated in the context of interaction within communities, we must be careful to give space to those communities to develop various ways of human flourishing and understandings of dignity and indignity.

The German Constitutional Court captures the argument that dignity is worked out within communities and networks of interactions:

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 a man as 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.138

The South African Constitutional Court makes a similar point. In MEC for Education: KwaZulu-Natal v. Pillay139 Langa CJ noted the ‘importance of community to individual identity and hence to human dignity’.140 As a substantive matter, the ideas of dignity assumed by the two constitutional courts differ from each other: the German Court starts with the Kantian notion of what it means to be an agent and what would lead to indignity. The South African Court on the other hand is more communitarian in its understanding of human dignity. What matters here, however, is that both think that the notion of dignity is not pre-social. It emerges within communities and networks of interaction.

Fourth, because human dignity as I have defended it not only places a primary duty on a State to defend the human dignity of those within its jurisdiction but also places a secondary duty on the international community, individually or collectively, to protect and defend human dignity when the primary duty holder is unable or unwilling to discharge its duty, we must be rather careful as to when we should allow such intervention. As I noted earlier, because the notion of human dignity is worked out in the context of particular communities and networks of communication and we want to encourage the development of various ways of dignifying humans, we must allow a measure of communal self-determination and autonomy. Only when there is an overlapping consensus should we permit or expect such intervention. Understood this way, human dignity gestures to universal aspiration, but it simultaneously embraces the proposition that the road to the universal, the abstract, individual goes through the particular individual living a specific life in a specific culture and at a specific time. This to me is the most plausible way of reconciling human dignity’s dual aspirations.141

138 See Kretzmer, in Klein and Kretzmer (n 16) at 307–08 (emphasis added).
139 2008 1 SA 474 (cc), 2008 2 BCLR 99 (cc).
140 Ibid para 53.
141 Seyla Benhabib and others have made a similar point. See Lasse Thomassen, ‘The Politics of Iterability: Behnabib, the Hijab, and Democratic Iterations’ (2011) 43 Polity 128, 132–33: ‘[T]he universals are constituted – repeated and altered – through the acts of self-constitution on the part of the particular demos.’
Viewed in this manner, human dignity accomplishes four goals. First, it reconciles its two seemingly contradictory aspirations: universal validity and particularity. Second, it embraces the notion that the universal develops from (or through) the particular. It is in the context of communities, traditions, and networks of communication that the ideas of dignity and indignity are worked out and subsequently an overlapping consensus emerges across cultures, traditions and networks of communication. Third, this view of human dignity necessarily implies that the notion of human dignity is political rather than metaphysical. It is worked out in the context of actual lives lived in real communities and traditions. It is about membership or inclusion. But to say that it is not metaphysical is not to claim that it is not or cannot be universal. The universal is crystallised from the bottom up rather than from the top down. Fourth, it follows from the first three observations that we can never talk about the complete and final notion of human dignity. In this sense, incompleteness may not only be an inevitable part of the deal, but it is in fact a virtue. I shall explore the notion of incompleteness in the following section.

5. THE CONCEPT OF HUMAN DIGNITY IN A WORLD OF PLURAL WORLD VIEWS AND VALUE SYSTEMS: IN DEFENCE OF INCOMPLETENESS

Just like many theories of justice, including that of John Rawls, most theorists of human dignity have attempted to write a final and complete chapter as to what constitutes human dignity as a conceptual and epistemological matter. The idea is to specify once and for all as to what the concept entails so as to apply it within and across cultures and systems. Once specified everyone would (or should) be motivated by the same understanding of human dignity. However, in this essay I have argued that human dignity that has to be applied in the real world in which we live must necessarily emerge from different traditions and systems and hence a theory of human dignity that has a universal aspiration has to do so for a world of imperfect convergence.

The political conception of human dignity that I have advanced here necessarily leads to the conclusion that there can never be a perfect and final answer as to what the phrase entails. Indeed, the notion of a perfect and final answer is the enemy of real lives living in a real and diverse world. The perfect answer will come not so much from neutral ‘nowhere’, but rather from a convergence of particular and partial traditions.

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142 The phrase ‘principles from nowhere’ is meant to refer to the belief that certain norms and principles have universal application and are derived as antecedents to their being rooted in one of many life-forms. And they are to be derived through traditional philosophical means. The argument of this article has been to dispute that such a route is available.

143 This view is often advanced through the notion of tolerance. Tolerance of other views, values and commitments might be defended on a number of grounds, but two grounds stand out. First, we
A few years ago Michael Walzer noted that many theorists, at least in the West, have the itch ‘for singularity and unity […] and therefore a kind of completion’. It is no accident that we see it from religious inspired theories for whom justice or dignity are to be derived from a particular relationship between humans and their creator. But we see it in secular theories as well. Thus, for example, we have theories of justice which attempt to derive a perfect theory of justice from a hypothetical bargain for a social contract. Walzer views this itch for completion as an attempt ‘to end the endlessness of liberation’. But as Walzer notes, ‘[i]ncompleteness is a virtue […] for it leaves room for local self-determination and cultural diversity’. This incompleteness is however tentatively or provisionally ‘completed’ when there is an overlapping consensus as illustrated by practices of communities either through custom or conventional law as to what they regard as the meanings of dignity and alternatively indignity.

The tentative completion, the tentative consensus, is not simply an accidental convergence. It is informed by communities and cultures engaging other cultures and communities as they even specify the notion of dignity within their own traditions. In this sense, the notion of human dignity is not just a result of imperfect convergence, but it is also a facilitator of the intersystemic and intercultural dialogues.

There are a number of ways in which the concept of human dignity becomes important in relation to intercultural and intersystem dialogues. First, the concept of human dignity has become an important trigger of international dialogue among national judicial tribunals or between national and international tribunals as to how the notion of human dignity can be cashed out in specific circumstances. There is some evidence that indicates that judicial tribunals are using the notion of human dignity as the basis through which to engage tribunals of other nations and international tribunals on specific issues and to draw from the decisions of those tribunals. That is, the concept of human dignity has facilitated dialogue on the interpretation of
tolerate because we realize the limits of our knowledge. On this account, tolerance is premised on epistemological modesty. We cannot be certain that we know all that needs to be known and that that modesty manifests itself in a manner that accords the views and commitments of others presumptively validity. The second ground for tolerance is that we tolerate different views and commitments not just because we realize the limits of our knowledge but also because human dignity requires that we treat the views and commitments of others as part of respecting the dignity of the agents who choose, endorse and pursue them. But in my view in the case of human dignity tolerance is also important because it is the only way that we will be able to understand as to what it means to enjoy human dignity. Only when it is specified and elaborated in the context of actual communities living actual lives and in real times will we know what the scopes of dignity and indignity are.


See Rawls, A Theory of Justice (n 11).


See Walzer, The Virtue of Incompletion (n 145) at 225.

See German and South African constitutional courts. See also Roper v Simmons, 125 S. Ct. 1183, 1200 (2005).
constitutional texts or international documents dealing with specific rights. The United States Supreme Court, for example, has used the notion of human dignity as a mediating concept to allow it to look at the decisions of international tribunals and other national courts to interpret the relevant provisions of the US Constitution on matters of capital punishment and the rights of homosexuals.149

To engage others in how human dignity is specified is to learn about alternative ways of being human, alternative ways of human flourishing. It is to learn how the universal can be localised. Conversations and dialogues that may not have taken place across cultures and systems take place because ‘[e]veryone could agree that human dignity was central, but not why or how’150 and the conversation becomes a process of both specifying what the concept actually means and in the process finding overlapping consensus of aspects of what human dignity entails.151 Comparative exchanges therefore perform two important functions. They indicate how human dignity can be specified while also adding datum to a more robust understanding of the general concept. Perhaps the process has similarity to what Cass Sunstein has called an incompletely theorised agreement:152 human dignity may lead to agreements of specific outcomes across cultures and systems even when there may not be agreement on a fully developed theory explaining the decisions and the agreements. Indeed, some have claimed that the adoption of the notion of dignity in the Universal Declaration of Human Rights was partly intended to achieve that goal. As McCrudden notes, ‘[d]ignity was included in that part of any discussion or text where the absence of a theory of human rights would have been embarrassing. It utility was to enable those participating to the debate to insert their own theory’.153 To be more precise, it is not

149 See for example Roper v Simmons, 125 S.Ct. 1183, 1200 (2005) (Justice Kennedy writing the majority opinion wrote that the application of the death penalty to juveniles (those under the age of 18) is violative of the Eighth Amendment’s prohibition against cruel and unusual punishment. In the process Justice Kennedy managed to refer to decisions of foreign courts and tribunals not so much to supplant the American legal documents which ‘are central to the American experience’ and are ‘essential our present-day self-definition and national identity,’ but rather to help the Court understand more fully the ‘liberty’ and ‘human dignity’ broadly secured by the American legal documents, especially the Constitution by how those very values, entrenched as ‘fundamental rights by other nations and peoples’ are understood or cashed out.

150 See Habermas, The Concept of Human Dignity (n 71) at 467.

151 Ibid.


153 McCrudden (n 49) at 678. McCrudden also quotes Doron Shultziner as having observed that there is an advantage in the approach to agree without adopting a completely theorized 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 waving or compromising basic principles of belief. Thus, the different parts 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 a linguistic-symbol that can represent different outlooks, thereby justifying a concrete political agreement on seemingly shared ground.’ Doron Shultziner, ‘Human Dignity – Function and Meaning’ (2003) 3 Global Jurist Topics 5, cited in McCrudden (n 49) at 678.
that there is no theory, but that the notion of human dignity supplies the theory for each culture and community to cash it out in a specific culturally appropriate way.

Before we conclude there is one more issue that we need to raise and deal with, albeit briefly. That is, who is to be considered ‘human’ and thus a bearer of dignity? Now, for many even asking the question will be mystifying, for in their minds there is no question as to who is a human being. And as a general matter, I agree that it is clear as to what or who humans are. There is no dispute either internationally or nationally on that issue even when there is deep disagreement as to what those humans are owed by virtue of the fact that they are humans. But there is deep disagreement on whether fetuses are sufficiently human that they deserve to be regarded as bearers of human dignity. As is well known, in the United States there is deep disagreement as to when life begins and what dignity is owed to the fetus, if any.\footnote{154}{See \textit{Roe v Wade}, 410 U.S. 113, 159 (1973). Justice Blackmun, writing the majority opinion, notes the difficulty of the issue and claimed to have avoided it in his opinion. This is what he wrote: ‘We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.’} And there are other societies that are as divided as the United States. Still other societies take the position, at least formally, that the fetus is in fact a human being and due the dignity owed to other humans. Thus, the German Constitutional Court held on two occasions that the human dignity that is enshrined in Article 1:1 of the Basic Law applies to unborn fetuses. In one abortion case the Court observed, \footnote{155}{See Henk Botha, ‘Human Dignity in Comparative Perspective’ (n 4) at 191. In another case the Court repeated the same sentiment when it declared that ‘[u]nborn human life possesses human dignity, [dignity] is not merely an attribute of a fully developed personality or human being after birth.’ Ibid.}

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.\footnote{156}{American Convention, (n 131), at Art. 4.}

International human rights documents are also divided on the issue. While the ICCPR and the European Convention for the Protection of Human Rights and Fundamental Freedoms are silent on the issue, the American Convention on Human Rights endorses the proposition that life begins at conception and the fetus is therefore a bearer of rights and dignity. Article 4 of the American Convention on Human Rights provides: ‘Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moments of conception. No one shall be arbitrarily deprived of his life’.\footnote{156}{American Convention, (n 131), at Art. 4.} It is clear that there is no overlapping consensus on the matter of whether the fetus has a right to life and thus a bearer of human dignity. Communities and traditions appropriating their comprehensive
theories have come to different conclusions and overlapping consensus has not developed yet. According to the approach that I have advanced here, because of that, we cannot say that there is an established international principle that recognises fetuses as bearers of human dignity.

6. CONCLUSION: HUMAN DIGNITY WITHOUT FOUNDATION(S): POLITICAL, NOT MORAL

The political account of human dignity that this article has advanced eschews an ultimate foundation on which to ground criticism of indignity or to intervene in the defence of dignity. It claims that in a world of plural values and ethical commitments, the idea of an essence from which we develop what dignity is and consequently what would lead to indignities is unattainable and in fact not even desirable. Dignity is not utopian in a sense that there is perfect state of dignity which is used to evaluate whether and how the actions of all of us are measuring up to see if they are leading us towards or approximating that perfect state. Rather, what constitutes dignity and inversely what would be regarded as indignity are constructed in the actual lives we lead and in the conversations we conduct. John Coetzee is surely right when he observes:

Nor do we inherently possess dignity [...]. [D]ignity is a state we claim for ourselves. Affronts [...] to the dignity of our persons are attacks not upon our essential being but upon constructs – constructs by which we live, but constructs nevertheless. This is not to say that affronts to [...] dignity are not real affronts [...]. The infringements are real.157

Given the fact that what we consider to be essential elements of humanness and dignity are developed in our work and conversations and that as an initial matter occurs within specific communities and traditions, the best (and perhaps the only) way to think about human dignity as a ‘universal’ concept is to think in terms of an overlapping consensus among these various communities and traditions. The overlap here is not simply aggregation of commonalities among various traditions and cultures, but also how these various traditions and customs have self-consciously agreed through international discourse and actions that treating individuals in a particular way would be considered as inflicting indignities on them. This merely requires that we apply what Joshua Cohen has called ‘justificatory minimalism’,

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the idea that the justification of human dignity must aim at finding the standard of evaluation within the overlapping consensus of the practice itself.\textsuperscript{158} Such an approach allows us to do a number of things that in my view will make the notion of human dignity an effective practical guide, rather than a concept which at best is used as indistinguishable from the notion of human right and at worst as an utterly meaningless concept.

First, the approach removes the notion of human dignity from the insecure house of foundationalism and puts it in the practical realm of work and conversation. That is, the idea of what dignity is due to humans as humans is worked out in a long process of construction and reconstruction within and across cultures and systems. If this is the case, then it seems logical to provide space for communities to engage in the development of what is human flourishing and what are indignities to humans from within their cultures and traditions. Respect for dignity thus in some ways requires presumptive respect for the communities and traditions within which it is developed, for there is no unencumbered self which can be a bearer of unmoored rights.

Second, to conceive of dignity this way is to value comparative studies to see how various communities (local, national and regional) understand and apply human dignity. Those comparative studies would of course alert us not only of the existence of other interpretive possibilities but the historical contingencies of choices made in the name of human dignity. Third, the fact that the approach requires us to develop the notion of dignity from the bottom up will likely ensure a more inclusive and a more defensible notion of dignity that is likely to be more effectively implemented. Fourth, the idea of overlapping consensus may encourage judicial and other public institutions to increasingly engage their counterparts in other jurisdictions and communities to see in defence of what values and acts the notion of human dignity is invoked and appropriated. That will be a valuable transnational process of co-developing and defining the contours of human dignity.

Fifth, and finally, let me emphasise that the approach to human dignity that is defended here does not contest the claim that there are universal rights people have in virtue of their humanity alone. Indeed, the whole exercise has been to figure out how such rights could be identified in a world of plural values and ethical commitments. My criticism of the traditional universalists is not that they claim that there are universal rights. Rather, my difference with them is on how we go about identifying those rights. The political conception of human dignity does not deny the universality of human dignity. It simply wishes to reorient our gaze as to where we should look to determine the nature and form of these rights. Once we have reoriented our gaze, we will then arrive at a set of standards of human dignity to which all political societies will subscribe and by which those societies will be made accountable in their treatment...

\textsuperscript{158} See Cohen, ‘Minimalism About Human Rights: The Most We Can Hope For?’ (n 97) at 199. The idea is that an acknowledgment of ethical pluralism will necessarily lead to human dignity minimalism.
of their members. That means, human dignity sets limits to the sovereignty of States and its violation, whether actual or anticipated, is sufficient reason to authorise outside intervention, whether collective or individual and whether coercively or otherwise. Then, and only then, will we say in the famous words of the Universal Declaration of Human Rights that this is ‘a common standard of achievement for all peoples and all nations’.159