

HUMAN DIGNITY IN COMPARATIVE CONSTITUTIONAL CONTEXT: IN SEARCH OF AN OVERLAPPING CONSENSUS

Adeno Addis*

Abstract: The concept of human dignity plays an important role in ordinary conversations and legal and political theories. It also occupies a prominent place in numerous national constitutions and international conventions. Yet, it is not always clear what the concept means or entails. The author, in an earlier work, argued that in a world of plural values and ethical commitments a top-down approach, whether philosophical or religious, is unlikely to provide us with a common standard for deciding what it means to dignify humans or to subject them to indignities. Building on the earlier work, this article argues that the best way to understand the scope and content of human dignity is to engage in a bottom-up inquiry, carefully describing the choices communities make in the name of human dignity. The purpose of such inquiry is to see whether there are patterns in the usage that suggest that there is a convergence of, an overlapping consensus on, an understanding of the phrase that could be appropriated as a standard of measurement in intercultural and intersystem conversations and critiques. Focusing on references to human dignity in national constitutions, the article shows that there are in fact patterns of usage that suggest the existence of a consensus on specific understandings of dignity.

Keywords: *human dignity; constitutions; equality; human rights; jurisprudence; physical integrity.*

I. Introduction

The concept of human dignity plays an important role in ordinary conversations¹ and an even more important and central role in many legal and political

* W R Irby Chair and W Ray Forrester Professor of Public and Constitutional Law, Tulane University School of Law. I thank Elan Silver of Tulane Law School Class of 2015 for his excellent research work.

1 Elisabeth Bumiller, "Bush Urges Graduates to Use Science to Protect Human Dignity", *New York Times* (New York, 7 May 2006); John Tagliabu, "Looking Back to 20th Century, Pope Says Respecting Human Dignity Is Key to World Peace", *New York Times*, (New York, 2 January 1999); Roger Mahoney, "Immigration Debate Should Be About Recognizing the Dignity in Every Human", *Washington Post* (Washington, 28 June 2012); Dan Froomkin, "A Question of Human Dignity", *Washington Post* (Washington, 14 February 2008). In a recent executive order President Barack Obama instructed government officials to engage in regulatory review to "consider (and discuss qualitatively) values that are difficult or impossible to quantify including equity, human dignity, fairness, and distributive impacts" Exec. Order No 13,563, 3 CFR 215, 216 (2012).

theories.² And some commentators have claimed that human dignity is the only absolute value in a world of plural values and commitments.³ The concept also occupies a prominent place in numerous national constitutions and international conventions⁴ as well as judicial decisions.⁵ 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.⁶

This much we know: human dignity is the dignity that humans supposedly have by virtue of the fact that they are humans, irrespective of who they are and where they come from. It is not the sort of respect we show people in virtue of their achievements or character.⁷ Rather, the object of respect that is demanded by

2 The most recent work of political theory that puts dignity as a central organizing principle is Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 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 University Press, 2011) “My aim is to defend the idea of human dignity”. 1; “Human dignity is an existential value”. 10.

3 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). See also Cape Verde Const. art.3: “[T]his Constitutional text consecrates...the concept of the dignity of the human being as the absolute value which is supreme over the State itself”.

4 See Section III below.

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 partly on the principle of human dignity. Public order was also invoked as a reason for the prohibition. As to human dignity, the idea seems to be that throwing people like balls for amusement purposes does not respect the dignity of the people tossed around even if they agree to be so tossed, Conseil d’Etat, Ass., 27 October 1995, *Cne de Morsang-sur-Orge*, Recueil Lebon., 372, available at <http://www.conseil-etat.fr/fr/presentation-des-grands-arrets/27-october-1995-commune-de-morsand-sur-orge.html>. The decision of the French court was affirmed by the ICCPR Committee in *Wackenheim v France*, Communication No 854/1999, U.N. Doc. CCPR/C/75/D/854/1999 (2002). See also *Nahmani v Nahmani*, CFH 2401/95. In that case, the Israeli Supreme Court held that a woman had a dignity interest in maintaining her pregnancy even if her former husband objects to keeping the pregnancy.

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 from the title, the word that was the focus of Fraser’s and Gordon’s study is “dependency” rather than “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. Dworkin (n.2) 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 Kateb (n.2) 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”.

7 Stephen L. Darwall, “Two Kinds of Respect” (1977) 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

human dignity is one that is non-evaluative. We respect people simply by virtue of the fact that they are humans, nothing more and nothing less. But what precisely are the things that people deserve to have in the name of human dignity? And how do we go about identifying them?

One familiar approach, to which I shall refer as the top-down approach, attempts to define human dignity in an abstract way, as a first principle, and then apply it as a regulatory norm both within and across communities and cultures. Two familiar and prominent examples of such an approach are philosophical and theological enquires that attempt to define the scope and content of human dignity. Derived philosophically or theologically, human dignity becomes a universal principle applicable without geographic or cultural limits. It applies wherever and whenever humans are subjected to indignities.

The most famous and most influential philosophical approach to human dignity is that of Immanuel Kant's.⁸ Here human dignity is thought of as a state of affairs in which individuals are able to act autonomously. That is, humans have dignity to the extent that they are recognized as having the capacity to make their own choices and to determine their destinies. Kant viewed morality as a system of categorical imperatives that we must fulfil whether we wish or not. A central part of that system is the Categorical Imperative that human beings should not act towards others (and even regarding themselves)⁹ in a way that treated 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".¹⁰ To think of humans as ends in 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".¹¹ That entails that treating individuals as autonomous beings able to choose their destiny and capable of moral reflection is to acknowledge their dignity.¹²

Another example of a top-down approach is a religiously based enquiry about the nature of human dignity. Here, dignity is explicitly tied to the idea that

but because they occupy certain positions. The Chinese Constitution takes it even further. Its preamble refers to "the duty [on citizens] to uphold the dignity of the Constitution and ensure its implementation". The idea of dignity for a document stretches it even further from the idea that there is dignity to positions (ie presidency or monarchy).

8 See Immanuel Kant, *Groundwork of the Metaphysics of Morals* (HJ Paton trans. Harper & Row, 1964) 96: "Act so that you treat humanity, whether in our own person or in that of another, always as an end and never as a means only".

9 *Ibid.*, 96.

10 *Ibid.*, 95.

11 *Ibid.*, 102. "[H]umanity so far as it is capable of morality is the only thing which has dignity".

12 See Immanuel Kant, "Metaphysical Principles of the Doctrine of Right" in Mary Gregor (ed) *Practical Philosophy* 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", 238.

man was created in the image of God and given authority to be the creator of his temporal existence. The dignity owed to man is based on the similarity he apparently has with his Creator.¹³ Pope Leo, or Leo the Great, (440–461AD) who is supposed to have been one of the earliest known Christian thinkers to use the word dignity 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”.¹⁴ 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]”.¹⁵ The Qur’an 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”.¹⁶ There are many current pronouncements that embrace this position. The teaching of the Catholic Church is a prime example.¹⁷ But it is not limited to the Catholic Church, or even to religious institutions. The Israeli Supreme Court, for example, made the following observation about human dignity: “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”.¹⁸

As attractive as the top-down approach is, as I have argued in a recent article, it simply will not work.¹⁹ In a world of plural values and ethical commitments and where the idea of god takes different forms and even more where many do

13 Giannozzo Manetti (1396–1459), a famous jurist from Florence, and Giovanni Pico Mirandola (1463–1494) were examples of such thinkers. See, eg Giannozzo Manetti, *De dignitate et excellentia hominis* (1452); Pico della Mirandola, *Oratio de hominis dignitate [Oration on the Dignity of man]* [1486] (Robert Caponigri trans. Regnery Gateway, 1956); The biblical source of this is, of course, *Genesis* 1: 26–27: “And God said, Let us make man in our image, after our likeness, and let them have dominion [over the earth and other creatures]. So God created man in his own image, in the image of God created he him; male and female created he them”. *Genesis* 1: 26–27.).

14 Quoted in Oliver Sensen, “Human Dignity in Historical Perspective: The Contemporary and Traditional Paradigms” (2011) 10 *European Journal of Political Theory* 71, 78. Leo the Great, *Sermons* 27, ch.6, 114 (JP Freeland and AJ Conway trans. 1996): “Wake up then, o friend, and acknowledge the dignity of your nature. Recall that you have been made ‘according to the image of God’”.

15 Leo the Great, *Sermons* 21, ch.3 (JP Freeland and AJ Conway trans. 1996). Apparently this passage is still used as the opening sentence of the part on moral questions in the Catholic Catechism. See *Catechism of the Catholic Church* §1691(1999).

16 Qur’an 17:70. According to the Qur’an, every single person whether pious or sinner is endowed with human dignity, for God “breathed into him [Adam] [His] own spirit”. Qur’an 38:72. See also Libya Cons. art.7: “The State Shall ... strive for the promulgation of new covenants which recognize the dignity of man as Allah’s representative on earth”.

17 The Biblical foundation of the Catholic social teaching that the human person is made in the image of God and that his dignity flows from that is to be found in *Genesis* 1: 26–27.

18 *State of Israel v Guetta* [1992] Isr SC 46(5) 704, 724–735, quoted in Erin Daly, *Dignity Rights: Courts, Constitutions, and the Worth of the Human Person* (University of Pennsylvania Press, 2013) 30.

19 Adeno Addis, “The Role of Human Dignity in a World of Plural Values and Ethical Commitments” (2013) 31 *Netherlands Quarterly of Human Rights* 403. Some parts of the current article draw from this earlier article.

not even believe in a god in whatever form that god is conceived, the justification of a universal dignity explicitly based on a particular value (autonomy) or on the likeness to a god is unlikely to succeed, at least unlikely to persuade.

Does that mean, therefore, that we should abandon the idea of human dignity as a universal principle? The answer is “No”. But, we need to abandon the idea of deriving the contents of human dignity from the top down. Instead what we must do to establish human dignity as a norm within a global public enterprise is to engage in a bottom-up process. By that I mean that we must engage in a careful examination and description of the choices communities and peoples make in the name of human dignity so as to see whether there are patterns in the usage that suggest that there is a convergence of, an overlapping consensus on, certain understandings of the phrase that we may be able to appropriate as a standard of measurement (as a kind of common law) when we engage in intercultural and intersystem critique. Only then will we be able to develop an idea of human dignity that will serve as a practical guide in a world of plural values and ethical commitments. This is an approach that could be referred to as *human dignity pragmatism*.

Where does one look to see to get a sense as to what a particular system, culture, or people mean by the idea of human dignity? Practice could take many forms. One could, for example, examine the political rhetoric in a particular country, culture or system. Quite often repeated declarations by the relevant actors (eg leaders) on human dignity may signal with what content the relevant community has endowed the concept. Or one could look at the laws that regulate in the name of human dignity. For this project I choose the latter approach. The laws that I will examine are the organic laws or the constitutions of countries (and to some extent major international human rights documents which have inspired many national constitutions) to see if there is an overlapping consensus in the way that constitutions and the relevant courts interpreting those constitutions describe and apply the idea of human dignity.

This article is part of a large project that attempts to develop an approach to human dignity that I have started in a recent article. There are three aspects to the project. The first article argued why top-down approaches, whether philosophically or theologically informed, will not help us to develop a usable concept of human dignity in the diverse world in which we live. That article also suggested that perhaps it is better to abandon the search for an abstract definition of human dignity, but rather to start from the bottom up to describe the choices people make in the name of human dignity. As I have already noted, the purpose here is to see if there are patterns that would suggest to us a commonality of usage. The current article starts that process by examining the use of human dignity in various national constitutions and major international human rights documents to see if there are patterns or commonalities on a set of understandings. In subsequent articles, I plan to explore in a more detailed way judicial decisions or the decisions of administrative tribunals of some selected countries and international human rights bodies to see when and how human dignity is invoked and whether there are convergences in how the concept is described and appropriated.

Human dignity pragmatism²⁰ claims that the notion of human dignity is best understood as a political not a metaphysical concept. By “political” I do not mean to refer to partisan and ordinary politics, I simply mean to suggest that we develop a sense of what it means to dignify humans or to subject them to indignities from the relationships we establish and the institutions we construct and that the best way to develop a transnational and transcultural standard of dignity is through a process of looking for and discovering a pattern, an overlapping consensus.

The article is organized in a manner that facilitates a systematic and orderly inquiry into the issue raised in Section I — how to understand the concept of human dignity that seems to occupy a prominent role in several national constitutions and major international human rights documents. Sections II and III give a brief account of how and when the notion of human dignity got codified first in international human rights documents and how that in turn influenced the incorporation of the concept in many national constitutions. Section IV, which forms the heart of the article, examines the various meanings which have been attached to the concept — such as dignity as a vessel, dignity as autonomy, dignity as a source of rights, and dignity as equal treatment — and finds them unsatisfactory. The rest of Section IV then makes and defends two propositions. First, it argues that the meaning of dignity cannot be fully understood through a top-down approach (whether philosophical or theological), because the world is defined by diverse ethical and moral commitments. The article advocates what has been termed as *human dignity pragmatism*, a bottom-up approach, as a better way of capturing how the notion of human dignity is appropriated in real life and across cultures so as to see whether there is in fact a convergence or a consensus on a particular meaning among different cultures and systems. Second, the article tests that proposition by examining all references to dignity in several national constitutions and concludes that the meaning of dignity that is captured by those constitutional provisions and major international human rights documents is one or another aspect of personal integrity. The Section then teases out those various aspects of personal integrity. Sections V and VI explicitly explore what has been implicit throughout the article — the best way to think of human dignity is in pragmatic and practical terms rather than in terms of metaphysics. Pragmatists are committed to finding guiding principles from the experiences of real rather than hypothetical human beings.

20 I borrow the phrase from David Luban. David Luban, “Human Rights Pragmatism and Human Dignity” in Massimo Renzo, Rowan Cruft and Matthew Liao (eds) *Philosophical Foundations of Human Dignity* (OUP, 2013). By pragmatism I simply mean to suggest that we develop our theory, in our case a theory about human dignity, from the failure and success of our past practices. David Luban puts it this way: “Pragmatism represents in the arena of conceptual change what Burke represents in that of political change: a cautionary voice protesting those who seek to overthrow the amassed wisdom of generations on no better basis than the trifling of speculations of philosophers”. David Luban, *Legal Modernism* (Michigan University Press, 1994) 138.

II. Codification of Human Dignity

Although the phrase “human dignity” was invoked and appropriated quite often and in multiple ways — from famous moral theorists²¹ and jurists²² to national texts — it is 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 and national constitutions. Perhaps three events have contributed to the prominence of human dignity in the post-World War II era, both in terms of codification and in everyday conversations. First, the horrendous destruction and crimes that occurred during World War II heightened people’s fear of and sensitivity to scales of indignities that can befall individuals and groups. Indeed, the preamble to the United Nations Charter which was adopted in 1945, not long after the war, announced that two of the objectives 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”.²³ The United Nations needed to “reaffirm faith” in human dignity, for it was badly shaken during the war.²⁴

The second event contributing to the popularity of human dignity is decolonization. Among other things what the colonizer did to the colonized was to subject them to many and constant indignities and humiliations. When many of the colonized in Africa and Asia became independent their constitutions reflected that history by codifying human dignity as a basic constitutional value. For people who were subjected to many humiliations and indignities as a matter of routine colonial control, codifying dignity as a value seems a response to that condition and an attempt to ensure such circumstances do not again prevail.²⁵ And, it is not coincidental that Eastern Europe and post-Soviet states which came out of dictatorships were also likely to codify dignity in their constitutions.²⁶

21 *Eg* Immanuel Kant [1724–1804].

22 Samuel von Pufendorf [1632–1694]. *See* Samuel 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 Belli ac Pacis [On the Law of Peace and War]* (trans. C. Campbell, 1814) Bk. II, chap.19.).

23 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 (adopted 1907) TS No 539, 1 Bevans 631, art.46; Geneva Convention Relative to the Treatment of Prisoners of War (adopted 1929) art.3.

24 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 59 Stat. 1031, TS 993, 3 Bevans 1153, pmb1.

25 But, of course, the history of postcolonial societies tells a different story.

26 In this regard, it is perhaps not accidental that after World War II Germany, Italy and Japan were the first nations to constitutionalize human dignity. *See* Germany Basic Law (1949) art.1; Italy Const. (1947) arts.3, 41; Japan Const. (1946) art.24.

Of course, one cannot deny the effect of the phenomenon of constitutional copying as well. Constitutional designers often engage in a wholesale transplant or importation of the contents of one constitution into another culture and system without much reflection on whether certain terms, concepts, or structures are appropriate for the new condition. Surely, this too must have contributed to the constitutional codification of the concept in the constitutions of several countries.

The third 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 begun to worry many people.²⁷ Such worries have pushed the concept of human dignity to the forefront as a way of talking about humanness both at the beginning and the end of life. Whatever the reasons, it is in the post-World War II era that the notion of human dignity assumed its canonical status both rhetorically and as a codified norm,²⁸ both internationally and domestically.

III. Constitutionalization of Human Dignity

The constitutions of most countries explicitly refer to human dignity or its variations.²⁹ Some refer to it in the preamble. Others list it in an article with other rights. And still others give it its own article. There is, of course, an overlap where one finds the phrase mentioned in all three categories — in the preamble, in an article devoted to it and it alone, and listed with other rights or values.

Some constitutions not only include human dignity but they claim that the protection of dignity is the primary purpose of the State. Thus, the Greek Constitution provides that “[r]espect for and protection of human dignity constitute the primary

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 eg* UNESCO, Universal Declaration on the Human Genome and Human Rights (adopted 11 November 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 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 World War II, 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 constitutions of at least 162 countries (out of the total of 193 UN Member Countries) refer to 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/US/Canada, and the least common reference is in Oceania.

obligation of the State”.³⁰ The Constitution of Peru makes a similar point when it declares that “[t]he protection of the individual and respect for his dignity are the supreme goal of society and the government”.³¹ The most well-known formulation, Article 1 of the German Basic Law, makes a similar declaration: “Human Dignity is inviolable. To respect and protect is the duty of all state authority”.³² Cape Verde Constitution claims that “the concept of the dignity of the human being [is an] absolute value [and] is supreme over the State itself”.³³ At times, courts have made similar statements about the centrality of human dignity in the constitutional scheme even when the relevant constitutions do not specifically mention the phrase at all.³⁴ However, as I noted earlier, it is not often clear what this apparently important phrase is intended to mean or how it can be cashed out or applied in real life (at least in legal terms). What precisely are the things that people are owed by virtue of the fact that they have dignity? And how do we derive or identify them?

IV. What Does Human Dignity Entail?

A. *Human dignity as a vessel or source of rights*

One way to understand human dignity might be to view it simply as a label for the catalogue of rights (human rights) that we believe humans should have in whatever way the list is developed (positive law, natural law, etc.). Under this understanding, the concept of human dignity does not function as a right or 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 at a given moment of time. It does not tell us how those rights are derived or how we should determine what makes them rights that people are owed by virtue of the fact that they are humans. Put another way, understood this way, human dignity is like a label on a vessel that contains all human rights.

30 Greece Const. (2008) art.2(1).

31 Peru Const. (2009) art.1. *See also* Bolivia Const. (2009) art.22: “The dignity and freedom of person is inviolable, it is the primary responsibility of the State to respect and protect them”.

32 German Basic Law (1949) art.1.

33 Cape Verde Const. (1992) pmb1.

34 Even though the United States Constitution does not mention “human dignity”, a former justice of the Supreme Court, the late Justice William Brennan, described the constitution “as a sparkling vision of the supremacy of the human dignity of every individual”. William Brennan, “The Constitution of the United States: Contemporary Ratification” (1985–6) 27 *Texas Law Review* 433, 439. Recently, the distinguished American constitutional scholar, Bruce Ackerman of Yale Law School, penned an essay for the *New York Times*, making similar claims. Bruce Ackerman, “Dignity is a Constitutional Principle” *New York Times* (New York, 30 March 2014) 5. The Supreme Court has increasingly invoked human dignity to interpret the Bill of Rights. *See* Neomi Rao, “Three Concepts of Dignity in Constitutional Law” (2011) 86 *Notre Dame Law Review* 183; Judith Resnik and Julie Chi-hye Suk, “Adding Insult to Injury: Questioning the Role of Human Dignity in Conceptions of Sovereignty” (2002–3) 55 *Stanford Law Review* 1921. Constitutions of several American states also contain the human dignity. *See, eg* Montana Const. art.2(4); Illinois Const. art.1(20).

I have argued in a recent article that the vessel theory of human dignity is unpersuasive.³⁵ At any rate, this view is explicitly contradicted by the position of many national constitutions and international human rights conventions. Those national and international documents assert that human dignity should be respected and then go on to refer to a list of human rights in other parts of the constitution or convention as meriting constitutional or conventional protection. In fact, in some national constitutions human dignity and human rights are listed in the same article suggesting that they are meant to capture different ideals. For example, the Afghan Constitution declares that “The state is obliged to ... protect human dignity [and] ... human rights”.³⁶ The South African Constitution announces that the Republic is founded on the following values: “[h]uman dignity, the achievement of equality, and the advancement of human rights and freedoms”.³⁷ And the Swedish Constitution provides that “[p]ublic power shall be exercised with respect for the equal worth of all and the liberty and dignity of the individual”.³⁸ So, at least for some drafters of constitutions and international conventions, human dignity appears to be a right (or a value) that is distinguishable from human rights. It, of course, is not clear what the distinguishing factors or features are, but for the moment it is sufficient to note that human dignity and human rights are viewed to be substantively different.

However, some national constitutions seem to indicate that human dignity is not just another human right but the source of all human rights. The Somali Constitution, for example, provides that “[h]uman dignity is given by God to every human being, and this is the basis for all human rights”.³⁹ The Constitution of Poland declares that “the inherent and inalienable dignity of the person shall constitute a source of freedom and rights of persons and citizens”.⁴⁰ Judge O’Regan of the South African Constitutional Court appears to share this view.⁴¹ And so it

35 Addis “The Role of Human Dignity in a World of Plural Values and Ethical Commitments” (n.19) 415–419. First, it is not clear why one would want to use a phrase that does not have any substantive content, one that does not add to our ethical and moral thinking. Why not simply list the rights rather than seeking a collective label? Second, as a historical matter, the notion of human dignity in fact emerged long before the notion of human rights became part of our vocabulary suggesting that human dignity, in fact, was thought of as adding to our ethical and moral thinking rather than being a place holder for human rights.

36 Afghanistan Const. (2004) art.6. See similar provision in South Sudan Const. (2011) pmb1.

37 South Africa Const. (2012) art.1.

38 South Africa Const. (2012) art.2.

39 Somalia Const. (2012) art.10(1).

40 Poland Const. (1997) art.30. See also Kosovo Const. (2008) art.23 (“Human dignity is inviolable and is the basis of all human rights and fundamental freedoms”).

41 In a well-known decision of the South African Constitutional Court, *S v Makwanyane*, Judge O’Regan expressed her view this way: “Recognizing a right to dignity is an acknowledgment of the intrinsic worth of human beings... This right therefore is the foundation of many of the other rights that are specifically entrenched in [the Bill of Rights]”. *S v Makwanyane* 1995 (3) SA 391 (CC), [328]. Note here, the judge did not say “all” but “many” of the rights. Which ones, the judge does not tell us. Nor does she indicate how we derive them.

seems with the Spanish Constitution.⁴² The view that human dignity is the source of all rights has been embraced by international human rights covenants and by major international organizations such as the General Assembly of the United Nations.⁴³

A version of the argument for the generative power of human dignity (human dignity as a source of human rights) goes this way: not only does human dignity generate rights, but it also unifies them, shows them to be indivisible, as the Universal Declaration of Human Rights suggests to be the case.⁴⁴ 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 organizing and interpretive concept. At least, that seems to be what the Court had in mind when it is said to have treated human dignity as a “master value”.⁴⁵ Under this view, the notion of human dignity plays both a generative and integrative role. In this sense, “the master value of human dignity”⁴⁶ appears to be analogous to the master rule in HLA Hart’s theory of law — the “rule of recognition”.⁴⁷ What the rule of recognition is to primary rules, human dignity is to human rights. But just like vessel theory, the source and generative theory does not tell us how the “master rule” unifies rights nor does it tell us what the precise content of the rule is.

B. *Human dignity as equal treatment*

Perhaps another way to conceive of human dignity is to view it as suggesting nothing more than the equal treatment of individuals. Article 40.1 of the Irish Constitution states that “[a]ll citizens shall, as human persons, be held equal before the law”.⁴⁸ The Irish Supreme Court has read this as “a guarantee of equality as human person and (as the Irish text of the Constitution makes quite clear) is a guarantee related to *their dignity* as human beings and a guarantee against any

42 See art.10(1): “The dignity of the person, the inviolable rights which are inherent... are the foundation of political order and social peace...” The same sentiment is also expressed in Germany. Human dignity is the “root of all basic rights”. BVerfGE 93, 26.

43 In 1986, the Assembly declared in its guidelines for new human rights instruments that they “[b]e of fundamental character and derive from the inherent dignity and worth of the human person”. GA Res. 41/120, 4 Dec 1986, quoted in Christopher McCrudden, “Human Dignity and Judicial Interpretation of Human Rights” (2008) 19 *European Journal of International Law* 655, 669; See also the Helsinki Final Act of 1975. The Final Act provides that human rights “derive from the inherent dignity of the human person”. Conference on Security and Cooperation in Europe: Final Act, Helsinki 1975, Section VII, para.2.

44 Universal Declaration of Human Rights G.A Res., 217, UN GAOR, ((III), 1948) art.22. Article 22 says 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”.

45 According to Donald Kommers, “the Constitutional Court envisions the Basic Law as a unified structure of objective principles and rights crowned by the master value of human dignity”. July 1998, on the occasion of his receiving and honorary doctor of law degree from Ruprecht-Karl’s University, Heidelberg, Germany.

46 *Ibid.*

47 HLA Hart, *The Concept of Law* (with an introduction by Leslie Green, OUP, 3d ed. 2012).

48 Ireland Const. (2012) art.40.1. (emphasis added).

inequalities grounded upon an assumption, or indeed, a belief, that some individual or individuals or classes of individuals, by reason of their human attributes or their ethnic or racial, social or religious background, are to be treated as the inferior or superior of other individuals in the community”.⁴⁹ Courts in the United Kingdom, where there is no written constitution, have referred to human dignity as if it were synonymous with equality. Thus in *Ghaidan v Godin-Mendoza*, Baroness Hale of Richmond observed: “Democracy is founded on the principle that each individual has equal value. Treating some as automatically having less value than others not only causes pain and distress to that person but also violates his or her dignity as a human being”.⁵⁰ Although the French Constitution does not have specific reference to human dignity, a similar sentiment has been expressed by the courts in the process of constitutional adjudication.⁵¹

The idea of dignity as equality is simultaneously attractive and unhelpful. It is attractive, because it seems to give the phrase a concrete meaning. To treat people with dignity is to treat them in a way where there is no rank among them. If this is what human dignity means, then there is no controversy. There is a general consensus among people across cultures and systems (at least in principle) that equality is a fundamental principle.⁵² Ronald Dworkin, who invested his considerable intellectual energy to understanding the nature of equality, once observed that no government “is legitimate that does not show equal concern for the fate of all those citizens over whom it claims dominion and from whom it

49 *Quinn's Supermarket Ltd v Attorney-General* (1972) IR 1, 13–14. In *Richmond v Minister for the Environment* (2001) 4 IR 61, 80, Herbert, J makes a similar observation: “In my judgment a law which has the effect, even if totally unintended, of discriminating between human persons on the basis of money is an attack upon the dignity of those persons as human beings who do not have money ... In my judgment this is exactly the type of discrimination for which the framers of the first sentence of Article 40.1 of the Constitution were providing”.

50 [2004] 2 AC 557, 605.

51 Conor O'Mahony, “There is no Such Thing as A Right Human Dignity” (2012) 10 International Journal of Constitutional Law 551, 555: “A similar importance has been attached to the term [human dignity] in constitutional adjudication in France, notwithstanding the absence of an express reference to the term in the French Constitution”. See also Costa Rica Const. (2011) art.33: “All human persons are equal before the law and no discrimination whatever contrary to human dignity may be practiced”. Cuba Const. (2002) art.43: “Discrimination based on race, color of the skin, sex, national origin, religious creeds, or any other type of offending human dignity, is prohibited and punishable by law”.

52 The norm is enshrined in both domestic and international law. Almost all domestic constitutions give the norm a central place and international human rights conventions declare equality a cornerstone concept. Some have declared the norm to be a rule of customary international law as well. See South West Africa Cases (*Ethiopia v South Africa* and *Liberia v South Africa*), ICJ, Second Phase, 18 July 1966, at 291. In a dissent, Judge Tanaka concluded that “the norm of non-discrimination ... has become a rule of customary international law”. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276* (1970), ICJ, Advisory Opinion, 21 June 1971, at 64. In a separate opinion Judge Ammoun declared: “One right which must certainly be considered a pre-existing binding customary norm, which the Universal Declaration on Human Rights codified is the right to equality”. See also UNESCO Declaration on Race and Racial Prejudice, E/CN.4/Sub.2/1982/2/Add.1, annex V, 1982) art.9: “[T]he principle of equality ... and rights of all beings and all people ... is generally accepted and recognized principle of international law”.

claims allegiance”.⁵³ Equality as a norm is, therefore, important in two senses. First, and most importantly, it demands that individuals be treated as having equal worth. Second, a government that does not comply with the demands of this norm is one that does not deserve to be treated as legitimate. So, if dignity is another way of describing equal worth, then there is no controversy about its global acceptance.

On reflection, however, it seems that ultimately the idea of dignity as equality seems to be rather unhelpful. This is so for a number of reasons. First, if dignity is no different from equality, then the use of human dignity is rather superfluous and even confusing, for it requires us to ask why the phrase was found to be necessary as a description of equality. It gives us another phrase to worry about rather than clarifying the notion of equality. True, equality is not a self-defining concept, but one can hardly make it clearer by invoking another, more elusive, concept. Indeed, that is precisely what the Canadian Supreme Court observed in *R v Kapp* when it abandoned the idea of human dignity as a means of distinguishing invidious from non-invidious discrimination. The Court observed that “critics have pointed out [that the idea of] human dignity is an abstract and subjective notion ... that cannot only become confusing and difficult to apply; it also has proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement that it was intended to be”.⁵⁴

Second, the notion of dignity as equality seems to contemplate the rather counterintuitive idea that a government that debases and humiliates its subjects equally will be acting consistently with the demands of dignity.

Third, in fact many constitutions indicate that they consider human dignity to be different from equality. They list the two side by side as freestanding and independent concepts. The South African Constitution is a good example. Article 1 provides that the Republic is founded on the following values “Human dignity, the achievement of equality and the advancement of human rights and freedoms”.⁵⁵ Apparently, for the drafters of the South African Constitution, the pursuit of dignity is distinct from the pursuit of equality or human rights. Article 2 of the Swedish Constitution requires that public power be “exercised with respect for the equal worth of all and the liberty and dignity of the individual”, indicating that equality and dignity are independent values or rights.⁵⁶ Article 10 of the Kenyan Constitution lists “national values and principles of governance” as including

53 Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press, 2000) 1.

54 *R v Kapp* [2008] 2 SCR 483, [22] (emphasis in original) (citation omitted).

55 South Africa Cons. (2012) art.1(a), art.36(1).

56 Sweden Const. (2012) art.2. *See also* Angola Const. (2010) pmb.; Belize Const. (2001), pmb.; Bolivia Const. (2009) pmb.; Bosnia-Herzegovina Const. (2009), pmb.; Costa Rica Const. (2011) art.33; Dominica Const. (1984), pmb.; Dominican Republic Const. (2010) pmb.; Japan Const.(1946) pmb.; Kenya Const. (2010) art.10(2)(b); Mauritania Const. (1992) pmb.; Namibia Const. (2010), pmb.; Republic of Korea Const. (1987) art. 36(1); Seychelles Const. (2011), pmb.; South Sudan Const. (2011) pmb.; Trinidad and Tobago Const. (2007), pmb.; Zimbabwe Const. (2013), pmb.

“human dignity, equity, social justice, inclusiveness, equality, human rights, etc”.⁵⁷ The German Basic Law provides for human dignity in Article 1 and the norm of equality in Article 3. The United States Department of Justice in a statement regarding prison rape makes a similar distinction: “[t]he individual rights enshrined in our Constitution express our country’s deepest commitment to human dignity and equality”.⁵⁸ The Israeli Supreme Court reading the 1992 Basic Law⁵⁹ observed that “discrimination, based on sex, race, or similar distinctions is the humiliation of the victim” and “the degradation of a human being violates his dignity”. But it also noted that “not every violation of equality amounts to degradation, and therefore not every violation of equality violates the right to dignity”. A violation of equality will be a violation of dignity “when the violation causes degradation”.⁶⁰

Human dignity as equality seems, therefore, to be at odds with the position of the constitutions of many countries. For the human dignity pragmatist, a reading that is so at odds with the practices of states and communities cannot be taken as a serious point of departure.

Perhaps there is a way to make sense of the idea of human dignity as equality if one were to adopt Jürgen Habermas’ view of human dignity, human dignity as fair political process.⁶¹ 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 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*”.⁶²

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”.⁶³ 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,

57 Kenya Const. (2010) art.10.

58 Regulatory Impact Assessment for PREA Final Rule, US Dep’t Just. 66 (May 17, 2012).

59 Basic Law: Human Dignity and Liberty, 1992, Israel Book of Laws 1992, at 150. An English version is found online: http://www.knesset.gov.il/laws/special/eng/basic3_eng.html.

60 *Miller v Minister of Defence* H CJ 94/4541 PD 49(4) 94 (1995) IsLR 178, 222–225. The case involved a female Israeli citizen who was denied by the Israeli Defense Forces the opportunity to take the entry test for the army fighter pilot course because at that time the position was formally closed to women.

61 Jürgen Habermas, “The Concept of Human Dignity and the Realistic Utopia of Human Rights” (2010) 41 *Metaphilosophy* 464.

62 *Ibid.*, 469 (emphasis in original).

63 *Ibid.*, 469.

human dignity is associated with the status that citizens assume in the *self-created* political order”.⁶⁴

Habermas’ view that human dignity is a state that people create for themselves in their works and conversations (ie political rather than metaphysical) is congenial to the human dignity pragmatist. There is also some indication from a number of national constitutions that that might be the version of human dignity that they contemplate, for dignity is used in terms of the rights and roles of citizens. Thus, the Burundi Constitution expresses human dignity in terms of what citizens grant one another as a consequence of the social contract that they have entered into.⁶⁵ And, so seems to be the position of the Bangladeshi Constitution.⁶⁶

But in my view, the Habermasian move is ultimately not successful. First, Habermas’ 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. Thus, as a descriptive matter, his account of human dignity does not capture as to how human dignity is understood by many cultures and systems. Second, to the extent that human dignity is tied to a particular political process, as Habermas’ is, that will hamper 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 recognized, the role human dignity played in forging consensus at the founding of the United Nations is precisely because it was not viewed as being tied to a particular system of governance.⁶⁷ Under Habermas’s view of human dignity, it might be difficult to reach an “overlapping consensus”⁶⁸ internationally or interculturally.

64 *Ibid.*, 473 (emphasis in original). Kant makes a similar point. In *The Metaphysics of Morals* he notes, “Certainly no human being can be without any dignity, since he at least has the dignity of a citizen”. Immanuel Kant, *The Metaphysics of Morals*, in *Kant, Practical Philosophy* 471 (6:329). But it is clear that Kant thinks that the dignity of citizenship does not comprehend the entire spectrum of human dignity, for he says “at least”.

65 Burundi Const. (2005) art.13.

66 Bangladesh Const. (2011) art.11.

67 See Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House, 2001).

68 *Ibid.* Glendon tells a story about Eleanor Roosevelt who chaired the UN 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 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 reported 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 and were avoided. People acted on overlapping consensus. See also Mohammad Hashim Kamal, *The Dignity of Man: An Islamic Perspective* (Islamic Text Society, 1992): “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

C. Human dignity as personal integrity: beginnings of an overlapping consensus

1. Human Dignity as Physical Integrity

Most national constitutions refer to human dignity in the context of referring to the physical integrity of the individual (the prohibition of degradation and humiliation). Thus, Article 34 of the Algerian Constitution refers to the inviolability of human dignity in the context of prohibiting any “form of physical or moral violence or infringement”.⁶⁹ The Armenian Constitution prohibits the subjecting of people “to torture, inhuman and degrading treatment or punishment” in the context of protecting human dignity.⁷⁰ Many other constitutions have similar provisions. The Finish Constitution, for example, provides that no one shall “be sentenced to death, torture, or otherwise treated in a manner violating human dignity”.⁷¹ The El Salvador Constitution provides for the right of habeas corpus “when any authority attacks the dignity or physical, mental or moral integrity of the detained person”.⁷² Physical integrity appears to be an essential aspect of how many national constitutions conceive of human dignity.⁷³ The violation of the physical integrity of the person is viewed as a degradation⁷⁴ and humiliation that leads to the “diminution in the victim’s life”.⁷⁵ This was the view of the United States Department of Justice about the “loss of dignity” that victims of sexual abuse in prison suffer.⁷⁶ Indeed, the Eighth Amendment of the United States Constitution prohibits the use of “cruel and

About Human Rights: The Most We Can Hope For?” (2004) 12 *Journal of Political Philosophy* 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 participated in discussion leading to the Universal Declaration — formulated the idea as follows: “Yes, we agree about the rights, but on condition that no one asks us why”.

69 Algeria Const. (2008) art.34.

70 Armenia Const. (2005) art.17.

71 Finland Const. (2011) §7.

72 El Salvador Const. (2003) art.11. *See also* Bolivia Const. (2009) art.73; Croatia Const. (2001) art.25; Democratic Republic of Congo Const. (2011) art.18; Ethiopia Const. (1994) art.2(1); Equatorial Guinea Const. (1995) art.13(2); Georgia Const. (2004) art.1(1); Greece Const. (2008) art.7(2); Haiti Const. (2012) art.44(1); Honduras Const. (2012) art.68; Iran Const. (1989) art.39; Jordan Const. (2011) art.8(2); Kazakhstan Const. (1998) art.17(2); Latvia Const. (2007) art.23; Lithuania Const. (2003) art.21; Macedonia Const. (2011) art.11; Monaco Const. art.20; Morocco Const. (2011) art.22; Malawi Const. (1999) art.42(1)(b); Nicaragua Const. (2007) art.33(2); Nigeria Const. (1999) art.34(1); Papua New Guinea Const. (1991) art.36(1); Seychelles Const. (2011) art.16; South Sudan Const. (2011) arts.11& 156; Sudan Const. (2005) art.149(1)(B); Tanzania Const. (1995) art.13(6)(d); Togo Const. (2007) art.16; Turkey Const. (2002) art.17; Uganda Const. (2005) art.24; Ukraine Const. (2004) art.28; Yemen Const. (2001) art.48(B).

73 Article 28 of the Sudanese Constitution expresses the protection of the person as “the integrity of his person”.

74 *See* Kenya Const. art.28 which states that a person is entitled “to be treated with dignity and respect and to be addressed and referred in a manner that is not demeaning”.

75 Regulatory Impact Assessment for PREA Final Rule, US Dep’t Just. 44 (May 17, 2012).

76 *Ibid.*

unusual punishment⁷⁷ which has been read by the United States Supreme Court as being inconsistent with the dignity of the person.⁷⁸

Perhaps the German Constitution Court's decision in the Aviation Security Act⁷⁹ case could also be read as an illustration of dignity-as-personal integrity. Although scholars including myself⁸⁰ have generally and correctly read that decision as standing for the Kantian view of dignity-as-autonomy, the decision also seems to fit within the notion that the physical integrity of innocent people (their very physical existence)⁸¹ cannot be violated by the government even for the purpose of saving the physical integrity of other, more numerous, individuals. 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".⁸² The German Constitution then makes the article in which this declaration is contained an unamendable part of the Constitution.⁸³ In the wake of the terrorist attack on the United States on September 11, 2001, the German Bundestag [Parliament] enacted a statute to deal with similar circumstances in Germany if they were to arise.⁸⁴ The statute authorized the armed forces to shoot down passenger airplanes that the authorities 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.⁸⁵ The German Constitutional Court declared that such shooting and 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. The Court refused to allow the government to sacrifice innocent individuals as an instrument of saving other, and perhaps more numerous, innocent individuals.⁸⁶

77 US Const. Amend. VIII (1791).

78 See *Roper v Simmons* 543 US 551, 560 (2005): "By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons". *Trop v Dulles* 356 US 86, 100 (1958) (plurality opinion) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man"); *Hall v Florida*, 572 US __ (2014) (Slip Opinion), [5].

79 German Aviation Security Act (LuftSiG), §14.3.

80 Addis "The Role of Human Dignity in a World of Plural Values and Ethical Commitments" (n.19) 417.

81 After all, even Kant had made specific observation that dignity prohibits certain punishments, "disgraceful punishments that dishonor humanity itself". See Immanuel Kant, *The Metaphysics of Morals*, in Kant, *Practical Philosophy* (6:463) 580.

82 German Basic Law (1948) art.1.

83 *Ibid.*, art.79(3).

84 *Luftsicherheitsgesetz* [Aviation of Security Act], 12 January 2005, BGBI.1.

85 *Ibid.*, §14(3). The provision empowered the Minister of Defense to order that a passenger plane be shot down if it could reasonably be assumed that the plane would be used against the life of others and if shooting it down would be the only means of preventing that danger.

86 BverfG, 1 BvR 357/05 vom 15.02.2006, Absatz-Nr. 124. English translation available at <http://www.bundesverfassungsgericht.de/entscheidungen/rs20060215-1bvr035705en.html>. Apparently, the Court would have come to a different conclusion if there were no innocent people on board. If they were all terrorists, the state could authorize the shoot down and the terrorists could not be said to have been

It is impermissible, said the Court, to treat people “as mere objects” to be used “to save others”, for that will deny them “the value that is due to a human being for his or her own sake”.⁸⁷

Before the concept of human dignity was enacted by the Knesset in 1992 as Basic Law: Human Dignity and Liberty,⁸⁸ the Israeli Supreme Court had developed the right to human dignity in its decisions. In *Katalan v Prison Services*,⁸⁹ Judge Ahron Barak noted, “[t]he system of life in prisons does not require the negation of the prisoner’s right to the integrity of his body and protection against the violation of human dignity. The prisoner is deprived of liberty but his humanity has not been taken away from him”.⁹⁰

International human rights conventions reinforce the constitutional consensus by prohibiting the inflicting of “torture or cruel, inhuman or degrading treatment”.⁹¹ Indeed, many national constitutions simply replicate the provisions in those international conventions. Article 7 of the International Covenant on Civil and Political Rights (ICCPR) provides that no one “shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”.⁹² The American Convention on Human Rights declares that every person “has the right to have his physical, mental, and moral integrity respected” and then it goes on to say that subjecting people “to torture or to cruel, inhuman, or degrading punishment or treatment” is inconsistent with that integrity.⁹³ The European Convention on Human Rights has a similar provision.⁹⁴ The African Charter on Human and Peoples’ Rights directly links human dignity and degrading treatments. After recognizing the right to respect “the dignity inherent in a human being” it immediately (in the same article) prohibited “all forms of degradation of man particularly slavery, slave trade, torture, cruel, inhuman and degrading treatment”.⁹⁵ There seems to be no doubt in the minds of the drafters of the African Charter that physical integrity is a

denied their dignity. This is so because the terrorists were engaged in an intentional activity that would imminently and physically destroy the very humanity and dignity that they would claim for themselves.

87 *Ibid.*

88 *Ibid.*

89 H CJ 355/79 [1980] Isr SC 34 (3) 294.

90 *Ibid.* The issue was whether an enema would be carried out on the bodies of prisoners when there is well-founded suspicion they had smuggled drugs within their bodies but without their consent. The Court opined that enforcing “enema on a prisoner against his will without medical reason injures the integrity of the body ...and damages his dignity as a person”.

91 See International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art.7. The UDHR, generally regarded as reflective of customary international law, has a similar provision. See art.5.

92 See ICCPR art.7.

93 American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (American Convention) art.5.

94 European Convention for the Protection of Human Rights (adopted 4 November 1950, entered into force 3 September 1953) UNTS 221 (European Convention) art.3.

95 African Charter on Human and Peoples’ Rights (adopted 26 June 1981, entered into force 21 October 1986) OAU Doc. CAB/LEG/67/3 Rev. 5 (Africa Charter) art.5.

matter of human dignity. Almost all of the rights I have mentioned have been made non-derogable by these international and regional human rights documents even “in time of public emergency which threatens the life of the nation”.⁹⁶

The apparent consensus on the idea of human dignity as physical integrity is also manifested in customary international law. Customary international law allows states to assert jurisdiction to prescribe and/or to adjudicate in relation to certain international crimes without having to show that there is a link between the state asserting the jurisdiction and the crime. That is, in relation to a handful of international crimes there is what international lawyers refer to as universal jurisdiction. 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. A state can prosecute and punish anyone who has committed certain international crimes regardless of the lack of any connection between the crime and the prosecuting state.⁹⁷ 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 humankind. Those crimes include genocide, slavery or slave trade, crimes against humanity,⁹⁸ war crimes, torture, etc. 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.⁹⁹

Why are these crimes deemed to be injuries to all of us? 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. Genocide and slavery make humans “superfluous” qua humans, to use an Arendtian description.¹⁰⁰ While genocide is physical extermination of a group as a group, slavery (another crime subject to universal jurisdiction) denies the slave’s very humanity by imagining him not to be fully human. Slavery is social

⁹⁶ See ICCPR art.4; American Convention art.27; European Convention art.15.

⁹⁷ Adeno Addis, “Imagining the International Community: The Constitutive Dimension of Universal Jurisdiction” (2009) 31 Human Rights Quarterly 129, 135.

⁹⁸ Crimes against humanity includes murder, enslavement, deportation, rape and other forms of grave sexual violence, enforced disappearance and apartheid if they are committed against civilian population in a systematic attack directed at civilians.

⁹⁹ In fact, those crimes also form the jurisdictions of most of the ad hoc tribunals such as the Yugoslav and Rwanda tribunals.

¹⁰⁰ Hanna Arendt, *Vies Politiques* (Paris: Tel/Gallimard, 1986) 1; Hanna Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (revised and enlarged ed. 1965) 268–269. 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, 268–269.

death.¹⁰¹ Torture is similarly an attack on the integrity of the person. As I have argued elsewhere, “[t]orture robs the target of torture an important ingredient of being a human subject, the capacity for autonomy and will”.¹⁰² The person is turned into a physical object which is subject to the complete control of the torturer, fully manipulated and commandeered as if he was no different from an object. These 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 authorize their derogation.¹⁰³ These rights are about the integrity of the person — in the physical, mental, social and moral sense — as national constitutions suggest. 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.

Interestingly, a number of international human rights conventions, such as the ICCPR and the American Convention, also recognize the importance of the integrity of juridical personality. The ICCPR, for example, recognizes the “right to recognition everywhere as a person before the law”.¹⁰⁴ And no derogation is allowed from this provision even in circumstances when the life of the nation is threatened.¹⁰⁵ Although not many national constitutions specifically provide that juridical personhood is a matter of human dignity, it seems clear that it is assumed in many of the provisions, for in the world we live in not to be recognized as a legal person is to lose much of everything else (including the protection of one’s physical integrity).

To summarize, there seems to be an overlapping consensus that personal integrity, whether in the legal (juridical), physical, social or emotional sense 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. Many constitutions declare that human dignity is inviolable, with the implication that no circumstance should justify derogation from it.¹⁰⁶ Reasoning

101 See Addis “Imagining the International Community: The Constitutive Dimension of Universal Jurisdiction” (n.97) 147.

102 Adeno Addis, “Torture as a Counterterrorism Strategy” (2010) XLIV *Revue de Droit Compare/Comparative law* 129, 143.

103 Some constitutions also have a non-derogable clause even in times of emergency.

104 ICCPR art.16. See also American Convention art.3 (“Every person has the right to recognition as a person before the law”).

105 ICCPR art.4; American Convention art.27.

106 See the following constitutions:

- Afghan Const. art.24(2) “Liberty and dignity of human beings are inviolable”.
- Bolivia Const. art.22 “The dignity and freedom of person is inviolable”.
- German Basic Law art.1 “Human dignity is inviolable”.
- Kyrgyzstan Const. art.15(1) “Dignity of an individual in the Kyrgyz Republic shall be absolute and inviolable”.
- Lithuania Const. art.21 “The person of the human being shall be inviolable”.
- Malawi Const. art.19(1) “The dignity of all persons shall be inviolable”.

from different cultures and traditions, apparently various peoples have come to the conclusion that securing the integrity of the person is the ultimate vindication of his or her dignity.

2. Human Dignity as Personal Integrity: The Question of Medical Experimentation

A number of national constitutions prohibit the use of people for medical experimentation without their consent. Thus, in the same article which prohibits certain punishments as being inconsistent with human dignity, the Azerbaijan Constitution provides thus: “Nobody can be experimented upon—medically, scientifically or in any other way—without his or her consent”.¹⁰⁷ The Montenegro Constitution recognizes the “right of a person and dignity of a human being with regard to the application of biology and medicine”.¹⁰⁸ International Conventions reaffirm that protection. Thus, in the same article that prohibits “torture, cruel, inhuman or degrading treatment” the ICCPR, one of the most widely ratified conventions, provides that “[i]n particular, no one shall be subjected without his free consent to medical or scientific experimentation”.¹⁰⁹ The phrase “in particular” suggests that the drafters of the convention saw unconsented experimentation as a version of “degrading treatment”.

3. Human Dignity and Minimum Level of Sustenance

Dignity as personal integrity is not simply one of prohibiting the state or private entities from engaging in forms of punishment that are viewed to seriously undermine the physical, social, and emotional person. Personal integrity could also be undermined if the individual does not have the basic necessities of life. Several constitutions affirm the right to such provisions. Thus, the Switzerland Constitution recognizes that persons “in distress and incapable of looking after themselves have the right to be helped and assisted, and to receive the means that are indispensable for leading in human dignity”.¹¹⁰ The Constitution of

- Pakistan Const. art.14 “The dignity of man...shall be inviolable”.
- Russia Const. art.21.1 “The dignity of the person is protected by the State, nothing may be used as a basis for its diminution”.
- Rwanda Const. art.12 “The human being shall be sacred”.
- Serbia Const. art.23(1) “Human dignity is inviolable and everyone is obliged to respect and protect it”.
- Spain Const. art.10 “The dignity of the person [is inviolable and] the foundation of political and legal order”.

¹⁰⁷ Azerbaijan Const. (2009) art.46(III).

¹⁰⁸ Montenegro Const. (2007) art.27. Although it does not explicitly refer to experimentation, the Swiss Constitution concerns itself with human dignity in relation to “human reproductive and genetic material” as well as “the field of transplantation of organs, tissues, and cells”. Switzerland Const. (2002) arts.119(2) and 119A(1).

¹⁰⁹ ICCPR art.7. Emphasis added.

¹¹⁰ Switzerland Const. (2002) art.12. *See also* Dominican Republic Const. art.62(9).

Finland has a similar provision recognizing the “right to receive indispensable subsistence and care” for those “who cannot obtain the means necessary for a life of dignity”.¹¹¹ The German Constitutional Court in a recent decision relied on the human dignity provision of the German Basic Law to deem the amount of social benefits that asylum seekers received unconstitutional. At the time when this case was before the Court, Asylum seekers only received 60 percent of what was considered to be the margin of subsistence in Germany. The Court concluded that the provisions for asylum seekers violated the basic rights of human level of existence. “Human dignity”, the Court noted, “cannot be compromised due to migration politics”.¹¹² The Court then affirmed that the human dignity provision of the Basic Law “establishes the right to the guarantee of a dignified minimum existence as a human right”.¹¹³

Constitutional courts of other countries have also invoked the general notion of human dignity found in their constitutions to develop a jurisprudence that required the state to provide for a minimum livelihood. Thus, the Hungarian Constitutional Court read the right to social security contained in the Hungarian Constitution as entailing “the obligation of the State to secure a minimum livelihood through all of the welfare benefits necessary for the realisation for the right to human dignity”.¹¹⁴ In another case, the Hungarian Constitutional Court ruled that such things as emergency shelter are minimum requirements of the state’s obligation to discharge its duty to dignity.¹¹⁵ A similar obligation has been recognized by the Indian Supreme Court on account of human dignity, even though the Constitution does not specifically tie minimum sustenance to human dignity. Thus, in *Mullin v Administrator, Union Territory of Delhi*¹¹⁶ the Supreme Court read the preambular provisions of liberty and fraternity as including “the right to live with human dignity and all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing, and shelter”.¹¹⁷ Without specifically tying it to human dignity, a number of other national constitutions refer to rights such as rights to housing, healthcare, and a minimum standard of living¹¹⁸ which

111 Finland Const. §19, *see also* Burundi Const. arts.27, 52; Guatemala Const. (1993) art.78; Cape Verde Const. art.69; Bolivia Const. art.19(1).

112 http://www.proasyl.de/de/presse/detail/news/german_constitutional_court_deems_material_reception_conditions_for_asylum_seekers_in_germany_uncons/, *See also* Federal Constitutional Court — Press Office, Press release no 56/2012 of July 2012.

113 *Ibid.*, 3. The Court further observed that “The Basic Law does not permit the necessities of a dignified life in Germany to be assessed at a lower level by referring to the existence level in the country of origin of the person in need or to the existence level in other countries”.

114 Alkotmánybíróság (AB) [Constitutional Court] 32/1998 (VI. 25.) AB (Hungary) (social welfare case).

115 *See* Rao “Three Concepts of Dignity in Constitutional Law” (n.34) 238.

116 [1981] 2 SCR 516. *See also* *Banduha Mukti Morcha v Union of India* AIR 1984 SC 802, 812: There are “minimum requirements which must exist in order to enable a person to live with human dignity and no State—neither the central government nor any state government—has the right to take any action which will deprive a person of the enjoyment of these basic needs”.

117 *Ibid.*, 518.

118 *See, for example*, S. Africa Const. §26, cls.1–2.

the relevant courts have read as required for a life of dignity.¹¹⁹ And still others tie work and living conditions to human dignity. Thus Article 82 of the Nicaraguan Constitution provides for work and living conditions that “ensure a well-being compatible with human dignity”.¹²⁰

International human rights documents make the same point. Thus, the Universal Declaration of Human Rights, generally regarded as having achieved the status of customary international law, recognizes that there is a minimum level of existence that is “worthy of human dignity”.¹²¹ But, of course, the question of what constitutes a “minimum level of sustenance” is not easily answered. It is going to depend on the level of resources a country has, the stage of development of the community and the like.¹²² Some Constitutions seem to suggest that the elected or political branches of government be given some deference (by the courts) to determine the appropriate level necessary for minimum sustenance.¹²³ I believe such deference is highly appropriate for the reasons well explored by the South African Constitutional Court.¹²⁴ Although the issue of what level is appropriate is an important one, what matters for our purpose here is that there are several national constitutions and international human rights documents which view a minimum level of sustenance as a matter of human dignity.

4. The *Human* in “Human Dignity”

Our discussion thus far has been on the *dignity* part of human dignity. We have simply assumed that we know what the *human* part entails. For many, there is no question

119 See *South Africa v Grootboom* 2001 (1) SA 46 (CC), a case involving a group of squatters who were evicted in a way that the Court saw as reminiscent of the Apartheid era. The Constitutional Court opined that there is a strong connection between the Constitution’s protection of dignity and the need for adequate living conditions. It said: “There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter”. (para.23). It went on to say: “A society must seek to ensure that the basic necessities of life are provided to all if it is to a society based on human dignity, freedom and equality”. (para.44). Political theorists concur with this reading of dignity. See James Griffin, *On Human Rights* (OUP, 2008)180–181.

120 Nicaragua Const. (2005) art.82(1); see also Portugal Const. (2005) art.59(1)(b); Republic of Korea Const. (1987) art.32(3). There are a number of other national constitutions that tie work conditions to human dignity.

121 UDHR art.23(3).

122 One of the International Bill of Rights suggests that route. See International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) If one reads articles 2(1) and 11(1) together that will be the sense one would get.

123 See *eg* Colombia Const. (2005) art.51: “All Colombian citizens are entitled to live in dignity. The state will determine the conditions necessary to give effect to this right and will promote plans for public housing, appropriate systems of long-term financing and community plans for the execution of these housing programs”.

124 The South Africa Constitutional Court appears to recognize that the political branches of government have comparatively better institutional competence. See *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721, [37] (CC) (“[T]he courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum core standards” ought to be.).

as to who is a human being. There is now¹²⁵ no deep 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 human. Although the Kantian view of dignity — dignity as autonomy — might be read to exclude those without the capacity for moral reflection and self-determination for purposes of recognizing that they have dignity,¹²⁶ it appears that almost all national constitutions and major international human rights documents (and perhaps most people’s intuitions) agree that the lack of relevant capacities does not (should not) deprive individuals of the right to dignity. There is no indication in national constitutions and international human rights documents that the free choice of moral agents is the basis on which the “human” is understood in human dignity. At any rate, it seems to me rather difficult to even attempt to develop clear criteria by which to decide as to who can exercise rationality and who cannot. And it is clearly the case that in the areas where there is an overlapping consensus in national constitutions as to what constitutes dignity (personal integrity) there is no justifiable reason to invoke autonomy as the decisive factor.¹²⁷

There is, however, deep disagreement as to whether fetuses or embryos are sufficiently human such that they deserve to be regarded as bearers of human dignity. As is well known, in the United States there is serious disagreement as to when human life begins and what dignity is owed to the fetus, if any.¹²⁸ There are others societies which are as divided as the United States. Some constitutional courts have concluded that dignity does not vest in the fetus.¹²⁹ Other societies take the position that the fetus is in fact a human being and due the dignity owed

125 I say “now”, because slavery was in fact based on the notion that some human beings were not sufficiently human and could thus be held as property by humans. There are of course pockets of communities even now which practice slaveholding in one form or another, but the practice is strongly condemned by the international community and, as I noted earlier, those who practice it are in fact considered to be enemies of all humanity.

126 This is so to the extent that Kant’s view of dignity as autonomy is justified on the account that people ought to be allowed to make free choices and to determine the course of their lives. On this account, people with marginal or no capacities (eg people with certain mental illness or disability) to make free choices or to make moral decisions cannot be said to be owed human dignity.

127 Others have argued that there is a distinction between “humanness” and “personhood” and that dignity attaches to all humans and not just persons. For those people, we are all human from birth but we “become persons through acquiring and participating in the socially generated knowledge of norms and actions that we learn to live by in order to impose humanness on humanness”. Rainer Ebert and Reginald MJ Oduor, “The Concept of Human Dignity in German and Kenyan Constitutional Law” (2012) 4 *Thought and Practice: A Journal of the Philosophical Association of Kenya* 43, giving an account of Kwasi Wiredu’s view. See Kwasi Wiredu, *Cultural Universals and Particulars: An African Perspective* (Indiana University Press, 1996).

128 See *Roe v Wade* 410 US 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”.

129 See, for example, the decision of the South Africa Constitutional Court *Christian Lawyers Association of South Africa v Minister of Health* 1998 (4) SA 113 (T).

to other humans. The German Constitutional Court, for example, has held that the human dignity enshrined in Article 1 of the Basic Law applies to unborn fetuses. In one abortion case the Court observed that “[w]henver 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”.¹³⁰ A similar sentiment is expressed in the Hungarian Constitution.¹³¹

International human rights conventions are also divided on the issue. While the ICCPR and the European Convention are silent on the issue, the American Convention 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 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”.¹³² It is clear that there is no overlapping consensus on the matter of whether the fetus has a right to life and is 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 lack of consensus, we cannot say that there is an established international principle that recognizes fetuses as bearers of human dignity.

V. A Political Conception of Human Dignity: Human Dignity Pragmatism and the Idea of Overlapping Consensus

A defensible political (as opposed to epistemological) conception of human dignity will need to attend to a number of facts and propositions. First, human dignity cannot be founded on some epistemological, pre-social or pre-institutional notion of what constitutes dignity. Human dignity is not about an intrinsic individual essence but about relationships. Relationships by their very nature arise in specific circumstances, whether cultural, social or political.

Second, a more defensible notion of human dignity would need to take into account that different cultural and social systems presumptively embody different social relationships and therefore different notions of what it means to dignify

130 BVerfGE 39, 1. *See also* Botha (n.3) 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.*

131 Hungary Const. art.2. “Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; embryonic and foetal life shall be subject to protection from the moment of conception”. It is not accidental that Hungary has views similar to Germany for “Hungarian constitutional law has imported the concept of human dignity from Germany”. Rao “Three Concepts of Dignity in Constitutional Law” (n.34) 217.

132 American Convention art.4.

human beings. As Avishai Margalit rightly notes, different societies represent different ways of dignifying humans.¹³³

Third, the most promising way of conceptualizing human dignity is, therefore, in terms of finding an overlapping consensus that exists among various comprehensive cultural, philosophical and social systems as to what constitutes human dignity. The conception of human dignity that is capable of being used as a standard of measurement across cultures and systems must be independent of particular philosophical or religious traditions. Finding and describing the various points of convergence is that task of scholars. This is what, borrowing from David Luban, I have chosen to refer to as *human dignity pragmatism*.¹³⁴

Now, consensus could manifest not only in the form of actual practice but in the form of publicly declared commitments as well, even though such public commitments do not always result in actual consistent practice. Take, for example, torture. The gap between public statements and actual practice of governments in relation to torture is well known. As the United States Court of Appeals for the Second Circuit put it, “torture is often honored in the breach”,¹³⁵ but that does not diminish the fact that there is a consensus about its prohibition,¹³⁶ for no government (no matter how authoritarian) will ever admit that it tortures. Indeed, every government official will condemn torture and most national constitutions and international human rights documents consider it as a violation of human dignity.¹³⁷ Given that circumstance, it is reasonable to conclude that as a general matter there is an overlapping consensus that official torture is impermissible as a violation of human dignity.

The political conception of human dignity that I have advanced here and in other works necessarily leads to the conclusion that there can never be a perfect and final answer as to what the phrase entails. Indeed, what human dignity pragmatism celebrates is the fact that the phrase is dynamic and it will increasingly accommodate and protect more and more rights as societies and communities increasingly know more about the human condition and what relationships are optimally conducive to the flourishing of the individual.

A few years ago, Michael Walzer, the noted political theorist, observed that many theorists, at least in the West, have the itch “for singularity and unity ... and therefore a kind of completion”.¹³⁸ 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

133 Avishai Margalit, *The Decent Society* (Harvard University Press, 1996).

134 See Luban “Human Rights Pragmatism and Human Dignity” (n.20).

135 See *Filartiga v Pena-Irala* 630 F2d 876 (2d Cir 1980) at 884 n.15.

136 *Ibid.*

137 Of course, there will always be dispute as to what counts and does not count, but that is the case with most general concepts such as equality and liberty.

138 Michael Walzer, “The Virtue of Incompletion (reviewing Agnes Heller’s *Beyond Justice*)” (1990) 19 *Theory and Society* 225, 226.

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.¹³⁹ Walzer views this itch for completion as an attempt “to end the endlessness of liberation”.¹⁴⁰ But as Walzer notes, “[i]ncompleteness is a virtue ... for it leaves room for local self-determination and cultural diversity”.¹⁴¹ This incompleteness is however tentatively or provisionally “completed” when there is an overlapping consensus as illustrated by practices of communities through national constitutions, through custom, or through conventional law as to what they regard as the meanings of dignity and alternatively indignity.

Comparative work on human dignity (the bottom-up approach) performs two important functions. First, it has the capacity to reveal how the elusive notion of human dignity is actually specified and applied in actual cases and practices across various cultures and systems. That is, comparative study will alert us not only of the existence of other interpretive possibilities but the historical contingencies of choices people make in the name of human dignity.

Second, the approach allows us to look for and to organize any convergence on, or consensus of, understanding of the concept of human dignity that will enable us to use as a standard of measurement across cultures and systems. As I indicated earlier, different cultures and societies may in fact agree on specific outcomes without agreeing on a fully developed theory explaining the decisions and the agreements. For the human dignity pragmatist, there is no need to require that there be agreement on general and abstract theory as long as we know what the practices show.

VI. Conclusion

The idea of human dignity is invoked often and in various circumstances. It is ubiquitous in ordinary conversations. Religious teachings regard it as an important way of understanding the relationship among humans that is reflective of the divine image in them. Many political theorists think of human dignity in terms of one or another aspect of the human essence. While these various approaches differ in their understandings of the source and content of dignity, they seem to agree that human dignity is universal in its aspiration and reach. It is universal in the sense that it attaches to humans qua humans regardless of who they are and where they come from. Understood this way, human dignity becomes a universal standard of measurement of the appropriateness of governmental actions or the actions of other entities in relation to individuals or groups of individuals. I have collectively

139 John Rawls, *A Theory of Justice* (revised edition, Harvard University Press, 1999).

140 Walzer “The Virtue of Incompletion (reviewing Agnes Heller’s *Beyond Justice*)” (n.138).

141 *Ibid.*, 225.

referred to such approaches, somewhat inelegantly, as top-down understandings of human dignity.

On close inspection, however, it appears that there are deep disagreements within and across cultures and political systems both in terms of the source and content of dignity. Top-down approaches cannot, therefore, be appropriate modes of inquiry for developing a notion of human dignity that simultaneously aspires to universal validity and is mindful of the fact that the idea of what it means to dignify humans or to subject them to indignities often arise in specific cultural and historical circumstances. I have argued that a notion of human dignity that can be appropriated across cultural, religious and political systems will have to be developed from practices of the various traditions and cultures that inhabit our world, a bottom-up approach. Searching for and giving an account of an overlapping consensus will have a better chance of advancing and deepening our understanding of what it means to dignify humans or to subject them to indignities. I have referred to this approach as *human dignity pragmatism*. The attempt here has been to explore possible consensus in relation to national constitutional texts, but the larger project will investigate such consensus in other areas of legal life such as decisions of national constitutional courts, common law courts and international tribunals.

Let me finally and quickly add here that the idea of consensus on a particular meaning of dignity will always be provisional. For the human dignity pragmatist, the idea of dignity is always a work in progress, not so much because of the limitation of our capacity to fully comprehend the true meaning of human dignity, but rather because the notions of dignifying humans or subjecting them to indignities are, as an initial matter, worked out within (or are contingent on) particular histories, structures, and cultural resources that are themselves contingent. The intercultural consensus that develops out of sustained dialogues among various cultures and systems will also be provisional, because an increasingly wider and deeper dialogue among the various cultures may deepen and even alter the existing consensus, the existing fusion of horizons.