
Beyond Dignity

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Introduction

›Human dignity‹ serves as a guiding principle for international legislation, and varieties of it lie at the root of a number of constitutions. It is evident that the presence of any idea that manifests itself so dominantly and universally requires justification. What that might look like, and whether it is possible at all, is what I inquire in this article. The legal texts themselves are not helpful in this regard. It is incumbent on those who do try to find a basis for ›dignity‹ to make it clear what it means and which beings would be dignified. This is the topic of the first section. An influential approach is Kant's. His focus on reason might seem straightforward enough at first sight, but it is reason in a special sense, namely, *practical* reason, that is decisive for him. This makes his stance an intricate one, which is at the same time difficult to connect to actual (human) beings. That does not necessarily mean, though, that exchanging it for *theoretical* reason is the answer, as this alternative produces significant problems of its own. In neither case is a basis for ›(human) dignity‹ provided.

In order to steer clear of such difficulties, one may resort to simply attributing ›dignity‹ to human beings regardless of their characteristics (or *other* characteristics, if being human is considered to be one). However, while this alternative may be attractive to some, that does not mean that it is also justified. In fact, resorting to such a notion may simply be the result of an unwillingness or incapability to confront the justification issue. This is the impasse those who would consider dignity to be a starting point for human rights legislation must face, regardless of whether they also recognize this.

Sections 2 and 3 provide the analysis to existing legislation, so that the problems become readily apparent. International legislation and the German constitution serve as examples here. ›Human dignity‹ is postulated, which brings with it the difficulty that believing in it cannot be enforced. In addition, whether or not it can be enforced, one wonders whether the desire to do so is reconcilable with a liberal democratic state in the first place. If that is indeed the case, an alternative approach may prove to be more compelling, from both an academic and a political perspective.

I. The meaning of ›dignity‹

For ›dignity‹ to be a proper basis for legislation and ethics, it must be clear what its meaning might be. The most promising position appears to be one that associates dignity with one or more characteristics; as a first approximation, an alternative conception would hardly be conceivable. It would of course be unwarranted to conclude from this that the way to determine the meaning of ›dignity‹ has definitely been found; nothing more than a *possibly* viable starting point has been established.

An important thinker who promotes such an idea of ›dignity‹ is Cicero, who associates ›dignity‹ with a good reputation, for example established by a courageous demeanor: »What is done in a manly and courageous spirit seems becoming to a man and proper; what is done in a contrary fashion is at once immoral and improper.«¹ It is clear that fleeting and superfluous elements do not contribute anything substantial: external characteristics (such as the sort of house in which one lives) may enhance dignity, but not provide the basis for it.² Importantly, the dignity of man is established by contrasting man with animals, the latter being occupied by nothing but sensual pleasure; »sensual pleasure is quite unworthy of the dignity of man and [...] we ought to despise it and cast it from us; but if [someone] should be found who sets some value upon sensual gratification, he must keep strictly within the limits of moderate indulgence.«³

Apparently, reason is what sets apart man from the animals according to Cicero. Still, while it appears to be the moral dimension of reason rather than the theoretical abilities that specifies the decisive difference, Cicero does not work this out systematically. His thoughts should not be considered in isolation, and it may in general be said that »in Rome, the original meaning of dignity (*dignitas*) referred to an acquired social and political status, implying, generally, important personal achievements in the public sphere and moral integrity. It was thus a manifestation of personal authority, majesty, greatness, magnanimity, gravity, decorum, and moral qualities.«⁴

¹ »Quod [...] viriliter animoque magno fit, id dignum viro et decorum videtur, quod contra, id ut turpe, sic indecorum.« M. T. Cicero, *De Officiis*, translated by W. Miller (London/New York 1913) I, 27, 96–97.

² *Ibid.* I, 39, 140–143.

³ »[...] corporis voluptatem non satis esse dignam hominis praestantia, eamque contemni et reici oportere; sin sit quispiam, qui aliquid tribuat voluptati, diligenter ei tenendum esse eius fruendae modum.« *Ibid.* I, 30, 108–109.

⁴ Izhak Englard, *Human Dignity: From Antiquity to Modern Israel's Constitutional Framework*. In: *Cardozo Law Review* 21, no. 5/6 (2000) 1903–1927, 1904; cf. Jack Donnelly, *Universal Human Rights in Theory and Practice* (New York, London 2013) 121–123.

Generally speaking, dignity seems to have been associated in ancient Rome with political life,⁵ while moral integrity is an important element.⁶ Such a conception of dignity is apparently contextualized, in that its meaning depends strongly on the societal and political circumstances against the background of which actions are valued. In addition, it would certainly be anachronistic to say that »[Cicero] universalized *dignitas* to apply to *all* human beings: All human beings have a rank or elevated position in nature.«⁷ Not every human being but only a select few may be considered dignified.⁸

An alternative account is Kant's, who has provided perhaps the most accomplished account in this regard. Kant, too, does not consider reason in the sense of reasoning power, to be decisive for a being to be considered dignified. Reason as the faculty of inferring (»das Vermögen zu schließen«)⁹ is, then, not what is decisive here, nor are other more ›elevated‹ varieties, namely, the faculty of principles (»das Vermögen der Principien«)¹⁰ or the faculty to establish the unity of the rules of the understanding guided by principles (»das Vermögen der Einheit der Verstandesregeln unter Principien«).¹¹

Such an alternative, i. e., theoretical reason, would indeed be difficult to serve as a proper candidate from a moral point of view. First of all, it would make the criterion an indifferent one, for theoretical reason may be used for various actions with strongly diverging consequences, from using one's abilities to earn money in order to donate to the poor to planning and executing a crime. Second, an ability would be considered something praiseworthy even though one has presumably done nothing to be endowed with it.¹²

Theoretical reason, and, more precisely, the understanding, is important in one respect for Kant, though, but only in a subordinate respect, the understanding man has and animals lack merely leading to a relative difference, expressed

⁵ Viktor Pöschl, *Der Begriff der Würde im antiken Rom* (Sitzungsberichte der Heidelberger Akademie der Wissenschaften, 1989. 3) (Heidelberg 1989) 7–15.

⁶ *Ibid.* 13.

⁷ Oliver Sensen, *Human dignity in historical perspective: The contemporary and traditional paradigms*. In: *European Journal of Political Theory* 10, no. 1 (2011) 71–91, 76.

⁸ Cf. Jack Donnelly, *Normative Versus Taxonomic Humanity: Varieties of Human Dignity in the Western Tradition*. In: *Journal of Human Rights*, 14, no. 1 (2015) 1–22, 3.

⁹ Immanuel Kant: *Kritik der reinen Vernunft*. A 330/B 386.

¹⁰ *Ibid.* A 299/B 356.

¹¹ *Ibid.* A 302/B 359. Incidentally, understanding (›Verstand‹) is not decisive here either, ›understanding‹ being defined as the faculty to think the object of sensible intuition (*Ibid.* A 51/B 75).

¹² A possible exception is an account that accepts reincarnation as an explanation, but in this case the problem would merely be replaced to another level: on what basis has one acted in a former life to be endowed with reason in this one? This would appear to lead to either an infinite regression or a (dogmatically) postulated first life.

in the price (›Preis‹) man can claim for what he may provide to another.¹³ By contrast, man's practical reason is not associated with a price but rather with a dignity: ›Only man, considered as a *person*, i.e. as the subject of a morally-practical reason, is elevated above any price; for as such (homo noumenon) he is not to be valued merely as a means for the ends of others or even his own, but rather as an end in itself, meaning that he possesses a *dignity* (an absolute inner worth), on the basis of which he forces *esteem* for himself from all other reasonable beings in the world, may measure up to any other being of this sort and may esteem them on an equal footing.«¹⁴ These observations provide the basis to conclude to the existence of man's ›inalienable dignity‹ (›unverlierbare Würde‹; ›dignitas interna‹).¹⁵

The idea of an ›end in itself‹, an important idea in Kant's practical philosophy, is difficult to grasp. As Schopenhauer famously remarks, an end is invariably an end for some will, an end ›as such‹ being a *contradictio in adjecto*, just as ›absolute value‹.¹⁶ Similar problems are connected with ›inalienable dignity‹, as well as with the related notion of ›inherent dignity‹, as will be argued below. This is no mere theoretical issue, for the phrase features prominently in some important legislation.

Returning to the present issue of the presumably special position of practical reason and its foundation, Kant maintains that a reasonable being should be considered an end in itself on account of the fact that it is autonomous.¹⁷ The most important epistemological problem in this respect is the fact that it cannot be grasped by means of (theoretical) reason how it would be possible to act on the ba-

¹³ I. Kant: Die Metaphysik der Sitten. In: Kant's gesammelte Schriften. Erste Abtheilung: Werke, Band 4 (Berlin 1903 [1785]) 435–436.

¹⁴ ›Allein der Mensch, als *Person* betrachtet, d. i. als Subject einer moralisch-praktischen Vernunft, ist über allen Preis erhaben; denn als ein solcher (homo noumenon) ist er nicht bloß als Mittel zu anderer ihren, ja selbst seinen eigenen Zwecken, sondern als Zweck an sich selbst zu schätzen, d. i. er besitzt eine *Würde* (einen absoluten innern Werth), wodurch er allen andern vernünftigen Weltwesen *Achtung* für ihn abnöthigt, sich mit jedem Anderen dieser Art messen und auf den Fuß der Gleichheit schätzen kann.« Ibid. 434–435.

¹⁵ Ibid. 436.

¹⁶ Arthur Schopenhauer: Die beiden Grundprobleme der Ethik (Leipzig 1860 [1840]) Die Grundlage der Moral, § 8, 631.

¹⁷ I. Kant: Kritik der praktischen Vernunft. In: Kant's gesammelte Schriften. Erste Abtheilung: Werke, Band 5 (Berlin 1908 [1788]) 87. Kant defines ›autonomy‹ (›of the will‹) (›Autonomie des Willens‹) (Grundlegung zur Metaphysik der Sitten. In: Kant's gesammelte Schriften. Erste Abtheilung: Werke, Band 4 [Berlin 1903/1785] 440) as ›the quality of the will by which it is a law to itself (independently of any quality of the objects of volition)«. (›die Beschaffenheit des Willens, dadurch derselbe ihm selbst [unabhängig von aller Beschaffenheit der Gegenstände des Willens] ein Gesetz ist.«)

sis of freedom,¹⁸ which is identified with autonomy.¹⁹ The capacity to act ›morally‹ rather than one's (theoretical) reasoning powers constitutes the reason why mankind should be considered an end in itself.²⁰ Autonomy is the basis of the ›dignity‹ of man's nature, and of every reasonable creature (or ›nature‹, in Kant's words).²¹

It is important to see that Kant does not *start* with ›human dignity‹: he does not simply attribute it to any human being or, more precisely, any reasonable being. Rather, the criterion he proposes someone must meet in order to be dignified is rather demanding, since it presupposes an intricate idea of who or what the subject of freedom is: man is presumably not restricted to the phenomenal realm but is also a noumenon.²² Freedom cannot be demonstrated²³ and must accordingly be presupposed or postulated.²⁴

A significant problem with Kant's position is that it means, if one is consistent, that no one can judge whether anyone (perhaps even the person who judges himself) is ›dignified‹ or not, for no one is able to observe – in the phenomenal realm – the freedom that would presumably constitute dignity.²⁵ Resorting to the idea of autonomy will not yield much, since this idea is at best vague and at worst incomprehensible.²⁶ So once a position such as Kant's is to be incorporated into

¹⁸ E. g. I. Kant: KdrV A 532 ff./B 560 ff., A 702/B 730, A 800 ff./B 828 ff.; Kritik der praktischen Vernunft, op. cit. [note 17] 46; Grundlegung zur Metaphysik der Sitten, op. cit. [note 17] 452.

¹⁹ I. Kant: Kritik der praktischen Vernunft, op. cit. [note 17] 33, 132; Grundlegung zur Metaphysik der Sitten, op. cit. [note 17] 446, 447, 449, 450, 452, 458, 459.

²⁰ Ibid. 435.

²¹ ›Autonomy is the basis of the dignity of human and every reasonable nature.« (›Autonomie ist [...] der Grund der Würde der menschlichen und jeder vernünftigen Natur.«) Ibid. 436.

²² E. g. I. Kant: Kritik der praktischen Vernunft, op. cit. [note 17] 6, 114, 115.

²³ E. g., I. Kant: Grundlegung zur Metaphysik der Sitten, op. cit. [note 17] 458, 459: ›[...] alsdann würde die Vernunft alle ihre Grenze überschreiten, wenn es sich zu *erklären* unterfinge, wie reine Vernunft praktisch sein könne, welches völlig einerlei mit der Aufgabe sein würde, zu erklären, *wie Freiheit möglich sei*.« (›Reason would exceed all its limits if it were to undertake to *explain* how pure reason could be practical, which would be completely identical to the task to explain *how freedom would be possible*.«)

²⁴ E. g. I. Kant: Kritik der praktischen Vernunft, op. cit. [note 17] 132; Grundlegung zur Metaphysik der Sitten, op. cit. [note 17] 449, 459.

²⁵ To be clear: the freedom that is involved here is not freedom of movement, and not even negative freedom in the political sense (leaving the issue here whether this can be reduced to freedom of movement), but rather the sort of freedom identified with ›free will‹ (or ›freedom of the will‹).

²⁶ It must be considered here that ›autonomy‹ does not refer here to the freedom one has to make (legal) choices, such as the freedom to buy a house or marry someone, but rather to ›the quality of the will by which it is a law to itself« (cf. note 17, *supra*). It is unclear how this would be possible, certainly if the noumenon is somehow to be identified with the phenomenal being. This is of course a corollary of Kant's dichotomy, but it does not follow from this that Kant's position must be accepted, as such a course of action would constitute an *argumentum*

legislation, the difficulty of acknowledging practical reason where none can be confirmed to exist (by means of *theoretical* reason) presents itself. Kant does not make it clear, in any event, why human beings' freedom²⁷ must be taken into consideration, and why they should, in other words, be granted certain rights, simply speaking of 'everyone' in defining a right action: »Every action is right which, or on the basis of whose maxim, the free choice of everyone may exist together with everyone's freedom in accordance with a general law.«²⁸

To be sure, the law demands less than does morality, namely, only conformity (observance of the rules), no (internal) agreement with the law or the motives on which it is based being required,²⁹ but that is not the issue here, but rather the criterion to decide which beings are to be considered as legal subjects. This is, considering what has been presented above, impossible. An alternative might be to resort to *theoretical* reason as the proper criterion, but that would not be acceptable for Kant. Those who would substitute it for practical reason in order to resolve the problems addressed here are confronted with the objection mentioned above, that theoretical reason may be used for all sorts of ends that are not generally considered morally right; Kant's account may at least counter that objection.

Furthermore, it is not clear why theoretical reason would be such a special faculty that those who are endowed with it should be considered absolutely different from others and why the differences should not rather be taken to be a merely relative. Such an account would admittedly be reductionist, as 'price' would, contra what Kant argues, become the proper standard for *all* cases. Such a stance was exhibited before Kant by Hobbes, who qualifies man's (value or) worth as his price,³⁰ defining 'dignity' as »[t]he publique worth of a man, which is the Value set on him by the Common-wealth.«³¹ Hobbes's position may be deemed simplistic and reductionist. Those who reach this verdict would have to consider whether a more complex theory might yield any viable result, and whether reducing unjustifiable elements to justifiable ones might not be a positive rather than a negative characteristic of a theory. Perhaps it is simply not possible to find such

ad ignorantiam. In any event, it would be unwarranted to accept, on this basis alone, a more elaborate notion of 'autonomy' than the straightforward (legal) one just mentioned. Whether one will in the end accept Kant's account may depend on more than can be discussed here.

²⁷ In this case, 'freedom' does refer to negative freedom in the political sense.

²⁸ »Eine jede Handlung ist recht, die oder nach deren Maxime die Freiheit der Willkür eines jeden mit jedermanns Freiheit nach einem allgemeinen Gesetze zusammen bestehen kann.« (I. Kant: *Die Metaphysik der Sitten*, op. cit. [note 13] 230.

²⁹ Ibid. 214, 219, 225

³⁰ Thomas Hobbes: *Leviathan*, ed. by R. Tuck (Cambridge 2007 [1651]) Ch. 10, 63: »The Value, or WORTH of a man, is as of all other things, his Price; that is to say, so much as would be given for the use of his Power: and therefore is not absolute; but a thing dependant on the need and judgement of another.«

³¹ Ibid.

results (presuming one will not cheat by introducing elements of one's own making), but it is clear, in any event, that the burden of proof is on those who argue that 'dignity' serves any role: it is up to them to make it clear why this would be the case and which beings would be the proper subjects, supposing 'dignity' has a meaning in the first place, which it would behoove them to show along the way.

Kant's position leads to the problem that the basis for dignity cannot reasonably be grasped and must be presupposed, leading to both epistemological and practical challenges; the former were touched upon above, while the latter are apparent from the fact that for legislation to be acceptable (and enforceable), it must be clear to whom it applies. An additional issue is that even if this is clear, it must still be decided how one must deal with those who do not share the decisive characteristic. Supposing, *arguendo*, that dignity is to be attributed to those who are endowed with theoretical reason, it must be concluded, *a contrario*, that those who are not endowed with it are not dignified.³²

This is no mere theoretical matter, as various human beings (notably those who are mentally handicapped) are concerned, along with the animals. A notion such as 'inalienable dignity' does nothing to resolve the problems and only compounds them, for it means that even if one loses one's reasoning abilities (in the case of those who defend theoretical reason as the basis of dignity) or ceases to act in accordance with one's conscience (in the case of those who defend practical reason as the basis of dignity), such a notion would have to be upheld, making it all the more abstract and unrealistic.

A radical alternative is to embrace an even more abstract account than Kant's (leaving the matter for now whether it is also unrealistic), for it abstracts from all, or at least most, characteristics. Kateb is among those who defend such an account. In contradistinction to Kant, who associates dignity with autonomy, Kateb maintains that »Human dignity is an existential value«³³ and rejects an added value of autonomy: »human dignity cannot depend on autonomy as its ultimate justification because most people, no matter how favorable the circumstances to individuality, will never break out of conformity to the extent that autonomy demands.«³⁴

³² This conclusion does not (logically) follow, but the alternative would mean that those who are *not* endowed with reason are (apparently) dignified on another basis, so that the problem would present itself anew.

³³ George Kateb: *Human Dignity* (Cambridge, MA/London 2011) 10. The same applies to human stature: »Human stature is essentially an existential, not a moral, value.« Ibid. 24. A similar stance is taken by Christian Byk: *Is Human Dignity a Useless Concept? Legal Perspectives*. In: *The Cambridge Handbook of Human Dignity*, ed. by Marcus Düwell, Jens Braarvig, Roger Brownsword and Dietmar Mieth (Cambridge 2014) 362–367, 364: »the concept of human dignity has an essentialist function: it appears anthropological, even ontological. It points out to us what we are, our humanity.«

³⁴ G. Kateb: *Human Dignity*, op.cit. (note 33) 108.

Kateb states that the human species is something special, on which its dignity is based. He distinguishes between two aspects, status and stature: »When we refer to the dignity of the human species, we could speak of the *stature* of the human race as distinguished from the *status* of individuals.«³⁵ Whether the stature aspect has an added value may be questioned, especially since it is said that »the element common to status and stature is uniqueness«,³⁶ but I will leave that issue here.³⁷ What does the uniqueness mean? Kateb says: »the dignity of the human species lies in its uniqueness in a world of species. I am what no one else is, while not existentially superior to anyone else; we human beings belong to a species that is what no other species is; it is the highest species on earth – so far.«³⁸ If this is correct, one or more criteria must account for this given, for otherwise it is only on the basis of belonging to this species, i.e., the mere fact that one is a human being, that one has dignity, which is not explanatory in any way.

Reason (in whatever sense of the word) is not adopted as a criterion, as Kant does, unless those who have lost their reasoning abilities are no longer to be considered human beings, but that is not what Kateb asserts. In fact, he takes their interests seriously: »we should not speak as if at any time degraded human beings are no longer human; to do so would justify the treatment inflicted on them.«³⁹ It is especially difficult to include every human being if the special nature of the human species is based on the »great achievements« of some individuals that others will never (be able to) accomplish: »equal individual status is shored up by the great achievements that testify to human stature because [...] they rebut the contention that human beings are merely another species in nature, and thus prepare the way for us to regard every person in his or her potentiality.«⁴⁰ The reason why dignity should be acknowledged for all human beings does not, then, become apparent. For all its faults, Kant's account does at least single out a criterion on the basis of which dignity is accorded, with the important corollary that those who fail to meet the standard do not have dignity. Since no criterion to exclude anyone is applied, every human being is included. The mere given of being human is, then, a sufficient condition. This solves the difficulties with which Kant's position is confronted. The epistemological problems are absent, while a poor treatment of non-reasonable human beings cannot be justified.

³⁵ Ibid. 5–6.

³⁶ Ibid. 8.

³⁷ The issue is dealt with in some detail in J. Doomen, *Freedom and Equality in a Liberal Democratic State* (Brussels 2014) § 4.4, 45; § 4.5, 47–48.

³⁸ Ibid. 17.

³⁹ Ibid. 21. This is, incidentally, an *argumentum ad consequentiam*. I will return to this point below.

⁴⁰ Ibid. 8; cf. 115.

It is only by failing to meet the demands that a convincing account should meet, however, that this account can be upheld. If the fact that all humans are included is the reason to proffer it, the basis is indeed very weak, for all one does is to try to justify an outcome one apparently considers favorable, namely, that no human beings are treated in a poor way. This position is not compelling, for it is based on an *argumentum ad consequentiam*: »if human dignity were not acknowledged, people might be treated poorly, so it must be acknowledged.« In addition, the demarcation line between various (sorts of) beings is obviously arbitrary. It is actually somewhat misleading to say that those who attribute dignity to all human beings on the mere basis that they are human beings would not use any characteristic, for being human is still a characteristic, albeit more abstract and less suitable than a characteristic such as (theoretical or practical) reason.

The objection that an account such as Kateb's uses an arbitrary characteristic, with the consequence that treating animals differently than people cannot be justified, is a serious one. One might take the abstraction to the next level and appeal to »animal dignity« or even »vegetable dignity«, in order to counter such an objection, but this would not solve anything and would in fact only add to the difficulties, for the more (sorts of) beings the notion is supposed to cover, the more abstract and thus »diluted« it becomes and the less it is able to serve as a proper candidate to confer dignity upon those who are endowed with the characteristic.

That it proves difficult to choose between a (relevant) characteristic and being human as such is manifested in Waldron's point of view as well, who defines »dignity« as »a matter of status – one's status as a member of society in good standing«.⁴¹ While this idea has some practical merit, it is difficult to underpin it in terms of the present discussion, especially if it is added that »Philosophically, we may say that dignity is inherent in the human person – and so it is.«⁴² If the meaning of »dignity« is difficult to grasp, understanding what »inherent dignity« means seems neigh impossible. The similar notion of »intrinsic dignity« faces the same problem: »By *intrinsic* dignity, I mean that worth, stature, or value that human beings have simply because they are human, not by virtue of any set of biological, psychological, social, economic, or political conditions, nor of the views of other persons, nor of any particular set of talents, skills, or powers. Intrinsic dignity is the value that human beings have simply by virtue of the fact that they are human.«⁴³

⁴¹ Jeremy Waldron: *The Harm in Hate Speech* (Cambridge, MA/London 2012) 60.

⁴² Ibid.

⁴³ Daniel P. Sulmasy: *The varieties of human dignity: a logical and conceptual analysis*. In: *Medicine, Health Care and Philosophy* 16, no. 4 (2013) 937–944, 938. Similarly, Sulmasy observes: »Intrinsic value is the value something has by virtue of its being the kind of thing it is.« Ibid. 939.

At this point it may be objected that the present analysis does not exclude the possibility that ›dignity‹, or even ›inherent dignity‹, has a meaning. Strictly speaking, this is correct, but if those who would uphold the notion were to do it on such a basis, theirs would be a very poor defense. First of all, it cannot be inferred from the existence of a word that it has a meaning. The scholastic term ›quiddity‹ (›quidditas‹), which is, incidentally, nowadays also used to signify a trivial matter, is a famous example. Second, it must be reminded what was observed before, that the burden of proof is on those who were just mentioned, to make it clear, if they can, what the notion they are adamant to include in their lexicon might mean, to which I add that it may be wise, with the history of philosophy in mind, to be parsimonious in this respect.

It would be difficult to imagine that a vague, abstract notion such as ›dignity‹, let alone ›inherent dignity‹ or ›intrinsic dignity‹, might universally be accepted, or that ›inalienable dignity‹ might be allowed as long as it is not clear on what basis it would be inalienable if this were not yet reality. This, the incorporation of the notion into legislation, is the topic of the next sections.

II. Dignity as the basis for legislation

The term ›dignity‹ appears not to have made its introduction into legislation until recently.⁴⁴ The Universal Declaration of Human Rights is not itself a law or treaty, but has proved to be very influential on legislation.⁴⁵ To quote part of the preamble and article 1: »Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world [...]. Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom [...]. All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.«

From a historical perspective, it is understandable why ›(human) dignity‹, so a general notion abstracted from characteristics such as race, and thus aspiring to an ideal that would ideally refer to any human being, would be attractive.

⁴⁴ Doris Schroeder: Human Rights and Human Dignity. In: *Ethical Theory and Moral Practice* 15, no. 3 (2012) 323–335, 324.

⁴⁵ For example, the International Covenant on Civil and Political Rights (ICCPR), which is based on the Universal Declaration of Human Rights, refers to ›human dignity‹ in several places.

Still, that just means that it can be explained why dignity is applied to every human being from a *political* viewpoint; it does not provide the justification from a *philosophical* viewpoint, which is still wanting. From that viewpoint, a moralistic fallacy is committed: ›since it would be wrong to treat human beings in certain ways, they must have dignity‹.⁴⁶ Human dignity may also be presented as part of a command: human dignity must be respected.

In either case, the basis from which to start (i. e., a description that may serve as a basis for a normative stance) is absent, for, as was indicated in section 1, ›humanity‹ or ›being human‹ is insufficient to fulfil the requirements. That is why human dignity cannot be proposed as the foundation of human rights, as Tiedemann does: »It makes no sense to say that we should protect human dignity like we should protect human life or bodily integrity. Human dignity is rather the idea behind human rights, the idea from which human rights can be *derived* [...].«⁴⁷ It may, then, be concluded: »In the absence of criteria that can enable us to know just when dignity is violated, the concept remains hopelessly vague.«⁴⁸

The fact that the descriptive and normative realms (›is‹ versus ›ought‹) remain separated may be a welcome given for those who would defend such a division,⁴⁹ but it is important to realize that the reason why this separation occurs in the first place is that the descriptive realm is void: no reason is provided why those considered to have human dignity should be treated in a special way and have certain rights. The only way to remedy this is to cling to ›human dignity‹ dogmatically. As Ignatieff puts it: »Human rights has become a secular article of faith. Yet the faith's metaphysical underpinnings are anything but clear. Article 1 of the Universal Declaration cuts short all justification and simply asserts: ›All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.‹ The Universal Declaration enunciates rights; it does not explain why people have them.«⁵⁰

⁴⁶ An alternative way to present the argument is in the form of an *argumentum ad consequentiam* (cf. section 1): ›if human beings did not have dignity, it would be acceptable to treat them in certain ways that are *not* considered acceptable, so they must have dignity‹ (it is important to see, incidentally, that this is *no modus tollens*).

⁴⁷ Paul Tiedemann: Human Dignity as an Absolute Value. In: *Human Dignity As a Foundation of Law*, ed. by Winfried Brugger and Stephan Kirste (Stuttgart 2013) 25–40, 30.

⁴⁸ Ruth Macklin: Dignity is a Useless Concept. In: *British Medical Journal* 327 (2003), 1420.

⁴⁹ E. g. P. Tiedemann: The Relation between Human Dignity and Human Rights. In: *Human dignity as a foundation of law*, op. cit. [note 47] 196: »Dignity is a value concept. It indicates an evaluation. *Right* is a normative concept. It indicates a request, a demand, an order, a provision, or a rule.« Cf., from another perspective, Michael Ignatieff: *Human Rights as Politics and Idolatry* (Princeton, NJ/Oxford 2001) 54.

⁵⁰ Ibid. 77.

One may think that these results mean that one is delivered to a forlorn relativism: ›if dignity were given up, everything would be permitted‹. Apart from the fact that this does not ›save‹ dignity (as this constitutes – once more – an *argumentum ad consequentiam*), it attests to a false dilemma, as if dignity were the only possibility (in a secular perspective) to provide a basis for human rights. Whether a more compelling alternative than dignity is available will be inquired in the next section.

III. Living without dignity

If the explanatory value of human dignity is given up, there are two options. The first consists in accepting, in line with what was discussed in section 1, a more realistic variety of dignity. The second option is to forgo the notion altogether, in line with Schroeder's remark: ›proponents of universal human rights are better off looking for alternative frameworks to justify human rights rather than relying on the concept of dignity.‹⁵¹ (Given that ›dignity‹ may in fact (contra Kant) be reduced to ›price‹, the differences between these two options may be relativized.) Accepting the second option, so the absence of dignity, does not in any way jeopardize human rights. One might object that without postulating dignity, no solid basis for human rights is presented, which results in the absence of a guarantee that they will be respected. Indeed, at the international level, nations may withdraw from a treaty,⁵² while at the national level, laws may in a democratic state be changed on the basis of a simple majority (a constitution may demand a qualified majority, but that only means that it is more difficult to realize a change, not that it would be impossible to do so).

It is possible to safeguard certain principles and rights in the constitution, in the sense that they may never be repealed. This is exemplified in the German constitution, in which it is stated (article 79), amongst other things, that amendments to the constitution that affect the principles laid down in articles 1 and 20 are inadmissible (article 1 speaks of the inviolability of the dignity of man and basic human rights, while article 20 states, amongst other things, that Germany is a democratic and social federation [›Bundesstaat‹]).

One wonders, though, whether a (qualified) majority bent on carrying through substantial changes will be impressed by such measures; if it has enough power, it may organize a coup and make the issue a completely academic one. (Incidentally, it may be questioned how it may be legitimized in a democratic state that

⁵¹ D. Schroeder: Human Rights and Human Dignity, op. cit. [note 44] 334.

⁵² Even if this is not the case, the problem of the lack of enforceability of international legislation makes this all but an academic issue in some situations.

the will of a [qualified] majority of the people is not carried out.) This applies to any idea one would eternalize politically, and especially to ›dignity‹. Waldron observes: ›Protecting people from assaults on their dignity indirectly protects their feelings, but it does so only because it protects them from a social reality – a radical denigration of status and an undermining of assurance – which, as it happens, naturally impacts upon their feelings.‹⁵³ Still, ›dignity‹ adds nothing to the protection, since those who would deny rights to some people would presumably not change their minds on account of a mere word (or a principle, for that matter) which only stands for something they want to remove in the first place.

Apart from that, ›dignity‹ has no added explanatory value, as was argued above. The rights of human beings are what is to be respected and protected rather than dignity. Waldron makes a category mistake, then, when he says: ›Dignity [...] is precisely what hate speech laws are designed to protect – not dignity in the sense of any particular level of honor or esteem (or self-esteem), but dignity in the sense of a person's basic entitlement to be regarded as a member of society in good standing, as someone whose membership of a minority group does not disqualify him or her from ordinary social interaction.‹⁵⁴ That people's entitlement in the sense mentioned here should be protected I will not deny. (The issue becomes complicated if a [qualified] majority should restrict the rights of one or more minorities, but that is something anyone who defends [procedural] democracy must confront.) Since, however, it is those people whose dignity is allegedly protected, that element adds nothing relevant, unless it would single out one or more qualities on which it would be based, which has already been shown to be problematic.

Waldron is correct, then, when he says: ›A democratic society cannot work, socially or politically, unless its members are respected in their character as equals, and accorded the authority associated with their vote and their basic rights‹,⁵⁵ but only if those basic rights are accepted without the need to acknowledge ›dignity‹. Indeed, it is hard to see what ›dignity‹ might add if one says: ›Understood as a right against government, the human right to moral equality is the right of every human being to be treated by lawmakers and other government officials as one who has equal inherent dignity and is inviolable [...].‹⁵⁶ I agree, then, with Igna-

⁵³ J. Waldron: The Harm in Hate Speech, op. cit. [note 41] 108; cf. 106.

⁵⁴ Ibid. 105.

⁵⁵ Ibid. 108, 109.

⁵⁶ Michael J. Perry: The Political Morality of Liberal Democracy (Cambridge 2010) 62. Basically the same consideration applies to what Wolterstorff says: ›The moral basis of constitutional liberal democracy [...] lies in the fact that all adult citizens, whatever their comprehensive doctrine, are treated fairly by virtue of having an equal right to exercise their full political voice. And it lies in the fact that the constitution prohibits the government from violating the fundamental natural rights of citizens. It prohibits the government from violating

tieff when he proposes to forgo foundational claims and »seek to build support for human rights on the basis of what such rights actually *do* for human beings.«⁵⁷

Even if what is said here is accepted, it may still be maintained that, while ›dignity‹ has no added value, there is at least no objection in presupposing or postulating its existence. This position overlooks an important given, though. I referred to the descriptive and normative realms in section 2; a legislator is not suited to provide descriptions of reality (which is a task that should be left to scientists, forgoing here what ›reality‹ is to be taken to mean), at least in a liberal democratic state. I agree with Kant (cf. note 29, *supra*) that all the law demands is that one keep to it, i. e., that one act in conformity with it, no agreement with those demands being necessary. In fact, an alternative approach would be difficult to reconcile with the idea of a *liberal* democratic state. One has the liberty to think of the existing laws what one wants, and to vote for individuals and political parties that want to change them, and one's liberty is not restricted any further, in such a state, than the outward acts.

A legislator that would not respect this liberty would not only commit a moralistic fallacy, but would in fact act as a virtual religious authority, forcing anyone to adopt his beliefs, even those who do not share them.⁵⁸ The law is normative rather than descriptive: its purpose is not to indicate what is the case (such as the existence of dignity), but merely to discourage certain behavior, by threatening with penalties.⁵⁹ It should not matter, certainly in a liberal democratic state, whether someone agrees with the contents of the law, so long as he does not break it. Demanding from anyone that he should accept the idea of ›(human) dignity‹ and that he should abstain from harmful acts to others would be redundant, the latter demand sufficing on its own.

I referred to the German constitution above. It may be questioned whether it does not demand too much from the people. Article 1 reads: »(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world. (3) The

their inherent dignity.« Nicholas Wolterstorff: *Understanding Liberal Democracy* (Oxford 2012) 137. No need to acknowledge the notion of ›dignity‹ exists if one accepts that all adult citizens should have the rights to which Wolterstorff refers. (I forgo an analysis of what ›morality‹ or ›natural rights‹ might mean.)

⁵⁷ M. Ignatieff: *Human Rights as Politics and Idolatry*, op. cit. [note 49] 54.

⁵⁸ Ironically, this would result in precisely the same situation, those who do not share this belief acting in accordance with them without agreeing with them, to which I would add that, since the belief itself does not stipulate anything, the question of its added value is raised even at this level.

⁵⁹ Forgoing here the sorts of laws that serve another function, such as those that provide individuals with facilities (in private law) (e. g., Herbert L. A. Hart: *The Concept of Law* [Oxford 1994] 27).

following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.«⁶⁰

Article 1, section 2 may be interpreted to be a matter of fact (the German people actually acknowledge these rights in this regard) or a demand (the German people should do so). The first situation would attest to the strange situation that the law would provide a description, to which it is not suited, as was argued. Moreover, it would mean that the section would be moot, there being no need to indicate a state of affairs. One might just as superfluously mention the birthplace of Otto von Bismarck or the chemical formula of water. The second situation, which is the case, means that Germans do not have the freedom to deny these rights in this regard. This conflicts with a basic demand of a liberal democracy. In this case, of course, individuals are not only protected from the government, but from other individuals, too.

As long as individuals do not harm others, they should be allowed, in a liberal democratic state, to think, and to some extent express, what they want. It should not matter whether they deny the existence of God, express their disagreement with speed limits or hold that ›dignity‹ does not mean anything. Omitting the demand that one acknowledge the existence or value of ›(human) dignity‹ leaves the proper room for the freedom of expression of those who want to argue that dignity does not exist; they might even be allowed to say that some people are inferior to others, provided that those deemed inferior are able to ignore what is said about them.⁶¹ Incidentally, the elimination of ›dignity‹ from legislation does not entail that anyone's protection from harmful acts by others is compromised, for, first, ›dignity‹ does not offer any protection and, second, the law may be formulated in any way the legislator sees fit, making it possible to extend the protection as he sees fit. There is no need to refer to ›dignity‹ and the challenge is not how to embellish the law with whatever conception of ›dignity‹ the legislator would uphold, but rather to take into consideration the protection of citizens and their liberty (important rights being involved in both cases), making sure that they are properly balanced.

⁶⁰ The original text reads: »(1) Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt. (2) Das Deutsche Volk bekennt sich darum zu unverletzlichen und unveräußerlichen Menschenrechten als Grundlage jeder menschlichen Gemeinschaft, des Friedens und der Gerechtigkeit in der Welt. (3) Die nachfolgenden Grundrechte binden Gesetzgebung, vollziehende Gewalt und Rechtsprechung als unmittelbar geltendes Recht.«

⁶¹ Cf. J. Doomen, *Freedom and Equality in a Liberal Democratic State*, op. cit. [note 37] § 10.5 (p. 115); § 11.4 (p. 129).

Conclusion

It is hard enough to determine what ›dignity‹ might mean if one uses characteristics to provide a standard, but those who seek to defend a variety that abstracts from (virtually) all characteristics, such as ›human dignity‹, are faced with an insurmountable challenge. This follows from that very given, namely the abstraction, which may stem from a desire to include every being, or at least every *human* being; the outcome is precisely the opposite, namely, that none is included.

This means that ›dignity‹ is not a proper starting point for legislation, various attempts to the contrary notwithstanding. Indeed, if such a notion is promoted by the state, this unjustifiably restricts the freedom of citizens to disagree with one of the principles defended in the law. One may even wonder whether basic moral ideas (may) serve any role in a liberal democratic state, especially if it is stipulated that they may never be changed, against the wishes of a (qualified) majority of the people.

An appeal to ›(human) dignity‹ has no added value, but the import of certain rights in a liberal democratic state is clear. If those rights are accepted by the same people who would uphold dignity, it may be concluded that rights, including minority rights, are already sufficiently protected; should they deny certain rights to some citizens (in particular minorities), ›dignity‹ does not fortify them in any way, certainly in a (liberal) democratic state. Only in extreme circumstances will these issues be of interest to others than academicians. The latter will do well to leave the notion out of their analyses, as its explanatory value is nil, while those who would use it as a shield in those extreme circumstances will soon find that it provides no more security than the paper on which it is printed.