

Article

The Function of Dignity

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Abstract

Using functionalist and genealogical frames of analysis, this article separates the function that dignity has served in law's self-legitimation from the functions that dignity plays in legal discourse. These modes of understanding dignity's function are related, but are apt to fuel scepticism about dignity if they are conflated. Dignity is an ideal challenging the idea of law as the will of the sovereign; and it is an ideal enriching law's construction of personhood. For different, systemic, reasons, dignity is a norm with unique discursive properties: it is principle, heuristic, and a peremptory norm. These differences are thrown into relief when 'function' is conceptualised in competing genealogical and functionalist terms. To the extent that these frames of reference are reconcilable, they point to dignity's core function as the disruption of law's dominant conception of sovereignty. We can conclude that dignity is a concept with problematic characteristics that can, nevertheless, be defended against charges of vacuity or redundancy.

Introduction

Dignity is a synecdoche representing the human rights project as a whole. It might be said to be both the foundation of human rights, giving them normative force, and the goal of human rights, giving them a standard and teleology. However, dignity is opaque and contested and, while it might be agreed that it plays an indispensable ideological role in law, it seems to add little to the practice of law. This article seeks to invert these assumptions, showing dignity's discursive functions to be powerful and complex, and its relationship with constitution and sovereignty to be both disruptive and unstable. This assumes that we can separate the discursive and adjudicative functions of dignity from the ideological functions of dignity. That is, we can identify the speech acts and classificatory practices that characterise the use of dignity in legal debate and distinguish these from a wider systemic or ideological function. Such analysis requires two different conceptions of function, where functionalist analysis is contrasted with genealogical analysis. Functionalism assumes commonalities across all legal norms. Any legal phenomenon must be understood within a systemic whole; a legal system serving wider social functions and seeking to maintain its own integrity as an independent system. In contrast, genealogical analysis stresses the function of foundational claims in law. Law depends upon discourses of origin and legitimation that function to justify and valorise components of the system. From this genealogical perspective the foundations of our institutions and our concepts are historical events which have generated new value systems which, in turn, determine the functions that our institutions and concepts can serve.

If functionalist and genealogical modes of analysis are separable, and are concerned to provide different - internal and systemic *versus* external and historical - perspectives on law, why consider their relationship? Both perspectives are necessary because, even where our focus is 'dignity in law', this encompasses questions of conceptual coherence as well as practices and utility. This becomes clear from its ambiguous presence in a range of constitutional cases

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where dignity is associated with fundamental constitutional issues. 'Ambiguous' because dignity neither predetermines constitutional interpretation, nor, from a global perspective, offers a single univocal jurisprudence. This is explicable in terms of the, *prima facie* antagonistic, aristocratic and democratic connotations of dignity. Linguistically and rhetorically, dignity is simultaneously the character disposition of the powerful and the collective demand of the dispossessed. Conceptually, dignity encompasses a range of assumptions and practices associated with status. However, assumptions and practices concerning the nature and significance of social status vary between democratised and hierarchical cultures. Consequently, dignity is not only located within a complex conceptual and linguistic field, but within a set of normative debates where the very nature of 'status' as inherent or situated itself is at issue. Accordingly a recurrent theme will be the tension between the hierarchical and the democratic, both in the semantics and in the legal functioning of dignity.

More specifically, conceptual analysis of dignity can be situated between, on the one hand, a Kantian defence of pre-modern ideas of humanity's inherent status, and on the other, Nietzsche's critique of human self-valorisation through metaphysics.¹ By extension when we appeal in constitutional and human rights law, with the use of dignity, to the 'inviolability' of the person, or the 'inherent worth' of the individual, we appear to be faced with a choice between endorsing Kant's metaphysics of humanity or Nietzsche's critique of democratised dignity as *ressentiment*, the envy of the powerless.² The law and morality of dignity are, in the latter sense, potent but perverse: a will to power, not a reconstituting of power.

We can also, giving this critique more specificity, locate dignity within the critical framework of political theology. Theories of political theology argue that even the most democratised of contemporary political and legal terms have their origins in theology, and with it, pre-modern cosmology and hierarchy.³ It is not possible to democratise ideas like 'inherent status' or 'inviolability' because they presume a pre-modern concept of sovereignty with dignity being dependent on the dual structure of sovereignty as the person of the monarch and their *dignitas*.⁴ Thus human dignity is, in the final analysis, an extension of sovereignty, not its displacement. While there is much that is unattractive in this challenge to strongly democratic or democratised concepts like human dignity, it is the logical conclusion of many other forms of criticism routinely levelled at dignity as conceptually vacuous, unstable or anachronistic.⁵

This specific critique can be rebutted, and the more general equivocation between the aristocratic and the democratic diffused through attention to the practices that surround dignity. This is not to evade conceptual analysis, but rather to provide a dual analysis that separates a family of conceptions from its range of uses. Legal uses of dignity certainly point to difficult conceptual questions, but also represent a set of practices that have to be understood in their own systemic terms, treating law as either a closed system of norms or a distinctive form of life. Law's dignity is not only the dignity of Roman law or Kantian moral philosophy, but the dignities found in contemporary healthcare ethics, constitutional law, and

¹ R.P. Kraynak, (2003) *Defending Human Dignity: The Challenge of Our Times*. In: R.P. Kraynak and G. Tinder (eds) *In Defence of Human Dignity: Essays for our Times*, Notre Dame, In.: University of Notre Dame Press 2003.

² I. Kant, *The Moral Law* (trans. Paton), London: Hutchinson University Press 1948[1785]; F. Nietzsche, *On the Genealogy of Morality*, USA: Hackett Publishing Company 1998.

³ C. Schmitt, *Political Theology: Four Essays on Sovereignty* (trans. G. Schwab), Chicago: Chicago University Press 2005.

⁴ E. Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology*, Indianapolis: Princeton University Press 1957.

⁵ M. Bagaric and J. Allan, 'The Vacuous Concept of Dignity', *Journal of Human Rights* 2006-5(2), pp. 257-270: see also R. Debes, 'Dignity's Gauntlet', *Philosophical Perspectives* 2009-23: pp. 45-78.

humanitarian law. This patchwork of 'dignitarian law', despite its ambiguities, represents one of the most dynamic areas of contemporary legal practice and theory, but one where any simple, univocal, methodological approach will be inadequate. Careful analysis by Mary Neal has separated the different language games that are associated with discrete 'dignitarian' practices at the international and at the domestic level.⁶ The present study amplifies some of those insights, positing two crucial, but not conceptually exhaustive, sets of norms: those relating to law's self-legitimation, and those relating to the application of substantive legal rules. Accordingly, the charge that dignity oscillates between democracy and aristocracy is applicable with respect to law's practices of self-legitimation, but there are good reasons to think of dignitarian law as insulated from these problems. In sum, what we might call broadly, internal and external perspectives on dignity's function are not incommensurable perspectives but an incomplete snapshot of a more complex family of practices.

This paper first describes the various legitimating functions that dignity might be said to serve in human rights law where the 'revival' of dignity in contemporary legal practice can be located.⁷ It then focusses on the ways in which variations in the use of dignity could be analysed as a group of core functions - via genealogical and functional analysis - followed by a further reduction of those frames of analysis to the more basic function of classification. Given that from each of these perspectives, dignity appears to defy explanation in terms of a single function, it is argued that, at best, we have to see dignity's functions as 'disruptive': disrupting orthodoxies concerning the source of law and status of the individual. The conclusion emphasises the fluidity of dignity's functions given their relationship with shifting discourses of the human. Variations in the function of dignity could be said, ultimately, to reflect our wider - dynamic and unstable - conceptions of humanity and inhumanity.

I. The Function of Legitimacy

Human rights give positive legal form to the notion of the human, and do so provocatively in the name of the universal.⁸ Law's relationship with universality can be traced in theoretical terms to Ancient Greek debates concerning the relationship between convention and nature, and, in practice, to the Imperial cosmopolitanism of the Roman Empire.⁹ Modern political and legal cosmopolitanism, in contrast to the Roman *jus gentium*, presents universality as a direct challenge to the sovereign state's claim to be the sufficient condition of security and legitimacy. The state's monopoly on the use of violence is not only the defining characteristic of the modern state, but was, at least until 1945, the implicit foundation of the international legal order. Sovereignty is effective control over a territory by means of force deployed against external aggressors and internal threats.¹⁰ The crimes against humanity associated with the Second World War exposed this blurring of violence and legality in international legal thinking as dangerous and unsustainable, and international human rights law represents, along with the Charter of the United Nations, an attempt to reconfigure international law with

⁶ M. Neal, 'Dignity, Law and Language-Games', *International Journal of the Semiotics of Law* 2012-25: pp. 107-122.

⁷ On the use of dignity in international law and constitutional law see generally M.A. Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*. New York: Random House 2001; Griffin, J., *On Human Rights*. Oxford: Oxford University Press, 2009; J. Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights', *Metaphilosophy* 2010-41(4): pp. 464-480.

⁸ J. Malpas and N. Lickiss (eds), *Perspectives on Human Dignity: A Conversation*, The Netherlands: Springer 2007; R.G. Teitel, *Humanity's Law*, Oxford: Oxford University Press 2011.

⁹ D. Daube, 'Personality in Roman Private Law' by P.W. Duff. *The Journal of Roman Studies* 1943- 33 (1 & 2), pp. 86-93.

¹⁰ R. Jackson, *Sovereignty: The Evolution of an Idea*, London: Polity Press 2007.

humanity as its *Grundnorm*. Legal legitimacy cannot now be reduced to the ability to employ force but is held to originate in a humanity transcending the state.

Human rights reside at the precise point where discourses of the human and the coercive authority of the state meet. And they give expression to an ideal of the legal order as a cosmopolitan order legitimated by universal humanity understood as both the concrete individual and the ideal of human coexistence.¹¹ This legal order protects the inviolability of the real individual, and it aspires to the norms of an ideal humanity which eschews external state aggression and internal state atrocity.¹² Accordingly, the foundations of human rights are not only important for the legal interpretation of those rights, but for international law's self-perception as a legitimate, and not just coercive, order.

How does dignity contribute to the role that human rights plays in this practice of self-legitimation? It does so at three different levels. Dignity is used rhetorically to represent the goal of, or the common denominator between, human rights. In jurisprudential contexts, dignity is a problem-solving tool for tensions generated by, or within human rights law. And, in theoretical reflection on the foundation of human rights, dignity provides clarification of the 'human' of human rights. Each of these contributions will be considered. It can be noted from the outset, however, that each of these functions place a considerable burden on dignity to be a *useful* – foundational, heuristic, and theoretical – concept as well as an ideologically potent one.

Because of these burdens, dignity takes the form of 'thicker' and 'thinner' forms within human rights discourse. A thin conception of dignity is associated with the Kantian requirement that persons be treated as ends in themselves and a prohibition on the treatment of persons merely as means to ends. This is a norm from which dissent is difficult, and from which fuller values can be drawn.¹³ A thicker conception uses dignity to connote the rights, privileges, and immunities that accompany humans' 'station'. The dignity or station of individual humans, as instances of humanity, can be used to generate a range of civil or social rights, and this station implies the existence of norms concerning the treatment of the body as well as protection of the personality of the individual.¹⁴

A thick conception of dignity therefore renders the 'human' of human rights 'real' by identifying it with physical embodiment and distinctively human concerns with personality, integrity, and reputation; it ties the pre-legal human to the legal person. A thinner conception of dignity makes the 'human' of human rights *normatively significant*; humans have inherent value, and human rights, therefore, have distinctive foundations and take distinctive forms. Either conception can be deduced from the articulation of dignity found in a number of human rights instruments: the 'inherent dignity of the human person'.¹⁵ This composite conjoins the natural human and the legal person, giving inexorable value to their instantiation in the individual.

¹¹ A. Peters, 'Humanity as the Alpha and Omega of Sovereignty', *European Journal of International Law* 2009-20(3): pp. 513-544.

¹² Teitel 2011, *supra* note 8.

¹³ C. Douzinas, *The End of Human Rights: Critical Legal Thought at the End of the Century*, Oxford: Hart Publishing 2000.

¹⁴ E. Daly, 'Dignity in the Service of Democracy', *Widener Law School Legal Studies Research Paper Series* 2011-no. 11-07; O. Schachter, 'Human Dignity as a Normative Concept', *American Journal of International Law* 1983-77(4), pp. 848-854.

¹⁵ UDHR (1948) Universal Declaration of Human Rights. General Assembly Resolution 217 A (III).

United Nations (2002) International Convention Against the Reproductive Cloning of Human Beings. General Assembly Resolution 56/93; ICCPR (1966) International Covenant on Civil and Political Rights, General Assembly Resolution 2200A (XXI).

Dignity is therefore where fact and value coincide: the embodied human being and the person recognised by law. To this extent, invocation of dignity serves to stabilise the 'human' of human rights. Human rights do not maintain their coherence and consistency by being located in pure positive law or the metaphysics of natural law, but somewhere between 'thin' (or ideal) humanity and 'thick' (or real) humanity. But law cannot invoke this equivocal concept of the dignified human person without relying upon defeasible assumptions. Dignity, when used in a thinner sense, is related to metaphysical concepts that justify the inherent status of the human on the basis of a relationship with humanity.¹⁶ 'Humanity', a reification of humans as a corporate entity, itself equivocates between fact and value. When using dignity in a thicker sense, the embodied human is being conjoined – through taxonomical stipulation – with the person. However, this is a classification that law itself can dissolve and law can be used to sever the pre-legal human from the legal person.¹⁷ In sum, human rights law has adopted a concept that is foundational in the sense of giving normative significance to the factual human, but it has also adopted a concept that gives rise to questions about the relationship of fact and value, and questions concerning the very possibility of foundational claims in law, where norms are assumed to gain their legitimacy from their membership of a system not their correspondence with external facts or values.¹⁸

The foregoing summary of the conceptual relationship between dignity and human rights can be relocated within two narratives. One concerns the historical conditions under which dignity was harnessed to human rights in the drafting of the Universal Declaration of Human Rights under the influence of the Thomist Jacques Maritain, in circumstances where cosmopolitan universalism confronted racial nationalism.¹⁹ Another narrative charts a different process under which the 'human' (of 'human rights' and 'human dignity') has come to have legal meaning. This lends itself more clearly to a genealogical analysis and will be considered first. It will be suggested that genealogical analysis reveals a much more enduring relationship with the aristocratic origins of dignity than conventional histories of human rights suggest. It remains to be proven whether an alternative, functionalist, analysis emphasising law's own normative practices affords a conceptual break with this genealogy, thereby isolating something more fundamentally democratic.

II. Genealogy

Questions concerning dignity's wider historical, etymological, and ideological function will be addressed as issues of dignity's genealogy. Associated with Michel Foucault (and in turn with Nietzsche's critique of 'unhealthy' values), genealogy is intended to chart the generation of values without subscription to either teleological understanding of their emergence or to the permanence of those values.²⁰ Concepts must be understood historically, but changes of meaning (that is, changes in the function of a concept) betray the influence of pressures - emerging forces and social upheavals - that are shrouded from us if we assume that concepts have no history or that the 'triumph of reason' in modernity has provided the final resting-place for those concepts. Dignity has an etymological history, as well as a legal one. But

¹⁶ M. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, London: The Belknap Press 2006.

¹⁷ G. Agamben, *State of Exception* (trans. Kevin Attell), Chicago: University of Chicago Press 2005; G. Agamben, *Remnants of Auschwitz: The Witness and the Archive* (trans. Heller-Roazen). New York: Zone Books 1999.

¹⁸ H.L.A. Hart, *The Concept of Law*. Oxford: Oxford University Press (1961)1994; H. Kelsen, *General Theory of Law and State*. New York: Russell & Russell 1961.

¹⁹ M.A. Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*. New York: Random House 2001.

²⁰ Nietzsche 1998, *supra* note 2.

genealogy encourages us to look at the conjunction of the two at crucial points of social pressure and change: "genealogy studies the accidents and contingencies that converge at crucial moments, giving rise to new epochs, concepts, and institutions".²¹ This requires us to consider the historical circumstances that encouraged dignity's adoption; identify dignity's pre-legal functions; identify the reasons for its endurance; and then reconsider the historical conditions of its adoption in the light of both the 'epoch' and its 'accidents and contingencies'.

Dignity's appearance in positive legal instruments can be charted with some clarity. The introduction of dignity into legal vocabulary was a consequence of two World Wars and the widespread and systematic violation of the rights of both combatants and civilians.²² Following the First World War it appears as a component of the Irish Constitution of 1937.²³ After 1945, it became a feature of both international law and constitutional law. In international law it appears in two forms. First, as dignity *simpliciter*: 'inherent dignity' in the UDHR and 'personal dignity' in the Geneva Conventions.²⁴ In later instruments, it is expressly qualified as 'human dignity' (e.g. United Nations, 2002)²⁵. Slippage between dignity *simpliciter* and human dignity does not denote any significant change in legal meaning.²⁶ In both instances, status, rights and deontology are centralised, albeit 'personal dignity' overtly emphasises the integrity of the body. Dignity has also enhanced the idea of *possessing* rights in international law as being a means to detach the rights-holding status of the individual from constitutional structures, thereby protecting stateless persons.²⁷

Constitutional law and constitutional jurisprudence around dignity have arisen from dignity's inclusion in constitutional instruments after 1945. The most enduring is the German Basic Law of 1949, drafted by the Control Powers in post-war Germany; the Constitution has 'human dignity' within the first clause of its first article, and the provision has given rise to a diverse jurisprudence.²⁸ This constitutional primacy afforded to dignity has been echoed in many constitutions since, although constitutional courts have interpreted it differently. Civil law systems read dignity within the context of personality rights, i.e. constitutional protection of personal integrity and reputation. In common law systems, dignity has been closely connected with civil and political rights, and with attendant privileges and immunities.²⁹ More recently, a relationship between dignity and economic and social rights has emerged.³⁰

Dignity, then, gains a legal function in close proximity to a set of varied, but overlapping, rights. These rights were not created *ex nihilo*, but through the modification and codification of natural rights. The 'human' of human rights, in contradistinction to natural rights, locates their origins in the worth of the individual human being rather than the social being of

²¹ G. Aylesworth, Postmodernism, available at

<http://plato.stanford.edu/archives/fall2012/entries/postmodernism/> (accessed 11 June 2013).

²² For an exploration of the correlation between social and military crises and revivals of concern with human rights and human dignity see J. Habermas, *supra* n. 7.

²³ S. Moyn, Did the Irish Save Civilization?: The Secret History of Constitutional Dignity, available at <http://ssrn.com/abstract=2159248> (accessed 11 June 2013).

²⁴ ICRC 1949: Common Article 3

²⁵ *Supra* note 14.

²⁶ *pace* M. Lebeck, *On the Problem of Human Dignity: A Hermeneutical and Phenomenological Investigation*, Würzburg: Königshausen & Neumann 2009, p.21.

²⁷ UNHCR (2007) Handbook for Emergencies, available at <http://www.unhcr.org/472af2972.pdf> (accessed 04 October 2012).

²⁸ J.B. Eberle, *Dignity and Liberty: Constitutional Visions in Germany and the United States*, USA: Praeger Publishers 2002.

²⁹ *Ibid.*

³⁰ C. McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights', *European Journal of International Law* 2008-19(4): pp. 655-724.

humans. Such worth is difficult to articulate in consequentialist terms because consequentialism involves shifting determinations of what is valuable. Conversely, deontology, where value is rooted in categorical assumptions concerning the nature or particularity of human beings, renders human value and human status axiomatic. Human rights discourse required the adoption of a concept with strong deontological force centred on humans *per se* as opposed to the natural necessity or social dependency that underpinned natural rights.³¹

The Latin *dignitas*, and its variants found throughout European languages, provided a deontologically pregnant concept. The etymology of *dignitas* combines ideas of elevated religious status with the bearing associated with that role.³² Dignity lost its relationship with a specific religious role because of its adoption as an individual virtue by the Stoics and, later, because of the insistence in Renaissance thought on the 'dignity of man' as *imago dei*, made in the image of God.³³ Continuing its severance from religious and social hierarchy, the revolutionary period democratised dignity as status; status regardless of social station.³⁴ Democratic functions notwithstanding, throughout these currents of political and ethical thought, dignity has always served simultaneously as an abstract notion of rank or station (characteristic of the Renaissance conception of dignity) *and* as a description of behaviour (characteristic of Stoic thought). Thus, an uneasy equivocation between aristocracy and democracy can still be heard in 'dignity'.

This etymological analysis serves as background for a more fundamental distinction between the anthropological and metaphysical elements of dignity. The anthropology of dignity centres on the significance of the upright gait.³⁵ This posture and orientation distinguishes us from animals because physical elevation above the natural world affords humanity more knowledge. Long before Darwin's work conceived the upright ape as the outcome of an evolutionary process, Ancient thinkers, including Plato and Cicero, had privileged uprightness as our distinctive species characteristic and a necessary condition of our superior knowledge.³⁶

The metaphysics of dignity asserts that humans should be understood as members of a qualitatively distinct and - cosmologically as well as physically - *elevated* species.³⁷ Individuals are *imago dei*, and are instances of humanity, a corporate entity making normative demands on individual humans. While the anthropological and the metaphysical aspects of dignity are distinct, they are often conjoined. First, through the idea of sovereignty: humanity is elevated and inviolable, a status evidenced by individual humans having the capacity, like sovereign rulers, for autonomy.³⁸ Second, through the idea of uprightness: the upright animal is a distinct species, an elevated species capable of, and demanding, upright behaviour from its members.³⁹

These ideas are brought together in the duality that can be found in Kantian moral theory. First, his theory has ontological elements. Kant grants individual humans inherent worth, and

³¹ H. Baker, *The Dignity of Man: Studies in the Persistence of an Idea*, Harvard, Ma.: Harvard University Press 1947.

³² Agamben 1999, *supra* note 16.

³³ E. Bloch, *Natural Law and Human Dignity* (trans. Schmidt), Cambridge, Ma.: MIT Press 1986.

³⁴ T. Paine, *Rights of Man*, Harmondsworth: Penguin Books 1967.

³⁵ Block 1986, *supra* note 29.

³⁶ S. Riley, 'Dignity as the Absence of the Bestial: A Genealogy', *Journal for Cultural Research* 2010-14(2): 143-159.

³⁷ Baker 1947, *supra* note 27.

³⁸ I. Kant, *The Moral Law* (trans. Paton), London: Hutchinson University Press 1948.

³⁹ Bloch 1986, *supra* note 29.

distinguishes this from exchange value, thereby asserting humans' qualitative difference from the rest of the cosmos.⁴⁰ Kant's theory also has categorical elements. Humans' unique capacity for autonomous action categorically prohibits the use of humans in a purely instrumental way as merely means to ends.⁴¹ Kant's arguments are both metaphysical (we are uniquely free beings and should be treated as such) and anthropological (Kant treats the qualitative distinctiveness of our species as axiomatic). We see this duality at work in Kant's conception of humanity as 'dominion'. Adopting a Genesisic account of the origins of humanity, God granted dominion over Creation to humanity. Dominion is humanity's delegated sovereignty over the natural world.⁴² The 'dignity of man' is therefore humanity's difference to Creation and its right to suppress and tame nature. For Kant, this narrative is the context within which a complete system of ethics is possible. We are each, as instances of humanity, sovereign individuals; we are called upon to suppress the natural within ourselves, and treat others as equally sovereign individuals. This is distilled in one of Kant's three formulations of the categorical imperative, the 'Kingdom of Ends', deriving the duties and worth of the individual from the fact that each can act as legislator through exercising their rational, as opposed to natural, faculties, and can seek to create a world where humans are of absolutely equal and elevated status.⁴³

These complex conceptual relationships, encompassing metaphysics and anthropology, raise questions that are commonly found in poststructural analyses, and more specifically in political theology. This mixture of metaphysics and anthropology may constitute a necessary but improvable proposition in any system of norms, an original point at which the division between fact and value is elided.⁴⁴ Any system of norms, including a system of human rights, demands a first principle that is constitutive of the system and determines what is to be contained within it.⁴⁵ However, the deduction of such a *Grundnorm* from the existence of a system, while theoretically coherent, is falsified by the actual promulgation of the system: there must be a *decision* that posits norms, they are not self-subsisting.⁴⁶ Whether this is located in the divine ordinance under-writing Kant's ethics, or in the decision to valorise humanity through human rights law, it might be said that in the beginning is a command, not a self-evident truth.

In more specific ethical and legal terms, dignity encompasses two conceptual problems. First, dignity's mixing of anthropology and metaphysics. Dignity entails that we should not treat each other as animals, nonetheless we are animals. Any argument for the privileging of a particular species of animals on the basis of particular capacities is question begging: dignity as a norm is premised on certain facts ('distinctively human characteristics' of which 'uprightness' is the most prominent), facts which have been isolated precisely because they are already value-laden (namely the will to distinguish ourselves from other animals). Put simply, a taxonomical decision is always in the first instance an arbitrary decision, and the valorisation of the upright animal reflects the prejudice of the species not an *a priori* distinction.⁴⁷

Second, it is impossible to decide whether dignity is an extra-legal norm, existing wholly outside legal practices, or a super-legal norm, implied by the sum of legal practices. Dignity has meaning within positive law, but it attempts to be both a constitutive principle making

⁴⁰ Kant 1948, *supra* note 33, p. 96.

⁴¹ *Ibid.*

⁴² I. Kant, *Conjectures on the Beginning of Human History* in: I. Kant, *Political Writings*, Avon: Cambridge University Press 1991, p. 225.

⁴³ Kant 1948, *supra* note 2, p. 95.

⁴⁴ J. Derrida, 'Justices', *Critical Enquiry* 2005-31(3): pp. 689-721.

⁴⁵ Kelsen 1961, *supra* note 18.

⁴⁶ Schmitt 2005, *supra* note 3.

⁴⁷ M. Foucault, *Order of things: An Archaeology of the Human Sciences*, New York: Vintage Books, 1994.

laws possible and a regulative principle already constituted by law by regulating its conduct. Therefore, law's adoption of dignity generates a problematic proposition: that there exists a norm, such that it is both part of the legal system and sufficiently independent to validate that system. This problem can be given a sharper outline. Dignity mirrors the role of sovereign in its being both created by, and creator of, legal systems. This problem, lying at the heart of any legal ideology of dignity, will be considered at greater length below.

In sum, the contingent aspects of dignity's adoption by law - the conscious adoption of the Latin *dignitas* by the Renaissance and Enlightenment, and, thereafter, its adoption in the post-Second World War international environment - are, precisely, contingent, and we cannot assume that the existing law of human dignity is the necessary end-point of a teleology of legal and political consciousness. Conversely, the hierarchical connotations of dignity are not accidental, but a reflection of human self-valorisation through cosmology and metaphysics, and represent the sole point of continuity through its history. Can we, nonetheless, identify a perspective on dignity's functioning which is not reliant on this genealogy?

III. Functionalism

Questions of dignity's systemic function will be cast in terms of Niklas Luhmann's theory of *autopoiesis* in social systems.⁴⁸ The development of social and institutional practices can be said to arise autopoetically, that is, through the rearrangement of internal communicative practices, rather than through conscious construction on utilitarian grounds. A legal system - that is, an independent decision-making system characterised by cognitive openness but normative closure - 'absorbs' a conflict by categorising and analysing the conflict by its own, internal, practices. It then generates a decision about the compatibility of the parties' claims with its own assumptions. Where complex problems arise ('hard cases' or constitutional crises), solutions are not simply chosen by those within a system through intuition or creative interpretation. Law restructures its own, internal, assumptions to make sense of the problem. Change is not achieved through the importation of something external to the system: structural change within a legal system represents the rearrangement of existing components of that system.⁴⁹

The legal deployment of dignity is a good candidate for this mode of analysis. Environmental pressures and international law's own internal resources allowed what appears to be an external (moral and religious) concept to become an internal (legal) concept. In these terms, we should understand the emergence of dignity as neither a natural occurrence, nor as a conscious ideological shift. The relationship between dignity and law should be understood as contingent *and* systemic. It was the consequence of certain external pressures, those which we have described in terms of law 'having to search for a powerful deontological concept'. However, from a functionalist perspective this was rather law creating dignity from its existing systemic resources. This putative construction of dignity requires that we look more closely at three distinctive practices associated with dignity in legal discourse: the peremptory, the classificatory, and the performative.

The *peremptory* function of dignity signals its ability to estop action. Invocation of dignity - be it as a general norm or as a specific principle under constitutional law - limits action and limits debate.⁵⁰ It is not a peremptory rule that can be defeated by another rule, but rather a peremptory principle, giving especial weight to claims limiting the agency of the state on the grounds of the basic status of individuals. This principle draws limits to legitimate action,

⁴⁸ N. Luhmann, *Law as a Social System*, Oxford: Oxford University Press 2008.

⁴⁹ *Ibid.*

⁵⁰ Schachter 1983, *supra* note 13, pp. 848-854.

asserting that deontology is the primary normative framework in certain legal contexts, and excludes consequentialist calculations in those contexts.⁵¹ Through this peremptory functioning, dignity can give rise to either *prohibitions* or *liberties*. That is to say, it functions as a multivalent right⁵² empowering the individual to act and/or to prohibit interference in action. However, precise prohibitions and liberties are not generated by dignity. Dignity has a powerful peremptory force, but no predefined zone in which this force can be deployed. We have the German Constitutional Court prohibiting the psychological mistreatment of individuals⁵³; we find dignity used to support reproductive choice.⁵⁴ Claimants have used dignity to prevent data collection because the state “must leave the individual with an inner space for the purpose of the free and responsible development of his personality”.⁵⁵ And dignity has been used to free prisoners serving life sentences:

humane execution of the lifetime imprisonment can only be assured if the sentenced criminal has a concrete and principally attainable possibility to regain freedom at a later point in time; for the core of human dignity is struck if the convicted criminal has to give up any hope of regaining his freedom no matter how his personality develops.⁵⁶

The common denominator here is uncertain. We could nominate a number of values – autonomy, respect for persons, respect for the private sphere – that dignity is here representing or substituting. However dignity was deployed not because it is synonymous with any one of these values, but because it has a peremptory force or weight that is more decisive than autonomy or respect alone. The normative weight that dignity possesses derives, first, from the priority of principles over policies. Autonomy and respect lack the status of legal principles, being more closely aligned with social and political policies.⁵⁷ The normative weight that dignity possesses also derives from its association with core constitutional values and the priority of constitutive legal norms over regulative legal norms. Autonomy and respect can take positive legal form, but they lack dignity’s privileged constitutional status. In these respects, dignity’s functions are not extrinsic to law. The priority of principles and constitutional norms are long-standing institutional assumptions in law.

Secondly, dignity functions to *classify*. Dignity classifies the individual as having normative significance within law. This classification can denote the individual, variously, as a rights-holder in a general sense, as a physical entity, as an autonomous decision-maker, or as an actor in the public and private spheres. More specifically, it serves the classificatory function of insisting on either the personhood of individual humans (without identifying which rights necessarily accrue to persons) or their humanity (i.e. their elevated station *or* their raw physicality).⁵⁸ *A fortiori*, dignity can give rise to discourses of the human or of the person. While it conjoins them in the ‘human person’, either conception of the individual can be invoked where necessary. On the one hand, it draws attention to the ‘pre-legal’ human, i.e. the embodied natural human animal:

The very essence of the [European] Convention is respect for human dignity and human freedom. Without in any way negating the principle of sanctity of life protected under the Convention, the Court considers that it is under Article 8 that notions of the quality of life take on significance. In an era of growing medical sophistication combined with longer life

⁵¹ D. Cowan, ‘Legal Consciousness: Some Observations’, *Modern Law Review* 2004- 67(6): pp. 928-958.

⁵² W. Hohfeld, *Fundamental Legal Conceptions*, New Haven: Yale University Press 1919.

⁵³ Eberle 2002, *supra* note 24.

⁵⁴ Daly 2011, *supra* note 13.

⁵⁵ *Microcensus Case* [1969] 27 BVerfGE 1 (German Constitutional Court), para. 6.

⁵⁶ *Life Imprisonment Case* [1977] (BVerfGE) 187 (German Constitutional Court), para. 4(a)).

⁵⁷ See R. Dworkin, *Law’s Empire*, Oxford: Hart Publishing, 1986.

⁵⁸ Malpas & Lickiss (eds) 2007, *supra* note 7.

expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity.⁵⁹

Or, on the other, it highlights the basic construction of the legal person, that is, the human to which rights and duties accrue:

The true significance of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.⁶⁰

Classification is the essence of legal process, and relates to the underlying conception of truth found in legal institutions, i.e. the adjudication of evidence using general classifications found in statute or precedent. While law does not monopolise the classifications 'human' or 'person' it undoubtedly constructs its own classifications for the purposes of adjudication. The dignitarian construction of the human person makes explicit processes which are as old, and as variable as legal institutions themselves.

Finally, dignity serves a *performative* function which is distinguishable from its peremptory function. Dignity's functioning as a peremptory principle depends upon a (moral or legal) normative background. As a performative, however, we need not appeal to this background and treat dignity's functioning purely as a speech-act within any form of life. Specifically, it has a *perlocutionary* function. That is, it is a speech-act intended to produce a particular reaction in its audience.⁶¹ Dignity tends to have a 'chilling effect' on debate. It has this effect because of its peremptory force and because of its classificatory significance. For either of these reasons, invocation of dignity indicates the seriousness and gravity of the debate. With a perlocutionary force it does not need a positive legal basis for its peremptory power, but serves an ordinary language meaning of pointing to the extremes of human behaviour and limits of legitimate treatment. Speaking *obiter dicta* on the issues of degradation and dignity, Judge Fitzmaurice gives full reign to the rhetorical force of dignity:

In the present context it can be assumed that it ['degradation'] is, or should be, intended to denote something seriously humiliating, lowering as to human dignity, or disparaging, like having one's head shaved, being tarred and feathered, smeared with filth, pelted with muck, paraded naked in front of strangers, forced to eat excreta, deface the portrait of one's sovereign or head of State, or dress up in a way calculated to provoke ridicule or contempt - although here one may pause to wonder whether Christ was really degraded by being made to don a purple robe and crown of thorns and to carry His own cross. Be that as it may [...].⁶²

This basic discursive power is perhaps the clearest way in which human dignity's metaphysical associations can still register within legal discourse. That is, dignity can function to persuade us that an idea, norm, or rule has *immanent or transcendent* justification. Transcendent, in the sense of finding authority or legitimation beyond reality; that the protection of the individual transcends positive law:

The constitutional principles of the Basic Law embrace the respect and protection of human dignity. The free human person and his dignity are the highest values of the constitutional

⁵⁹ *Pretty v United Kingdom* (2002) application no 2346/02, judgment of 29 April, para. 65.

⁶⁰ *Furman v Georgia* (1972) 408 U.S. 238, para. 272.

⁶¹ J. Searle, *Speech Acts: An Essay in the Philosophy of Language*, Cambridge: Cambridge University Press 1969.

⁶² *Ireland v UK* application no 5310/71, judgement of 18 January 1978, ECHR (Series A) No. 25, 90, separate opinion of Judge Fitzmaurice.

order. The state in all of its forms is obliged to respect and defend it. This is based on the conception of man as a spiritual-moral being endowed with the freedom to determine and develop himself.⁶³

Immanent, in the sense of finding authority or legitimation within reality, for instance in the idea that the integrity of the human body is at all times a determinant of the limits of state power:

the lack of requisite medical care and assistance for the applicant's chronic hepatitis coupled with the prison conditions which the applicant has so far had to endure for more than two years diminished the applicant's human dignity and aroused in her feelings of anguish and inferiority capable of humiliating and debasing her and possibly breaking her physical or moral resistance.⁶⁴

Either way, law has always functioned to identify the limits of legitimate action, including within legal processes themselves. While it would be democratically unacceptable for legal institutions to identify the limits of their own powers, it has always been possible, through general principles and through legal rhetoric, to estop legal practices and signal the limits of the justified, and the intelligible, in law. In this sense, dignity can be said to draw on law's perennial relationship with justice – i.e. the assumed, but non-positive, law of laws – and to share with justice a predominantly rhetorical, but nonetheless effective, ability to provoke self-limitation in law itself.

Taking these functions together, it is not surprising that the *forms* that dignity takes are multifarious. Dignity takes the form of non-exclusive alternatives like human/person or transcendent/immanent. These are not binary choices for a legal system to decide upon, but rather options available in reasoning about hard cases. We can also see that the metaphysics of dignity has not been erased by law, but is now shared out across its functions. In a peremptory gesture that does not depend upon positive legal rules; in the classificatory use of 'humanity'; and in a perlocutionary act that signals the very limits of possible legal debate. And these functions are neither mutually exclusive nor mutually dependent. To the extent that they are linked, they are a set of nested normative functions: classification allows the peremptory and the peremptory gives rise to the perlocutionary. Nonetheless from a wider, systemic, perspective, these are not new practices in law and other rules and principles share these three functions. Rather, 'dignity' is the label law uses for a new *grouping* of norms and practices, a grouping constituted by law under external pressure to develop a new set of practices associated with the 'human person'.

This functionalist perspective reveals a far more consistently democratic concept. Indeed a concept that is democratic not only because of the general commitment to democracy found in any legal systems and therefore any legal norm but as a fundamentally democratic notion, symbolic of constitutionalism and state duties. Far from relying on dignity's genealogy, dignity is a cluster of discursive practices which together challenge dominant conceptions of the source of law and the nature of legal personhood. From this perspective a break between dignity's genealogy and 'law's dignity' seems possible.

In fact, a reconciliation between genealogy and functionalism may be possible. Dignity possesses functional unity in law flowing from its classificatory properties: dignity allows us to classify both facts and values in a way that recognises and gives meaning to the human person. The aristocratic connotations of dignity are less important than the fact that it classifies as 'elevated'. Thus, classification itself represents the meeting-point of functionalism and

⁶³ *Life Imprisonment Case* 1977, supra note 50, para. 278.

⁶⁴ *Testa v Croatia* application no 20877/04, judgement of 12 July 2007, ECHR (Series A) No.? para. 63.

genealogy. However, classification is a complex and composite phenomenon, and genealogy and functionalism provide very different conceptions of classification in law and beyond. Accordingly, any rapprochement between these two frames of reference relies on a shared understanding of classificatory practices in law. We will consider four approaches to this. Two approaches more immediately associated with functionalism: the reduction of all and any components of a legal system to, on the one hand, *communication*, and on the other, the *governance of change*. This is followed by two analyses more closely associated with classifications found in dignity's genealogy: dignity as the *reification of necessity*, and dignity as an instance of legal *self-legitimation*.

IV. The Foundation of Functions: Classification

All legal concepts and practices can be seen as instances of the *communicative* structure of law.⁶⁵ We should resist reifying either the legal system or its functions, and rather treat law as a distinct social system to the extent that communicative practices allow a distinction between what is inside and outside law. This articulates ontological claims about the existence of the legal system, not in terms of practices and norms, but in terms of the observer drawing, and using, a distinction between those communications inside, and outside, the legal system. In Luhmann's terms, a system exists through the selection and classification of those norms considered part of that system:

This is [...] the legal system's normative (or operative) closure. Normative closure denotes that norms do not change merely on the basis of factual conditions. Normative change occurs on the basis of autopoietic reproduction: the superimposition of norms onto norms.⁶⁶

The environment within which the system functions is closed off from the communicative structures of that system, but environmental events serve as stimuli for the deployment or reorganisation of elements within the system. In this sense, dignity as it is discovered in contemporary law is a new form of law's existing internal organisation. The 'environmental shock' of the Second World War is not construed as a catalyst for root-and-branch legal reform and legal creativity, but an instance of where law was thrown back on its own resources to both justify its functioning and provide its own basis for a revised form of functioning. The internal organisation of law is now such that certain claims will be met with a peremptory response, categorical rejection, or a perlocutionary gesture pointing to the limits of legitimate legal practice. This communicative ontology allows us to reject limitations, placed by genealogy, on the forms, which dignity can take in law: dignity may or may not take the form of Kantian deontology, may or may not invoke the metaphysics of humanity's elevation. The various forms that dignity now takes – including examples of cross-constitutional sharing – are instances of law recognising an internally generated, and therefore 'fully legal', concept. Dignity is, above all, a communicative practice, one categorising the human as person, and classifying duties as superior to consequences.

The function of dignity could be reduced to its serving the function of governing *change*. Unlike other social systems, law acts predominantly as a restraining force on the ways in which society directs its development. Dignity within law has functioned to steer legal decision-making towards the deontological rather than the consequentialist. With the normative devaluation of consequences, dignity represents an inward-turning of law to its own self-generated normative commitments: managing human life in a way that is predominantly corrective rather than distributive, and duty-driven rather than goal-driven.

⁶⁵ Luhmann 2008, *supra* note 43.

⁶⁶ A. Philippopoulos-Mihalopoulos, *Niklas Luhmann: Law, Justice, Society*, Oxfordshire: Routledge 2010, p.71, emphasis removed.

The result is law deploying the bivalent, but static category of the human person, rather than one tied to the improvement or progression of humanity. This explains why dignity is generally more associated with conservative currents of political thought and has a broadly consistent legal function as a barrier to action articulated in the name of an atemporal humanity.⁶⁷ Dignity simply classifies the deontological and the humane as having priority over the consequential and the useful.

With these two systemic approaches we treat law not as a set of social or distinctively legal norms, but as a system whose classifications can be understood in terms of a functional whole. This helpfully cuts away many more problematic conceptual dimensions of both dignity and law in favour of an ontologically neutral account of their functioning (communication) or normatively minimal account of legal practice (governance of change). In contrast, the genealogical approach encourages us to reject a view of law as an ontologically or normatively closed system and treats law's classificatory practices as part of a continuum with general normative and epistemological practices. Law, like other social institutions, is dependent upon fundamental (but dynamic) claims about obligations, with particular emphasis on necessity and legitimacy in legal discourse. Accordingly, we should attend to the contribution dignity makes to legal classifications articulating the necessary or legitimate in law.

The presence of dignity within law could be said to provide a reified focus for, and explanation of, *necessity*. Dignity makes necessity concrete in the human person. This is because of specific historical circumstances. Following the Second World War, the normative resources of law were shown to be inadequate given their inability to prohibit gross human rights violations; necessity is now located in the human or the person because these were severed by force, and by law, during the worst excesses of world wars. By associating necessity with a simple legal place-holder, dignity functions to make necessity real as well as ideal. Thus the underlying modality of law has been reclassified. The modalities of any judgment (about existence or about foundations) are exhausted by actuality, possibility, and necessity. Law has hitherto sought to identify its existence with necessity, necessity understood as the will of the sovereign. But the significance of dignity is that it identifies law's existence with necessity (sovereign will) *and* actuality (human being). The category human person reflects precisely this dual modality of law, with law and nature, *nomos* and *physis*, together constituting the legal system.

Finally, this modality of self-constitution must be related to *legitimation*. The vulnerable human body, metaphysical humanity, and basic personhood, together, can be said to provide the sufficient conditions for validity in law. As the explicit wellspring of human rights law and some constitutional systems, dignity is the clearest candidate that we have for a Kelsenian *Grundnorm*, a norm from which other legal norms gain their validity.⁶⁸ While the positive law of human rights (or the self-constituting of a nation through a constitution) do not stand in need of justification to be effective, they benefit from conceptual or ideological underpinnings that give legitimation in the event of a clash of rights or challenges to their efficacy. So, while law exists and is effective without having recurrent recourse to fundamental justification, a first principle, like dignity, functions as a final arbiter within a legal system of what constitutes part of that system; in this case, invalidating any norms which sever the human and person.

This returns to the paradox that any practices of self-legitimation entail. Given that legitimation or authorisation are, conceptually, always outside the thing being legitimated or

⁶⁷ Nussbaum 2006, *supra* note 15.

⁶⁸ Kelsen 1961, *supra* note 18.

authorised, any process of *self*-legitimation is, by definition, paradoxically inside and outside. The human/person clearly shares this kind of liminal status. Accordingly, dignity provides legal self-legitimation at the expense of paradox: it is both inside and outside of law, legitimating but not standing in need of legitimation, and dormant in a legal system, except where fundamental questions arise of deciding upon what is, or is not, to fall within the purview of the system. Or, put differently, it was a legal act to classify the factual human as identical with the legal person, and that identification in the form of 'the inherent dignity of the human person' now serves to give legitimacy to legal classifications concerning the human person. The 'inside' and 'outside' of law are conjoined, but at the expense of begging the question of law's legitimate authority to do so.

V. Dignity's 'Disruptive' Function

By accepting any one of these ways of combining the functional and genealogical, we can allow dignity to escape the ambiguity of its hierarchical and democratic significance. However, this happens at the expense of reducing our basic understanding of function to classification and, by extension, blurring the boundaries between form, function and foundation. Nonetheless, this does do justice to the intuition that dignity must exist inside and outside legal practices. More precisely, legal systems could not have manipulated any norm to serve the same functions as dignity; other concepts like 'respect' or 'recognition' lack the ability to be both intrinsic and extrinsic, both necessary and actual, both universal and particular. In other words, dignity's genealogy – in particular its composite structure and its liminal relationship with law – would have to feature within an account of its discursive function.

Nonetheless, dignity remains a paradoxical *legal* notion. Even if the aristocratic dimensions of dignity have been translated into the more formal notions of 'elevation' and 'status', we are elevating the individual in a fundamentally hierarchical system, i.e. law and the state. The condition of a democratised dignity being functionally useful is a hierarchical system, and for dignity to play its functional role in legal discourse it must deny the conditions that make it possible. Put less paradoxically, the specific contribution made by dignity's genealogy can be characterised negatively as dignity's ability to disrupt ideas of sovereignty. This capacity to disrupt sovereignty is not a single function but a set of discursive and conceptual characteristics that defy any final, ideological, characterisation of dignity. These characteristics can be subdivided into dignity's *flexibility*, *force*, *non-binary forms*, and how its genealogy intersects with *conceptual and phenomenological discourses of the human*.

Concerning *flexibility*, the composite and liminal structure of dignity entails that it is more resilient than other ethical concepts used by law. On the basis of its genealogy, dignity has provided law with a combination of naturalism and necessity: the inalienable worth of the human animal reified in legal recognition of the person. While the natural law school has demanded naturalism and necessity of law, it has done so either on the basis of a substantive (and therefore contestable) conception of the human, or on the basis of what can be abstracted from human reason (becoming thereby vulnerable to the historicisation of reason).⁶⁹ Dignity shaves the natural and necessary to the barest possible grounds: the human being identified with the person. This entails flexibility with respect to the spheres in which dignity functions (domestic, international, public and private law) and the functions that it serves in them. In both its thinner and thicker forms, dignity is always more than the positive law of the state.

⁶⁹ Foucault 1994, *supra* note 42.

Dignity has a unique discursive *force*. Few other concepts have a peremptory power on the basis of so little sustained jurisprudence. Admittedly, other concepts can play similarly peremptory roles, including 'the rule of law'. Necessity in the rule of law equated with the separation of law from other social forms of force, compulsion or authority; naturalism is achieved through the putative atemporality of law's rules. As in the case of dignity, this might also be thought to shield the 'decision' behind the seemingly autonomous normativity of law: the decision to make rules, the decision to make exceptions. However, unlike the rule of law, dignity is not a way of shrouding the mechanics of sovereign power and sovereign decision-making. Its discursive force does not derive alone from its close relationship with constitutional structures, but also from the various language games of dignitarian law which clearly *regulate* legal activity without reference to how dignity might also be said to *constitute* legal activity.

Dignity's resilience also lies in its refusal to generate the binary oppositions of legal *versus* non-legal and universal *versus* particular. The composite human person gives rise to duties that are related to both the particular individual and the universal normative demands of humanity; dignity allows invocation of both the transcendent and immanent. This bivalence certainly leaves much scepticism intact. Law can be used to sever personhood from the natural human, and law is still required to decide upon the allocation of legal rights to the person.⁷⁰ These are no doubt problems for conceptual defence of dignity, but dignity is a powerful means to articulate resistance to such a severance.⁷¹

Finally, the intersection of the genealogy of dignity and wider discourses of the human multiplies its complexity and resilience still further. The previous, genealogical, narrative of the etymological and conceptual evolution of dignity can be summarised as follows: *dignitas* lost its original religious meaning and was thereafter progressively democratised through its attribution to humanity and to each biological human. However, we have to locate this within wider conceptual and phenomenological tributaries of thought and experience, united by the expansion and disruption of European notions of sovereignty. Conceptually, dignity as the recognition of personhood is related to cosmopolitan ideas, specifically the pragmatic cosmopolitanism of the Roman Empire granting citizenship and legal status to slaves and conquered peoples.⁷² Granting universal legal recognition to the human is not a straightforward cosmopolitan gesture: it also represents the expansion of power through law.

Phenomenologically, encounters between European and non-European peoples demanded a restructuring of anthropological assumptions. The colonial 'other', while resembling the upright sovereign animal of European self-perception, had upright behaviour demanded of it while such upright behaviour was neither expected nor reciprocated.⁷³ In other words, the hierarchical and aristocratic dimensions of dignity allowed new experiences of humanity, and new forms of sovereignty, to be cast in terms that were both ostensibly benign and compatible with the creation of subaltern status for the colonised: the 'dignity of man' and the 'natural station' of the subjugated.

Each of these conceptual and phenomenological tributaries adds richness to the discourse of dignity. 'Human dignity' in particular contributes to the disruption of a simple, hegemonic, idea of sovereignty. It encourages ideas of popular sovereignty; it also invokes hierarchical norms ('station' and 'rank') that mesh with the colonial ideology of civilising and subjugating. Simply, where dignity is attributed to each human person, the 'sovereign inviolability' of the

⁷⁰ Agamben 1999, *supra* note 28.

⁷¹ Douzinas 2000, *supra* note 12.

⁷² Daube 1943, *supra* note 8.

⁷³ E.W. Said, *Orientalism*. Reading: Peregrine Books 1978.

individual becomes possible as does a normative yardstick by which those less clearly 'civilised' (or 'upright') can be denigrated or dehumanised. By extension, the relationship between dignity and human rights has deep conceptual and phenomenological origins that do not preclude the aristocratic and hierarchical connotations of dignity being used to invoke sovereignty and political theology.⁷⁴ This is why it is appropriate to suggest that dignity 'disrupts' but does not replace legal conceptions of sovereignty. Conceptually and phenomenologically, dignity entails normative demands that are potentially, but by no means necessarily, democratic.

VI. Conclusion

If the normative use of dignity is characterised by a range of problems – the paradox of legal self-legitimation through legal classification and the paradox of human self-valorisation through anthropology – these are not necessarily manifest in the dignity found in legal discourse. Dignity is a useful, and for the most part uncontroversial, way to make sense of the human part of human rights. It may be that human rights law uses, or has begun to stipulate, a conception of dignity that is neither theoretically extravagant nor anthropologically contentious. Furthermore, law has developed distinctive functions for dignity, and any legal appropriation of concepts entails their partial isolation from critique: conceptual opacity does not preclude legal utility. Further, on the basis of that partial isolation from critique, we can also say that human rights discourse makes powerful use of dignity in *ideological* terms, with dignity having become a synecdoche for human rights as a project, i.e. a democratic social project separable from the defence of any particular human right or human rights instrument. But we should emphasise, by way of summarising dignity's relationship with law as a whole, that dignity's genealogy means that its forms and functions are not exhausted by its current manifestations. Dignity still resonates with that genealogy, and therefore any legal or any purely functional analysis is necessarily incomplete. Consequently, this entails that poststructural scepticism, whilst well founded in some respects, can also miss the structure and resilience of this unique concept: there is more potentiality in dignity than is captured in its current ideological, and discursive, manifestations.

Construed as a means of partially democratising sovereignty, the genealogy and legal functions of dignity allow it to challenge the very notion of sovereignty that is predominant in law: the singular, commanding and coercive, sovereign. However, we cannot say that it therefore serves as *the* basic foundation or source of human rights discourse. As long as the human remains part of what we now classify as 'human rights', a range of justifications can be allied to human rights discourse. This is because 'human' is itself contested: as fact and as value, as atemporal and evolving. Human rights therefore have a multiplicity of justifications arising from the continuing contestation of the ideas of human and humanity. Ultimately, the disrupted conception of sovereignty provided by dignity does not, alone, found human rights claims, but mixes with other bases of justification and other discourses of the human. Dignity is a unique concept which, at present, plays a useful role within law's self-perception including the defence of human rights. It is also uniquely susceptible to criticisms and problems at the heart not only of law, but of anthropology, sociology, and theories of value.

⁷⁴ Kantorowicz 1957, *supra* note 4.