

Othering through Human Dignity

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1. Introduction

The concept of human dignity is rapidly assuming more influence in international, constitutional and human rights law. Although it is mentioned in the ILO's 1944 Declaration of Philadelphia and in the preambles of the key post-World-War-II documents, references to human dignity have recently multiplied in international, regional and national contexts. The Universal Declaration on Bioethics and Human Rights, for example, abounds with such references;¹ the EU makes it clear in its foundational documents that it is built on the value of human dignity;² the European Court of Human Rights (ECtHR) has confirmed that 'the very essence' of the European Convention is 'respect for human dignity and human freedom';³ and constitutions adopted since 2000 tend to refer to it 'emphatically and repeatedly' (Daly 2013, 101, fn 1 at 206). Furthermore, human dignity is now commonly presented as the basis and ultimate aim of human rights (Habermas 2010, 464; Andorno 2009, 223; de Gaay Fortman 2014; Kleinig & Evans 2013, 539), and also features prominently in non-legal contexts such as faith-based ethical discourse (Rosen 2012, 3) and bioethics (Fenton & Arras 2009, 127–29). Given all this, it would seem, at least at first sight, that the language of human dignity could have increasing potential to counter some of the forms of 'othering' discussed in this Special Issue.

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¹ Universal Declaration on Bioethics and Human Rights, UNESCO, 33rd Session of the General Conference, 19 October 2005.

² Art. 2, Consolidated version of the Treaty on European Union, OJ 2010 C 83/01; Art. 1, Charter of Fundamental Rights of the European Union, OJ 2010 C 83/02.

³ *SW v. United Kingdom*, 21 EHRR (1995) 363, at para. 44.

Yet, the prevalence of the concept has also met with criticism. In particular, critics have argued that human dignity is a hopelessly vague concept, and as such is useless in terms of decision-making. My aim in this article, however, is to provide a rather different critique that does not focus on its potential inefficiency. I rather argue that the use of the concept may result in 'othering', despite the best intentions of those employing it. In so doing I attempt to go against the grain of most academic work done on the concept of human dignity: I do not ask what human dignity is, but rather what the concept *does* – or what is done with it – and what it produces. My primary argument is that it is best understood as a decision-making apparatus that can be used to connect various discourses, forces, and sentiments and direct them to achieve concrete purposes. As such, human dignity is an important and useful concept, but also potentially dangerous – especially from the perspective of this Special Issue – if it is approached uncritically. As I argue, those wielding the apparatus of human dignity must either assume some notion of an ideal human, thus excluding other forms of life, or try to do away with difference altogether, thus ignoring human particularities. In either case, the apparatus of human dignity implies its 'others'. Although this is true of most, if not all, legal concepts, I believe the effect is emphasized in the case of human dignity, given its abstract yet fundamental, almost theological nature and specifically the idea that not only it is the same always and everywhere, it is also superior to other legal concepts and principles.

The remaining sections of this article are structured as follows. Section 2 addresses the opposing arguments that human dignity is a useless concept and that it has a legally unambiguous meaning, the aim being to counter them by introducing the idea that human dignity is best seen as an apparatus. Sections 3 and 4 flesh out my argument that using the apparatus of human dignity almost inevitably results in 'othering'. Section 3 provides a brief genealogy of the concept and makes the case that even in its most contemporary usage it has not managed to shrug off the inherently hierarchical character of the archaic notion of *dignitas*, an early form of dignity. I argue in Section 4 that this hierarchical nature may result in 'othering', regardless of whether human dignity is used in an exclusive or an inclusive manner: in either case the 'othering' is probably an unintended by-product of well-meaning uses of the apparatus, although I would not be surprised to learn of cases in which it is used strategically to discipline populations through 'othering'. Section 5 concludes the article.

2. Human dignity as an apparatus

The fact that there are different usages of human dignity has sometimes been taken to mean that as a concept it is useless. Philosopher and bioethicist Ruth Macklin, for example, published an editorial in 2002

entitled 'Human Dignity is a Useless Concept' in which she argues that 'appeals to dignity are either vague restatements of other, more precise notions or mere slogans that add nothing to the understanding of the topic' (Macklin 2003). In a similar vein, Bagaric and Allan state that as 'a legal or philosophical concept [dignity] is without bounds and ultimately is one incapable of explaining or justifying any narrower interests', and as such 'cannot do the work nonconsequentialist rights adherents demand of it' (Bagaric and Allan 2006, 260). Others, such as Aharon Barak, defend human dignity, arguing that what might be unclear and vague to philosophers and other scholars might not be so among practising jurists, and especially judges. As he reminds his readers, judges do not enjoy the same kind of discretion that philosophers do, but 'live in a legal framework, which determines rules on whose opinion is decisive and whose is not' (Barak 2015, 10).

In my opinion, neither view gets it quite right. Where I do agree with the critics is that human dignity is an *indeterminate* concept, especially in regional, international and transnational contexts in which different legal cultures collide. Nevertheless, I do believe it is useful as a concept – at least for the decision makers who are able to employ the indeterminacy as well as the energy and hopes vested in it to help them legitimate their decisions. In contrast, then, to those who claim that human dignity is a useless concept, I would like to suggest that it is best seen as an apparatus (*dispositif*), more or less as that term is used in continental philosophy. I am aware of the philosophical discussion on the correct use and translation of the term, and wish to make it clear from the outset that I hope to avoid that debate as much as possible in this article: I do not make claims based on what precisely authors such as Foucault, Deleuze and Agamben mean with the term for example, or on which of these usages should be privileged over the others (Agamben 2009; Legg 2011; Bussolini 2010). What I do contend, however, is that describing human dignity as an apparatus opens useful perspectives on the functioning of the concept, even if I use the term only *roughly* in its 'precise' meaning.

A short introduction of the term apparatus is nevertheless in order. In an interview dating from 1977, Foucault gave what was perhaps his clearest definition, which he used in various contexts and in varying senses, but that nevertheless formed an important element of his thought throughout his work:

What I'm trying to single out with this term is, first and foremost, a thoroughly heterogeneous set consisting of discourses, institutions, architectural forms, regulatory decisions, laws, administrative measures, scientific statements, philosophical, moral, and philanthropic propositions – in short, the said as much as the unsaid. Such are the elements of the apparatus. The apparatus itself is the network that can be established between these elements [...]

the term 'apparatus' I mean a kind of a formation, so to speak, that at a given historical moment has as its major function the response to an urgency. The apparatus therefore has a dominant strategic function [...] I said that the nature of an apparatus is essentially strategic, which means that we are speaking about a certain manipulation of relations of forces, of a rational and concrete intervention in the relations of forces, either so as to develop them in a particular direction, or to block them, to stabilize them, and to utilize them. The apparatus is thus always inscribed into a play of power, but it is also always linked to certain limits of knowledge that arise from it and, to an equal degree, condition it. The apparatus is precisely this: a set of strategies of the relations of forces supporting, and supported by, certain types of knowledge (Foucault 1980, 194–96).

Taking this excerpt as his basis, Giorgio Agamben helpfully summarizes Foucault's usage of the term 'apparatus' in the following three points:

1. It is a 'heterogeneous set that includes virtually anything linguistic and nonlinguistic [...] the apparatus itself is the network that is established between these elements'.
2. It always has a 'concrete strategic function and is located in a power relation'.
3. It 'appears at the intersection of power relations and relations of knowledge'(Agamben 2009, 2–3).

This, then, is more or less the sense in which I employ the concept of apparatus in my attempt to understand how the concept of human dignity functions. In other words, the former concept helps to foster in me the conception that, even though human dignity means nothing in the abstract, it is exactly because of this that it can collect together, or capture, a wide array of forces drawn from different discourses and practices, connect them and direct them to accomplish concrete results in concrete cases (Datta 2008, 296). Therefore, when I refer to the concept of human dignity as an apparatus, I aim most of all to highlight the fact that it has the power to make diffused, manifold, often contradictory forces and sentiments – especially sentiments – become operative, and to use them to accomplish strategic functions. In so doing, it not only reflects existing power relations, but also draws from and produces knowledge, in particular in the form of truths about 'the human'.

This capacity of human dignity to function as a decision-making apparatus is highlighted on the international level. Although some domestic legal systems already have rather crystallized ways of using the concept, the situation is completely different internationally given the collision among traditions and the lack of criteria determining which of them to apply, apart from particular preferences. This much becomes

clear, for instance, from the commonly cited distinction between autonomy-based and obligation-creating approaches to human dignity.

Autonomy-based usage is expressed clearly, for example, in two excerpts from the Israeli Supreme Court. It is stated in *Veckselbum v. The Defence Minister* that '[a]t the base of this concept [of human dignity] stands the recognition that man is a free creature who develops his body and mind as he sees fit',⁴ and in *The Movement for Quality Government in Israel v. The Knesset* that: '[at] the center of human dignity are the sanctity and liberty of life. At its foundation are the autonomy of the individual will, the freedom of choice, and the freedom of man to act as a free creature.'⁵ Such usage is also visible in the United States Supreme Court case of *Rice v. Cayetano*, for example, in which Kennedy J stated that an affirmative action measure was unconstitutional because it demeaned 'the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities',⁶ as well as in a Slovenian case in which the Court held that forced medication constituted 'a most humiliating act and a degradation of the human being as a person, as it constitutes a deprivation of liberty or a deprivation of the right to decide about oneself.'⁷ A further illustrative example is the Canadian Supreme Court's decision in *Sauvé v. Canada*, in which Justice Gonthier referred to the link between human dignity and autonomy as the basis of the entire criminal-law system: as he argued, 'it could be said that the notion of punishment is predicated on the dignity of the individual: it recognizes serious criminals as rational, autonomous individuals, who have made choices.'⁸ Possibly the most paradigmatic example, however, is the US Supreme Court case of *Planned Parenthood v. Casey*, in which Kennedy, O'Connor and Souter JJ framed the abortion decision as one in which human dignity requires the abstention of the state thus:

Our cases recognize "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." [...] Our precedents "have respected the private realm of family life which the state cannot enter." [...] These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of

⁴ HCJ 5688/92, *Veckselbum v. The Defence Minister* [1993] IsrSC 47(2) 812, 830.

⁵ HCJ 6427/02, *The Movement for Quality Government in Israel v. The Knesset* [2006] IsrSC 61(1) 619, 685.

⁶ Cited in McCrudden 2008, 700.

⁷ U-I-60/03-4-12-2003, Official Gazette RS, No. 131/2003 and OdlUS XII, 93 at para. 1, cited in Daly 2013.

⁸ *Sauvé v. Canada* (Chief Electoral Officer), (2002) 3 SCR 519; 2002 SCC 68 (Gonthier J., dissenting at para. 73), cited in Daly 2013, p. 108.

meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.⁹

The autonomy-based approach to human dignity is therefore founded on the notion of humans as rational, autonomous beings in full possession of their bodies. The aim is to help the 'individual to take control over his life without any interference, or indeed any help, from others or from the state', and therefore 'surrounds the individual in a sort of protective sphere, and thus isolates individuals from each other' (Dupré 2003, 125).

By way of contrast, obligation-creating usage conceives of human dignity as something objective and independent of the desires of individuals. This is illustrated in the *Life Imprisonment Case*, for example, in which the German Constitutional Court stated that the freedoms guaranteed in the constitution were not those 'of an isolated and self-regarding individual but rather of a person related to and bound by the community', and the individual must therefore 'allow those limits on his freedom of action that the legislature deems necessary in the interest of the community's social life.'¹⁰ Another well-known case that illustrates the non-subjective, obligation-founding character of the German approach to human dignity is the *Peep Show* decision:¹¹ the Federal Administrative Tribunal denied a licence for a peep-show on the basis that the show would violate human dignity, irrespective of the fact that the women acting in it had given their consent. In explaining its decision the Court held that because the significance of human dignity was beyond the scope of an individual, it must be protected even against the contrary wishes of the women performing in the shows, in that the will of those women differed from the objective value of human dignity. As Susanne Baer comments, the Court

never asked the women why they were there; what they did, wanted, or had to do; or how they felt about it. The Court never inquired into the existence or nature of the activity, instead attributing what it perceived as harm. This harm was, then, a violation of specific morals rather than economic deprivation or sexual violence, both well-documented as aspects of prostitution. Thus, the Court used the notion of dignity to regulate rather than to liberate the women involved (Baer 2009, 458–59).

⁹ *Planned Parenthood v Casey*, 505 U.S. 833 (1992).

¹⁰ 45 BVerfGE 187 (1977). Cited in McCrudden 2008, p. 700.

¹¹ BVerfGE 64, 274 (1981), BVerfGE 84, 314 (1990).

A similar approach to sexual self-determination has also been taken by the Israeli Supreme Court regarding pornography,¹² and by the Constitutional Court of South Africa regarding prostitution. In deciding in the *Jordan* case that the prohibition of prostitution was not unconstitutional, Judges O'Reagan and Sachs JJ of the latter Court explained that "[e]ven though we accept that prostitutes may have few alternatives to prostitution, the dignity of prostitutes is diminished ... by their engaging in commercial sex work."¹³ Finally, a French court held in the *Senanayake* case, dealing with blood transfusion, that

The French understanding of autonomy is much narrower than the Anglo-Saxon one [...] it is the capacity to define and respect universal duties, laws, towards others as well as towards oneself as members of Humanity. [...] It encompasses an objective dimension, founded in the belonging of the individual to humanity, and leads to giving a greater importance, whenever a human value is at stake, to the universal standard over singular preferences.¹⁴

These examples imply that the concept of human dignity is indeed sufficiently indeterminate and empty to be filled with very different contents: it is not unheard of that both parties to the same case refer to opposing notions of human dignity (Möllers 2013).¹⁵ However, this indeterminacy does not make the concept useless: it rather makes it flexible enough to be useful to decision makers for the legitimation of their decisions – decisions that have very concrete outcomes: a woman becomes or does not become a mother, an affirmative action programme is struck down, an individual loses her job, and so on.

The German Abortion decisions are particularly illustrative as an example of how human dignity can be used to legitimate difficult decisions. In 1974 West Germany passed a law that decriminalized abortion for women who agreed to take part in abortion-dissuasive counselling. A year later the German Constitutional Court had to give its decision in the *First Abortion Case* on the constitutionality of the law. Holding that the law was unconstitutional, the Court referred to the emphasis that German Basic Law puts on the protection of life and human dignity:

developing life also enjoys the protection which Article 1(1) accords to the dignity of man. Wherever human life exists it merits human dignity; whether the subject of this dignity is conscious of it and knows how to safeguard it is not of decisive moment. The potential

¹² HCJ 5432/03, *Shin v. Council for Cable TV and Satellite Broadcasting* [2004] IsrSC 58(3) 65.

¹³ *Jordan v. The State*, 2002 (6) SA 642 (CC), cited in McCrudden 2008, 706.

¹⁴ M. Heers, conclusions, C.A.A. Paris, 9 June 1998 (1998) 6 *Revue française de droit administratif*, 1231-42, cited in Hennette-Vauchez, 2007, 202–203.

¹⁵ See also Section 4 below.

capabilities inherent in human existence from its inception are adequate to establish human dignity.¹⁶

Human dignity was therefore strongly linked to the interest of life, which the State had the duty to protect: the Constitutional Court stated that human life 'is the vital basis of human dignity and the prerequisite of all other basic rights'. As Christopher McCrudden aptly points out, '[b]y combining dignity with the state's duty to protect life, dignity became a technique whereby the court was able to apply stricter scrutiny to derogations from the state's duty to protect life and consequently restrict the rights of the mother' (McCrudden 2008, 716). The consequence was that once 'dignity entered the balancing calculus on the side of the life interest, the conclusion that the protection of the foetus's life must receive priority over the women's freedom was inevitable' (McCrudden 2008, 718–19). By only invoking the human dignity of the foetus, the Court was able to restrict the mother's self-determination.

Much changed, however, between the mid-1970s and the mid-1990s, when the Constitutional Court was supposed to deliver its decision in the *Second Abortion Case*.¹⁷ The strict criminalization of abortion no longer matched social reality and public opinion. Nevertheless, the Court could not withdraw the priority given to life and human dignity, which it has declared time and time again to form the basis of the German legal system. The solution was twofold. First, human dignity was now attributed to both sides of the rights-balancing equation, with the result that the conflict became one between human dignity as the free development of (the woman's) personality and the human dignity of foetal life. Second, it was now stated that counselling was more effective in protecting life than strict criminalization could ever be. It was this combination that allowed the Court to depart from its earlier view. By dealing human dignity differently than previously between the parties to the case, the Court could arrive at a diametrically opposite judgment without departing from the priorities it had set for itself and for the whole German legal order (McCrudden 2008, 718–19).

3. Human dignity and hierarchy: a brief genealogy

My critique of human dignity is not that it can be used as a decision-making and legitimation technique, however. In this sense it is only a tool that facilitates the achievement of myriad outcomes, both desirable and undesirable depending on the context and the preferences of the commentator. I am rather concerned with the usually (but not always) unwanted and unintended consequences of using the apparatus – its by-products – and the effects of human dignity on knowledge production.

¹⁶ Abortion Case, 39 BverfGE R 1 (1975), cited in McCrudden (n 13) 709.

¹⁷ BverfGE 88, 208 (1993).

Given the abstract nature of human dignity on the one hand, and its symbolic weight on the other, any use of the concept tends to rely on 'some substantive ideal of what it is to be human, and what therefore counts as diminishing or degrading that humanness' (Phillips 2015, 80). As mentioned above, not only does it rely on some 'truths' about the human being, it also produces and reinforces them.

The cases mentioned above also support the claim that those applying the apparatus of human dignity also produce their own notion of what an ideal human is like and impose it on others. Indeed, what perhaps emerges most strongly from the cases is the creation of two different subjects of law (see also Urueña 2010, 106), or two images of a human being: one is individualistic, rational, always in control and clearly distinguishable from and immunized against other individuals and the society in his or her protective bubble; the other is more communal, first and foremost a member of his or her society and species, even to the extent of becoming completely enmeshed in and inseparable from the norms of the majority. The flipside of this kind of subject creation is that it also implies its 'other', that is to say it either implies a hierarchy between different forms of life or excludes some of those forms of life from the sphere of human dignity altogether. In this sense, the apparatus of human dignity is an apparatus of othering.

Drawing from both historical and theoretical perspectives, I aim in this section to provide a basis for the argument – which I flesh out in further detail in the next one – that the apparatus of human dignity often acts as an apparatus of othering. More specifically, my focus is on how the concept of human dignity has been used throughout its history, and I seek to extrapolate from that history certain theoretical points supporting the notion that human dignity can function as an apparatus of othering. The key point in the section is that all notions of human dignity comprise a certain hierarchical element that was characteristic of the ancient notion of *dignitas*. In making this point, I lean heavily on the work of Whitman and Waldron on the one hand, and that of Hennete-Vauchez, on the other (Whitman 2003; Waldron 2007, 2012; Hennete-Vauchez 2011). Whereas Whitman and Waldron argue that human dignity has undergone a 'leveling up' process, through which the once exclusionary concept now applies to everyone equally, its hierarchical nature tamed although not eradicated, Hennete-Vauchez counter-proposes that contemporary uses of human dignity, in fact, have more in common with its archaic forms than Whitman and Waldron would like to admit.

Dignity has been an openly hierarchical concept for much of its history. Its roots can be traced to ancient Rome and the aristocratic notion of *dignitas*. Roman social life was strongly based on honour, which was linked to the office that an individual held. Hence, *dignitas*, which derives from the office and not from the individual human being, was perceived to mean 'elevated position or rank' (Iglesias 2001, 120–

21). It was therefore not attributed equally to everyone, and was rather used as a term of distinction and applied only to the few. Used in this way, *dignitas* was not intrinsic and inalienable, but could be gained and lost. It was a relational concept that not only conferred certain powers but also entailed certain duties to behave according to one's rank (Van Der Graaf & Van Delden 2009, 155; Ober 2014). As Oliver Sensen writes, 'the sense in which something is elevated over something else [had] to be specified with each usage of dignity' (Sensen 2011, 75–76).

The concept of human dignity has gone through several transformations since ancient Rome. Even Cicero sought to universalize *dignitas* to apply to all human beings by using it 'to express the idea of human beings' elevated place in the universe' (Sensen 2011, 76). Nevertheless, while Cicero's definition of *dignitas* is certainly a step in a more egalitarian direction, it too relies ultimately on a hierarchy, namely the superiority of human beings over animals. Furthermore, given that human nature derives from reason, not every human being was equally 'human' (Sensen 2011, 78).

The same applies to Kant, who is sometimes hailed as the creator of a contemporary, universal notion of human dignity. Kant posits that human beings are superior to the rest of nature in possessing free will, and that the Categorical Imperative, the supreme principle of morality, commands one to universalize one's maxims by following its dictates - not because of some ulterior motive but because it is right. He refers to this prerogative over the rest of nature as 'dignity'. As he writes, 'this dignity [...] he has over all merely natural beings [...] brings with it that he must always take his maxims from the point of view of himself, and likewise every other rational being' (Kant 2002, Ak 4:438). Dignity is therefore dependent not only on reason, but also on its correct use. Kant, like the ancient Romans, associated dignity with duties – duties entailing being conscious of one's dignity and acting so as not to violate it (Sensen 2011, 81). Human beings enjoy dignity only if they fulfil these duties: 'morality, and humanity insofar as it is capable of morality, is that which alone has dignity' (Kant 2002, Ak 4:435).

More recently, many authors have claimed that we now have an egalitarian version of human dignity that is also fundamentally different from the Kantian vision. According to Sensen, the contemporary version is based on the notion that 'human beings possess the objective and inherent value property called "dignity", and because of this they can make rights claims on others.' Human dignity is thus a non-relational property, meaning that it cannot change or disappear depending on the situation in which human beings find themselves: each human being has an intrinsic and objective value that is higher than other values (Sensen 2011, 72).

The claim that human dignity is now completely egalitarian can be challenged, however. As demonstrated above, it is far from clear exactly what human dignity means when applied in practice, in situations in

which competing claims collide. It is therefore not surprising that it has proven very difficult to construct a truly universal, non-hierarchical basis of human dignity.

Indeed, even most of the authors who would declare that human dignity belongs to everyone have to assume some sort of hierarchy. For example, although J.Q. Whitman argues that contemporary dignity is egalitarian and universal, in contrast to former versions, he still identifies a clear link between them, arguing that the aristocratic notion of dignity was transformed to the contemporary one through a 'levelling process' that generalized the exclusive *dignitas* so that it now applies universally and equally to every human being. As Whitman writes, 'human dignity for everybody, as it existed at the end of the 20th century, means definitive admission to high social status for everybody' (Whitman 2003, 426).

Similarly, as Jeremy Waldron suggests, 'when we attribute rights to people in virtue of their dignity, we do so on account of some high rank we hold them to have.' However, this rank should not be that of some over others. Instead, we 'may be talking about rank of humans generally in the great chain of being. [...] Presumably in this ranking, plants are in turn inferior in dignity to beasts, and beasts are inferior to humans, and humans are inferior to angels, and all of them of course are inferior in dignity to God.' The main implication behind this kind of traditional conception of rank is that '*within* each rank, everything is equal'. Thus, Waldron purports to use the idea of rank 'to articulate an aggressively egalitarian position', in which humans 'are basically one another's equals, because denial of equality in this fundamental sense would relegate some to the status of animals or elevate some to the status of gods' (Waldron 2007, 216–18). Indeed, Waldron argues that there are still traces of the old notion of dignity in contemporary usage – traces that could help in building a coherent philosophical basis for the application of human rights and human dignity in law. Drawing from the work of Gregory Vlastos, Waldron points out that we still 'organize ourselves like a caste society but with just one caste, or like an aristocratic society but with just one rank (and a pretty high rank at that) for all of us'. He goes on to suggest that 'there may be a useful connection between the independent meaning of dignity, associated with high or noble rank, and the egalitarian claims about human dignity that we make in human rights discourse' (Waldron 2007, 221–22, 2012, 34–35).

Waldron's argument is characteristically sophisticated, and his emphasis on equality is very attractive. However, his curious ignorance of all things related to aristocracy that we should try very hard to abolish, instead of extending them to everyone, is less appealing (Herzog 2012, 114). This is however, in my opinion, not so much a fault in Waldron's argument as evidence of the fundamentally hierarchical nature of the concept of human dignity. Hennette-Vauchez has persuasively argued that even contemporary uses of human dignity tend to operate in the

mode of ancient *dignitas*: in the same way as the relation between the individual and *dignitas* was once mediated by the office that an individual could hold, the relation between the individual and human dignity is now mediated through the concept of humanity – or alternatively personhood, I would add. Hence, the fundamentally hierarchical nature of *dignitas* has not disappeared in the move to human dignity: on the contrary, its two key characteristics are retained in many instances. In other words, it can be gained and lost, and it imposes duties on those included in its sphere (Hennette-Vauchez 2011).

4. Othering

These two key characteristics also represent the two ways in which human dignity can operate as an apparatus of othering: it can be used to 'other' or may inadvertently cause othering by excluding some forms of life from within its sphere or by disciplining those who are included in it. It is worth emphasizing, however, that although these two forms of othering are separated here for the sake of illustration, they are in fact closely intertwined and derive from the same source.

The former form – othering through exclusion – is the more straightforward of the two. As argued above, whatever approach is taken to the concept of human dignity, its operation must, in practice, rely on an at least an implicit idea of its essence, be it reason, humanity, personhood or something else, and this notion of essence must imply its other, which is seen as somehow less dignified. This 'other' could be another species, but regardless of whether or not one holds on to the requirement of species neutrality and equality between species, the distinction may well not be easy to make – one could think of beginning- and end-of-life situations and some bioethical issues, for example. In most cases this peculiar construction, in which human dignity is mediated through another apparatus, hardly matters, and indeed remains securely hidden. Nevertheless, it starts to reveal its problematic face in limit-situations when the construction is pushed to its edge. Zones of indistinguishability tend to form in such situations, in which decisions ultimately rely on an exclusionary logic – decisions have to be made on who counts as a (legal) person and entail pushing others over the edge of thingness (Soirila 2016; see also Esposito 2012, 2015). In most cases this is an unwanted by-product of the operation of the apparatus of human dignity. Nevertheless, I would not be surprised to hear that in some cases it is also used strategically, to discipline and normalize the population (see Hennette-Vauchez 2007).

The second, interlinked, form of othering derives from the other key characteristic of *dignitas*. The archaic form of dignity did not differ from the ideal egalitarian notion of human dignity merely in excluding those who did not hold a certain office from the sphere of *dignitas*: it also imposed certain strict obligations on those included. It is indeed the

latter difference that Hennette-Vaucher particularly emphasizes when she formulates her argument that many contemporary uses of human dignity still operate in the mode of *dignitas*. Mediated through the apparatus of humanity, this 'mode of reasoning invariably unfolds as follows: every human being is a repository (but not a proprietor) of a parcel of humanity, in the name of which she may be subjected to a number of obligations that have to do with this parcel's preservation at all times and in all places' (Hennette-Vaucher 2011, 43).

This kind of disciplining or normalization of those included within the sphere of human dignity may lead to another type of othering – by way of forcing us to deny some essential part of ourselves. As Anne Phillips points out, we lose an important part of ourselves if we have to present ourselves as disembodied abstractions in order to claim our equality: we 'should not have to pretend away key aspects of ourselves, ask forbearance in the face of our particularities, or appeal to people to see who and what we are "beyond" our gender, skin colour, sexuality, or disability' (Phillips 2015, 86). Hence, even if human dignity is used in an explicitly inclusive way, it still tends to produce 'othering' by forcing us to hide our particularities in aspiring to reach out to some common notion of humanity. Yet, as Phillips writes, we 'are not human instead of but as...women, men, black, white, gay, lesbian, heterosexual, and so on' (Phillips 2015, 133). Forcing us to pretend otherwise is simply another way of 'othering', regardless of how good the intentions are.

Here one could no doubt point out that this argument may be extended to any legal concept and therefore amounts to little else than splitting hairs. I would rebut that argument, however, submitting that although there is some truth in it, the issue is emphasized when it comes to human dignity given the aim to reach some essential, if not transcendent, element of humanity. My argument against human dignity is therefore a matter of scale or degree. Indeed, even the closest possible reference point, human rights, is much more formalistic, and relies less on assumptions about the essence of humanity. Spelled out into long lists of specific rights, tailored sometimes to specific contexts, and coming with exceptions, the application of human rights is more constrained and legalized than in the case of human dignity, which is more abstract and must therefore rely more explicitly on some presumed notion of shared humanity. Moreover, the symbolic effect of declaring some action a violation or a non-violation of human dignity is much greater than finding that some act violates or does not violate human rights. There is a difference in my mind, for example, between arguing over whether certain sadomasochistic sexual practices fall within the protection of private and family life, and whether the state can intervene in the interest of public health, on the one hand, and

arguing whether such practices are an affront to human dignity, always and everywhere, on the other.¹⁸

Some of these problematic aspects of human dignity are well-illustrated in the complex and well-known case of Manuel Wackenheim, sometimes referred to as the 'French dwarf-throwing case'. As its moniker suggests, it concerns an activity during which a person, classified as a dwarf, is clothed in padded attire and a helmet, and is thrown around during various events. The applicant concerned, Mr. Wackenheim, had been taking part in these dwarf-throwing events since July 1991. They were organized by a company called Société Fun-Productions, with a view to entertaining the clients of discotheques by allowing them to throw the applicant onto an air bed. At the end of October 1991 the mayor of Morsang-sur-Orge imposed a ban on dwarf-tossing events scheduled to take place at the local discotheque in the interests of public order and safety. There was an appeal against the order, which was eventually annulled by the Administrative Court of Versailles. However, the persistent mayor lodged a further appeal to the Conseil d'État, successfully invoking the concept of human dignity. Instead of closely scrutinizing the specificities of the local circumstances, as it had previously done, the Court elevated human dignity to be an element of public order, which public authorities could legitimately protect regardless of the particular circumstances. Hence, in that dwarf-throwing events infringed 'the dignity of the human person in its very objective', the Mayor was acting within his powers in banning the activity. The same applied with a similar ban issued by the mayor of Aix-en-Provence on 20 March 1992.¹⁹ The decisions of the Conseil d'État, in which it emphasized that these considerations of human dignity were not tied to particular local circumstances, but were applied generally, meant that other mayors were also allowed to ban dwarf-throwing activities, and this quickly led to the end of the practice altogether. Finding himself unemployed, Mr. Wackenheim applied to the Human Rights Committee, arguing that France had discriminated against him and violated his rights to freedom, employment, respect for his private life, and an adequate standard of living. He claimed that, in fact, it was the *banning* of dwarf-throwing that violated his human dignity, not the activity itself: he argued that human dignity was built on the right to make autonomous decisions about one's life, and the right to work in a profession one has chosen for oneself.²⁰ The Committee did not hold

¹⁸ I have in mind here the case of *Laskey, Jaggard and Brown v. United Kingdom*, 24 EHRR (1997) 39, decided on the national level as *R v Brown* [1993] 2 All ER 75. For a discussion, see (Beyleveld and Brownsword 2002, 35).

¹⁹ Conseil d'État, ass., 27 October 1995, Commune de Morsang-Sur-Orge, Dalloz Jur. 1995, p. 257; Conseil d'État, ass. 27 October 1995, Ville d'Aix-en-Provence, Rec. C.E., p. 372; Dalloz Jur. 1996, p. 177.

²⁰ Manuel Wackenheim v. France, Human Rights Committee, Communication No 854/1999, U.N. Doc. CCPR/C/75/D/854/1999 (2002), paras 2.1-3.

that France had violated Mr. Wackenheim's rights, however, finding that 'the bans had been necessary in order to protect public order, which brings into play considerations of human dignity that are compatible with the objectives of the Covenant [on Civil and Political Rights].'²¹

At the heart of the case was the question of Wackenheim's dignity and what it entailed. In Wackenheim's view, protecting his dignity meant being given the autonomy freely to make decisions about his life, as well as the right to work. In the view of the French authorities, on the other hand, it meant protecting him, fellow dwarves and the whole human race from exploitation and humiliation – or what is deemed as such by an 'objective' third party. It is not difficult to agree with the French authorities and the Human Rights Committee that 'dwarf-throwing' is an activity worth banning. Moreover, the French Comissaire du Gouvernement, Patrick Frydman, may well have had a point in arguing that the appeal of the events derived from the perverse need of the spectators – who were the ones doing the throwing – to feel superior to those with 'abnormalities', although he no doubt went too far when he went on to hint at Nazi Untermenschen thinking.²²

My protest, then, is not against the outcome of the decision as such – although it was indeed most unfortunate for Mr Wackenheim, who argued that he had trouble getting other employment and had taken great pride in finally being able to sustain himself financially. I rather bring up the case to demonstrate some of the problems related to the language of human dignity. Framing the issue as a matter of human dignity implies not only that we can somehow deprive ourselves of our dignity through our life choices, posing questions of self-determination and consequently of belonging, but also that the acts of some can diminish the esteem of another individual, a group, or even the whole of humanity (Rosen 2012, 91). Moreover, it makes the case rely on some fixed assumptions of what it is to be a human and implicitly creates a hierarchy between different forms of life and their dignity. In some strange way, arguing that the tossing of the dwarf – as opposed, for example, to an average-sized acrobat – was a violation of human dignity as such, even though he did not agree, seems to imply that it *was* a bit less human because he was a dwarf. This, of course, was not at all what the public authorities intended when they took measures to ban the activity. But my point is precisely that such problematic unintended implications could have been mitigated to some extent by employing other legal concepts that would achieve the same legal result without invoking the same kinds of almost metaphysical problems, thus leading to othering. Finally, the language of human dignity draws attention away

²¹ Manuel Wackenheim v. France, Human Rights Committee, Communication No 854/1999, U.N. Doc. CCPR/C/75/D/854/1999 (2002), para. 7.4.

²² The opinion of Patrick Frydman, Comissaire du Gouvernement, available at https://fiches.dalloz.etudiant.fr/fileadmin/contenu_fiches/Public/La_police_administrative/RFDA_1995.1204.pdf (accessed 17 May 2018).

from the background inequalities and structural forms of discrimination that no doubt played a role in convincing the applicant to start working in the events and protecting his trade so persistently. In this there is a link between contemporary uses of human dignity and 'those early Catholic notions of human dignity, where being told that your way of life was replete with dignity became a coded way of saying you should therefore not bother your head with equality' (Phillips 2015, 133).

5. Concluding remarks

I have argued in this article against the view that human dignity is a useless concept. I have maintained, instead, that it is a dangerous one. My argument is based on the notion of human dignity as an apparatus, which can be wielded by decision makers to achieve concrete results in concrete cases – but which, most importantly, tends to result in 'othering' as its by-product (and perhaps sometimes as its strategically selected main product). This, I maintain, it does when those wielding the apparatus assume some ideal notion of the human in applying it, but also when they try to do away with difference altogether.

Taking this effect of othering into consideration, I am not very enthusiastic about the recent advances of human dignity in legal discussion and practice – and obviously not about its potential to counter 'othering'. Writing more from the perspective of philosophy and political theory, Anne Phillips recently argued that we should replace the discourse of human dignity with that of equality, the latter always being *claimed*, whereas dignity is a matter of philosophical, and sometimes even theological pondering. I completely agree with Phillips, although in a legal context I might also settle for the more legalized concept of human rights. Curiously, it seems to me that much of the recent acclaim of human dignity derives from a loss of faith in human rights, which have – entirely correctly – been found to be indeterminate, full of exceptions and requiring complicated balancing acts (on the indeterminacy of human rights see, for example, Koskenniemi 2001; Petman 2006). Indeed, the assumption behind its ascendancy seems to be that we can finally solve these problems of balancing once we give priority to considerations of human dignity. However, if we are looking for precision, it seems to me that human dignity is a step in the wrong direction, and what is more relevant to this article, it is a step towards stronger forms of 'othering'. Whereas the issue of othering also applies to human rights, which also tend to rely on some idea of the human, as codified legal rules they are less abstract and philosophical, and more formal than human dignity. Moreover, they retain some aspects of being claimed, as Phillips emphasizes regarding equality (see, for example, Rancière 2004; Douzinas 2000). This is not to say that there are not cases that almost everyone would agree constitute a violation of human dignity – as problematic as that expression might be in itself. However,

it seems to me unlikely that such events would not be captured within more established legal categories as well, without the need to involve human dignity with all the heavy philosophical, almost theological baggage it carries.

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