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**ON THE SACRED, OUR STORIES AND SUFFERING
- HOW DOES THE ETHICAL VALUE OF HUMAN DIGNITY
WORK IN THE EUROPEAN COURT OF HUMAN RIGHTS?**

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1. INTRODUCTION

Human dignity has come to be seen as underpinning “legal humanism.”¹ Still it is as a legal value that it has been met with the strongest criticism. Many scholars appreciate the political-strategic value of the term as “a placeholder for any more fundamental explanation of the theoretical basis for human rights,”² but “unlike in linguistics [...] where a placeholder carries no semantic information, dignity carried an enormous amount of content, but different content for different people.”³ Considering the frequent and central appearances in legal documents, it was no wonder that judges sought to apply the term, and at this judicial stage many scholars agree that it becomes a dangerously malleable concept, “an empty vessel”⁴ or “a loose cannon.”⁵ Others claim that, considered as a legal value, it is simply a “vacuous concept.”⁶ In the following I argue that human dignity, correctly understood as an ethical value/attitude, has important functions in human rights adjudication.

It will become clear that there are different versions and aspects as well as levels that it can operate on. I propose, however, that a contemporary understanding of dignity plausibly related to human rights will have certain basic elements. After a short

¹ Feldman, David, “Human Dignity as a Legal Value: Part 1,” *P.L.* 1999, WIN (hereafter: Feldman 1999), 682.

² McCrudden, Christopher, “Human Dignity,” Working paper no 10/2006 April 2006, University of Oxford Faculty of Law Legal Studies Research Paper Series (hereafter: McCrudden), 39. See also Schultziner, Doron, “Human Dignity – Functions and Meanings”, *Global Jurist Topics*, Vol.3 [2003], Iss. 3, Art. 3, (hereafter: Schultziner), 4-5, on “symbolic-representation” and lack of fixed content, and Henkin, Louis, (1989), “International Human Rights as “Rights””, *The Philosophy of Human Rights*, ed. M. Winston, Belmont: Wadsworth Publishing Company, 134-135.

³ McCrudden, 39-40.

⁴ McCrudden, 40.

⁵ Beyleveld, D and Brownsword R, “Human Dignity, Human Rights, and Human Genetics” (1998), 61 *MLR*, 661, (hereafter: Beyleveld and Brownsword), 662

⁶ Bagaric M. and Allan J., “The Vacuous Concept of Human Dignity”, *Journal of Human Rights*, 5:257–270, 2006, (hereafter: Bagaric and Allan).

overview of the history of human dignity, I therefore develop a skeleton theory based on a sense of the sacred and a questioning attitude, an appreciation of our stories and a commitment to relieve suffering and extreme pain.

Human dignity plays a central role in human rights discourse,⁷ and although the term does not appear explicitly in the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter: ECHR), the European Court of Human Rights (hereafter: ECtHR) has made extensive use of it in their jurisprudence. I wish to test to what extent their use of the term relates to the moral-philosophical skeleton theory. By looking at the application of the ethical value in concrete cases, the legal consequences also become clearer and the skeleton theory is somewhat fleshed out.

Among the major challenges are those of cultural relativism and legal paternalism/moralism. According to McCrudden, the use of dignity enables the incorporation of cultural differences and undermines universalism.⁸ Feldman's criticisms relate to inter alia the dilemma of autonomy and legal paternalism/moralism.⁹ Alder argues that human rights conflicts often involve incommensurable values and that a political forum is better suited for emotional choices.¹⁰ A fundamental critique is voiced by A.T. Williams who believes law concentrates on what he calls sufferance rather than insufferability.¹¹ Considering that

⁷ See Kretzmer and Klein (ed.), (2002), *The Concept of Human Dignity in Human Rights Discourse*, The Hague: Kluwer Law International (hereafter: Kretzmer and Klein). "Dignity" has been used in a variety of legal contexts and been attached to different legal entities. According to Frowein, Nazi propaganda discredited the democratic Weimar constitution claiming that "the dignity of the state" should be re-established. See Frowein, J.A., "Human Dignity in International Law" in Kretzmer and Klein (hereafter Frowein), 123. It is precisely the idea of *human* dignity that has influenced the development of post-World-War-II international law. I mostly use the terms "dignity" and "human dignity" interchangeably.

⁸ McCrudden, 42.

⁹ Feldman.

¹⁰ Alder, John, "The Sublime and the Beautiful: Incommensurability and Human Rights", *P.L.* 2006, WIN, (hereafter: Alder)

¹¹ Williams, A.T., "Human Rights and Law: Between Sufferance and Insufferability", *L.Q.R.* 2007, 123(JAN), (hereafter: Williams, A.T.)

“one cannot guess how a word functions [...] [o]ne has to *look at* its use and learn from that”¹², and that the court has an evolutive approach, I will concentrate on recent and topical cases to test how the value faces these challenges.

There seems to be broad consensus that the core rights in, or closest related to, human dignity include as a minimum the rights I will focus on here, namely the right to life (article 2), the right to be free of torture, inhuman and degrading treatment and punishment (article 3) and respect for private and family life (article 8).¹³ (I will not be concerned with dignity as an independent right.¹⁴) Due to my understanding of dignity, the analysis of cases is not structured according to the rights, but rather as a sort of needs-based narrative, beginning before birth and ending with death.

In sum, dignity correctly understood as an ethical value/attitude can have important functions in human rights adjudication, and the ECtHR’s application relating to the skeleton theory survives several challenges/criticisms.

2. WESTERN HISTORY AND THEORY OF HUMAN DIGNITY

¹² Wittgenstein, Ludwig, (1996), *Philosophical Investigations*, Oxford: Blackwell, passage 340.

¹³ See for example Feldman 1999, 690, and Gearty, CA, (2004), *Principles of Human Rights Adjudication*, especially chapter 5, Oxford: Oxford University Press, (hereafter: Gearty 2004). Other rights that may be included are basic social and economic rights.

¹⁴ On this question see Klein in Krezmer and Klein, who shows that article 1 of the German Basic Law mostly has an auxiliary function, i.e. in interpreting other articles. The right may therefore resemble the interpretive value.

The history of human dignity is very complex. Here I focus on the main developments and versions through Western history. *Dignitas hominis* was the classical Roman concept of status and honour. Worthiness depended on rank or office, and it was a sort of personality right. Cicero, probably influenced by the Greek Stoics, used the term *dignitas* at least once to refer to the dignity of human beings as such.¹⁵ Regarding human beings as having dignity because they are human beings, however, begs the question. Both secular and religious traditions have historically emphasised R/reason and F/free W/will and a link to Nature and/or the Divine.

In the Church doctrine *imago dei* is central. Today the following may serve as the dominant understanding:

God is seen to speak, signifying that he has the power of thought, and he is also seen to create, denoting that he has the power to will things into existence [...]
Catholic theology identified the image of God in man with God's spiritual powers of reason and free will.¹⁶

In addition to the Genesis, the Christian understanding is informed by the Trinitarian theology to include the capacity for community with other persons and ultimately with God, and by Christological theology as the idea of image is related to filiation: everyone is called and has the capacity to participate in Christ's divine sonship.¹⁷

Along with society at large, the Church now frequently employs the term dignity. In for example *Gaudium et Spec*, 07.12.1965, the first chapter is called "The Dignity of the Human Person". It is ultimately something that is *given* to humans by God, and

¹⁵ Cancik, H., "*Dignity of Man and Persona* in Stoic Anthropology: Some Remarks on Cicero, *De Officiis I* 105-107", in Kretzmer and Klein.

¹⁶ Guerra, Marc D, "The Affirmation of Genuine Human Dignity", *Journal of Markets and Morality*, Vol.4, No.2, Fall 2001, (hereafter: Guerra).

¹⁷ For an introduction to the modern Catholic doctrine, see Williams, Fr. Thomas, "The Question of Human Dignity", Catholic Dossier July/August 2000, (Available at: <http://www.catholic.net/rcc/Periodicals/Dossier/2000-08/article3.html>; last visited 12.08.2007)

Guerra encourages the Church to be cautious and precise in its language so as to clearly mark the distance to radical autonomy versions.¹⁸

Locke and other social contract theorists referred back to a (hypothetical) primordial state of human existence as the basis for natural rights. Dignity and rights were seen as prior to and above the establishments of states and laws. Other secular versions were based on Kant who grounded dignity in the noumenal realm (The kingdom of ends) rather than a (hypothetical) state of nature:

[T]hat which constitutes the condition under which alone something can be an end in itself has not merely a relative worth, that is, a price, but an inner worth, that is, *dignity*.

Now morality is the condition under which alone a rational being can be an end in itself, since only through this is it possible to be a lawgiving member in the kingdom of ends.¹⁹

Kant's duty-driven categorical imperative is used as an injunction against instrumentalisation: Due to the intrinsic value, one cannot treat persons merely as a means. One must always at the same time treat them as an end in themselves. Because Kant emphasised capacities, particularly reason, in a noumenal sense, dignity was not dependent on the capacities of a concrete person, but related to humanity as such.

Contrary to Kant who stressed the importance of moral autonomy, rationality and individuality, Samuel Pufendorf put special emphasis on the social nature of man.

Another communitarian version was promoted by Rousseau and other republicans who

¹⁸ Guerra.

¹⁹ Kant, *Groundwork of the Metaphysic of Morals*, (ed. Gregor, M), Cambridge: Cambridge University Press, 1997, p.43. Contrast with Hobbes who seemingly operates with *dignitas hominis*: "The Value, or Worth of a man is, as of all other things, his Price; that is to say, so much as would be given for the use of his Power: and therefore is not absolute." (Hobbes, Thomas, *Leviathan*, (ed. Richard Tuck), Cambridge: Cambridge University Press, 1996, p.63).

were concerned with equality and fraternity. Socialist and social reform movements also employed the term extensively. Both in the abolition of slavery and in the labour movements, reformists and revolutionaries focused on social conditions and recognition through dignity arguments.

Having looked briefly at some of the dominating versions of dignity, we already see that it can operate on three levels:²⁰ dignity of the human species, relating mainly to an objective aspect; dignity of specific groups within the species, relating to both objective and subjective aspects; and dignity of the individual, relating mainly to a subjective aspect.

The subjective/experiential aspect, the focus for proponents of radical autonomy, is concerned with a sense of self-worth and individuals' capacities. By itself it does not, however, cater for central features of our convictions about dignity. Many people, including liberals such as Ronald Dworkin, believe that people can compromise their own dignity, and that unrecognised indignities are often as bad or worse than recognised ones: slaves or Auschwitz-victims could for example be so oppressed that they themselves deemed the oppression appropriate.²¹ The inclusion of the objective aspect has the effect that people who lack the subjective capacity are still considered to have dignity. As the vice of indignity exists in a relation between those who show and those who are shown indignity, both parties have a stake, and the transgressor(s) or audience at large will have a right not to act in ways that deny our

²⁰ See Feldman for further analysis of levels and aspects.

²¹ The objective/evaluative aspect is needed to deal with the worrying paradox that everyone *has* human dignity, it cannot be taken away, but at the same time it can apparently be *violated* by for example degrading treatment so that there is no, or diminished, human dignity in the eyes of the transgressor(s) and/or of the victim. Illustrations of this are found in Victor Frankl's account from Auschwitz: Frankl, V., (2006), *Man's Search for Meaning*, Beacon Press.

sense of the moral importance of someone else, even if (s)he would prefer or want us to.²²

In the post-war period human dignity came to be seen and used as a legal value in a sustained way at an international level. The recent experiences of the war and egregious abuses prompted the incorporation into both international²³ and national instruments at about the same time: “Identifying which particular document influenced which other document is thus somewhat a pointless enterprise as the concept was so much in the political ether, as it were, that it tended to crop up all over the place.”²⁴ It features prominently as the “untouchable” (“unantastbar” is stronger than “inviolable”) first article of the German constitution.²⁵ Since the 1940s, the period of most dramatic insertion into constitutions was the 1990s, following the fall of the Soviet Bloc. The protection of dignity is also the first article in the European Union Charter of Fundamental Rights and is considered a general principle in Community law deriving from the constitutional traditions common to the member states.²⁶

²² Dworkin, R., (1993), *Life's Dominion – an argument about abortion and euthanasia*, London: Harper Collins, (hereafter: Dworkin 1993), 259, fn 23. Another example of how dignity is relational is given in Jefferson's remark on owning slaves, when “odious particularities” undermine the master's own dignity. See the quote in Meyer, M., “Dignity as a (Modern) Virtue” in Kretzmer and Klein, 205.

²³ The preamble, *Charter of the United Nations* (1945): “We the people of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person [...]” A similar reference is found in the preamble of the *Universal Declaration of Human Rights* (1948): “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind[...]” On how the concept came to be included, see Dicke, K., “The Founding Function of Human Dignity” in Kretzmer and Klein, (hereafter: Dicke). In the preamble of the *Covenant on Civil and Political Rights* (1966) a foundational relationship between human rights and dignity is identified: “[...] Recognizing that these rights derive from the inherent dignity of the human person [...]”

²⁴ McCrudden, 13-14.

²⁵ See Eckert, J., “Legal Roots of Human Dignity in German Law”, and Klein, E., “Human Dignity in German Law”, both in Kretzmer and Klein.

²⁶ See also “Omega”, 14.10.2004, 26/02: “the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law.”

3. ON THE SACRED, OUR STORIES AND SUFFERING

In the following I develop a moral-philosophical skeleton theory, built on what I believe must be the core elements in any contemporary understanding of human dignity. Even some of the sharpest critics of dignity as a legal value admit that the different versions can work together at least as a negative demarcation line.²⁷ The skeleton theory of human dignity involves a question mark, suffering and stories in

²⁷ Ritschl, D., “Ethical Maxims from Theological Concepts of Human Dignity?”, in Kretzmer and Klein, (hereafter: Ritschl), 97.

several senses. These three elements are linked to a duty-driven agency and a notion of “patienthood”. The Kantian notion rooted in rationality needs to be complemented by an emotional perspective. Before moving on to the cases and looking closer at the legal consequences, some preliminary remarks on legal paternalism/moralism, cultural relativism and other challenges/criticisms are made.

First and foremost, any dedicated person seeking answers will at some point realise that pursuing the question “why?” will eventually leave one with (only) the question mark. My intuitive claim is that this is not a small insight. It can lead to a certain attitude colouring human rights decisions. This question mark can be understood as an indication that there is something larger/other than what we can rationally explain and understand. It points to our ultimate vulnerability, rather than grandiose Reason or Free Will, and demands some humility in confronting ourselves, the world and others. The ultimate not knowing, nihilism as “nothingness”, may foster openness, caution, flourishing and recognition of even the enemy’s humanity rather than absolute dogmas, demonization and brutality.

We can no longer point authoritatively and with consensus to God, Nature, History or similar totalitarian entities to justify hard answers.²⁸ If not previously, then certainly in these “post-modern” times of uncertainty, one may find that the foundation for morals is paradoxically the lack of or ultimate unknown/uncertain foundation(s). Rather than needing a mask that “protects us from our doubting selves”²⁹, our doubting selves may

²⁸ “[...] Hannah Arendt observed that after nature – i.e., the natural law tradition – and history – i.e., historicism and positivism as well as Marxism – had lost any power to convincingly put forth universal principles only mankind itself is left to fill this gap (Dicke, 120).”

²⁹ Gearty, CA, (2006) *Can Human Rights Survive?* Cambridge: Cambridge University Press (hereafter Gearty 2006), 143.

indeed be closely related to this fundamental/foundational question mark, the ultimate uncertainty.

The unfathomable question mark inspires awe in us and seems connected to a sense of the sacred.³⁰ It involves a certain ambiguity, but is different from, if not opposed to, the exclamation mark. Torture is an example of unaccepted conduct, and the ban is allegedly absolute. One could call these areas of conduct a “taboo”.³¹ The question mark carries weight in its cautioning, making certain conduct *prima facie* or generally wrong. Interestingly, the Hebrew term used for dignity, *kavod*, is derived from the root *k-b-d*, literally “weight”.³² This then becomes an ethics not of 100% absolutes, completely deontological, but it is far from utilitarian.

The question mark is what some religious-minded people might call the divine and try to fill with meaning, but the question mark does not disappear.³³ One might wish to ignore the potentially terrifying silence, by fanatic adherence to certain perceptions of right and wrong, good and evil. But as the essence of the belief, the question mark remains, as the dynamics of doubt and faith may indicate. It can foster a spiritual attitude, but it is not confined to those of a religious temperament in the narrow sense.

³⁰ Within religious studies there are different definitions of the sacred, e.g. things set apart or forbidden. The Oxford Advanced Learner’s Dictionary (electronic) defines sacred thus: “Connected with God or a god; considered to be holy [...] Very important and treated with respect.” For a different view on the relationship of dignity and the sacred, see Kohen, Ari, “The Problem of Secular Sacredness: Ronald Dworkin, Michael Perry, and Human Rights Foundationalism”, *Journal of Human Rights*, 5:235-256, 2006, (hereafter: Kohen).

³¹ For similar observations see Koskenniemi, M, “The Effect of Rights on Political Culture,” (1999), P. Alston, *The EU and Human Rights*, 99-117, Oxford University Press.

³² See Lorberbaum, Y., “Blood and the Image of God: On the Sanctity of Life in Biblical and Early Rabbinical Law, Myth, and Ritual”, in Kretzmer and Klein, (hereafter: Lorberbaum).

³³ In several religious traditions the divine is linked to a question mark and silence, fostering the appropriate reverence and open attitude, rather than loud answers and exclusionism. See for example a lecture by Catholic Professor Davies O., “Divine Silence and Human Rights” (on file with the author; hereafter: Davies), and consider the Indian tradition of “brahmodya”, i.e. asking questions in a Socratic-like dialogue until one arrives at silence and experiences the divine. Another example is the “silent waiting” of the Religious Society of Friends (Quakers).

As so many, if not most, great thinkers have realised, “[i]n our attempts to justify our beliefs to others, we ultimately reach a point beyond which we can rationally argue no further. This is true whether our beliefs are based in religion, nature or reason.”³⁴ This is common to people of all traditions and cultures, secular and religious, from natural science or the humanities. Human dignity, then, may be related to the question mark, rather than a hard answer.

This question mark, and consequently a sense of the sacred, is intimately linked to our stories. We can talk about stories (or the more fashionable “narratives”) in three senses. One is history, another is the personal life story and the third is story-telling/multiple stories.

Any concept, not only human dignity, is itself also dependent on preceding language in the form of stories. Concepts are gained by induction. This should be clear by reflection on concepts from “peace” and “freedom” to “punishment” and “rule”.³⁵

Historically, we see that insertions of human dignity into legal documents have regularly followed excesses of cruelty and an extreme denial or violation of the question mark and its possible directions. Some of these instruments themselves mention the past history of atrocities and thereby include these memories in the story of human dignity.³⁶ The memory of horror generated by the Holocaust is arguably

³⁴ Kohen, 241.

³⁵ Ritschl, 88-89. The author, however, believes it is difficult or impossible to derive ethical or legal maxims from the concept and that “[i]t is only derivations by way of deduction that provide – in “hard logics” – unambiguous results (Ibid., 89).” Results, I believe, are seldom unambiguous in the field of human science. Furthermore, the skeleton theory is more concerned with the emotional than legal rationality or “hard logics”.

³⁶ Cf. fn 23.

something that sustains the need for human rights more than any belief in R/reason.³⁷

Before executing his final solution, Hitler allegedly referred to the Ottoman genocide of Armenians: “Who now remembers the Armenians?” We remember the past to build a present and future as epitomized in the post-war slogan of “never again”. Some challenges inherent in this historical approach include drawing out what is relevant (is euthanasia generally wrong because it happened in Nazi Germany?) and remembering even when the past becomes further removed (do we need new atrocities?).

It is not, however, only the memory of Holocaust and similar human made disasters that gives meaning to human dignity, but every single person’s life story. Also on the personal level, we have stories of mistakes and learning, made up of factors in and outside of our control. The terms “micro” and “macro” do not quite do justice to the dynamics between a single life story and history. We are not isolated but social beings placed in the world. The life stories are a natural and necessary complement to the question mark, and may also be experienced as something sacred, attempts to become whole. (“Holy” is related to “wholly”.) This process of living, the personal life story, should, as Teresa Iglesias suggests, be quite indisputable:

To be a human being is not a status conferred upon me by anyone [...] These are facts of recognition, of acknowledgement, constituting the very beings we are, and that we take for granted in what we do. We are not “instructed” in these truths, they **become part of us in the process of being alive and aware**

³⁷ The Universal Declaration, article by article, was based upon the experience of the Nazi atrocities. See Morsink, J., “World War Two and the Universal Declaration”, *HRQ* 15 (1993), 357-405. Chaskalson starts off his article by recounting the Nazi treatment of fellow humans and later gives examples from apartheid South Africa. See Chaskalson, A., “Human Dignity as a Constitutional Value” in Kretzmer and Klein. Shedding light on the requirements of dignity is often done by remembering the apartheid past in South African courts (as the Nazi past is particularly in Germany).

as human beings. Let me acknowledge these facts as bedrock truths [Emphasis added].³⁸

Dworkin argues that sacredness can be held as a secular but deep philosophical belief rather than one that is necessarily religious: “[E]ven people [...] who accept instead the Darwinian thesis that the evolution of species is a matter of accidental mutation rather than divine design, nevertheless often use artistic metaphors of creation.”³⁹ He moves on to differentiate humans from others by our will; we are the product also of the “deliberative human creative force that we honor in honouring art.”⁴⁰ The aesthetic metaphors employed to describe life, as art, a poem or literary narrative, maybe also implying a desire for organic unity, show that we need an emotional and aesthetic understanding of human dignity.

Alder claims that the sublime and the beautiful are generated by practical life, and “[i]n particular the notion of the sacred engages human rights with the sublime.”⁴¹ More than legal rationality (which is mainly secondary and not related to primary norms), it may be emotional attitudes that support human rights and guide us when confronted with incommensurable values. As Alder stresses, these emotional attitudes may, however, work both ways: Obscurity, power and terror are also sublime qualities. The sublime may highlight human vulnerability, while the beautiful, being linked to empathy, may mitigate the possible excesses of the sublime.

When Bagaric and Allan dismiss the concept of dignity as “vacuous” because “it is a notion that is used by academics, judges, and legislators when rational justifications

³⁸ Iglesias, Teresa, “Bedrock Truths and the Dignity of the Individual”, *Logos: A Journal of Catholic Thought and Culture*, Vol.4, No.1, Winter 2001, 114.

³⁹ Dworkin 1993, 76.

⁴⁰ *Ibid.*, 82.

⁴¹ Alder, 703.

have been exhausted,”⁴² they operate with narrowly limited premises and an exaggerated faith in rationality. One must recognise the weaknesses and limits to legal rationality. Human dignity is not vacuous merely because it does not play a traditional role in the rational game. There is no explicit definition of human dignity in international instruments, and as Oscar Schachter writes, it is, when invoked in concrete situations, often assumed to be recognised quite intuitively even if the abstract term is not defined rationally: “*I know it when I see it even if I cannot tell you what it is.*”⁴³

Pullman, who also thinks of dignity as lived experience and an aesthetic and ethical project, focuses on the link of suffering and vulnerability to life stories:

Maintaining a unified and meaningful life narrative is both a moral and an aesthetic project. Suffering occurs when any aspect of the person is threatened or is perceived as undergoing disintegration. Such aesthetic upheaval is often referred to as a loss of dignity. Persons, as such are fragile creatures.⁴⁴

Pullman has succinctly described the distinction between pain and suffering. Suffering is a consequence of personhood: If one makes sense of or can find some meaning in the pain, place it within ones life story, it may cease to be suffering. A woman giving birth may be in great pain, but not necessarily suffer. The same may be true of someone with a fatal disease.

We have now arrived at the third basic element in the skeleton theory: suffering and the commitment to relieve suffering which I believe must be at the human rights core.

⁴² Bagaric and Allan, 260.

⁴³ Schachter, Oscar, “Human Dignity as a Normative Concept,” *The American Journal of International Law*, Vol.77, No.4. (Oct.1983), 849.

⁴⁴ Pullman, Daryl, “Human Dignity and the Ethics and Aesthetics of Pain and Suffering”, *Theoretical Medicine* 23, 2002, (hereafter: Pullman), 84.

Compassion and sympathy mean suffering with or striving together to make sense of someone's pain by the aesthetic project of weaving such experiences into a meaningful story that can be shared.⁴⁵ Suffering can be silent or silenced, and there may be a (temporary) need for voice-bearing and visibility projects. Compared with pity – which seems to carry with it a (perhaps unconscious and unwarranted) belief in one's own superiority – I believe compassion/sympathy operates more horizontally than vertically. Davies calls compassion a fundamental “virtuous disposition” and reminds us of Nussbaum's identification of the cognitive, affective and voluntarist elements at work.⁴⁶

Within the phenomenal realm, we suffer and share stories. Therefore, moral obligation may also be anchored in the shared capacity to suffer and will to relieve the suffering of others. While animals can feel pain, only human persons suffer, according to Pullman.⁴⁷ Extreme pain in itself and the recognition of it, is a central motivation to act, I believe, and remains a strong impetus for securing better animal rights as well. Concerning the specific *human* dignity, suffering may often be more defining than pain, though. At first sight pain or suffering will draw our attention to the specific manifestation, and on a closer examination one can decide whether we are dealing with suffering or extreme pain to be relieved or simply voluntary and tolerable pain.

Concerning the relief of suffering, A.T. Williams does not have much faith in law's role:

Law, in its modern, western liberal form in particular, is inherently antithetical or counter-intuitive to the notion of human rights based on the will to relieve

⁴⁵ Pullman, 78. He draws upon theories of Kolnai, Cassell and others.

⁴⁶ Davies, 6-7.

⁴⁷ Pullman, 80 seq.

suffering. For, through its structures, principles and processes, law is conditioned and framed by sufferance rather than insufferability.⁴⁸

By sufferance, he means “the acknowledgement of suffering but the active toleration of its presence,” while insufferability is “the acknowledgement that a condition is intolerable, cannot be tolerated, and demands action as a consequence.”⁴⁹ To evaluate whether dignity as a legal value is truly related to insufferability we look at how it influences jurisdiction, rule of law and the notion of a victim in the analysis of cases.

The emotional “patienthood” (“patient” meaning “in suffering”) introduced here is an important complement to the rational duty-agency of for example Kant. (It should not be understood as a contrast to agency; the emotional is active in compassion.) There is a continuum of both agency and “patienthood” as well as of flourishing and suffering.

I am not discarding the Kantian sentence of not treating someone merely as a means. I believe, however, that it too can be linked to suffering in the phenomenal realm: If one is treated merely as an object, one’s life story is disrespected and one will often suffer or be in pain. This bears certain resemblance to how human dignity is interpreted as a right, “a right not to be treated in specific ways [i]t is a modal right.”⁵⁰ There is a spiritual aspect to this, because the handling of suffering and story-building is related to a faith in life, its meaning, in ones life story. The stories are part of the question mark, the holy/sacred, and/or it is part of the beauty of the stories.

⁴⁸ Williams A.T., 136-137.

⁴⁹ Ibid, 147.

⁵⁰ Klein, 152.

Although Rorty is a proclaimed anti-foundationalist and critic of human rights, his theory of sentimental progress seems to follow in a very similar vein, emphasising stories and compassion:

[I]t would help to stop answering the question “What makes us different from other animals?” by saying “We can **know**, and they can merely feel.” We should substitute “We can **feel** for *each other* to a much greater extent than they can.” [...] it would let us concentrate our energies on manipulating sentiments, on sentimental education. That sort of education sufficiently acquaints people of different kinds with one another so that they are less tempted to think of those different from themselves as only quasi-human [Emphasis added].⁵¹

Through the telling and sharing of “the sort of long, sad, sentimental story which begins *Because this is what it is like to be in her situation* [...]”⁵² a human rights culture may be strengthened.

Having looked at the elements of the sacred, the stories and suffering, one could plausibly stipulate a link to the fundamental human rights norm of non-discrimination and equality which may work progressively. Although the Western origin of rights is linked to the Enlightenment bourgeoisie, the legal language and ontological presuppositions (“everyone” has certain rights) facilitates democratization. Dignity is akin to Dworkin’s fundamental attitude of “equal importance”⁵³ and Gearty’s “equality

⁵¹ Rorty R. (1993) “Human Rights, Rationality and Sentimentality”, S. Shute and S. Herley, *On Human Rights*, Basic Books, 122-123.

⁵² *Ibid.*, 133.

⁵³ Dworkin, R., “What Are Human Rights?” *Colloquium Draft: 10/1/2003* (On file with author), 41 seq.

of esteem”⁵⁴. At a glance, it seems that stories of human dignity, even the mere use of the term, have had some sort of progressive snowball effect.⁵⁵ As it works for one marginalised group, dignity arguments have been adopted by other marginalised groups and society at large, and the term almost seems to have taken on a life of its own. (This becomes clearer in the analysis of cases.)

This account of suffering and stories leads to a potentially troublesome conclusion: someone may subjectively cease to or never suffer because meaning is found in what others consider a violation of dignity. This relates to the dilemma of autonomy and legal paternalism/moralism. Not surprisingly, considering the history of state abuse, many scholars are critical of the objective aspect by which “freedom is limited because it is thought to be good for people’s dignity (objectively assessed), and dignity is deemed to be good for everyone, whether or not they share the State’s model of dignity or want it imposed on them.”⁵⁶ As Feldman himself mentions, but only in passing, what is considered the legal requirements of dignity will not necessarily be drawn from the state’s version, though. As any of the parties’ versions, it will be subjected to judicial review.⁵⁷ Furthermore, the law in general has never existed merely for the protection of freedom in a narrow liberal sense. In the criminal law sphere this is clear not only from Devlin’s legal moralism⁵⁸, but also from the harm paternalism of the liberal Hart.⁵⁹ Some liberals, in particular proponents of radical autonomy⁶⁰, claim

⁵⁴ Gearty 2006, 46.

⁵⁵ “Human dignity” as “keyword” and in “complete text” out of all “judgments”, “reports” and “resolutions” (Hudoc): 04.04.1993-04.04.2000: 26/4488 compared to 04.04.2000-04.04.2007: 117/7695. Other factors to be taken into account are an increase of case-load and the merger of the court and commission in 1999. Consider also the occurrence “anywhere” in “all UK newspapers” (LexisNexis): 04.04.1993-04.04.1994: 78 compared to 04.04.2006-04.04.2007: 216.

⁵⁶ Feldman 1999, 700.

⁵⁷ Feldman 1999, 702.

⁵⁸ Devlin, P. *The Enforcement of Morals*, 1965.

⁵⁹ Hart, HLA, *Law, Liberty and Morality*, 1963.

⁶⁰ See also Beyleveld and Brownsword who adhere to Alan Gewirth’s rights-led interpretation: “Crucially, what matters is whether the agent freely invites the “compromising” conduct of others, not whether a loss of self-respect is experienced, even less whether dignity in some metaphysical sense is

that dignity should be or is synonymous with autonomy, though. Jones seems to believe that the state/court actually violates human dignity by its paternalism and limitation of autonomy because it treats the person as the object of the state and the judicial assessment of dignity.⁶¹ In so far as one will have to respect a court's decision, however, one is always an object of judicial decisions.

From the understanding of dignity developed in the skeleton theory, follow certain guidelines for this dilemma. Stories have an inter-subjective aspect in that they will always also include and depend on other persons than the "protagonist" and incorporate stories from society and world history. I would add to Dworkin's understanding of life/art, mentioned above, that the greatest art is characterised not solely by a process where the artist has had creative control, but a process where the art piece has also been shaped by uncontrollable factors (or the artist has let go of control). We do not need to establish the exact boundaries of free will or such capacity to appreciate life stories as something valuable and something to be protected. The life stories are fundamentally related to the question mark. This social and somewhat fatalistic aspect to the personal life stories, including the social aspect of suffering and identification with fellow humans, may open for some legal paternalism/moralism. On the other hand, the diversity of life stories, the subjectivity of suffering as well as the question mark fostering humility and a recognition of our vulnerability and limited understanding, call for utmost caution. As precisely our history shows, the criminal law has often led to much unnecessary suffering, and one should primarily look for

compromised. ...it is precisely respect for dignity that demands that there should be no interference – for, to interfere with such agents would be to treat them as mere things (671)." They read Kant as non-paternalistic.

⁶¹ Jones J., "Can the Meaning of Human Dignity under German Law Guide the European Court of Justice?" *P.L.*, 2004 SPR (hereafter Jones), 179.

alternative arenas for the enhancement of what is considered objective dignity. In one sentence, one can, according to the skeleton theory of dignity, only interfere with the free, informed choice of a person in quite extreme cases. Autonomy can normally only be restricted in a non-discriminatory fashion. Finally, human dignity must be an impetus for allowing stories into the court room. The principle involves as a minimum a right to be heard and have your story appreciated, a sort of due process right. Thus, the person participates, and is not merely a means, in the decision concerning him/herself.

Another problem that now needs to be briefly addressed is that of cultural relativism. Suffering, as well as our stories, will obviously be contextual, but there seem to be some commonalities. While culture may be the content that lives are filled with, this content presupposes certain forms to be filled. While the cultural content may differ, all human lives have some common forms, such as birth, puberty and transition to adulthood, the longing for a partner, sex and thereby maybe procreation, the death of near ones, ones own death. Compared to animals, as we have seen, human lives may furthermore, be considered as a whole; the story is more than the parts that it is composed of. Importantly, the three elements elaborated here are also *formally* viewed important to dignity. The question mark, our stories and suffering *as such* create a base of dignity, regardless of the substantive content, the details of how a question is framed or the particularities of a story. Although manifestations of suffering and stories vary, the right to have ones dignity recognised (whatever that may entail in a specific cultural context) are at this formal level universal. As Dworkin astutely puts it,

In one sense, dignity is a matter of convention, because the systems of gesture and taboo that societies use to draw the boundary between disadvantage and indignity differ. But the right that all people have – that their society recognise the importance of their lives, expressed through whatever vocabulary it has – is not itself a matter of convention.⁶²

The recognition of diverse cultural contexts and practices must, however, inform our decisions. In the words of A.T. Williams,

By turning our attention to trying to understand suffering in context, listening to the voices proclaiming suffering, we might avoid those desperate negotiations that seek to set in text, once and for all it would seem, the definition of a human right designed to outlaw a perceived wrong, or condition that can be rectified by human agency.⁶³

The decisive point is not whether a particular right is appreciated in a specific location, but whether a particular type of suffering is experienced that dictates action. Human rights could at its essence be understood as a needs-based approach rather than a strict rights-approach. The value of human dignity may allow genuine needs not directly accommodated in or addressed by a positive right, to enter the courtrooms. Possibly McCrudden underestimates the importance of the common term.⁶⁴ If nothing else, the ECtHR may as a regional body, while allowing diversity, work as a check on certain

⁶² Dworkin 1993, 236-237.

⁶³ Williams, A.T., 143.

⁶⁴ He seems at times quite ambiguous if not inconsistent. In the following he seems to recognise the value of the common term: “Despite differences in method, however, dignity provided a common starting point for continuing discussion on what was required in the way of human rights interpretation. This might have led to the development, though [sic] discussion among judges transnationally to the judicial development of the overarching, transnational, transcultural, non-ideological, humanistic, nonpositivistic, individualistic-yet-communitarian theory of human rights that was absent when the Charter and the declaration were being drafted (McCrudden, 40).”

local practices when dictated by their own interpretation of the demands of human dignity.

Briefly summed up, a contemporary and moral-philosophical skeleton theory of human dignity involves an emotional perspective and relates to three basic and interlinked elements: The fundamental/foundational question mark and the sacred, an appreciation of stories in three senses (history, the personal life story, and story-telling), and suffering (and the relief of suffering).

4. ELEMENTS OF HUMAN DIGNITY IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

I now wish to test to what extent the ECtHR's use of human dignity relates to the moral-philosophical skeleton theory. By looking at the application of the value in concrete cases, the legal consequences also become clearer, the skeleton theory is somewhat fleshed out, and we see how it faces the challenges/criticisms.

All articles in the ECHR are interpreted in light of the overall purpose of the convention. In the Preamble the ECHR implicitly adopts human dignity by reference to the UN Charter and Declaration. The first reference to human dignity by the ECtHR was in “*Tyrer v UK*”.⁶⁵ They relied on human dignity with regard to article 3, but since then they have identified it in several rights, including article 8, and now regard it as underpinning the entire ECHR. We can anticipate that this may have consequences for A.T. Williams’ critique of law supporting sufferance.

Furthermore, the court sees the concepts of the convention as autonomous and rely at times on European consensus so that a particular local, state or cultural understanding of dignity is not necessarily accepted. Therefore McCrudden’s fear that dignity is used to allow in otherwise intolerable local and culturally contingent practices may not apply to the same degree.

Accepting that choices involving human rights are sometimes incommensurable and that emotional responses are appropriate, a political forum may have advantages over the legal.⁶⁶ A challenge is therefore the balancing of the application of the margin of appreciation against the task of providing a check on unacceptable local practices. Devices for the courts to protect social and moral pluralism include “incompletely theorised agreements”⁶⁷ which involve emphasising specific circumstances and avoiding grand generalisations. In many cases diverse proponents of human dignity may come to a different outcome than for example utilitarians. Another question is

⁶⁵ The Commission had already referred to human dignity in the “East African Asians case”.

⁶⁶ Alder, 719. He admits that “[i]n the context of a pluralistic political order the European Court also has the useful secondary role of providing an independent critique of domestic processes (Alder, 721).”

⁶⁷ Sunstein, C, (1996), *Legal reasoning and Political Conflict*, Oxford: Oxford University Press, vii, cited in Alder, 708-709.

therefore to what extent the court chooses dignity over more consequentialist/utilitarian reasoning.

Finally, human dignity must, as mentioned above, be an impetus for allowing stories into the court room. The principle involves as a minimum a right to be heard and have your story appreciated, a sort of due process right.⁶⁸

4.1 CREATED BUT NOT YET BORN

In *Vo v. France*⁶⁹ the court held that a therapeutic abortion due to medical negligence did not violate article 2. Although the case did not concern voluntary termination of pregnancy, many considerations were similar. The embryo/foetus had human dignity but no right to life.

At European level, the Court observes that there is no **consensus** on the nature and status of the embryo and/or foetus [...] although they are beginning to receive some protection in the light of scientific progress and the potential consequences of research into genetic engineering, medically assisted procreation or embryo experimentation. At best, it may be regarded as common ground between States that the embryo/foetus belongs to the human race. The **potentiality of that being and its capacity to become a person** [...] require protection in the name of human dignity, without making it a “person” with the “right to life” for the purposes of Article 2 [Emphasis added].⁷⁰

⁶⁸ Others argue that the only purpose of due process is to improve the quality of decision-making. See for example Galligan, Dennis, (1996), *Due Process and Fair Procedures*, esp. chapter 4, Oxford: Clarendon Press.

⁶⁹ Grand Chamber judgment of 08.07.2004 (app.no. 53924/00). On IVF treatment, see “*Evans v. UK*” 10.04.2007 (app.no. 6339/05).

⁷⁰ *Ibid* para. 84.

The two versions of human dignity in clearest contrast to each other here are that of radical autonomy where a rational capacity is what qualifies the agent so that the unborn is not necessarily protected, something the Church version considers a “culture of death”⁷¹. Scholars committed to feminism, will albeit through different reasoning, on matters concerning the woman’s body, often arrive at results similar to the radical autonomists.⁷² The court, however, seems closest to a position of the skeleton theory. The potentiality and “capacity to become a person”, to have a story, and the ultimate question mark open for dignity considerations. The protection afforded can be graded. At some point when the embryo/foetus can experience pain, and maybe even some form of story or suffering, the protection must be stronger. Pain and other capacities clearly have an evidential aspect and we therefore depend largely on scientific knowledge. Apparently it was a relevant consideration for the court that the matter remained controversial not only politically, but also scientifically. Three factors have been relied upon as evidence of consensus: legal consensus, expert consensus and European public consensus.⁷³ In addition to the mentioned capacity and potentiality, the court found the European consensus that the embryo/foetus belongs to the “human race”, relating thereby to a species level and objective aspect, decisive in making human dignity applicable.

Some protection had to be extended, but on this controversial matter the court allowed for a wide margin of appreciation and was attuned to the need to respect different basic moral values. By employing the “even assuming that [article 2 was

⁷¹ Guerra.

⁷² Dembour, M.-B., *Who Believes in Human Rights?* Cambridge 2006: Cambridge University Press, (hereafter: Dembour), 206.

⁷³ See Helfer, L., “Consensus, Coherence and The European Convention on Human Rights”, 26 *Cornell Int.L.J.* 13 (1993), 134.

applicable]”-argument they managed to focus on the outcome rather than the reasoning and emotional choice of position.⁷⁴ They also referred to the “Boso” case. In that case the “even assuming that”-argument went along the following lines: “[...] Italian law on the voluntary termination of pregnancy struck a fair balance between the woman’s interests and the need to ensure protection of the unborn child.”⁷⁵ There is a limit to the margin of appreciation: “A fair balance” needs to be struck, ensuring some basic protection to the unborn. The reasoning of the court, stating first that the embryo/foetus does not have a right to life and then employing “even assuming that”-arguments, appears untidy, but it does succeed in avoiding a final stance on morally contentious issues while still defending the basic dignity of the unborn.

The current president, judge Costa (from France; a country with strong and explicit national-law commitments to human dignity), formulated a separate opinion holding that article 2 was applicable but not violated. This would not threaten the legislation concerning voluntary termination of pregnancy, because the right did not have to be absolute but could retain the fair balance-test. Costa seemed to long for the legal rationality and coherence that may be sacrificed for the “incompletely theorised agreement” and result-oriented attitude. The court may in time “tidy up” their reasoning, but this should only happen after the interaction with political and moral institutions has made it legitimate.

It is also clear that the court has a certain antipathy to resorting to criminalisation in such cases. “Vo v. France” did not require criminal-law protection, and so it was argued that it did not, in any event, plead in favour of making other terminations of

⁷⁴ Para. 85 of the judgment.

⁷⁵ Ibid para. 87.

pregnancy a criminal offence. Dissenting judge Ress, a German, agreed that criminal sanctions were unnecessary, but thought France needed to take strict disciplinary action in this case.⁷⁶ In Germany the human dignity of the unborn also means that the state cannot be too liberal in its abortion legislation.⁷⁷ They have therefore put in place compulsory counselling for anyone who is considering an abortion.⁷⁸ Several judges in the German courts have emphasised that human dignity should lead to a cautious approach to criminal law, “the abuse of which has led to so much suffering in the history of mankind.”⁷⁹ Such alternative measures to criminalisation are as argued above, often more appropriate in defending dignity. Dworkin, although he might have an even stronger commitment to individual freedom and choice,⁸⁰ claims that

[i]t matters as much that we live up to our freedom as that we have it[...] it is unforgivable to ignore the high importance of these matters altogether, to choose or counsel abortion out of unreflective convenience[...] The greatest insult to the sanctity of life is indifference or laziness in the face of its complexity.⁸¹

⁷⁶ In “Odièvre v. France”, 13.02.2003 (app.no. 42326/98), the same judge states in a concurring opinion that “[i]t is clearly in the general interest for appropriate measures to be taken [...] to protect children’s lives by reducing so far as possible the number of abortions, whether legal or illegal.” The case concerned anonymous birth-giving as an alternative to abortion, not a condemnation of abortion as such, and I cannot join Dembour on her criticism here. I would rather agree with Greve, also concurring and a woman, that “no society should in the name of the promotion of human rights be forced to leave a woman with abortion as the only apparent safe option.” While respecting the woman’s subjective dignity and autonomy, one may still promote dignity at a relational/objective level on other arenas by fostering reflection and making alternatives to abortion available.

⁷⁷ “Where human life exists, it is awarded human dignity; it does not matter whether the person concerned is aware of this dignity and knows how to protect it. The potential capacities existent from the very beginning of the human existence are sufficient to establish human dignity[...] The Basic Law contains principles[...] which can only be explained by the historical experience and by the moral-ethical recollection of the past system of national Socialism[...] the [Basic Law] demands the unconditional respect for every life, however, seemingly without “social value” (“First Abortion”, BVerfGE 39, 1, cited in Jones, 170 and fn 75).” Note also the historical reference, an incorporation of the story of Nazi atrocities.

⁷⁸ The pregnant woman who is obliged to take part in the counselling, but ultimately makes the decision herself, does not suffer a violation of dignity because she is treated not merely as a means, but as a partner by the law. See BVerfGE 88, 203, 281 (1993), referred to in Klein, 151.

⁷⁹ BVerfGE 39, 78, cited in Jones, 175.

⁸⁰ Dworkin 1993, 239.

⁸¹ Ibid., 239-240.

The unborn requires basic protection, but beyond that protection, society should, rather than criminalise, show interest and foster reflection on these matters. I join Dembour and feminists in deploring the fact that the ECtHR allows a wide enough margin of appreciation for some Catholic countries to maintain an absolute criminal-law-sanctioned ban on abortion even at the earliest stages of pregnancy, arguably a violation of women's dignity. Here they have still not required the "fair balance"-test. In a recent case, "Tysiac v. Poland"⁸², the court, while stressing that they were not discussing a right to abortion, ruled that governments have a duty to establish effective measures for ensuring access to abortions where it is legal. Tysiac was denied abortion despite fulfilling recognised medical grounds, because the medical profession in Poland is wary of granting abortions even where they are legal. The ECtHR may feel that establishing a right to abortion would be moving beyond their legitimate field, but advocates of reproductive rights have hailed this latest case as a landmark decision.⁸³

Most importantly, what dignity has done in the case of the unborn is to grant it a sort of right to be "heard", i.e. the unborn has a voice through dignity and its interests must be considered. Feldman argues that "dignity may be highly controversial and simply shift the terminology in which disputes are conducted rather than solving them."⁸⁴ He speculates that "Roe v. Wade" would not have been less controversial if it had been framed in dignity arguments rather than the right to privacy. That would, he says, have required the court to balance the dignity of the unborn against that of the mother. Dignity may indeed operate on both sides of a conflict, but an important function may precisely be that it allows for or even requires a broader range of interests,

⁸² Judgement of 20.03.2007 (app.no. 5410/03)

⁸³ See for example Centre for Reproductive Rights:
http://www.reproductiverights.org/pr_07_0320ECHRTysiac.html(last visited 12.08.2007)

⁸⁴ Feldman 1999, 699.

persons/beings and arguments to be taken into account. As already noted, dignity is at its core more related to a questioning attitude than a hard answer.

4.2 LET'S TALK ABOUT SEX – BUT MOSTLY ABOUT GENDER

“Dudgeon v. UK”⁸⁵ concerned a breach of article 8 due to the existence in Northern Ireland of laws criminalising homosexual acts. There was a certain deference to the political sphere, but since the case concerned “a most intimate aspect of private life”, there had to be “particularly serious reasons before interferences on the part of the public authorities can be legitimate[...]”⁸⁶ The ECtHR did not employ an absolutist argument, but because “particularly serious reasons” were needed, one could say that *prima facie* this was not to be interfered with or it was a sort of “taboo”. I identified certain common forms in discussing cultural relativism, some of which were sexuality and the longing for a partner. Great suffering is caused when the state interferes on these personal matters. Interference would furthermore, indicate a non-recognition of some life stories’ importance compared to others and violate non-discrimination. The burden had with human dignity shifted against the state.

The court considered the local context a relevant factor – Northern Irish society was said to be conservative and Catholic – but placed greater weight on other factors, thereby providing a check on the local and cultural understanding of dignity:

[T]here is now a **better understanding, and in consequence an increased tolerance**, of homosexual behaviour to the extent that in the **great majority of**

⁸⁵ Judgment of 22.10.1981 (app.no. 7525/76).

⁸⁶ Ibid, para. 52.

the member States [...] it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied[...]

It cannot be maintained in these circumstances that there is a "pressing social need" to make such acts criminal offences, there being no sufficient justification provided by the risk of **harm to vulnerable sections** of society requiring protection or by the effects on the public. On the issue of proportionality, the Court considers that such justifications as there are for retaining the law in force unamended are **outweighed** by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation [...]

"Decriminalisation" does not imply approval [...]

To sum up, the restriction imposed on Mr. Dudgeon under Northern Ireland law, by reason of its **breadth and absolute character**, is, quite apart from the severity of the possible penalties provided for, disproportionate [Emphasis added].⁸⁷

European consensus seemed to weigh heavily. If dignity had not had independent importance, however, the court could have accepted the Northern Irish departure. Application of the pure consensus inquiry in its extreme would exclude almost ever

⁸⁷ Ibid., paras. 60-61.

finding national legislation in violation of the ECHR. Diversity of laws is often a value one highlights or at least tolerates just as well as uniformity. “Consensus” was important because it had a moral content that is due to “better understanding” and “increased tolerance”, thereby defending dignity. There is a reference to increased knowledge of homosexuality in the term “better understanding”, but together with “increased tolerance” it might also be a subtle reference to a progress of sentiments and history. Here we could look to history to see how gays have been dehumanised and at times eventually persecuted.

The main aims of human rights being the relief of suffering and appreciation of life stories, dignity is primarily a defence and tool for the marginalised, i.e. those that do not already have their dignity completely recognised. In this case, the sexual minority was the vulnerable group, and there was no “risk of harm to vulnerable sections”, no conflict with other vulnerable groups.

In addition to the margin of appreciation, the court tried to avoid trespassing onto the moral-political domain, by employing, at least rhetorically, dignity as a due process right: the “breadth and absolute character” of the law did not cater for exceptions and particularities. It is, however, clear that in this case the reasoning was not very dependent on the specific circumstances. The Northern Irish legislation was amended.

The dissenting minority had been of the opinion that there was no “victim” in the meaning of article 25 because there had not been any criminal prosecution of Dudgeon. Therefore, the court did not have jurisdiction.⁸⁸ This relates to A.T. Williams’ critique of liberal law. For the majority, the background ethical value of dignity may have served to broaden the notion of victim somewhat so that the law could relieve suffering rather than tolerate it. We find an even clearer example of this in “Norris v. Ireland”⁸⁹ where the applicant had been less victimized than Dudgeon.

Since these cases, UK anti-gay rules in the military as well as the differing age of consent (18 compared to 16 for heterosexuals) have been challenged in Strasbourg and had to be amended.⁹⁰

In “Christine Goodwin v. UK”⁹¹ concerning articles 8 and 12 and the recognition of post-operative transsexuals’ new sex, the ECtHR reiterated that “[t]he very essence of the Convention is respect for human dignity and human freedom.” Now it is clear that dignity may have a progressive and pervasive effect. On this specific matter it led to the following observations:

Under Article 8 of the Convention in particular, where the notion of **personal autonomy** is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual,

⁸⁸ Ibid., dissenting opinions of Pinheiro Farinha and Walsh.

⁸⁹ Judgment of 26.10.1988 (app.no. 10581/83), para. 27. In connection with the structures underpinning sufferance, mention should also be made of interstate procedure under article 33 (as in “Ireland v. the UK”) or individual petition procedure pursuant to article 34. Complaints are also accepted by groups or NGOs, and under article 33 it is not necessary for a state to allege that the rights of its own national have been violated (as is the traditional approach under the international law of state responsibility for injury to aliens.)

⁹⁰ “Lustig-Prean and Beckett v. UK” of 27.09.1999 (app.nos. 31417/96 and 32377/96) and “Sutherland v. UK” of 01.07.1997 (app.no. 25986/94)

⁹¹ Grand Chamber judgment of 11.07.2002 (app.no. 28957/95), para. 90. See also “I v. UK”, Grand Chamber judgment of 11.07.2002 (app.no. 25680/94).

including the **right to establish details of their identity as individual human beings**[...] In the **twenty first century** the right of transsexuals to personal development and to physical and moral security in the full sense **enjoyed by others in society** cannot be regarded as a matter of controversy [...] [Emphasis added].⁹²

The court applied their own autonomous understanding of dignity and thereby provided a check on the local UK practices. In the twenty first century these matters “cannot” be controversial, according to the court, but clearly they were not entirely uncontroversial. Rather it seems the judges felt that in our century these matters “should not” be controversial. The ECtHR had been in a sort of conversation with the national political forum since 1986, but nothing had effectively been done.⁹³ They now found that the UK could no longer claim that the matter fell within their margin of appreciation. The balance tilted decisively in favour of the applicant.

Autonomy is considered an important interpretive principle in these personal and intimate matters, related to the understanding of dignity in “Dudgeon”. Interestingly, it is not dignity by itself that makes out “the very essence” of the convention, however, but “human dignity and human freedom.” This was already “enjoyed by others in society” – a reference to the marginalised position of sexual minorities.

⁹² Ibid., paras. 90-91.

⁹³ Certainly the court took its time, and among the critics we find Dembour who believes the natural tendency of the court is to be conservative (Dembour, 241). The margin of appreciation and objective aspect of dignity have their functions, however, and rather than forcing a rash decision over the heads of governments, the court may have done well in trying the conversational route first.

Arguably these cases are examples of judicial activism,⁹⁴ and apparently dignity arguments have a snowball effect. Dignity, informed also by its own progressive story, makes the law see and protect marginalised groups, so that Feldman's argument, that the tension between different levels and aspects of the principle explains why sexual minorities are not well protected, may not apply to the same degree today.⁹⁵

Finally, a somewhat different case should be considered with these developments in mind. In "Laskey, Jaggard and Brown v. UK"⁹⁶ the court accepted that the criminalisation of sado-masochist practices by UK courts was justifiable under article 8(2). In deciding whether to give priority to legal paternalism/moralism or autonomy, it is important to remember Pullman's account of the difference between suffering and pain. Although there is pain in sado-masochism, it cannot normally be considered sufficiently extreme and harmful to allow an intervention in such an intimate sphere as a person's sex life.

4.3 CRIME AND PUNISHMENT – OR THE CRIMES OF PUNISHMENT

⁹⁴ These cases may stand as an example of how the law can push, precipitate and/or engage with broader socio-cultural change. I thank Gearty for drawing this to my attention.

⁹⁵ Feldman, David, "Human Dignity as a Legal Value: Part 2," *P.L.* 2000, SPR (hereafter: Feldman 2000), 74. Dembour discusses whether there is a movement away from protest against injustice toward greater hedonism: The more we become used to having human rights granted to us, the more we take them as our due, leaving behind altruistic ethical ideals (Dembour, 242). I do not however, see how it can be a problem here where a normalisation is to be welcomed.

⁹⁶ Laskey, Jaggard and Brown v. UK, Judgement of 19.02.1997, 24 E.H.R.R. 39.

“*Tyrer v. UK*”⁹⁷ concerned judicial corporal punishment. The suffering occasioned was not considered to attain the particular level to be classified as “inhuman”, cf. article 3. (The court may have operated with a conflated notion of pain and suffering.) The majority did, however, find that he had been subjected to “degrading punishment.” Again the court rhetorically emphasised the specific circumstances, operating with an “it depends”-assessment to avoid grand generalisations.⁹⁸ They recalled, however, that the convention is a “living instrument” and the judges “[...] cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States[...].”⁹⁹ European consensus is relied upon when they find a local practice insufferable. This is the first time that evolutive interpretation, through which dignity may work progressively, is laid down in explicit terms as one of the main principles.

In considering the nature of judicial corporal punishment and why it is degrading, the court departed from the rhetorical “it depends”-assessment and let dignity-arguments, primarily the instrumentalisation-objection, explicitly and generally condemn the practice:

The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalised violence [...] Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment - whereby he was

⁹⁷ Judgment of 25.04.1978 (*app.no. 5856/72*). Both this case and “*Ireland v. the UK*” have been extensively discussed elsewhere. Regarding the latter, sensory deprivation techniques were seen as sophisticated methods to break or even eliminate the will, and therefore the commission condemned it as a modern system of torture. The court saw it as inhuman and degrading, but there is no doubt that it would be considered torture today. This too shows that what dignity requires is interpreted dynamically.

⁹⁸ *Ibid.*, para. 30.

⁹⁹ *Ibid.*, para. 31.

treated as an object in the power of the authorities - constituted an assault on precisely that which it is one of the main purposes of Article 3 (art. 3) to protect, namely a person's **dignity** and physical integrity [Emphasis added].¹⁰⁰

Clearly this is a progressive and emotionally founded human dignity, for a prisoner will in a sense always be the object of the state. Corporal punishment has, however, come to be seen as particularly invasive, brutal and humiliating.¹⁰¹ Historically, judicial corporal punishment was for a long period the common punishment (at least of the poor), but this changed until it was only in dealing with juveniles that it was accepted. The fact that it was only inflicted on young men, implying that it now would have been too indignified for an adult, also indicated a distinction between the importance given to different people's or group's suffering and stories.¹⁰² In the 1970s, the age of youth revolution, the court regarded corporal punishment to be more degrading than other punishment. Because dignity has an objective aspect and species level, it was not considered relevant that birching was an alternative to a period of detention. How we treat another human, no longer distinguished as a "juvenile", forms part of our common story and says something about how we view ourselves. Imprisonment is still not generally held to be problematic, but as we shall see dignity at least demands that certain conditions be met in prisons also. (Both retributionists and rehabilitationists have relied on human dignity to justify their traditions.¹⁰³)

¹⁰⁰ Ibid., para.33.

¹⁰¹ Corporal punishment is no longer accepted in judicial, educational or parental settings. Compare note 94 on socio-legal effects.

¹⁰² It should be noted that humiliation is not viewed negatively as such in many cultures. One thing is punishment which is meant to shame, but also many transitory rites involve humiliating elements.

¹⁰³ Retributionists have traditionally relied heavily on Kant; the offender has in some sense willed his punishment and it is his right. But even in the nation of Kant, the German court has found that "rehabilitation is constitutionally required in any community that establishes human dignity as its centrepiece and commits itself to the principle of social justice ("Life Imprisonment", BVerfGE 45, cited in Jones, 180)."

In criticising the judgment the dissenting English judge, Fitzmaurice, admitted that his views were influenced by his own upbringing and education under a system with corporal punishment as the *normal* sanction. The particular requirements of dignity depend on what is regarded as normal. Although one may disapprove of certain treatment or punishment as being morally wrong, he believed the article should not be used “as a vehicle of indirect penal reform, for which it was not intended.”¹⁰⁴ Penal policy has traditionally been within the core of national political sovereignty, but the article along with the rest of the convention was intended to promote and protect dignity, and one should not forget the brutal history, including the use of criminal law and atrocities accepted due to sovereignty, that forms its backdrop.

In “Tomasi v France”¹⁰⁵ the police custody treatment of a terrorist suspect amounted to inhuman and degrading treatment. Dignity applies to all, regardless of whether they have committed crimes, and especially important today, even if they are “terrorists”. A life story is more than any particular instance forming part of it. Article 3 provides for basic dignity:

The requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals.”¹⁰⁶

In a concurring opinion by Meyer, a principle of force was drawn up:

Any use of physical force in respect of a person deprived of his liberty which is not made strictly necessary as a result of his own conduct violates human

¹⁰⁴ Judgment of 25.04.1978 (*app.no. 5856/72*).

¹⁰⁵ Judgment of 27.08.1992 (*app.no. 12850/87*)

¹⁰⁶ Para. 115 of the judgment.

dignity and must therefore be regarded as a breach of the right guaranteed under Article 3 [...]

These principles were confirmed in “Ribitsch v. Austria.”¹⁰⁷

In “Kudla v. Poland”¹⁰⁸ the court explained that article 3 requires positively that the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance.¹⁰⁹

In “Wieser v. Austria”¹¹⁰, the court further specified that strip and intimate body searches carried out with due respect for human dignity and for a legitimate purpose may be compatible with article 3. One had to look at the specific circumstances that might be debasing and aggravate the inevitable humiliation of the procedure, such as whether the officer is of the same sex, sexual organs are touched, one is verbally abused and the like. The majority found a breach because Wieser was undressed completely, handcuffed and in a particular helpless situation, and he could have been searched for arms by a simple body search.

¹⁰⁷ Judgment of 04.12.1995 (app.no. 42/1994/489/571).

¹⁰⁸ Judgment of 26.10.2000 (app.no. 30210/96)

¹⁰⁹ Ibid., para. 94.

¹¹⁰ Judgment of 22.02.2007 (app.no. 2293/03).

When one relies on a consideration of the circumstances as a whole, arguments do not necessarily draw decisively in one direction, though. Considering that the search was carried out within few minutes by all male police officers not applying any physical or verbal abuse, dissenting judge Jebens concluded that human dignity and bodily integrity was respected. Agreeing that the suspect's dignity was important, he believed "[h]owever, when deciding in such cases, one must also keep in mind the difficult role of the police in cases like this, and make a balanced evaluation." The judge in addition to working in the Norwegian courts and Ministry of Justice has previously practiced as a police lawyer.¹¹¹ The judges have as everyone else a particular background influencing their decisions, and as human dignity is largely an emotional and ethical value, the emphasis that one puts on the value as well as the interpretation will vary accordingly. We have now seen this confirmed in not only Fitzmaurice but also Jebens.

In "Jalloh v. Germany"¹¹² the administration of emetics on a suspect to make him regurgitate drugs which were used as evidence against him, was found to constitute inhuman and degrading treatment. The German understanding of human dignity was challenged. One might, however, readily argue that the German courts were in a grey zone even according to their own jurisprudence on for example passivity.¹¹³ In his

¹¹¹ *Advokatbladet*, 21.12.2004. Available in Norwegian at: <http://www.jus.no/?id=55442> (last visited: 12.08.2007).

¹¹² Grand Chamber Judgment of 11.07.2006 (app.no. 54810/00)

¹¹³ The German requirements of human dignity relate to a distinction between passivity and activity: One may never threaten with torture, but state agents have a right to shoot and kill a hostage-taker on the spot in order to save the life of the hostage. The hostage-taker is not requested to do anything, e.g. give information, only to omit something, namely threaten and kill the hostage. See for example "Daschner Wolfgang and E", 20.12.2004, Landgericht of Frankfurt am Main, summarised in "Respect for Human Dignity in Today's Germany", *Journal of International Criminal Justice* 4 (2006), 862-865. The distinction may seem strange at times because in both these cases the will to do something is subverted

concurring opinion, judge Zupancic lamented “[...] the already apparent change in the *Zeitgeist* and the consequent degradation of minimal standards.” He seemed to support the moral-philosophical skeleton theory that acknowledges the emotional, a progress of sentiments through stories and appreciation of history, by claiming that

this transmutation has little to do with the scholarly differentiation of juristic standards[...] This assessment derives from a certain hierarchy of values – assimilated by everyone [...] These hierarchies of values are the real origin of all the secondary ratiocination and, more worrisome, often the apparent lack of sensibility and interest[...]

Two principles that underpin law’s focus on sufferance are jurisdiction and the rule of law. In “Soering v. UK”,¹¹⁴ and later in “Chahal v. UK”,¹¹⁵ however, article 3 was interpreted to have certain extra-territorial effects. Briefly summed up, the government could not extradite/deport someone if (s)he thereby risked treatment contrary to the article. In “S.W. v. UK”¹¹⁶ the court rejected a claim that the UK finding of someone guilty of marital rape had violated article 7 (guaranteeing non-retroactivity). They considered the UK courts to have done “no more than continue a perceptible line of case-law development”, and

What is more, the abandonment of the **unacceptable idea** of a husband being immune against prosecution of rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the

by force or threat of force. This distinction also results in the rather absurd conclusion that it is necessary with consent for alco-breathing-tests, but not for blood tests.

¹¹⁴ Judgment of 07.07.1989 (app.no. 14038/88)

¹¹⁵ Grand Chamber judgment of 15.11.1996 (app.no. 70/1995/576/662)

¹¹⁶ Judgement of 22.11.1995, (app.no. 47/1994/494/576).

fundamental objectives of the Convention, the very essence of which is respect for **human dignity** and human freedom [Emphasis added].¹¹⁷

It seems that human dignity weighed more than any relevant argument based on the rule of law and non-retroactivity (and the liberal private-public dichotomy). Again then, we see how human dignity has made insufferability guide the law.

4.4 POLITICIANS AS PIGS

“Vereinigung Bildender Künstler v. Austria”¹¹⁸ concerned freedom of expression, article 10, and the dignity of a politician: In a painting Meischberger, an FPÖ politician, was shown gripping the ejaculating penis of Haider while being touched by two other FPÖ politicians and ejaculating on Mother Teresa. The Austrian courts prohibited its display. The ECtHR majority did not accept that the interference pursued proportionately the aim of protecting public morals. Importantly, the painting was not seen to concern Meischberger’s private life, but could rather be understood as an attack on the Austrian Freedom Party. Judges Jebens and Spielmann expressed a joint dissenting opinion based on a different understanding of the requirements of dignity.¹¹⁹

9. In our opinion, it was not the abstract or indeterminate concept of human dignity [...] but **the concrete concept of “fundamental personal dignity of others”** which was central [...] seeing that a photograph of Mr Meischberger

¹¹⁷ Ibid, paras. 43-44. Dembour, however, concludes that in general the court has a disappointing record on rape seen from a radical feminist perspective. See Dembour, 202 seq.

¹¹⁸ Judgment of 25.01.2007 (app.no. 68354/01).

¹¹⁹ Ibid., dissenting opinion of Spielmann and Jebens.

was used in a pictorial montage which **he felt** to be profoundly humiliating and degrading.

10. It should be noted in this connection that [...] the German Federal Constitutional Court relied on the concept of human dignity [...] in dismissing a complaint by a publisher. The cartoon portrayed a well-known politician as a pig copulating with another pig dressed in judicial robes [...] [The court] dismissed the complaint, finding that the cartoons were intended to deprive the politician concerned of his dignity by portraying him as engaging in bestial sexual conduct. Where there was a conflict with human dignity, artistic freedom (*Kunstfreiheit*) must always be subordinate to personality rights.

[...]

12. In a word, a person's human dignity must be respected, regardless of whether the person is a **well-known figure or not**. [Emphasis added]

Human dignity has clearly become important in the jurisprudence of the court. The entire dissent was built on a different understanding of the value. It was a sort of personality right or a purely subjective and individual (“felt”) dignity, that was alluded to in the “concrete concept of *fundamental personal dignity of others*”. We have seen, however, that dignity is not so easily pinned down; it may be emotional and holistic rather than merely rational and specific, and it has an objective and relational aspect. Albeit discussing a less defaming case, Feldman ridicules a

[r]ight not to be treated in such a way that the balloon of one’s self-importance is punctured or which makes one look silly (or sillier than usual) in the eyes of

other people. [It] is not human dignity of the sort which could conceivably be treated, in a sane world, as a fundamental value [...]¹²⁰

He regards the law of defamation as an unsuitable tool for upholding dignity.¹²¹

In discussing the UK Human Rights Act, Gearty reminds us that

[i]t is a liberal axiom that human rights legislation should be available to all [...]. It is artificial therefore to restrict our scrutiny of the principle of human dignity to the marginalized categories of persons[...]. The reach of the Act is far wider than this, and consequently more controversial.¹²²

Of course human dignity is to be protected “regardless of whether the person is a well-known figure or not”. According to the skeleton theory and the court’s application we see, however, that its core operating sphere is that of the marginalised, persons that are not fully recognised as other humans are. It involves a needs-based approach.

Politicians may be unpopular and operate in a heated climate, but that is something that to a large extent goes with the territory. It is a chosen position, and it is a position not exactly on the margins of society. It is not necessarily very constructive or morally sound with (perceivably) personal attacks on politicians, but generally other rights and principles may be more appropriately applied to protect them than that of human dignity. Rather than packing too much into human dignity and thereby making it susceptible to be weighed down by its own success,¹²³ one should look around for other rights, principles and considerations and retain its core.

¹²⁰ Feldman 1999, 687.

¹²¹ Feldman 2000, 74-75.

¹²² Gearty 2004, 107.

¹²³ See a similar argument about the harm principle in Harcourt, B.E., “The Collapse of the Harm Principle”, *Journal of Criminal Law and Criminology*, Vol. 90, 109-194, 1999.

Jebens attempted to nuance the picture of dignity in favour of the police in “Wieser v. Austria”, weakening the protection of the suspect, while in this case concerning a politician, a public and powerful figure, he believed dignity provided protection. These are only scattered examples and hopefully not completely illustrative of his attitude. If they are, his approach seems to run contrary to that of the skeleton theory as well as that of the majority of the court.

4.4 DEATH

In “Pretty v. UK”¹²⁴ the court held that denying Pretty assisted suicide did not violate any relevant articles. Taking life is a “taboo” related to a sense of the sacred. The court would not interpret article 2 as including a right to die, regardless of the present life quality and pain/suffering: “any interpretation had also to accord with the fundamental objectives of the Convention and its coherence as a system of human rights protection. Article 3 had to be construed in harmony with Article 2.”¹²⁵ The court still emphasised that it “cannot but be sympathetic to the applicant’s apprehension that without the possibility of ending her life she faces the prospect of a distressing death.”¹²⁶ Although they ended up finding factors other than autonomy decisive, they needed to express their respect and, interestingly to the emotional and suffering-oriented skeleton theory, *sympathy* for Pretty.

¹²⁴ Judgment of 29.04.2002 (app.no. 2346/02). The Voluntary Euthanasia Society and the Catholic Bishops’ Conference of England and Wales naturally had conflicting views of dignity and the possibilities of relieving suffering. While The Voluntary Euthanasia Society implicitly relied on autonomy, the Catholics argued, as they do with regard to abortion, that human life was a gift from God received in trust, so that actions with the purpose of killing oneself or another, even with consent, reflected a misunderstanding of the human worth. There were also research-based arguments.

¹²⁵ Ibid., para. 54.

¹²⁶ Ibid., para. 55.

In contrast to other dignity cases, the domestic law was here (at least partly) designed to protect the weak and vulnerable and especially those who were not in a condition to take informed decisions. Pretty was not representing the only vulnerable group in the equation. Thus, she could not succeed so easily with dignity arguments. Her case could, however, have been distinguished by the fact that these reasons for the prohibition did not apply to her situation. Contrary to the UK, the ECtHR had not doubted that her intellect and capacity to make decisions was unimpaired.

Dignity gave Pretty the right to argue that her particular case was within an exceptional category¹²⁷, but an *advance* request for exemption was denied partly due to the rule of law, a principle A.T. Williams identified as upholding law as sufferance. The reason the blanket nature of the ban was not considered disproportionate, was due to a system of enforcement and adjudication that provided for flexibility in individual cases – *post facto*. This is a sort of compromise which enables society to maintain a commitment to a general set of values while compassion can be shown on the presentation of the specific facts.

Regarding article 14, non-discrimination, the ECtHR believed it to be justified not to distinguish in law between those who were and those who were not physically capable of committing suicide. The borderline would often be a very fine one, and an exemption for those judged to be incapable of committing suicide might increase the risk of abuse. This is close to a “slippery slope” argument that must also have formed

¹²⁷ For a similar observation on the effect of dignity, see Gearty 2004, p.106.

part in the court's consideration that, although Pretty's decision-making capacities were unimpaired, she could not be exempted from the law protecting other more vulnerable persons.

Her exceptional situation is weighed against the potential risk of other groups. Such considerations are of course crucial in legislation, but in adjudication dignity arguments might trump them, and it could be possible to distinguish the case. Although the court employed "incompletely theorised agreements" to avoid a clear stance, showed sympathy and set off a conversation, it seems a utilitarian-legislative line of thinking was dominant in this case.

In their general attack on human dignity, Bagaric and Allan claim that Dworkin's argument on death with dignity, which follows similar lines as on abortion, is inconsistent:

[L]ife is supposedly precious and valuable because of dignity. On the other hand, though, a constituent element of dignity, namely freedom, is said by Dworkin to make it permissible to destroy that which on the first hand was alleged to be inherently precious.¹²⁸

They seem to have missed a potentially crucial detail. Even if one decides to die, chooses to end life, it does not *destroy the life story as such*. Death is part of life and the story (which remains as part of other stories if nothing else).

We are not merely dealing with the persons who wish to die, however, but also the family, friends, society, and the person or system that would have to assist in the

¹²⁸ Bagaric and Allan, 266.

suicide. As we have seen our stories have social and inter-subjective elements. A relational or objective aspect of dignity may therefore pull in the opposite direction of the person's choice.

Although human rights law should generally be governed by the idea of insufferability, there are limits to how a legal (and especially an adjudicative) understanding of dignity can and should deal with suffering and pain. Life involves pain and suffering. It is not something that we can rinse it of. It can in fact be valuable. Our ultimate question mark and a sense of the sacred compel us to take a cautious approach to these matters.

This may be considered one of the extreme cases where some intervention in the form of legal paternalism/moralism is justified, but such an intervention does not leave us only to choose criminalisation. In countries where physician-assisted suicide has become decriminalised, there is an elaborate system of regulation to foster reflection, the inclusion of family and friends, and the consideration of other alternatives.¹²⁹ Palliative care must be a real alternative provided by the state. As in the case of abortion, one could use other arenas to positively promote reflection and dignity in the objective sense rather than the negative criminal law focusing on an effect rather than on the causes. Ultimately then autonomy is respected. The law treats the pregnant woman or the person seeking assisted suicide as a partner. Some important choices must ultimately be left to the person's conscience and the moral community at large.

¹²⁹ The system of regulation that is in place in several countries, seems a world apart from the Nazi distinction between life worth living and worthless life that led to mass euthanasia. One should, as already urged, always be wary of the history of abuses, though.

Suffering may depend on how autonomy, ones body and soul, as well as the good life are viewed.¹³⁰ While the suffering of a particular person should be in focus in the court, the causes of this suffering may more appropriately be considered by society at large. In legislation one also takes utilitarian concerns into consideration, but dignity does not by itself provide decisive arguments for a criminalisation of assisted suicide. Both sides have strong dignity arguments. The ageing population of Europe will force these questions into the spotlight, and the larger moral and political arenas are more suitable for such debate than the courts.¹³¹

¹³⁰ Pullman has interesting observations on both the Cartesian dualism of mind and body and differences between individualistic and more communal life styles and their impact on suffering (Pullman, 88-89).

¹³¹ For an overview of ethical and religious arguments: <http://www.bbc.co.uk/religion/ethics/euthanasia/> (last visited: 12.08.2007)

5. LARGER THAN LAW – “CONCLUSION”

Human dignity, understood as an ethical value/attitude, has important functions in adjudication, and the ECtHR’s application relating to the moral-philosophical skeleton theory, survives several challenges/criticisms. Human dignity does not provide all the answers. As Feldman observes, it changes the way in which questions are asked and answered.¹³² I fear the great intellectual does not appreciate, or emphasise, sufficiently the importance of questions, though. Human dignity makes the parties in the judiciary frame questions differently and allows a wider range of interests to be taken into account. Asking a question may get you half way to the answer, and much of the challenge has traditionally been to be recognised as a person with legally relevant concerns and granted entry onto the judicial stage. In many cases human dignity has placed the burden to argue on the state. By broadening the range of interests and humans seen by the law, human dignity has already got us a long way.

The question mark, the ultimate uncertainty, inspires awe in us and relates to a sense of the sacred. While remaining ambiguous, it supports a form of “taboos”, making certain conduct *prima facie* or generally wrong so that for example “particularly serious

¹³² Feldman 2000, 76.

reasons” are needed to interfere in intimate aspects of life. The question mark connects to our stories which inform understandings of dignity. Dignity’s own history has contributed to making the law see and protect the marginalised and vulnerable. As Frowein writes, the ECtHR has “a specific understanding of human dignity in vulnerable situation [sic].”¹³³ Dignity through the evolutive approach may work progressively. Also on a formal level, life stories considered as a whole, mean basic protection and equality extend to all, including for example so-called terrorists and other outcasts.

By an autonomous understanding and appeal to consensus, local practices may be deemed insufferable. Dignity also influences notions of rule of law, victim and jurisdiction, making insufferability guide the law. Suffering and pain can be silent, but dignity grants even the unborn a right to have its story/suffering “heard”. There will, however, be evidential aspects especially to pain and other limits to how far law can and should regulate suffering and pain. Many issues should rather be dealt with by society at large or the person concerned, and a certain antipathy towards criminalisation as a solution is appropriate. Human dignity as a value is larger than law.

Finally, the particular manifestations and content of suffering and stories vary, but the right to have ones dignity recognised, are at a formal level universal. The majority of the ECtHR has over time been loyal to the core elements in the skeleton theory. It remains to be seen how other jurisdictions compare to the ECtHR. The stories considered here had a European flavour, and the full meaning of human dignity is not fixed once and for all.

¹³³ Frowein, 132.

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