

DIGNITY IN INTERNATIONAL HUMAN RIGHTS LAW: POTENTIAL APPLICABILITY IN RELATION TO INTERNATIONAL RECOGNITION OF ANIMAL RIGHTS

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Recent decades have seen momentum build towards some form of international legal recognition of animal rights.² This article considers whether, in line with the approach taken to international human rights recognition, such recognition should be based on a concept of animal dignity. In this respect, this article explores the legal meaning of dignity in international human rights law and the extent to which it can and should be transposed to international legal recognition of animal rights. It is contended that such utilisation would be desirable, provided that it does not impede progress towards international legal recognition of animal rights.

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2. This paper takes the position that whether such recognition draws on the language of rights or welfare is not particularly important, as documents that provide for welfare protection can often operate in the same way as would rights protection. See Clare McCausland, *United Nations Declaration on Animal Welfare: Why Not Rights?* REGARDING RTS. (Apr. 19, 2013), <http://asiapacific.anu.edu.au/regarding-rights/2013/04/19/united-nations-declaration-on-animal-welfare-why-not-rights/>.

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I. INTRODUCTION

[C]ircus animals are being forced to perform unnatural tricks, are housed in cramped cages, subjected to fear, hunger, pain, not to mention the undignified way of life they have to live ... Though not homosapiens, they are also beings entitled to dignified existences and humane treatment sans cruelty and torture ... If humans are entitled to fundamental rights, why not animals?³

The last seven decades have seen a proliferation of laws establishing human rights and a corresponding recognition of the growing importance of human rights and the laws that protect and foster them.⁴ Following the creation of the International Bill of Human Rights,⁵ a multitude of more specific international treaties have entered into force⁶ and numerous states have passed domestic legislation implementing these norms.⁷ This growing recognition of human rights was initiated by outrage at the horrors of the Holocaust and other massacres of World War II in order to prevent the reoccurrence of such atrocities.⁸

3. Nair v. Union of India, AIR 2000 (Ker.) 340, ¶ 13 (India).

4. See Mirko Bagaric & Penny Dimopoulos, *International Human Rights Law: All Show, No Go*, 4 J. HUM. RTS 3 (2005) [hereinafter *International Human Rights Law: All Show, No Go*].

5. The United Nations Declaration of Human Rights was adopted by the UN General Assembly on 10 December 1948. See Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948) [hereinafter UDHR]. The International Convention on Civil and Political Rights and the International Convention on Economic and Social Rights were adopted on 16 December 1966. See International Covenant on Civil and Political Rights, art. 18, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; see also International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

6. See, e.g., International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter CERD]; see also Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; see also Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

7. See, e.g., Human Rights Act, 1998, c. 42 (Eng.); see also New Zealand Bill of Rights Act 1990; see also Basic Law: Human Dignity and Liberty, 5754 (Isr.).

8. Jürgen Habermas, *The Concept of Human Dignity and the Realistic Utopia of Human Rights*, 41 METAPHILOSOPHY 464, 465–66 (2010).

While human rights are frequently breached,⁹ their growing importance has produced a “language of human rights” which serves to increase the scrutiny of human treatment and can result in improved outcomes.¹⁰ Many international human rights treaties, such as the International Convention on Civil and Political Rights (ICCPR),¹¹ the International Convention on Economic, Social, and Cultural Rights (ICESCR),¹² and the International Convention on the Elimination of Racial Discrimination (ICERD),¹³ require signatory states to regularly report to a Convention body in relation to human rights within their territory.¹⁴ Other mechanisms to ensure scrutiny and publicize human rights abuses include special rapporteurs, mechanisms to enable people to complain of rights violations, and the work of independent human rights advocates.¹⁵ While it is difficult to assess the effect of increased scrutiny on human rights generally, formal international and domestic dispute resolution processes demonstrate that some positive outcomes have been achieved.¹⁶ For example, in the case of *Toonen v. Australia*, an individual complaint lodged with the Human Rights Committee resulted in the decriminalization of homosexual sex in Tasmania.¹⁷ In Colombia,

9. See HUMAN RIGHTS WATCH, WORLD REPORT 2017: EVENTS OF 2016 137, 267 (2017), https://www.hrw.org/sites/default/files/world_report_download/wr2017-web.pdf; see also Raziye Akkoc, *How the World Violates Human Rights, Country by Country*, TELEGRAPH (Feb. 2, 2015, 12:18 PM), <http://www.telegraph.co.uk/news/worldnews/11381744/How-the-world-violates-human-rights-country-by-country.html>.

10. Navanethem Pillay, *What are Human Rights For? Three Personal Reflections*, in INTERNATIONAL HUMAN RIGHTS LAW 4 (Daniel Moeckli et al. eds., 2nd ed. 2014); see also *International Human Rights Law: All Show, No Go*, *supra* note 4, at 3.

11. See ICCPR, *supra* note 5.

12. See ICESCR, *supra* note 5.

13. See CERD, *supra* note 6.

14. UNITED NATIONS HUMAN RIGHTS: OFFICE OF THE HIGH COMMISSIONER, *Human Rights Bodies*, OHCHR, <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> (last visited Apr. 30, 2017).

15. Jane Connors & Markus Schmidt, *United Nations*, in INTERNATIONAL HUMAN RIGHTS LAW, *supra* note 10, at 359, 362, 366.

16. See, e.g., *Toonen v. Australia*, Communication 488/1992, Human Rights Committee (Mar. 31, 1994); see generally BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS 245–53 (2009).

17. AUSTL. HUMAN RIGHTS COMM’N, HUMAN RIGHTS EXPLAINED: CASE STUDIES: COMPLAINTS ABOUT AUSTRALIA TO THE HUMAN RIGHTS COMMITTEE 1 (2009),

women were able to use the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) as a tool to influence the development of a new constitution.¹⁸ More broadly, it is unclear whether ratification of human rights treaties results in improved human rights performance.¹⁹ It is likely, however, that the creation and support for such treaties has a broader effect on what states perceive to be acceptable behaviour.²⁰

In some ways similar to outrage at the atrocities of World War II, contemporary times have seen a growing awareness of, and horror at, the persecution and killing of animals.²¹ Animals are increasingly exploited in many contexts.²² In sports, for example, greyhounds have been reported to be subject to overbreeding, mass killing, poor conditions, and ill-treatment.²³ Animals are used in scientific testing, research, and

<https://www.humanrights.gov.au/human-rights-explained-case-studies-complaints-about-australia-human-rights-committee>.

18. SIMMONS, *supra* note 16, at 245; *see also* CERD, *supra* note 6.

19. *See* Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1940–41 (2002); *see also* *International Human Rights Law: All Show, No Go*, *supra* note 4, at 7.

20. Hathaway, *supra* note 19, at 2020–21.

21. Note that this paper uses the term ‘animal’ to refer to all animals, excluding human beings. While human beings are themselves animals, this popular use of the term animal is helpful for the purposes of clear communication. *See* Josefín Dolsten, *Holocaust Survivor Likens Treatment of Farm Animals to Modern-Day Shoa*, JEWISH TELEGRAPHIC AGENCY (Oct. 6, 2016 3:40 PM), <http://www.jta.org/2016/10/06/news-opinion/united-states/holocaust-survivor-likens-treatment-of-farm-animals-to-modern-day-shoah> (Oct. 6, 2016) (discussing contemporary awareness); *see also* Steven J. Bartlett, *Roots of Human Resistance to Animal Rights: Psychological and Conceptual Blocks*, 8 ANIMAL L. 143, 155–58 (2002); *see also* Martha C. Nussbaum, *Animal Rights: The Need for a Theoretical Basis*, 114 HARV. L. REV. 1506, 1509–11 (2001) (reviewing STEVEN M. WISE, *RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS* (2000)) [hereinafter *Animal Rights: The Need for a Theoretical Basis*]; *see also* PETER SINGER, *ANIMAL LIBERATION* 22, 136–37 (2nd ed. 1990).

22. *See generally* MIRKO BAGARIC & KEITH AKERS, *HUMANISING ANIMALS: CIVILISING PEOPLE* (2012) [hereinafter *HUMANISING ANIMALS: CIVILISING PEOPLE*].

23. PETA, *Greyhound Racing: Death in the Fast Lane*, PETA, <http://www.peta.org/issues/animals-in-entertainment/animals-used-entertainment-factsheets/greyhound-racing-death-fast-lane/> (last visited Sept. 29, 2017); *see also* Bernard Keane, *Left and Right Revel in the Pointless Cruelty of Greyhound Racing*, CRIKEY (July 11, 2016), <https://www.crikey.com.au/2016/07/11/greyhound-racing-ban/>; *see also* *What are you Really Betting on?*, ANIMALS AUSTL. & ANIMAL LIBERATION QUEENSL., <http://greyhoundcruelty.com/> (last visited Sept. 29, 2017).

teaching,²⁴ despite queries over the benefit of such testing²⁵ and despite the development of new computer software which could potentially take the place of animals in some of this research.²⁶ Perhaps most concerning is the growth and commercialisation of animals in the food industry.²⁷ Livestock are frequently subject to reduced legal protection compared to other animals.²⁸ Livestock are often kept in very small and unnatural spaces, provided with minimal or insufficient food and water, and subjected to painful practices such as de-beaking, branding, cropping, and castration.²⁹ At the same time, research suggests that many animals have greater levels of intelligence and sentience than previously thought.³⁰ Yet despite the systematic and barbaric nature of contemporary exploitation of animals, much of this practice is within the law.³¹ This issue has prompted some to argue for the law to be changed

24. SONIA WAISMAN, PAMELA FRASCH, & BRUCE WAGMAN, *ANIMAL LAW: CASES AND MATERIALS* 475 (5th ed. 2014).

25. Andrew Knight, *Animals in Research: Do the Costs Outweigh the Benefits?*, CONVERSATION (Aug. 6, 2013 4:11 PM), <https://theconversation.com/animals-in-research-do-the-costs-outweigh-the-benefits-16390>; see also Monika Merkes, *Animal Research Provides a Flawed Model, So Why Not Stop?*, CONVERSATION (Aug. 5, 2012 4:16 PM), <https://theconversation.com/animal-research-provides-a-flawed-model-so-why-not-stop-7890>; see also WAISMAN, FRASCH, & WAGMAN, *supra* note 23, at 476–79.

26. See Timna Jacks, *Calls to Stop Animal Testing at University*, AGE (July 29, 2016), <http://www.theage.com.au/victoria/calls-to-stop-animal-testing-at-university-20160728-gqfwux.html>.

27. See WAISMAN, FRASCH, & WAGMAN, *supra* note 23, at 377.

28. *How Laws are Failing Animals: Codes of Cruelty*, ANIMALS AUSTL., <http://www.animalsaustralia.org/issues/codes-of-cruelty.php> (last visited Sept. 29, 2017); see also WAISMAN, FRASCH, & WAGMAN, *supra* note 23, at 378–79, 403.

29. *How Laws are Failing Animals: Codes of Cruelty*, *supra* note 28; see also *Factory Farming*, VOICELESS, <https://www.voiceless.org.au/the-issues/factory-farming> (last updated June 2017).

30. Clint J. Perry, *Are Animals As Smart, Or As Dumb, As We Think They Are?*, CONVERSATION (Oct. 28, 2013 3:20 PM), <https://theconversation.com/are-animals-as-smart-or-as-dumb-as-we-think-they-are-18986>; see also Marc Bekoff, *After 2,500 Studies, It's Time To Declare Animal Sentience Proven*, LIVE SCIENCE (Sept. 6, 2013), <http://www.livescience.com/39481-time-to-declare-animal-sentience.html>; see also Marc Bekoff, *Scientists Conclude Nonhuman Animals Are Conscious Beings*, PSYCHOL. TODAY (Aug. 10, 2012), <https://www.psychologytoday.com/blog/animal-emotions/201208/scientists-conclude-nonhuman-animals-are-conscious-beings>.

31. See generally HUMANISING ANIMALS: CIVILISING PEOPLE, *supra* note 22, ch. 6, 7.

to introduce and improve animal rights and welfare.³² The last few decades have seen various attempts to recognise animal rights in international law.³³

Within this context, this article considers one of the key concepts and justifications of human rights law — that of dignity.³⁴ Major human rights documents refer to human dignity as the foundation for the creation of human rights law.³⁵ For example, the preambles to the ICCPR and ICESCR assert that “rights derive from the inherent dignity of the human person.”³⁶ In this respect, human dignity is said to provide the reason for the existence of human rights and also operates as an aid to interpret specific human rights.³⁷ Given the centrality of the concept of human dignity in this respect, this article considers whether the foundational concept of dignity might also be extended to animals — in other words, whether there is such a thing, as the High Court of Kerala asserts, as animal dignity.³⁸ To determine whether this is the case, this article seeks to develop an understanding of what is meant by human dignity in international human rights law. Having considered the meaning of human dignity, this article considers whether the concept of dignity can and should provide the basis for an international recognition

32. See Martha Nussbaum, *Beyond “Compassion and Humanity”: Justice for Nonhuman Animals*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 299, 299–300 (Cass R. Sunstein & Martha C. Nussbaum eds., 2005); see generally Gary L. Francione, *Animal Rights Theory and Utilitarianism: Relative Normative Guidance*, 3 ANIMAL L. 75 (1997); see generally Cass R. Sunstein, *The Rights of Animals*, 70 U. CHI. L. REV. 387 (2003); see generally Valerio Pocar, *Animal Rights: A Socio-Legal Perspective*, 19 J. L. & SOC’Y 214 (1992).

33. See, e.g., Universal Declaration of Animal Rights (proposed Oct. 15, 1978) [hereinafter Universal Declaration of Animal Rights 1978]; see, e.g., International Convention for the Protection of Animals (proposed Apr. 4, 1988); see *infra* Section III.b.

34. Paolo G. Carozza, *Human Dignity and Judicial Interpretation of Human Rights: A Reply*, 19 EUR. J. INT’L L. 931, 932 (2008).

35. ICCPR, *supra* note 5, pbml.; see also ICESCR, *supra* note 5, pbml.

36. ICCPR, *supra* note 5, pbml.; see also ICESCR, *supra* note 5, pbml.

37. Luis Roberto Barroso, *Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse*, 35 B.C. INT’L & COMP. L. REV. 331, 392 (2012).

38. Note that while it is possible to recognize animal dignity as a valid concept in its own right, or as a concept linked to that of human dignity, this article pursues the latter approach. See discussion *infra* Section III.C.

of animal rights. It is contended that, while the substance of human dignity is vague in some respects, its key elements comprise a recognition of inherent value, equal to all persons, which must be respected by others. Given that the concept of dignity plays an important function in identifying those individuals entitled to equal moral consideration, it should therefore be utilised, where practicable, in any international legal agreement to respect animal rights. Part I of this paper looks at the meaning of human dignity in international human rights law, including the meaning of the plain language, the intended meaning, and its interpretation in practice. In Part II, the paper looks at whether the concept of dignity can and should provide the basis for the international recognition of animal rights.

There is a wealth of scholarship and commentary in relation to the concept of human dignity.³⁹ While human dignity can be considered from a number of different disciplinary perspectives and has a rich history pre-dating its appearance in international treaties,⁴⁰ this article will be limited to a consideration of human dignity from a legal perspective. Further, while the concept of human dignity is relevant to human rights law at the international, regional, and domestic levels, the analysis in this article will be confined to international human rights law. In this respect, analysis of the practical use of the term is limited to the decisions of major treaty bodies. These limitations are appropriate in the context of the purpose of this article — to determine whether the legal concept of dignity might be drawn upon to underpin the international recognition of animal rights.

39. See generally Habermas, *supra* note 8; see also GEORGE KATEB, HUMAN DIGNITY (2011); see also THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE (David Kretzmer & Eckart Klein eds., 2002); see also MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP (2006) (each discussing the concept of human dignity) [hereinafter FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP].

40. See KATEB, *supra* note 39, at 4–9.

II. THE CONCEPT OF DIGNITY IN INTERNATIONAL HUMAN RIGHTS LAW

a. Dignity in the Legal Documentation

The concept of dignity is foundational to modern international human rights law.⁴¹ By agreeing to the Charter of the United Nations (UN Charter), member states “reaffirm[] their faith in . . . the dignity and worth of the human person.”⁴² According to the major human rights documents, human rights arise as a result of the “inherent dignity of the human person.”⁴³ It was the repeated and gross violation of human dignity during World War II that provided the impetus for the creation of the United Nations and the development of subsequent global human rights treaties.⁴⁴ Human rights can therefore be considered as specific descriptions of what human dignity entails.⁴⁵

While the concepts of human rights and human dignity existed long before the passage of the International Bill of Human Rights, it was only at that point in time that the concept of human dignity was incorporated into legal instruments as a justification for human rights.⁴⁶ Its rise to prominence in this respect was significant because “[r]espect for human dignity is the one explicit underlying principle of the International Bill of Human Rights.”⁴⁷ The International Bill of Human Rights is comprised of three documents, the Universal Declaration of Human Rights (UDHR), the ICCPR, and the ICESCR.⁴⁸ Each of these documents are underpinned by reference to human dignity.

41. Kyle Ash, *International Animal Rights: Speciesism and Exclusionary Human Dignity*, 11 *ANIMAL L.* 195, 196 (2005); see also Arthur Chaskalson, *Human Dignity as a Constitutional Value*, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE*, *supra* note 39, at 133. (David Kretzmer & Eckart Klein eds., 2002).

42. UDHR, *supra* note 5, pmbl.

43. Sandesh Sivakumaran, *International Humanitarian Law*, in *INTERNATIONAL HUMAN RIGHTS LAW*, *supra* note 10, at 479, 483.

44. Habermas, *supra* note 8, at 465.

45. *Id.* at 464.

46. *Id.* at 465; see also Klaus Dicke, *The Founding Function of Human Dignity in the Universal Declaration of Human Rights*, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE*, *supra* note 39, at 111, 112.

47. Nigel S. Rodley, *Integrity of the Person*, in *INTERNATIONAL HUMAN RIGHTS LAW* *supra* note 10, at 174, 174.

48. *International Human Rights Law: All Show, No Go*, *supra* note 4, at 3.

The UDHR is the foundation of modern international human rights law.⁴⁹ Within the Preamble of the UDHR, “inherent dignity” is referred to as founding “freedom, justice and peace.”⁵⁰ The concept of dignity is also referred to in specific articles of the UDHR.⁵¹ Article 1 asserts that “[a]ll human beings are born free and equal in dignity and rights.”⁵² Article 22 declares that “economic, social and cultural rights” are indispensable for human dignity.⁵³ Further, Article 23 establishes a right to remuneration for work to ensure “an existence worthy of human dignity.”⁵⁴

The ICCPR and ICESCR also make significant reference to dignity. The preambles of both Conventions claim that recognition of “the inherent dignity and . . . rights” of human beings “is the foundation of freedom, justice and peace in the world.”⁵⁵ Similarly, both preambles assert that “[human] rights derive from the inherent dignity of the human person.”⁵⁶ The ICCPR also references dignity in Article 10, which states that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”⁵⁷ Similarly, in ICESCR, states parties agree that “education shall be directed to the full development of the human personality and the sense of its dignity.”⁵⁸

Reference to human dignity is also found in other key international human rights treaties. The ICERD is premised on the respect for human dignity manifested in the UN Charter, UDHR, and UN Declaration on the Elimination of All Forms of Racial Discrimination.⁵⁹ Similarly, CEDAW references human dignity in the UN Charter and UDHR and

49. *The Foundation of International Human Rights Law*, UNITED NATIONS, <http://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html> (last visited Sept. 1, 2017).

50. UDHR, *supra* note 5, pmb1.

51. *Id.* arts. 1, 22, 23.

52. *Id.* art. 1.

53. *Id.* art. 22.

54. *Id.* art. 23.

55. ICCPR, *supra* note 5, pmb1.; *see also* ICESCR, *supra* note 5, pmb1.

56. ICCPR, *supra* note 5, pmb1.; *see also* ICESCR, *supra* note 5, pmb1.

57. ICCPR, *supra* note 5, art. 10(1).

58. ICESCR, *supra* note 5, at 13(1). The term ‘states parties’ refers to those states that have adhered to the relevant legal document, in this case ICESCR.

59. CERD, *supra* note 6, pmb1.

asserts that “discrimination against women violates the principles of . . . human dignity.”⁶⁰ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment recognizes that human rights “derive from the inherent dignity of the human person.”⁶¹ Further, the Convention on the Rights of the Child makes numerous references to human dignity, which extends to the child.⁶² The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the Convention on the Rights of Persons with Disabilities (CRPD), and the International Convention for the Protection of All Persons from Enforced Disappearance also make reference to human dignity.⁶³ As McCrudden notes, the term human dignity has been increasingly used not only in the preambles to such international conventions but also in relation to substantive rights set out within them.⁶⁴

The influence of the concept of human dignity is also apparent in regional and national legal documentation. Protocol No 13 to the European Convention on Human Rights references the “inherent dignity of all human beings,”⁶⁵ which is a significant concept when interpreting the Convention.⁶⁶ Dignity is an important concept in many state constitutions, for example: Finland, South Africa, Germany, Brazil, Angola, Belgium, Bulgaria, Peru, and Hungary.⁶⁷ Dignity has also been a

60. CEDAW, *supra* note 6, pmbi.

61. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, pmbi., Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT].

62. CRC, *supra* note 6, pmbi., arts. 23(1), 28(2), 37(c), 39, 40(1).

63. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, arts. 17(1), 70, Dec. 18, 1990, 2220 U.N.T.S. 3; Convention on the Rights of Persons with Disabilities, pmbi., arts. 1, 3(a), 8(1)(a), 16(4), 24(1)(a), 25(d), Jan. 24, 2007, 2515 U.N.T.S. 3; International Convention for the Protection of All Persons from Enforced Disappearance, arts. 19(2), 24(5)(c), Dec. 20, 2006, 2716 U.N.T.S. 3.

64. Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655, 670 (2008).

65. Convention for the Protection of Human Rights and Fundamental Freedoms, pmbi., Nov. 4, 1950, 213 U.N.T.S. 222.

66. Mirko Bagaric & James Allan, *The Vacuous Concept of Dignity*, 5 J. HUM. RTS., 257, 261 (2006) [hereinafter *The Vacuous Concept of Dignity*].

67. *Id.* at 262–63.

significant idea in the case law of numerous jurisdictions, including the United States, Canada, and New Zealand.⁶⁸

b. The Meaning of Human Dignity

In terms of determining what the meaning of “dignity” is, the context in which the word is used must be considered.⁶⁹ Further, reference to its dictionary meaning may be helpful.⁷⁰ According to the Oxford Dictionary, dignity has the following meanings:

1. The state or quality of being worthy of honour or respect.
 - 1.1 A high rank or position.
 2. A composed or serious manner or style.
 - 2.1 A sense of pride in oneself; self-respect.⁷¹

In the context of the international legal documents discussed above, the first meaning appears to be the one drawn upon.⁷² Human dignity belongs to all human beings equally,⁷³ thus definition 1.1 would not be appropriate. Defining dignity as a “composed or serious manner”⁷⁴ would make little sense in terms of attributing rights to human beings. Finally, while dignity should give rise to self-respect, self-respect is not a necessary precondition for rights, which are more concerned with mandating the respect of others.

Thus, the phrase “human dignity” seems to suggest that there is something inherent in human beings which warrants honour and respect.

68. *Id.* at 263; *see also* Gerald L. Neuman, *Human Dignity in United States Constitutional Law*, in *ZUR AUTONOMIE DES INDIVIDUUMS: LIBER AMICORUM SPIROS SIMITIS* 249, 249 (Dieter Simon & Manfred Weiss eds. 2000) [hereinafter *Human Dignity in United States Constitutional Law*] (discussing the development of dignity in the U.S.).

69. MICHELLE SANSON, *STATUTORY INTERPRETATION* 115–16 (Trischa Baker ed., 2012).

70. *See id.* at 120–21.

71. *Dignity*, OXFORD DICTIONARIES, <https://en.oxforddictionaries.com/definition/dignity> (last visited Oct. 5, 2017).

72. Although it is acknowledged that the meanings are interrelated.

73. UDHR, *supra* note 5, art. 1.

74. *Dignity*, *supra* note 71.

When one speaks about offending somebody's dignity, they tend to refer to words or actions that cause another extreme embarrassment, humiliation, or discomfort that would be considered disrespectful. Indeed, Luban argues that "non-humiliation" can act as a surrogate for human dignity.⁷⁵ For example, in relation to Abu Ghraib, a United States Army detention centre which operated between 2003 and 2006, the abuse and torture of prisoners has been referred to as an offense against human dignity.⁷⁶

McCrudden's "basic minimum content" framework is helpful in understanding the meaning of human dignity.⁷⁷ The first element of the framework is the ontological claim, namely the notion that every human being possesses an intrinsic worth — that is, to merely be human.⁷⁸ The second element, referred to as the relational claim, is that "intrinsic worth should be recognized and respected by others, and some forms of treatment by others are inconsistent with . . . respect for this intrinsic worth."⁷⁹ The final element of McCrudden's framework relates to the relationship between the individual and the state.⁸⁰ This element highlights that, given the intrinsic worth of the individual, "the state exists for the sake of the individual human beings, and not vice versa."⁸¹ This is known as the limited-state claim.⁸²

75. David Luban, *Human Rights Pragmatism and Human Dignity*, in PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS 263, 277 (Rowan Cruft et al. eds., 2015); see also Daniel Statman, in THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE, *supra* note 39, at 209, 209; see also Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM.J. INT'L L. 848, 850 (1983).

76. See, e.g., Gregory Hooks & Clayton James Mosher, *Outrages Against Personal Dignity: Rationalizing Abuse and Torture in the War on Terror*, 83 SOC. FORCES 1627, 1627 (2005).

77. McCrudden, *supra* note 64, at 679, 689–90.

78. *Id.* at 679.

79. *Id.*

80. See *id.*

81. *Id.*

82. *Id.* This definition is similar to the following one offered by Neuman,

that human beings possess an intrinsic worth that should be recognized and respected; . . . that the state exists for the sake of individual human beings, and not vice versa; that some forms of treatment of individuals are inconsistent with respect for this intrinsic worth, and that individuals have a right not to be subjected to such treatment; and that this intrinsic worth and the

While it is reasonably clear that human dignity refers to an inherent value equally possessed by human beings, which warrants honour and respect, this meaning leaves some aspects of the term unclear.⁸³ It is not clear, for example, what it is about human beings that gives rise to their dignity.⁸⁴ Further, if dignity arises by virtue of some common human characteristic (such as rationality), do those human beings without that characteristic still have dignity? Moreover, is dignity the sole domain of the human species or can other species also have dignity? In sum, the actual substance of the concept of human dignity is unclear.

c. Intended Meaning

This section will consider the meaning of human dignity intended by the drafters of the relevant legal documents by looking at textual context, historical context, and the purpose of the relevant international documents.

i. Textual Context

In relation to textual context, the language of the international treaties suggests that human dignity is something *intrinsic* to human beings.⁸⁵ This is suggested by the word “inherent,” which prefaces the word “dignity” in the UDHR, ICCPR, and ICESCR preambles.⁸⁶ The assertion in the UDHR preamble that human beings are born with dignity supports this inference.⁸⁷ In this respect, human beings are equal in their dignity.⁸⁸

consequent right cannot be lost, alienated or forfeited (although the right might in fact be violated).

Human Dignity in United States Constitutional Law, *supra* note 68, at 249–50.

83. *See Human Dignity in United States Constitutional Law*, *supra* note 68, at 250.

84. *The Vacuous Concept of Dignity*, *supra* note 66, at 268–69.

85. Pablo Gilabert, *Human Rights, Human Dignity, and Power*, in PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS, *supra* note 75, at 196, 197; *see also* Dicke, *supra* note 46, at 114; *see also* Schachter, *supra* note 75, at 849.

86. UDHR, *supra* note 5, pmbl.; ICCPR, *supra* note 5, pmbl.; ICESCR, *supra* note 5, pmbl.; *see also* CAT, *supra* note 61, pmbl.; *see also* MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING 9 (2012).

87. UDHR, *supra* note 5, pmbl.; *see also id.* art. 1; *see also* Viviana Bohórquez Monsalve & Javier Aguirre Román, *Tensions of Human Dignity: Conceptualization and*

The documents also indicate that human dignity *gives rise* to human rights.⁸⁹ This is a direct result of the phrasing in the ICCPR and ICESCR preambles, which both state “[human] rights derive from the inherent dignity of the human person.”⁹⁰ In this respect, the UDHR appears to suggest the existence of *particular qualities* in human beings upon which dignity rests.⁹¹ Article 1 of the UDHR states that human beings are born equal in dignity and follows this statement with an assertion that “[t]hey are endowed with reason and conscience.”⁹² This perhaps suggests that there is some link between these qualities and dignity. Finegan explains that the inclusion of this phrase was at the behest of Charles Malik, one of the drafters of the UDHR.⁹³ Malik wished to include the phrase because he felt that reason and conscience were “the qualities which essentially characterized man, since man and his rights were the Commission’s main concern.”⁹⁴

The international documents may be interpreted as containing some discrepancies in relation to their treatment of dignity. While the preamble of the UDHR states that human beings are born equal in dignity, Article 22 states that “economic, social and cultural rights [are] indispensable for . . . dignity.”⁹⁵ Article 22 might be interpreted as meaning that without the enjoyment of such rights, humans do not have dignity.⁹⁶ Similarly, while the ICESCR preamble refers to “inherent dignity,” Article 13 indicates that education is to be directed towards developing a sense of dignity.⁹⁷ Article 13 might be taken to mean that human dignity must be

Application to International Human Rights Law, 6 INT’L J. ON HUM. RTS. 39, 45–46 (2009); see also Thomas Finegan, *Conceptual Foundations of the Universal Declaration of Human Rights: Human Rights, Human Dignity and Personhood*, 37 AUSTL. J. LEGAL PHIL. 182, 185 (2012).

88. Finegan, *supra* note 87, at 197.

89. ICCPR, *supra* note 5, pmb.; ICESCR, *supra* note 5, pmb.; CAT, *supra* note 61, pmb.; see also Gilabert, *supra* note 85, at 197–200.

90. ICCPR, *supra* note 5, pmb.; ICESCR, *supra* note 5, pmb.; CAT, *supra* note 61, pmb.

91. See Gilabert, *supra* note 85, at 197–200.

92. UDHR, *supra* note 5, art. 1; see also Finegan, *supra* note 87, at 186.

93. Finegan, *supra* note 87, at 186.

94. U.N. ESCOR, 3rd Sess., 50th mtg., at 13, U.N. Doc. E/CN.4/SR.50 (June 4, 1948).

95. UDHR, *supra* note 5, art. 22.

96. See Gilabert, *supra* note 85, at 197.

97. ICESCR, *supra* note 5, art. 13(1).

developed rather than being an intrinsic characteristic of human beings.⁹⁸ While such discrepancies might exist, it is more likely that they are the result of compromise in the drafting process than that they detract from the key characteristics of human dignity described above.

ii. Historical Context

1. Historical Roots of the Concept of Human Dignity

While the concept of human dignity only became significant in international human rights law following the creation of the International Bill of Rights, it has a long history in philosophical thinking. At the same time, there have been “distinct strands in the meaning of dignity” and “dignity has not always been seen as something that is restricted to human beings alone.”⁹⁹ Originally, dignity was related to social status and position and the respect that was owed to people in those positions.¹⁰⁰ In this respect, Cicero asserted that dignity was “someone’s virtuous authority which makes him worthy to be [honoured] with regard and respect.”¹⁰¹ At the same time, dignity was also used with respect to all human beings; Cicero contrasted the superior nature (and thus dignity) of human beings to that of animals.¹⁰² Cicero’s understanding of human dignity was continued during the Renaissance period.¹⁰³ One of the features of humanism during the Renaissance period was the focus on the dignity of human beings.¹⁰⁴ According to Singer, an influential philosopher and animal rights advocate, “the Renaissance humanists emphasized the uniqueness of human beings, their free will, their

98. See Gilabert, *supra* note 85, at 197–98.

99. ROSEN, *supra* note 86, at 8.

100. *Id.* at 11.

101. Hubert Cancik, *Dignity of Man and Persona on Stoic Anthropology: Some Remarks on Cicero, De Officiis*, in THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE, *supra* note 39, at FIRST PAGE, 23. Marcus Tullius Cicero was a Roman statesman, scholar and writer who lived from 106 BCE to 43 BCE. John P.V. Dacre Balsdon & John Ferguson, *Marcus Tullius Cicero*, ENCYCLOPEDIA BRITANNICA (last visited Oct. 14, 2017), <https://www.britannica.com/biography/Cicero>. He has been credited with introducing the term human dignity. Luban, *supra* note 75, at 274.

102. ROSEN, *supra* note 86, at 12.

103. SINGER, *supra* note 21, at 198.

104. *Id.* at 198.

potential, and their dignity; and they contrasted all this with the limited nature of the ‘lower animals.’”¹⁰⁵ In terms of dignity itself, Catholic philosopher St. Thomas Aquinas understood the term as simply referring to something’s intrinsic value, which may extend beyond human beings to other members of God’s creation.¹⁰⁶ Further, while not specifically mentioning the word dignity, Bentham famously asserted that the criteria for moral consideration should be “not, Can they *reason?* nor, Can they *talk?* but, Can they *suffer?*”¹⁰⁷ In post-World War II discussions, the concept of dignity has grown in importance and has been heavily influenced by the ideas of Immanuel Kant, a philosopher whose work has been credited with influencing the modern doctrine of human rights.¹⁰⁸ According to Kant, the basis for human dignity (or “unconditional, incomparable value”) is human autonomy.¹⁰⁹ In terms of what has dignity, for Kant it is only “morality, and humanity itself insofar as it is capable of morality.”¹¹⁰ In modern discourse, the concept of dignity remains focused on “the (special) place of humans in nature,”¹¹¹ but has lost its “physical and religious shackles.”¹¹²

2. Impetus Behind the Creation of the UDHR

To understand the meaning of human dignity, it is important to consider world events at the time of the creation of the UDHR.¹¹³ As noted above, the UDHR (and consequent human rights covenants) represented a response to the atrocities of two world wars and, in

105. *Id.* at 199; *see also* ROSEN, *supra* note 86, at 14.

106. ROSEN, *supra* note 86, at 17.

107. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 311 n.1 (1823).

108. ROSEN, *supra* note 86, at 10, 19.

109. *Id.* at 22.

110. *Id.*

111. Raymond Corbey, “Race” and Species in the Post-World War II United Nations Discourse on Human Rights, in THE POLITICS OF SPECIES: RESHAPING OUR RELATIONSHIPS WITH OTHER ANIMALS 67, 69 (Raymond Corbey & Annette Lanjouw eds., 2013).

112. SINGER, *supra* note 21, at 238.

113. *See* Dicke, *supra* note 46, at 120; *see also* Yehoshua Arieli, *On the Necessary and Sufficient Conditions for the Emergence of the Doctrine of the Dignity of Man and His Rights*, in THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE, *supra* note 39, at 1, 1.

particular, a response to the terrible actions perpetrated during the Holocaust of World War II.¹¹⁴ In terms of the phrase “human dignity” then, this concept might be seen as a response to the notion of “dignity of the state” which was important in Nazi Germany.¹¹⁵ In other words, “human dignity” might be interpreted as a statement that it is the individual which has inherent worth and that the state is in place only to serve the individual, not vice versa. More broadly, as Arieli asserts, human dignity and human rights should be seen as “counter-thesis and counter-ideology . . . to the ideologies of the Axis Powers and in particular to National Socialism.”¹¹⁶

3. Drafting History

The lack of clarity contained in the ordinary meaning of the phrase “human dignity” was apparent at the time of drafting the various international documents. The reference to “free and equal in dignity and rights” in Article 1 of the UDHR was added by René Cassin, who told the drafting committee that “[t]he text was trying to convey the idea that the most humble men of the most different races have among them the particular spark that distinguishes them from animals, and at the same time obligates them to more grandeur and to more duties than any other beings on earth.”¹¹⁷ Nevertheless, it is not clear that Cassin’s view was shared amongst the drafters.¹¹⁸ Rather, according to Beitz, “we cannot say from the record that the framers of either document had any articulate or agreed conception of human dignity or that their views of the nature or substance of human rights were much influenced by it.”¹¹⁹

Further, it has been suggested that the lack of clarity inherent in the term “human dignity” was understood by the drafters of the UDHR.¹²⁰

114. See *supra* Section I.

115. Jochen Frowein, *Human Dignity in International Law*, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE*, *supra* note 39, at 121, 123.

116. Arieli, *supra* note 113, at 3.

117. Charles R. Beitz, *Human Dignity in the Theory of Human Rights: Nothing but a Phrase?*, 41 *PHIL. & PUB. AFF.* 259, 267 (2013) (quoting U.N. Comm’n on Human Rights, 1st Sess., 8th summ. mtg. at 2, U.N. Doc. E/CN.4/AC.1/SR.8 (June 20, 1947)).

118. See *id.* at 267.

119. *Id.* at 268.

120. Serena Parekh, *Resisting “Dull and Torpid” Assent: Returning to the Debate Over the Foundations of Human Rights*, 29 *HUM. RTS. Q.* 754, 763 (2007).

Rather than include a definition or explain the source of human dignity in the UDHR, the drafters chose to omit such reference.¹²¹ This omission enabled states to reach a consensus in relation to the existence of human dignity and the specific rights which flowed from the concept without having to come to some consensus as to the meaning of human dignity.¹²² In other words, having to define the meaning of human dignity would likely have proven an obstacle to the creation of the UDHR (and subsequent human rights conventions). In this light, the phrase “human dignity” may be considered somewhat of a placeholder, enabling states to infer into it their own understandings of the meaning of the term.¹²³

iii. Purpose

The meaning of provisions within human rights treaties must be understood “in light of the object[s] and purpose[s]” of the relevant treaty.¹²⁴ The ICCPR, the ICESCR, and other main international human rights treaties are human rights instruments that create legally binding obligations on states parties to respect human rights.¹²⁵ It is clear from the preambles to the ICCPR and the ICESCR that they are dedicated to particular values: dignity, equality, freedom, justice, and peace.¹²⁶ Further, the preambles of the ICCPR and the ICESCR indicate that respect for human rights is believed to establish “freedom, justice and peace” and will lead to the enjoyment of political and civil freedom.¹²⁷

Thus, the phrase “human dignity” must be understood in light of these objects and purposes. This means understanding human dignity in a way that will give meaning and operation to the rights set out in the relevant treaties. Such interpretation must accord with the values that underpin

121. Luban, *supra* note 75, at 22; *see also* Beitz, *supra* note 117, at 259; *see also* Dicke, *supra* note 46, at 118.

122. *See* Audrey R. Chapman, *Human Dignity, Bioethics, and Human Rights*, 3 AMSTERDAM L.F. 3, 4–5 (2011).

123. McCrudden, *supra* note 64, at 677–80. While the phrase “human dignity” operates in this way, it is not contended that it is devoid of meaning, just that it lacks clarity and entails a degree of subjective interpretation. Habermas, *supra* note 8, at 466.

124. Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

125. *See The Foundation of International Human Rights Law*, *supra* note 49.

126. ICCPR, *supra* note 5, pmb.; ICESCR, *supra* note 5, pmb.

127. ICCPR, *supra* note 5, pmb.; ICESCR, *supra* note 5, pmb.

the treaties, including the professed purposes of “freedom, justice and peace.” It follows that the interpretation of human dignity should be expansive, in line with the rights enumerated in the relevant treaties, and accord with a vision of a peaceful, just, and free world.

d. Meaning in Practice

i. Introduction

This section of the article will consider the decisions of major international treaty bodies that reference human dignity in order to assist in clarifying the meaning of the phrase. Specifically, it will consider decisions of the Human Rights Committee (CCPR), the Committee against Torture (CAT), the Committee on the Elimination of Discrimination against Women (Committee), the Committee on the Elimination of Racial Discrimination, CRPD, the Committee on Enforced Disappearances, the Committee on Economic, Social and Cultural Rights (CESCR), and the Committee on the Rights of the Child, which relate to the issue of human dignity.¹²⁸ The research was conducted utilising the United Nations High Commissioner for Refugees jurisprudence database¹²⁹ and considered those cases identified as addressing the issue of human dignity or referencing human dignity. In this respect, it is noted that the Optional Protocol to the ICESCR has only been in operation for a short time,¹³⁰ and accordingly, CESCR has heard a limited number of cases pursuant to the individual complaints mechanism.¹³¹

The jurisprudence considered here indicates that the United Nations treaty bodies have not provided a clear definition of the term human

128. UNITED NATIONS HUMAN RIGHTS, OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, *Jurisprudence*, OHCHR, <http://juris.ohchr.org> (last visited Apr. 13, 2017).

129. *See id.*

130. The Optional Protocol entered into force on 10 May 2013. *See Optional Protocol to ICESCR Enters into Force*, HUM. RIGHTS L. CENT. (May 10, 2013), <https://www.hrlc.org.au/news/optional-protocol-to-icescr-enters-into-force>.

131. UNITED NATIONS HUMAN RIGHTS, OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, *Statistical Survey on Individual Complaints*, OHCHR, <http://www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx> (then follow “Statistical Survey on Individual Complaints” hyperlink under “Complaints Procedure”) (last visited Apr. 13, 2017).

dignity. Instead of directly defining the term, most discussion has focused on the acts and behaviours that constitute a violation of human dignity.¹³² In this respect, much of the case law focuses on Article 10 of the ICCPR, which provides that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”¹³³ Article 10 places a positive obligation on states parties to guarantee the human dignity of those individuals deprived of their liberty.¹³⁴ A strong relationship also exists between the requirement to respect human dignity in Article 10 and the prohibition on cruel, inhuman, or degrading treatment or punishment in Article 7 of the ICCPR.¹³⁵ In many cases, a violation of human dignity under Article 10 is made out through a breach of Article 7.¹³⁶ This use of Article 7 as a counterpart to Article 10 is indicative of a breach-based approach to outlining the nature of human dignity.

While a concrete definition of human dignity is not provided by the treaty bodies, the case law provides guidance in terms of what constitutes an infringement of human dignity.¹³⁷ The following forms of conduct, which may have potential applicability to a concept of animal dignity, have been considered to constitute a violation of human dignity under Article 10 of the ICCPR.¹³⁸

132. A number of cases also discuss human dignity as outlined in domestic legislation, albeit without a focus on defining the concept or adopting a definition.

133. ICCPR, *supra* note 5, art. 10; *see, e.g.*, Human Rights Comm., Communication No. 1405/2005, ¶ 9.2, U.N. Doc. CCPR/C/110/D/1405/2005 (May 12, 2014) [hereinafter Pustovoit].

134. *See* Human Rights Council, General Comment No. 21: Article 10, Humane Treatment of Persons Deprived of Their Liberty, ¶ 3 (Apr. 10, 1992); *see also* Pustovoit, *supra* note 133, ¶ 9.2.

135. *See* Human Rights Comm., Communication No. 1860/2009, ¶ 3.6, U.N. Doc. CCPR/C/111/D/1860/2009 (Sept. 4, 2014).

136. *See, e.g., id.* (“Since Mr. Al-Rabassi was subjected to torture and cruel, inhuman and degrading treatment, in violation of article 7, while in custody, it is evident that he was not treated with humanity and respect for his dignity. Thus, the above-mentioned incidents also entail a violation of article 10 of the Covenant.”); *see also* Human Rights Comm., Views: Communication 1486/2006, ¶ 4.16, U.N. Doc. CCPR/C/93/D/1486/2006 (Aug. 5, 2008); *see also* Human Rights Comm., Communication No. 1791/2008, ¶ 3.7, U.N. Doc. CCPR/C/107/D/1791/2008 (July 5, 2013).

137. *See* discussion of case law *infra* Sections II.d.ii, II.d.iv, II.d.v.

138. *See* discussion of case law *infra* Sections II.d.ii, II.d.iii, II.d.iv, II.d.v.

ii. *Humiliating and Unnecessary Methods*

The CCPR has identified that the use of humiliating and unnecessary methods in the detention of a person can constitute a violation of human dignity.¹³⁹ In *Cabal v. Australia* it was found that the use of shackles, strip searches, and cavity searches in order to prevent a flight risk was found to be a violation of the complainant's human dignity.¹⁴⁰ Similarly, in *Sharifova v. Tajikistan*, the CCPR found that the use of physical force to extract a confession amounted to a violation of human dignity.¹⁴¹ This case law appears to align with the plain language meaning of human dignity outlined above because it is reflective of a belief that humans have some inherent quality worthy of respect and that (as per McCrudden's framework)¹⁴² this type of treatment conflicts with that quality. It also aligns well with Luban's argument that non-humiliation can act as a surrogate for human dignity.¹⁴³

iii. *Conditions of Detention*

Poor conditions when in detention are clearly emphasized as a breach of human dignity.¹⁴⁴ The use of small cells,¹⁴⁵ limited or absent sanitation facilities,¹⁴⁶ poor ventilation,¹⁴⁷ lack of access to natural light,¹⁴⁸ lack of

139. See Human Rights Comm., Views: Communication No. 1020/2001, ¶¶ 2.5–2.11, U.N. Doc. CCPR/C/78/D/1020/2001 (Sept. 19, 2003) [hereinafter *Cabal v. Australia*]; see also Human Rights Comm., Views: Communications Nos. 1209, 1231/2003, & 1241/2004, ¶ 6.3, U.N. Doc. CCPR/C/92/D/1209,1231/2003&1241/2004 (Apr. 24, 2008) [hereinafter *Sharifova v. Tajikistan*].

140. *Cabal v. Australia*, *supra* note 139, ¶ 8.2.

141. *Sharifova v. Tajikistan*, *supra* note 139, ¶ 6.3.

142. See McCrudden, *supra* note 64, at 679.

143. Luban, *supra* note 75, at 276–77.

144. See generally Frowein, *supra* note 115, at 128–29.

145. See Human Rights Comm., Views: Communication No. 899/1999, ¶¶ 2.1, 5.6, U.N. Doc. CCPR/C/75/D/899/1999 (July 25, 2002) [hereinafter *Francis v. Trinidad*] (where the cell was approximately 9 feet by 6 feet). See also Human Rights Comm., Views: Communication No. 683/1996, ¶ 9.2, U.N. Doc. CCPR/C/74/D/683/1996 (June 10, 2002) [hereinafter *Wanza v. Trinidad*]; see also Human Rights Comm., Views: Communication No. 1530/2006, ¶ 7.3, U.N. Doc. CCPR/C/100/D/1530/2006 (Nov. 3, 2010) [hereinafter *Bozbej v. Turkmenistan*].

146. *Francis v. Trinidad*, *supra* note 145, ¶¶ 2.3, 5.6; Human Rights Comm., Views: Communication No. 677/1996, ¶¶ 3.1, 9.1, U.N. Doc. CCPR/C/74/D/677/1996 (Apr. 15, 2002) [hereinafter *Teesdale v. Trinidad*]; Human Rights Comm., Views:

access to visitors,¹⁴⁹ insufficient nourishment,¹⁵⁰ lack of access to medical treatment,¹⁵¹ and limited or no access to the outside world¹⁵² all constitute a violation of human dignity. Yet, while it is clear that poor conditions can constitute a breach of human dignity, it is not clear what base level conditions are sufficient to respect human dignity. Nevertheless, that these type of conditions do violate human dignity helps to clarify the concept of human dignity because they suggest that a failure to meet basic human needs constitutes a violation of human dignity.

iv. Inhumane Treatment

Inhumane treatment can take a number of forms and must attain “a minimum level of severity to come within the scope of [A]rticle 10 of the [ICCPR].”¹⁵³ In many cases, inhumane treatment is closely linked with the conditions of detention.¹⁵⁴ For example, in *Kozulina v. Belurus*, it was

Communication No. 1870/2009, ¶ 2.4, U.N. Doc. CCPR/C/99/D/1870/2009 (Aug. 11, 2010) [hereinafter *Sobhraj v. Nepal*]; Human Rights Comm., Views: Communication No. 938/2000, ¶¶ 2.3, 6.3, U.N. Doc. CCPR/C/81/D/938/2000 (Aug. 19, 2004) [hereinafter *Siewpersaud v. Trinidad*]; Human Rights Comm., Views: Communication No. 721/1996, ¶ 2.2, U.N. Doc. CCPR/C/74/D/721/1996 (Apr. 15, 2002) [hereinafter *Boodoo v. Trinidad*].

147. *Francis v. Trinidad*, *supra* note 145, ¶ 2.3; *Wanza v. Trinidad*, *supra* note 145, ¶ 3.3; *Teesdale v. Trinidad*, *supra* note 146, ¶ 3.1; *Siewpersaud v. Trinidad*, *supra* note 146, ¶ 2.3.

148. *Francis v. Trinidad*, *supra* note 145, ¶ 2.3; *Teesdale v. Trinidad*, *supra* note 146, ¶ 3.1.

149. *Teesdale v. Trinidad*, *supra* note 146, ¶ 3.1.

150. *Bozbej v. Turkmenistan*, *supra* note 145, ¶ 2.5; Human Rights Comm., Views: Communication No. 1776/2008, ¶¶ 2.6, 2.7, U.N. Doc. CCPR/C/100/D/1776/2008 (Nov. 2, 2010) [hereinafter *Bashasha v. Libyan Arab Jamahiriya*].

151. Human Rights Comm., Views: Communication No. 695/1996, ¶ 2.1, U.N. Doc. CCPR/C/73/D/695/1996 (Nov. 5, 2001); *see* *Teesdale v. Trinidad*, *supra* note 146, ¶ 3.1; *Sobhraj v. Nepal*, *supra* note 146, ¶ 2.4; *Bashasha v. Libyan Arab Jamahiriya*, *supra* note 150, ¶ 2.7.

152. *Wanza v. Trinidad*, *supra* note 145, ¶ 9.2; *Boodoo v. Trinidad*, *supra* note 146, ¶¶ 2.2, 6.4.

153. Human Rights Comm., Views: Communication No. 1184/2003, ¶ 9.2, U.N. Doc. CCPR/C/86/D/1184/2003 (Apr. 27, 2006).

154. *See* Human Rights Comm., Views: Communication No. 1126/2002, ¶ 7.2, U.N. Doc. CCPR/C/85/D/1126/2002 (Nov. 17, 2005); *Francis v. Trinidad*, *supra* note 145, ¶ 5.6; Human Rights Comm., Views: Communication No. 1422/2005, ¶ 6.5, U.N.

found that the complainant was not afforded humane treatment, in violation of Article 10 of the ICCPR, due to a denial of access to counsel and an independent doctor during a hunger strike while in prison.¹⁵⁵ Similarly, in *Komarovski v. Turkmenistan*, a United States journalist was detained in Turkmenistan without charge, denied counsel, held incommunicado, and injected with a psychotropic substance while in detention.¹⁵⁶ The CCPR concluded that “he was treated inhumanely and without respect for his inherent dignity, in violation of [A]rticle 10, paragraph 1, of the [ICCPR].”¹⁵⁷ In *Sharifova v. Tajikistan*, the CCPR found a violation of human dignity due to ill-treatment at the hands of the police, which included coercion of confessions and torture.¹⁵⁸ As with cases relating to conditions of detention, these cases suggest that a failure to meet basic human needs such as medical care will amount to a violation of human dignity. Further, similar to cases involving humiliating and unnecessary methods, instances of inhumane treatment indicate that such treatment fails to respect some inherent quality in human beings.

v. *Additional Applications of Human Dignity*

Case law outside of the above particular categories further elucidates the meaning of human dignity. In *Wackenheim v. France*, a prohibition on dwarf throwing within commercial entertainment was upheld by the CCPR because the ban “was necessary in order to protect public order, which brings into play considerations of human dignity that are compatible with the objectives of the [ICCPR].”¹⁵⁹ The suggestion appears to be that permitting dwarf throwing may engage human dignity

Doc. CCPR/C/91/D/1422/2005 (Nov. 13, 2007); Human Rights Comm., Views: Communication No. 1520/2006, ¶ 6.4, U.N. Doc. CCPR/C/98/D/1520/2006 (Apr. 30, 2010).

155. Human Rights Comm., Views: Communication No. 1773/2008, ¶¶ 2.1, 2.13, U.N. Doc. CCPR/C/112/D/1773/2008 (Jan. 14, 2015).

156. Human Rights Comm., Views: Communication No. 1450/2006, ¶¶ 2.7–2.10, U.N. Doc. CCPR/C/93/D/1450/2006 (Aug. 5, 2008).

157. *Id.* ¶ 7.5.

158. *Sharifova v. Tajikistan*, *supra* note 139, ¶ 6.2.

159. Human Rights Comm., Views: Communication No. 854/1999, ¶ 7.4, U.N. Doc. CCPR/C/75/D/854/1999 (July 26, 2002); *see also* ROSEN, *supra* note 86, at 67. For further discussion see *id.* at 63–67.

considerations under the ICCPR; perhaps it may constitute humiliating treatment. In *Abramova v. Belarus*, the Committee found that the complainant's privacy and dignity was not respected as a result of sexual harassment and discrimination, in contravention of Articles 7 and 10(1) of the ICCPR.¹⁶⁰ This may be because sexual harassment constitutes humiliation or possibly that a failure to accord equality breaches human dignity.

While jurisprudence relating to human dignity has been largely concerned with Articles 7 and 10 of the ICCPR, the application of human dignity does extend beyond these Articles and beyond the ICCPR.¹⁶¹ For example, in *Lopez Rodriguez v. Spain*, the CESCR noted that "social security is of central importance in guaranteeing human dignity for all persons when they are faced with circumstances that deprive them of their capacity to fully realize their Covenant rights."¹⁶² In this context, it appears that human dignity requires that individuals are able to meet their basic living needs.¹⁶³

e. Conclusion: Meaning of Dignity in International Human Rights Law

The basic meaning of dignity in international human rights law is clear. Human dignity refers to the inherent worth possessed equally by all human beings, which demands respect from others.¹⁶⁴ This is apparent from the dictionary and contextual meanings as well as McCrudden's basic minimum framework.¹⁶⁵ These are also the key elements common

160. Comm. on the Elimination of Discrimination Against Women, Views: Communication No. 23/2009, ¶ 5.5, U.N. Doc. CEDAW/C/49/D/23/2009 (Sept. 27, 2011).

161. As noted above, for example, human dignity is referenced in Article 13 of the ICESCR. ICESCR, *supra* note 5, art. 13. See also CRC, *supra* note 6, arts. 23(1), 28(2), 37(c), 39, 40(1).

162. Comm. on Econ., Soc. & Cultural Rights, Communication No. 1/2013, ¶ 10.1, U.N. Doc. E/C.12/57/D/1/2013 (Apr. 20, 2016).

163. See Antonio Cassese, *Can the Notion of Inhuman and Degrading Treatment be Applied to Socio-Economic Conditions?*, 2 EUR. J. INT'L L. 141, 143–44 (1991).

164. Chapman, *supra* note 122, at 3; see also Barroso, *supra* note 37, at 360; see also McCrudden, *supra* note 64, at 722–23.

165. See *Dignity*, *supra* note 71; see generally McCrudden, *supra* note 64, at 675–80.

to the textual and historical meanings of human dignity as well as the purpose of the relevant international human rights law documentation. Further, the utilisation of the term dignity by the international treaty bodies supports an interpretation of the term as attributing dignity to all human beings equally and focuses on identifying conduct that is considered a breach of human dignity or, in other words, a failure by others to respect human dignity. Such treatment includes extreme humiliation, failure to meet basic human needs, and failure to accord equality to all human beings.¹⁶⁶

Nevertheless, it is apparent that there is some conflict in the details of the various accounts of human dignity discussed above. For some, dignity is possessed only by human beings; for others, dignity may extend beyond humans.¹⁶⁷ Dignity may be based on autonomy (in terms of morality), reason, or conscience.¹⁶⁸ These discrepancies may go some way towards explaining why the concept has been attacked for its vagueness and why there has been some disagreement as to its meaning and requirements,¹⁶⁹ both within and across jurisdictions.¹⁷⁰ To the extent that the meaning of dignity in relation to these details is unclear, and to the extent that the meaning must be interpreted in the circumstances of each case, it is accepted that the term human dignity lacks some clarity.

Despite the lack of absolute clarity of the meaning of the term dignity, dignity performs an essential function in international human rights law. In essence, ascribing dignity to an individual means that the individual has moral worth equal to others and that must be respected by others. As the Constitutional Court of South Africa noted, “[r]ecognising a right to dignity is an acknowledgement of the intrinsic worth of human

166. See discussion of case law *supra* Section II.d.

167. Cf. ROSEN, *supra* note 86, at 12, 17 (considering the positions of Cicero and Aquinas).

168. Cf. *id.* at 22 (considering Kant’s position on the meaning of dignity); see also Finegan, *supra* note 87, at 186; see e.g., UDHR, *supra* note 5, art. 1.

169. Samantha Besson, *Justifications*, in INTERNATIONAL HUMAN RIGHTS LAW, *supra* note 10, at 34, 46; Luban, *supra* note 75, at 274; *The Vacuous Concept of Dignity*, *supra* note 66,

at 260; Steven Pinker, *The Stupidity of Dignity*, 28, 28 (May 2008); Ruth Macklin, *Dignity is a Useless Concept: It Means No More Than Respect for Persons or Their Autonomy*, 327 BRIT. MED. J. 1419, 1420 (2003); see also Chapman, *supra* note 122, at 3.

170. McCrudden, *supra* note 64, at 655.

beings.”¹⁷¹ To think of an individual as being “possessed of human dignity, simply *is* to think of him [or her] as a potential maker of claims.”¹⁷² Thus, the true function of dignity is to join individuals “within the community of moral equals.”¹⁷³

III. THE POTENTIAL OF A CONCEPT OF ANIMAL DIGNITY

Having discussed the meaning of the concept of human dignity, this section considers whether it would make sense to discuss animal dignity. While the view may be debated, it has generally been considered by philosophers and ethicists that animals must have moral status if they are to be considered to have an interest in not being mistreated.¹⁷⁴ In this context, moral status refers to “when an animal can be recognised as a[n] . . . equal member, with humans, of the moral community.”¹⁷⁵ Given that one of the aspects of dignity is that it must be respected by others, it would appear then that animals must have moral status if they are to have dignity.¹⁷⁶ Some of the following arguments relate to moral status and are thus relevant.

The following discussion is divided into three parts. Discussed first are the recent developments towards a recognition of international animal rights. Second, arguments against a concept of animal dignity will be discussed. Finally, this article discusses the desirability of drawing on a concept of animal dignity in constructing international legal animal rights.

171. *State v. Makwanyane* 1995 (6) BCLR 665 (CC) at 328 para. (S. Afr.).

172. Joel Feinberg, *The Nature and Value of Rights*, 4 J. VALUE INQUIRY 243, 252 (1970).

173. Corbey, *supra* note 111, at 74.

174. HUMANISING ANIMALS: CIVILISING PEOPLE, *supra* note 22, at 17.

175. *Id.*

176. *See generally* DAVID DEGRAZIA, TAKING ANIMALS SERIOUSLY: MENTAL LIFE AND MORAL STATUS 75 (1996).

a. Momentum Towards International Recognition of Animal Rights

At present, there is no international convention or declaration in relation to animal rights or even in relation to animal welfare.¹⁷⁷ Nevertheless, there has been significant movement towards such recognition.¹⁷⁸ Movement towards an international recognition of animal rights by way of declaration or other documentation began in earnest at the end of the nineteenth century and beginning of the twentieth century.¹⁷⁹ The Universal Declaration of Animal Rights was the first text to assert the principle of equality of species in relation to the right to life.¹⁸⁰ The Declaration was proclaimed at the United Nations Educational, Scientific & Cultural Organization (UNESCO) in 1978, although it was not adopted by UNESCO or any other international organisation.¹⁸¹ A revised version of the Declaration was adopted in 1989.¹⁸² While neither text references animal dignity as providing the foundation for animal rights, both texts implicitly recognise the concept of animal dignity.¹⁸³ In the 1978 version, Article 2(1) provides that “[a]ll animals are entitled to respect,” while Article 10(2) asserts that “[e]xhibitions and spectacles involving animals are incompatible with their dignity.”¹⁸⁴ Similar provisions are included in the 1989 text.¹⁸⁵

177. Joan Schaffner et al., *Animal Rights: From Why to How*, 22 ANIMAL L. 225, 227 (2016); see also David Favre, *An International Treaty for Animal Welfare*, 18 ANIMAL L. 237, 237 (2012); see also Miah Gibson, *The Universal Declaration of Animal Welfare*, 16 DEAKIN L. REV. 539, 540 (2011).

178. See Gail Tulloch & Steven White, *A Global Justice Approach to Animal Law & Ethics*, 6 AUSTL. ANIMAL PROTECTION L.J. 29, 29 (2011).

179. Jean-Marc Neumann, *The Universal Declaration of Animal Rights or the Creation of a New Equilibrium Between Species*, 19 ANIMAL L. 91, 93 (2012) [hereinafter *The Universal Declaration of Animal Rights or the Creation of a New Equilibrium Between Species*].

180. *Id.* at 103–04.

181. *Id.* at 103.

182. *Id.* at 100.

183. See, e.g., Universal Declaration of Animal Rights 1978, *supra* note 33, arts. 2(1), 10(2); see also Universal Declaration of Animal Rights, arts. 2, 5(4) (revised 1989) [hereinafter *Universal Declaration of Animal Rights 1989*].

184. Universal Declaration of Animal Rights 1978, *supra* note 33, art 2(1), 10(2).

185. Universal Declaration of Animal Rights 1989, *supra* note 183, arts. 2, 5(4).

Other more recent attempts to embed a recognition of animal rights or protect animal welfare have been made. For example, an International Convention for the Protection of Animals, drafted by the Committee for the Convention for the Protection of Animals in 1988, but never adopted, fails to recognise dignity but does assert that “[l]ife has intrinsic value.”¹⁸⁶ Further, the Universal Declaration on Animal Welfare represents “an attempt to secure international legal recognition for the principles of animal welfare.”¹⁸⁷ Although it has received endorsement in a number of high level forums and from numerous governments,¹⁸⁸ the Universal Declaration on Animal Welfare has not yet been formally adopted.¹⁸⁹ It does not reference animal dignity, although it recognises “that animals are sentient beings and . . . their welfare is an issue worthy of consideration and respect by Member States.”¹⁹⁰ Similarly, the Universal Charter of the Rights of Other Species (2000) recognises that “by virtue of their sentience, [other species] make strong moral claims upon human beings.”¹⁹¹ The European Union also has a number of treaties relating to animal protection.¹⁹²

Thus, there have been many efforts to recognise and protect animal rights or welfare in international law. In this respect, whether such recognition draws on the language of rights or welfare is not particularly important, as documents that provide for welfare protection can often

186. See International Convention for the Protection of Animals, art. 1(2) (proposed Apr. 4, 1988), https://www.animallaw.info/treaty/international-convention-protection-animals_

187. Gibson, *supra* note 177, at 540.

188. *Id.* at 542–43.

189. *UDAW Universal Declaration for Animal Welfare*, INT’L FUND FOR ANIMAL WELFARE, <http://www.ifaw.org/australia/our-work/political-advocacy/udaw-universal-declaration-animal-welfare> (last visited Apr. 20, 2017).

190. *Draft Declaration on Animal Welfare at Universal Level: UDAW Proposal*, GLOBAL ANIMAL L. pmb1.(1) (2011), <https://www.globalanimallaw.org/database/universal.html>.

191. *The Universal Charter of the Rights of Other Species*, ALL-CREATURES.ORG pmb1.(1) (May 2013), <http://www.all-creatures.org/articles/ar-universal-charter-rights-species.html>.

192. *International and Foreign Animal Law Research Guide: E.U. Treaties*, GEO. U.L. LIBR. (June 28, 2016 9:21 AM), <http://guides.ll.georgetown.edu/c.php?g=363480&p=2455787>.

operate in the same way as would rights protection.¹⁹³ None of the efforts described, however, expressly base protection on a concept of animal dignity and only some implicitly recognise the concept. The next section of this article considers whether there are any compelling arguments against acknowledgement of animal dignity.

b. Opposition to the Concept of Animal Dignity

i. *Species Superiority Arguments*

Arguments against a concept of animal dignity often posit that there is something special about human beings which places them above other animal species and to which dignity attaches.¹⁹⁴ This is understandable, as to assert that human beings have dignity simply because of their membership of the human species is a speciesist argument — it gives preference to members of a particular species over members of other species purely on the basis of their species membership.¹⁹⁵ Such an argument is akin to racism or sexism; for example, preference should be given to men over women simply because they are men.¹⁹⁶ As Brownsword asserts, “any attempt to privilege the members of a particular species, including the members of the human species, merely by virtue of their species-membership will attract the charge of ‘speciesism’ — such a response is arbitrary and it plainly will not do.”¹⁹⁷

According to Cicero, it is the rational nature of human beings that places them in a superior position to other animals and which gives rise to human dignity.¹⁹⁸ Similarly, according to Kant, humans have dignity

193. See Clare McCausland, *United Nations Declaration on Animal Welfare: Why Not Rights?* REGARDING RTS. (Apr. 19, 2013), <http://asiapacific.anu.edu.au/regarding-rights/2013/04/19/united-nations-declaration-on-animal-welfare-why-not-rights/>.

194. Assuming, of course, that a clear distinction can be made. See WAISMAN, FRASCH, & WAGMAN, *supra* note 23, at 48.

195. Roger Brownsword, *Bioethics Today, Bioethics Tomorrow: Stem Cell Research and the Dignitarian Alliance*, 17 NOTRE DAME J.L., ETHICS & PUB. POL’Y 15, 22 (2003).

196. See PAOLA CAVALIERI, *THE ANIMAL QUESTION: WHY NONHUMAN ANIMALS DESERVE RIGHTS* 70–85 (Catherine Woollard trans. 2001).

197. Brownsword, *supra* note 195, at 22.

198. Finegan, *supra* note 87, at 202; see also ROSEN, *supra* note 86, at 11–12.

as a result of their moral rationality and ability to make their own decisions.¹⁹⁹ More recently, Lee and George make the argument that it is human beings' rational nature that causes them to excel over other beings and which establishes dignity.²⁰⁰ The argument appears to be reflected in Article 1 of the UDHR, which (as noted above) refers to "reason and conscience," suggesting there may be a link between these qualities and dignity.²⁰¹ The consequence of these arguments is that because animals do not share these characteristics, they cannot have dignity.²⁰²

Kateb also makes the argument that there is something special about human beings which founds dignity, but takes a slightly different approach from that described above. Kateb asserts that "[t]he subject of human dignity is the worth of human beings or their high rank, or even their special place in nature."²⁰³ According to him, it is the ability of human beings to break with nature that places them in a position of superiority to other species.²⁰⁴

The common thread among the species superiority arguments is that there is something in human cognition — an ability to think, reason, and make choices — which is posited as being the foundation of dignity.²⁰⁵ There are, however, two major problems with these arguments.²⁰⁶ First, it is not clear why these particular characteristics (rationality, conscience, reason, and choice) should found dignity as opposed to other possible attributes, such as sentience.²⁰⁷ Lee and George assert that rationality is the foundation of human dignity on the basis that it is rationality that leads us to make choices to pursue human goods, such as "human life

199. Philipp Balzer et al., *Two Concepts of Dignity for Humans and Non-Human Organisms in the Context of Genetic Engineering*, 13 J. AGRIC. & ENVTL. ETHICS 7, 9 (2000); see also FRONTIERS OF JUSTICES: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP, *supra* note 39, at 131; see also JAMES RACHELS, THE ELEMENTS OF MORAL PHILOSOPHY 114 (1986); see also ROSEN, *supra* note 86, at 30.

200. Patrick Lee & Robert P. George, *The Nature and Basis of Human Dignity*, 21 RATIO JURIS 173, 174 (2008).

201. Finegan, *supra* note 87, at 186; see also UDHR, *supra* note 5, art. 1.

202. Corbey, *supra* note 111, at 69.

203. KATEB, *supra* note 39, at ix.

204. *Id.* at x.

205. Ash, *supra* note 41, at 197.

206. See Corbey, *supra* note 111, at 69; see also FRONTIERS OF JUSTICES: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP, *supra* note 39, at 131–32.

207. Corbey, *supra* note 111, at 69; see also Pocar, *supra* note 32, at 223.

and health, speculative knowledge or understanding,” and that these human goods are shared objects of pursuit among all humans.²⁰⁸ This is an anthropocentric argument, however, in that it bases dignity on the means used to pursue *human* goods.²⁰⁹ If, instead, dignity was based on the means used to pursue the goods of another species, it is likely that humans would not meet the requirements for the attribution of dignity.

The second major issue with the species superiority argument is that characteristics such as reason and rationality are not necessarily exclusive to humans and do not necessarily belong to all humans.²¹⁰ In relation to the possibility of some animals exhibiting typically human mental capabilities, Cavalieri notes that

a pluralistic approach [to] incorporating human phenomenology, nonhuman behaviour, functional-evolutionary arguments and physiology [has] led many authors to assert that all mental phenomena we find in humans can be found in the other animals, and that the most important capacities traditionally conceptualized as all-or-nothing — self-consciousness, capacity for autonomy, rationality, capacity for moral agency and so on — are instead multidimensional and gradational.²¹¹

In this respect, a “prominent international group of cognitive neuroscientists, neuropharmacologists, neurophysiologists, neuroanatomists and computational neuroscientists” recently declared that “non-human animals [also] have the neuroanatomical, neurochemical, and neurophysiological substrates of conscious states along with the capacity to exhibit intentional [behaviours].”²¹² So there is, at least, a strong argument that such characteristics are not exclusive to humans.

208. Lee & George, *supra* note 200, at 188.

209. See HUMANISING ANIMALS: CIVILISING PEOPLE, *supra* note 22, at 31–32.

210. FRONTIERS OF JUSTICES: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP, *supra* note 39, at 131–32; see also *Animal Rights: The Need for a Theoretical Basis*, *supra* note 21, at 1507; see also WAISMAN, FRASCH, & WAGMAN, *supra* note 23, at 50; see generally Bartlett, *supra* note 21, at 149–50.

211. CAVALIERI, *supra* note 196, at 78.

212. *Cambridge Declaration on Consciousness*, FCM CONFERENCE (July 7, 2012), <http://fcmconference.org/img/CambridgeDeclarationOnConsciousness.pdf>.

It is also clear that characteristics such as reason and rationality do not belong to all humans.²¹³ Very young children, people experiencing mental impairment, and elderly people experiencing the loss of mental faculties may not have these mental attributes.²¹⁴ At least some human beings then, do not share these human characteristics. To posit that dignity rests on such characteristics will result in an exclusion of these human beings from the moral status of dignity and the respect that it demands. In other words, if human beings have dignity because of their rationality (or other human characteristic), and therefore must be respected via an entitlement to human rights, then human beings without rationality will not be entitled to human rights. This would result in the unpalatable situation in which very young children, mentally impaired human beings, and elderly people could be tortured, subjected to experimentation, and so forth because of their lack of rationality. It is unlikely that anyone would accept such an outcome.

*ii. Correspondence Between Morally Relevant
Characteristics and Species or Morally Relevant
Characteristics and Human Nature*

An argument sometimes presented in response to the difficulty of finding an attribute that distinguishes all human beings from all animals is that some basic aspect of human beings (whether or not an individual has that aspect) is superior to aspects of other species.²¹⁵ As Cavalieri notes, this argument can take two very closely related forms.²¹⁶ First, in an approach referred to by Cavalieri as “the correspondence approach,” it has been argued that “moral status [and accordingly dignity] depends not on a particular being’s actual capacities but on the capacities that are typical of its kind.”²¹⁷ This appears to involve some assessment as to what the typical or average capacities are of different species, followed by an assessment as to the relative merit of those typical capacities.²¹⁸

213. Pocar, *supra* note 32, at 220.

214. See HUMANISING ANIMALS: CIVILISING PEOPLE, *supra* note 22, at 32.

215. See CAVALIERI, *supra* note 196, at 74, 77; see also Lee & George, *supra* note 200, at 190.

216. See CAVALIERI, *supra* note 196, at 73–79.

217. *Id.* at 74 (referring to arguments presented by Thomas Scanlon).

218. *Id.* at 77.

Following this analysis, if members of biological Group A typically possess a characteristic deemed morally relevant to a greater extent than biological Group B, then members of biological Group A may be accorded dignity whereas members of biological Group B may not be.

The correspondence approach is undermined by a significant weakness. The consequence of the approach (according dignity on the basis of characteristics typical of kind) will only appear morally just where there is no overlap between biological groups.²¹⁹ In other words, if there are members of biological Group B that happen to possess the morally relevant characteristic to a greater extent than some members of biological Group A, then denying them dignity while according dignity to those members of Group A would appear to be unjust. The example proffered by Cavalieri highlights this injustice.²²⁰ This example consists of giving the right to life exclusively to members of a group that typically possess a morally relevant characteristic.²²¹ If Mary was a member of that group, but John was not, then it will be wrong to kill Mary but right to kill John, *even if* Mary and John possess the morally relevant characteristic to an equal extent.²²² Singer provides a second example — if we assess that it is a typical characteristic of females that they are good at looking after children, but that males do not share this characteristic, then the correspondence approach would require that females stay home and look after children.²²³ This would be so even for females who demonstrated less capacity to look after children than some males.²²⁴

Very similar to the correspondence approach is the argument that the *nature* of a human being is somehow different, and superior to, animal nature.²²⁵ As Cavalieri identifies, this argument appears to require an assessment of what human nature is, rather than a quantitative type

219. *Id.* at 74.

220. *See id.*

221. *Id.*

222. *Id.*

223. SINGER, *supra* note 21, at 240–41.

224. *Id.*

225. CAVALIERI, *supra* note 196, at 77 (referring to arguments presented by Carl Cohen). This argument has also been expressed in the language of a species “root form.” *See* Lee & George, *supra* note 200, at 190–91.

assessment of average capacities.²²⁶ Thus, if we deem rationality to be a morally relevant characteristic, and assess that rationality is part of human nature and not part of animal nature, then moral status (and dignity) should be exclusively the domain of human beings, including those who are not actually rational. This approach, however, suffers from evidentiary weakness.²²⁷ Reference to the genetic structures of different species indicates that human beings “do not constitute a distinct family, nor even a distinct genus.”²²⁸ Further, reference to psychological characteristics of different species leads to the conclusion that “all mental phenomena we find in humans can be found in . . . other animals.”²²⁹ Without reference to metaphysical or religious arguments, an approach relying on the distinctiveness of human nature is insupportable.²³⁰

iii. Lack of Normative Determinacy

Zuolo asserts that dignity is not an appropriate concept for recognising the importance of animals because it fails to meet the requirement of normative determinacy.²³¹ This requirement, as put forward by Zuolo, is that “dignity includes a prescriptive dimension beyond its including intrinsic value.”²³² In other words, recognition of dignity must lead to some practical requirement. In this argument, however, Zuolo overlooks the nature of the prescription within the current legal conception of human dignity, which is to respect the human rights agreed to by states parties to the relevant conventions.²³³ Adopting the same approach, a conception of animal dignity will have normative determinacy by virtue of animal rights agreed to by states parties to a relevant convention.

226. See CAVALIERI, *supra* note 196, at 77.

227. See *id.* at 78–79.

228. *Id.* at 78.

229. *Id.*

230. See *id.* at 79.

231. See Federico Zuolo, *Dignity and Animals. Does it Make Sense to Apply the Concept of Dignity to All Sentient Beings?*, 19 ETHICAL THEORY & MORAL PRAC. 1117, 1117 (2016).

232. *Id.* at 1120.

233. For example, the ICCPR and the ICESCR both recognise that “rights derive from the inherent dignity of the human person” and proceed to set out what these rights are. ICCPR, *supra* note 5, pmbl.; ICESCR, *supra* note 5, pmbl.

Zuolo's opposition to extending dignity to animals seems to be that the same concept, dignity, must result in the same treatment (humans and non-humans must be accorded the same rights).²³⁴ Yet even if the underlying concept (dignity) is the same, normative determinacy should not be interpreted to require the same treatment, but rather to require a prescriptive dimension. As DeGrazia identifies, acknowledging equal moral worth does not mean that animals should have the same rights as humans, should be treated equally to humans, or that there are no morally relevant differences between animals and humans.²³⁵ Acknowledging the dignity of all animals will require a prescriptive dimension in the event that it gives rise to rights. Just because different animals may require different rights, or different actions to enable the enjoyment of rights, does not mean the prescriptive dimension is lost.

iv. Vacuousness of the Concept of Dignity

It is accepted that the concept of dignity lacks clarity in some respects. It might therefore be argued that the vacuousness of the concept²³⁶ in itself is a sufficient reason not to utilise it in any international recognition of animal rights. In this respect, Bagaric and Allan's argument is that dignity is "incapable of explaining or justifying any narrower interests."²³⁷ The issue is well illustrated by reference to contexts in which dignity may be called upon to determine a conflict, but where the argument can be reframed to advocate polar opposite outcomes.²³⁸ For example, in relation to the debate surrounding euthanasia, opponents may argue that respect for the dignity of human life should compel rejection of euthanasia, whereas proponents might argue that respecting human dignity requires respecting the individual wishes of the person seeking access to euthanasia.²³⁹ Bagaric and Allan conclude that for dignity "to provide meaningful guidance" in relation to

234. See Zuolo, *supra* note 231, at 1124–26.

235. DEGRAZIA, *supra* note 176, at 37.

236. *The Vacuous Concept of Dignity*, *supra* note 66, at 260.

237. *Id.*

238. See *id.* at 267 (citing *Gosselin v. Québec*, [2002] 4 S.C.R. 429 (Can.)).

239. *The Vacuous Concept of Dignity*, *supra* note 66, at 266; see generally SCOTT CUTLER SHERSHOW, *DECONSTRUCTING DIGNITY: A CRITIQUE OF THE RIGHT-TO-DIE DEBATE* 85–97 (2014).

the operation of rights, “a number of matters need to [be] resolved, including the meaning and justification of dignity.”²⁴⁰

Yet, to the extent that the concept of dignity lacks clarity, this does not mean that it is without merit. In contemporary international law, human rights are underpinned by reference to dignity,²⁴¹ and this situation will not change in the foreseeable future. As discussed above, the concept of dignity operates in international human rights law to include human beings in a category of those with equal intrinsic moral worth which must be respected by others.²⁴² For such a category to exist in the law, and to exclude animals from membership of that category, would imply that animals are not morally relevant in the same way as human beings are. It would suggest, in other words, that whatever ‘rights’ are granted to animals, they are secondary to human rights. While it is possible for international law to provide improved recognition and protection for animals without recognising animal dignity, it is suggested that recognition of such dignity would be reflective of a paradigm change from valuing animals based on their worth to human beings to valuing animals based on their own inherent worth.

c. Should Dignity Underpin an International Recognition of Animal Rights?

The concept of dignity is utilised in international law to recognise the equal moral worth of an individual, which must be respected by others. The above discussion of the meaning of dignity indicates that, while the concept has been used as a way of differentiating humans from animals, the concept is not necessarily specific to human beings and may extend to animals, or even beyond animals. Further, consideration of the arguments against recognition of animal dignity indicate that there is no persuasive reason why animals should not be considered to have dignity.²⁴³ It is contended that, as dignity is used in relation to human beings in international human rights law, a failure to use it in relation to

240. *The Vacuous Concept of Dignity*, *supra* note 66, at 263.

241. *See* discussion *supra* Section II.a.

242. *See* discussion *supra* Section II.e.

243. *See* discussion *supra* Section III.b.

animals would suggest that they are not entitled to equal moral status and would thus perpetuate the cruelty towards and exploitation of animals.

Beyond conceptual reasons why dignity cannot be exclusive to human beings, time spent with animals will suggest that that they do have dignity. Many animals share “human” attributes such as intelligence, emotion, and social bonds.²⁴⁴ It is clear that many animals can experience pleasure, enjoyment, pain, distress, fear, anxiety, and suffering.²⁴⁵ Research also indicates that some animals have the capacity to comprehend and use languages.²⁴⁶ Further, “[h]igher order animals also seem to have self-awareness” and “some animals are capable of metacognition.”²⁴⁷ More importantly, intuition indicates that animals do have dignity. Taking the approach of Oscar Schachter (“I know it when I see it even if I cannot tell you what it is”),²⁴⁸ even those who argue against animal dignity can recognize when it is violated. Zuolo, for example, writes,

we may think that capturing a wild animal and keeping it in captivity is a violation of its dignity. I suspect many people would share this moral reaction if they see, for instance, a lion in a cage. In this case, the idea of dignity serves to express a sense of indignation caused by the experience of seeing an animal in such an unnatural condition. My sense is that this is a genuine and probably sensible moral response.²⁴⁹

Recognising animal dignity in international law is important in terms of codifying, encouraging, and cementing change in societal values.²⁵⁰ This change can be seen in domestic legislation and case law in a number

244. WAISMAN, FRASCH, & WAGMAN, *supra* note 23, at 50; *see also* Thomas G. Kelch, *Toward A Non-Property Status for Animals*, 6 N.Y.U. ENVTL. L.J. 531, 563 (1998).

245. DEGRAZIA, *supra* note 176, at 128.

246. *Id.* at 198.

247. HUMANISING ANIMALS: CIVILISING PEOPLE, *supra* note 22, at 14–15. Here, higher order animals refers to “[a]nimals of relatively advanced or developed characteristics” *Higher Animals*, OXFORD DICTIONARIES, https://en.oxforddictionaries.com/definition/higher_animals (last visited Oct. 31, 2017).

248. Schachter, *supra* note 75, at 849.

249. Zuolo, *supra* note 231, at 1128.

250. Schaffner et al., *supra* note 177, at 241.

of jurisdictions.²⁵¹ For example, Article 120(2) of the Federal Constitution of the Swiss Confederation provides that “[t]he Confederation shall legislate on the use of reproductive and genetic material from animals, plants and other organisms. In doing so, it shall take account of the *dignity* of living beings”²⁵² In India, the High Court of the State of Kerala held that “circus animals are ‘beings entitled to dignified existence’ under the Indian Constitution’s Article 21, which protects the right to life with dignity.”²⁵³ The German Animal Welfare Act of 2006 recognises the responsibility of human beings to protect animals.²⁵⁴ More recently, in New Zealand, the Animal Welfare Amendment Act (No 2) 2015 was passed which explicitly recognises that animals are sentient.²⁵⁵

Acknowledgement of animal dignity in legal documentation could utilise the word dignity or a synonym phrase, such as intrinsic worth or inherent value. As with most human rights documentation, recognition would be best placed in a preamble to a declaration or convention. In terms of the prescriptive requirements of what dignity entails, this would comprise the agreed rights to be attributed to animals (or a particular species). Although it is outside the scope of this article to discuss what rights should be attributed to animals, it is suggested that these could be based on the capabilities of different species.²⁵⁶ Further, the meaning of dignity, to the extent that it informs agreed rights, could be approached (as per human dignity) from a breach-based perspective.²⁵⁷ For example, using humiliating and unnecessary methods, providing inadequate

251. See, e.g., BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 120 (Switz.); see also Nair, AIR 2000, ¶ 13; see also Tierschutzgesetz [TierSchG] [Animal Welfare Act], § 1, translation at <https://www.animallaw.info/statute/germany-cruelty-german-animal-welfare-act> [hereinafter German Animal Welfare Act]; see also Animal Welfare Amendment Act (No. 2) 2015, s 4(i) (N.Z.) [hereinafter New Zealand Animal Welfare Act].

252. BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 120(2) (Switz.) (emphasis added).

253. PAUL WALDAU, ANIMAL RIGHTS: WHAT EVERYONE NEEDS TO KNOW 107–08 (2011).

254. German Animal Welfare Act, § 1.

255. New Zealand Animal Welfare Act, § 4(i).

256. FRONTIERS OF JUSTICES: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP, *supra* note 39, at 326; see also Nataša Stojanović, *Which Animal Rights Should be Recognised?*, 3 BELGRADE L. REV. 75, 75 (2016).

257. See discussion *supra* Section II.d.i.

conditions of detention, or inhuman treatment in relation to animals may be held to constitute a breach of specific agreed animal rights as informed by the concept of dignity.²⁵⁸

Nevertheless, the overriding concern in developing international law in relation to animals should be the improvement of recognition and protection for animals. To achieve these objectives, it is important to take into account political considerations, including the feasibility of persuading states to support proposed laws. For example, it has been argued that instruments that adopt the language of rights as opposed to welfare in relation to animals “are unlikely to be successful” because they are unlikely to gain wide acceptance.²⁵⁹ If the incorporation of recognition of animal dignity into international legal documentation designed to recognise and protect animals were to provide an obstacle to consideration and acceptance of such documentation, then it would be better to dispense with the recognition of animal dignity.

IV. CONCLUSION

Human dignity is intrinsic and must be respected. This concept also performs an important function in international human rights law in terms of identifying those individuals considered to be of equal moral worth.²⁶⁰ There are no compelling reasons why the concept of dignity does not also extend to animals.²⁶¹ On the contrary, the clear need to improve recognition and protection of animals, the intuitive response that suggests that animals do have dignity, and changes in societal values all suggest the existence of animal dignity.

This article argues that there is a concept of animal dignity that should be recognised in international law. This is because the concept has a common foundation with the concept of human dignity that underpins international human rights law and because such recognition would operate to encourage and cement a paradigm change in human attitudes towards animals. Although this article does not attempt to set out in detail how that recognition should be achieved, the analysis of dignity

258. See Amy B. Draeger, *More Than Property: An argument For Adoption of the Universal Declaration on Animal Welfare*, 12 DRAKE J. AGRIC. L. 277, 298 (2007).

259. Gibson, *supra* note 177, at 550; see also Favre, *supra* note 177, at 239.

260. See discussion *supra* Section II.e.

261. See discussion *supra* Section III.b.

undertaken in this article suggests that, analogously with the recognition of human rights, animal dignity should be recognised in declarations or treaties that seek to improve recognition and protection of animals. At the same time, it is acknowledged that the overriding objective should be improved recognition and protection of animals in international law, and to the extent that recognition of animal dignity provides an obstacle to that objective, it may be preferable to dispense with such recognition.

