The Concept of Human Dignity in German and Kenyan Constitutional Law

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Abstract

This paper is a historical, legal and philosophical analysis of the concept of human dignity in German and Kenyan constitutional law. We base our analysis on decisions of the *Federal Constitutional Court of Germany*, in particular its take on life imprisonment and its 2006 decision concerning the shooting of hijacked airplanes, and on a close reading of the *Constitution of Kenya*. We also present a dialogue between us in which we offer some critical remarks on the concept of human dignity in the two constitutions, each one of us from his own philosophical perspective.

Key Words

Human dignity, constitutional law, human rights, Constitution of Kenya, Basic Law for the Federal Republic of Germany, philosophy of law, Germany, Kenya

Introduction: Human Dignity as a Legal Concept

Dignity as a legal concept enjoys increasing popularity all over the world. It can be found in the *Basic Laws of Israel* (Israel 1992, Articles 1, 4), the *Constitution of South Africa* (Republic of South Africa 1996, Articles 1, 7, 10), as well as in the proposed draft of the new Moroccan constitution put forward by King Mohammed VI in response to recent pro-democracy protests (Kingdom of Morocco 2011). Human dignity has also been invoked by the *Supreme Court of Canada* in some of its recent opinions (see, e.g., *Law vs. Canada*), and a Swiss government ethics committee even went so far as to issue guidelines on the dignity of plants (Federal Ethics Committee on Non-Human Biotechnology 2008).

In the *Basic Law for the Federal Republic of Germany* (Grundgesetz),[1] hereafter referred to as "the *Basic Law*", the concept of dignity is most prominently located in Article 1 Section 1:

> *Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlicher Gewalt.* [Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority] (Basic Law, Article 1 Section 1).

The *Constitution of Kenya* mentions the word "dignity" thirteen times, most prominently in Article 10 among the "National values and principles of governance", and in Article 28, titled "Human Dignity". Thus both the German and Kenyan constitutions are crafted in line with a global trend which considers human dignity to be the fundamental value, or one of the fundamental values, of a society that adequately respects human rights.

The concept of human dignity is rooted in religious tradition, the ideas of the eighteenth century European Enlightenment, and contemporary secular theories of autonomy and self-determination. In particular, it is commonly associated with the Judeo-Christian doctrine that humans are created in god's image (*imago dei*) and the moral philosophy of Immanuel Kant which views the human person as having intrinsic worth by virtue of his or her rational faculty. Although the concept of dignity has a long history, it did not find its way into any legal framework prior to the 20th century.[2]

Besides its role as a constitutional value in several jurisdictions, human dignity enjoys popularity in a wide variety of social contexts. It was invoked by Martin Luther King, Jr. in support of the

[1] The Basic Law is the constitutional law of Germany. Since it was regarded as provisional when drafted, the German term "Verfassung" (*constitution*) was not used.

[2] Human dignity as a legal concept was first quoted, even though in a rather insignificant role, in Article 151 Section 5 of the *Weimar Constitution* of 1919: "The economy has to be organized based on the principles of justice, with the goal of achieving life in dignity for everyone."

African-American Civil Rights Movement.[3] Similarly, working conditions in Bangladeshi sweatshops are criticized for being undignified, and the *World Medical Association* also identifies human dignity in its *Declaration of Helsinki* as one of the goods physicians ought to protect.[4] The concept of human dignity is usually associated with the notion that every individual human being has intrinsic worth by virtue of being human, and that this worth entitles him or her to respect from all other human beings. Yet there is no universally accepted *definition* of the term. Some have taken this fact to show that no sense can be made of human dignity. However, we suspect that *too many* senses can be made of the term. We will not attempt to provide a survey of these many (more or less useful) senses. Instead, we will restrict ourselves to the senses that are given to the concept of human dignity in German and Kenyan constitutional law.

This paper undertakes a critical examination of the concept of human dignity in German and Kenyan constitutional law. Our analysis starts with Germany, and the meaning of human dignity that can be extracted from the decisions of the *Federal Constitutional Court of Germany* (Bundesverfassungsgericht),[5] which is the ultimate authority regarding the interpretation of the *Basic Law*. Josef Isensee called human dignity as posited in the German *Basic Law* an "article of faith of a civil religion" (Isensee 2006, 179). We shall try to approach and circumscribe this article of faith through a detailed analysis of the *Court*'s take on life imprisonment and its 2006 decision concerning the shooting of hijacked airplanes. We shall then move on to the case of Kenya. After presenting a brief history of constitutional law in Kenya, we shall trace the concept of dignity throughout the country's current constitution. Finally, we shall present a dialogue between us, in which we shall offer some critical remarks on the concept of human dignity in the constitutions of Germany and Kenya, each one of us from his own philosophical perspective.

Human Dignity in German Constitutional Law

Article 1 of the German Basic Law

Historically, the strong commitment to human dignity expressed in Article 1 Section 1 of the German *Basic Law* is to be understood as a reaction to the atrocities of National Socialism. The German *Basic Law* was drafted with the intention to prevent the horror of totalitarianism from

[3] For example, in his "Letter from Birmingham Jail", King writes: "Now is the time to lift our national policy from the quicksand of racial injustice to the solid rock of human dignity" (Martin Luther King, Jr. 2008, 113).
[4] "It is the duty of physicians who participate in medical research to protect the life, health, dignity, integrity, right to self-determination, privacy, and confidentiality of personal information of research subjects" (WMA General Assembly 2008, Article 11).
[5] In the following, we will refer to this court simply as "the *Court*".

ever happening again. This intention of Article 1 is explicitly stated in the preamble of a number of German state constitutions.[6] The *Constitution of Bremen*, for example, says in its preamble that it is given "[e]rschüttert von der Vernichtung, die die autoritäre Regierung der Nationalsozialisten unter Mißachtung der persönlichen Freiheit und der Würde des Menschen […] verursacht hat" (Freie Hansestadt Bremen 2009, Preamble) - shaken by the destruction, which the authoritarian government of the National Socialists caused through its disregard for the personal freedom and dignity of man. Human dignity was introduced as the fundamental value of a new Germany when the *Basic Law* came into effect on May 23, 1949, and it serves as an absolute barrier to what individuals as well as the state in all its manifestations may legitimately do.

Article 1 of the *Basic Law*, as quoted in the introduction to this paper, establishes human dignity as the central value of the German *Basic Law* (BVerfGE 27, 1; BVerfGE 65, 1)[7] and the "highest constitutional value" in Germany (BVerfGE 5, 85; BVerfGE 6, 32; BVerfGE 45, 187; BVerfGE 109, 279; BVerfGE 115, 118).[8] Rather than constituting an independent civil right in itself, the dignity clause is commonly interpreted as representing the basis for all the rights protected in the *Basic Law* (BVerfGE 6, 32; BVerfGE 115, 118). Accordingly, the literature on German constitutional law sometimes refers to human dignity as the "*original right to have rights*" (Enders 2010, 3).

The designation of human dignity as the central value of the German legal order reflects the intention to elevate Germany beyond the inhumanity of Hitler Germany, with a view to ensuring that totalitarianism does not find ground in Germany *ever again*. The protection of human dignity is therefore guaranteed in perpetuity by the *Basic Law*. The so-called *eternity clause*, Article 79 Section 3 of the *Basic Law*, prevents the legislature from making any amendments to the *Basic Law* that affect Article 1.[9]

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[6] In fact, human dignity is not referred to in the constitutions of only three out of sixteen German states: Hamburg, Schleswig-Holstein and Niedersachsen.

[7] "BVerfGE" stands for "*Bundesverfassungsgerichtsentscheidung"*, which is German for "decision of the *Federal Constitutional Court of Germany*". The first number that follows this abbreviation refers to the volume of (Verein der Richter des Bundesverfassungsgerichts), where decisions of the *Court* can be found, the second number to the first page of the decision.

[8] Note that, while the American constitution, for example, emphasizes the limitation of state power and the protection of negative liberties, the Basic Law also contains a significant positive element that obliges the German government to take affirmative steps to enforce our rights and further respect for human dignity. E.g., Article 1 provides the foundation for the social welfare principle as formulated in Article 20 Section 1. The state has a legal obligation to provide a minimal existence to all its citizens.

[9] "Amendments to this Basic Law affecting […] the principles laid down in Articles 1 and 20 shall be inadmissible." (*Basic Law*, Article 79 Section 3.) The eternity clause does not explicitly protect itself from revision by the legislature. Therefore, taken at face value, the eternity clause could rather easily be circumvented. Because of this fact, the clause is commonly taken to demand a purposive interpretation under which it is implicitly self-entrenched.

The dignity clause precedes the list of basic rights guaranteed by the *Basic Law*. While these rights, including the right to life, may be restricted, human dignity is *absolute*; it is said to be "inviolable". Dignity is, hence, not only shielded from constitutional amendment, but also from legislative incursion. If a law is found to breach human dignity, a court has sufficient reason to declare it unconstitutional. Neither a parliamentary nor a popular majority can possibly justify laws or actions that infringe upon human dignity. Not even the person in question can justify such an infringement by voluntarily consenting to it, as noted by German courts in cases concerning dwarf throwing (NVwZ 1993, 98) and peep shows (BVerwGE 64, 274).

The declaration of the inviolability of human dignity in Section 1 of Article 1 is followed by two more sections (*Basic Law*, Article 1):

> (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
>
> (3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

Section 2 emphasizes the (alleged) utmost importance of human dignity and human rights for peace and justice, and presents human dignity as the *reason*[10] for proclaiming human rights.

Given the notorious vagueness of the term, the authors of the *Basic Law* felt the necessity to qualify the legal meaning of human dignity. Accordingly, Section 3 establishes the basic rights listed in Articles 2 to 19 as *manifestations* of human dignity. Under normal circumstances, human dignity is sufficiently protected by respecting these basic rights. Since Article 1 was most commonly applied by the *Court* in conjunction with Articles 2 and 3, the following brief elaboration on these two articles is instructive on the interplay between human dignity and basic rights.

Article 2 guarantees a right to free development of personality (*Basic Law*, Article 2 Section 1), and is commonly taken to protect the freedom to act in accordance with one's desires as long as one's actions do not collide with the equal freedom of everybody else. In light of Article 1, this right is more generally regarded as a right to personality, linking the freedom of action to the intimate realm of human nature. This right includes, for example, the right to informational privacy (BVerfGE 65, 1), the right to one's own picture, and the right to have one's paternity established (BVerfGE 90, 263; BVerfGE 79, 256). Article 2 further guarantees the right to life

[10] Cf. the use of the word "therefore" in Section 2.

and physical integrity (*Basic Law*, Article 2 Section 2).[11] Like the other basic rights, the right to life can be restricted by law. Killing a person, hence, may be in accordance with the *Basic Law*, such as in certain cases of self-defense. However, if a killing would involve a violation of human dignity, it cannot be legally justified. The right to physical integrity protects the bodies of individuals from invasions that would cause injury, harm or pain;[12] in particular, it makes torture and capital punishment unacceptable. Since Article 1 Section 1 not only recognizes a negative state duty to "respect" but also a positive duty to "protect" human dignity, the German legislature must make efforts to prevent private violations of human dignity related to the physical integrity of persons (and other basic rights).[13] Accordingly, § 1631 Section 2 of the *German Civil Code* (*BGB*), for example, prohibits the corporal punishment of children.

Under the German constitution, dignity further means equality, as textually specified in Article 3. A society in which some are regarded as second-class citizens contradicts the ideal of human dignity. Therefore, slavery, racial and sex-based discrimination can have no place in the German social order.

The basic rights flow from human dignity in the sense that they all have what we propose to call *dignity-core*. Human dignity is the "root of all basic rights" (BVerfGE 93, 266), informs the basic rights, and is the foremost rationale for protecting them. While the legislature may restrict basic rights, such a restriction is only constitutional as long as their dignity-core is not infringed.[14] There can be no balancing of human dignity with other basic laws (BVerfGE 93, 266; BVerfGE 107, 275). Article 20 declares that in "no case […] the essence of a basic right [may] be affected" (*Basic Law*, Article 20 Section 2). Identifying the dignity-core of a basic right with its essence, we can understand this provision as a consequence of the absoluteness of Article 1. Human dignity is *the* absolute barrier to government (and private) action. It limits the restrictions that the German state can put on the freedom of individuals. Accordingly, human dignity is at times called "Schranken-Schranke" (*barrier-barrier*) in scholarly texts on German law (see, e.g., Degenhart 2011, 191). Thus the relation between basic rights and human dignity is perhaps best understood as one of *mutual* influence. While human dignity provides the foundation for the basic rights, the basic rights help us to understand the meaning of human dignity.

[11] This right led to Germany's strict limitations on abortion (BVerfGE 88, 203; BVerfGE 39, 1).
[12] The Court, for example, declared a court-ordered puncture of an individual's vertebral canal for the purposes of obtaining evidence against a defendant in a criminal trial unconstitutional (BVerfGE 17, 108).
[13] While the legislature has some discretion in its decisions how to protect human dignity, severe violations of human dignity such as rape must be subjected to criminal prosecution.
[14] On the other hand, human dignity can be a reason to restrict basic rights. For example, the German legislature has a duty to prohibit the private infringement of human dignity and, for this purpose, must restrict the freedom of people accordingly.

The hierarchy of values outlined above becomes apparent, for example, in Germany's approach to free speech. By virtue of the dignity clause, all ideas are subject to strict government control.[15] Accordingly, when free speech and human dignity collide, free speech – being the less important constitutional value – usually must give way.

Consider the famous case concerning Klaus Mann's novel *Mephisto* (BVerfGE 30, 173). In this novel, Mann tells the story of a Nazi collaborator who abandons his ethical values in order to make an artistic career under the National Socialists. Mann admittedly based the character of this artist loosely on the German actor Gustaf Gründgens (who was already deceased at the time the case reached the *Court*). A relative of Gründgens asked the courts to ban the novel, arguing that it dishonors Gründgens. After three lower courts reached contradictory verdicts, the case was handed over to the *Federal Constitutional Court of Germany*. The *Court* found that the human dignity of Gründgens outweighs Mann's Article 5 right to freedom of artistic expression,[16] and upheld the decision of one of the lower courts prohibiting the distribution of *Mephisto* in Germany.[17] In its decision, the *Court* cited the fact, among others, that Gründgens is "a person of contemporary history and that public memory of him is still alive" (BVerfGE 30, 173). This mention of public memory reflects a culture of honor that has a long tradition in continental Europe. It is foreign, for example, to the United States legal system. As Whitman observes, "American law is just different" (Whitman 2000, 1382). It has "remarkably little to say about norms of hierarchical respect" (Whitman 2000, 1382).

The *Court* regularly gives particularly little importance to *political* free speech. While this fact is understandable in the light of recent German history, it raises the question as to whether or not speech is in fact free in Germany in any substantial and meaningful sense. For example, it is illegal to sell copies of Hitler's *Mein Kampf* (My Struggle), the German government runs an aggressive campaign against websites promoting Nazi ideology, and German criminal law prohibits Holocaust denial. Further, the *Court* may declare forfeiture of somebody's basic right to freedom of expression if he or she uses this right "to combat the free democratic basic order" (*Basic Law*, Article 18). Accordingly, "an entire category of core political speech activity enjoys no protection whatsoever in the German constitutional system" (Krotoszynski 2004, 1554).

[15] In contrast, the right to free speech as formulated in the First Amendment of the *United States Constitution* is absolute, if taken at face value.
[16] "Arts […] shall be free" (*Basic Law*, Article 5 Section 3).
[17] This shows that the human dignity of a person in Germany legally extends to the time after his or her death.

Hoping to have provided a sufficiently comprehensive picture of the German view of the interrelation of dignity and human rights, we shall proceed to determine the precise legal and philosophical content of the concept of human dignity in German constitutional law, aspects of which are taken to be at the core of the basic rights recognized by the *Basic Law*.

The Object Formula in German Constitutional Law

The modern concept of human dignity traces a line through the history of thought, and is closely related to the Judeo-Christian idea that humans are created in god's image, and to the philosophy of autonomy. This line runs all the way back to the Stoics of Ancient Greece, and, on its way, touches on the thoughts of Enlightenment philosopher Immanuel Kant, Renaissance philosopher Giovanni Pico della Mirandola and others. Despite the conceptional tension between religious and secular concepts of human dignity, they all share the common idea that every human being has equal intrinsic value, regardless of ability or potential. This value is posited to be inalienable and inviolable. Maybe because this core meaning of human dignity is maximally compatible with the various traditional concepts of the term, the *Court* chose to adopt the general idea of equal worth as the basis of its interpretation of Article 1. This choice results in a rather narrow interpretation of the concept of human dignity, as required by the desire to keep its absoluteness from paralyzing the German government.

In 1977, the *Court* was faced with the question whether life imprisonment without the possibility of parole is constitutional (BVerfGE 45, 187). It held that the state "must regard every individual within society as having equal worth. It is contrary to human dignity to make persons the mere tools […] of the state" (BVerfGE 45, 227; Kommers 1989, 316). In particular, the state may not "turn the offender into an object of crime prevention to the detriment of his constitutionally protected right to social worth and respect" (BVerfGE 45, 187). In the opinion of the *Court*, a convict's capacity to determine his or her own life would be denied were one to sentence him or her to life imprisonment without the chance to be freed before the time of his or her death. Such a denial would be tantamount to treating him or her as a mere object. The state, however, must regard persons as subjects. Persons must not be treated in a way that implies the negation of their belonging to humankind. Thus life imprisonment without the possibility of parole invades the absolutely inviolable sphere of human dignity. Accordingly, the *Court* declared this particular

kind of punishment unconstitutional.[18] Its decision bears the imprint of Immanuel Kant's moral philosophy, as is evident from the *Court*'s repeated reference to the objectification of persons.

In another place in the life imprisonment decision, the *Court* explicitly recognizes that Article 1 requires the principle that "each person must always be an end in himself" (BVerfGE 45, 228; Currie 1994, 314) to be respected. This test of whether human dignity is infringed upon is known as the *Object Formula*. The German constitutional scholar Günter Dürig famously provided the following explication of this formula:

> Human dignity as such is affected when a concrete human being is reduced to an object, to a mere means, to a dispensable quantity. [Infringements of dignity involve] the degradation of the person to a thing, which can, in its entirety, be grasped, disposed of, registered, brainwashed, replaced, used and expelled (Dürig 1956, 125; translated in Botha 2009, 183).

Interestingly, even though human dignity can be infringed upon, the *Court* has consistently held that a person can neither loose his or her inherent dignity (BVerfGE 87, 209), nor waive or forfeit it. If human dignity is inalienable and cannot be possibly lessened by whatever anybody might do, why do we need to protect it? The answer to this question lies in the fact that the human dignity clause, as interpreted by the *Court*, has a strong expressivist component insofar as it essentially refers to the "degradation" of the person to a thing. While a human being will always keep his or her dignity no matter how he or she is treated by others, he or she needs to be protected from behavior that *displays disrespect* towards his or her dignity. This expressivist component of human dignity played a prominent role in a decision of the *Court* on the tapping of telephones. In this decision, the *Court* held that to "violate human dignity, the treatment of a person […] must […] be an *expression* of contempt for the value which accrues to every human being by virtue of the fact that he is a person" (BVerfGE 30, 1; translated in Botha 2009, 186; emphasis added).

Anderson and Pildes (2000, 1527) define expressive harms as harms a person suffers "when she is treated according to principles that express negative or inappropriate attitudes toward her". In this terminology, Article 1 protects persons in Germany from a certain kind of expressive harm. Under no circumstances may the state express disrespect towards the intrinsic value of a human being. Everybody is worthy of equal respect, and all legal norms must accord to the spirit of human dignity.

[18] Note that convicts regularly found to be dangerous by experts can be kept imprisoned indefinitely. Human dignity merely requires that the door to freedom is not closed in principle for anybody.

In the aftermath of the September 11th attacks on the free world, the German legislature added § 14.3 to the *German Aviation Security Act* (LuftSiG). § 14.3 authorizes the *Bundeswehr* – Germany's armed forces – to shoot down any airplane with innocent passengers that is intended to be used as a weapon in a crime against human lives. A group of people who regularly uses airplanes for private and business travel filed a complaint with the *Court*, arguing that a law permitting the state to kill innocent people violates their basic rights as guaranteed by the *Basic Law*. The *Court* ruled:

> § 14.3 of the Aviation Security Act is incompatible with the fundamental right to life and with the guarantee of human dignity to the extent that the use of armed force affects persons on board the aircraft who are not participants in the crime. By the state's using their killing as a means to save others, they are treated as mere objects, which denies them the value that is due to a human being for his or her own sake (Bundesverfassungsgericht 2006).

Thus according to the court, dignity must not be treated as a measurable quantity – *because it is not*. Consequently, killing a few innocent people to save many is not the kind of action a state committed to safeguarding human dignity may legitimately perform. In addition, the Court ruled that

> the assessment that the persons affected are doomed anyway cannot remove from the killing of innocent people in the situation described its nature of an infringement of these people's right to dignity. Human life and human dignity enjoy the same constitutional protection regardless of the duration of the physical existence of the individual human being" (Bundesverfassungsgericht 2006).

The *Court* concluded that § 14.3 of the German Aviation Security Act is incompatible with the *Basic Law* and, hence, void (1 BvR 357/05).

To sum up, the German dignity clause makes the following three (partly independent) claims:

(a) Every human being possesses equal intrinsic (moral) value.

(b) The value of each human being is inalienable, unique, and irreplaceable and, hence, cannot be weighed against the value of others.

(c) Under no circumstances may individuals and the state express disrespect towards the intrinsic value of a human being, be it through action or the passing of laws. In particular, human beings may not be reduced to a mere means.

We shall undertake a critical examination of the place of human dignity in both the German and Kenyan constitutions after presenting an exposition of the position of human dignity in the Kenyan constitution.

Human Dignity in Kenyan Constitutional Law

A Brief History of the Current Constitutional Order in Kenya

It is important to point out at the outset that Kenya as a political community is less than a hundred years old, going back to the advent of the British invasion and subjugation of the territory that now bears the name Kenya. As such, the current Kenyan constitution is the product of historical antecedents quite different from those that culminated in the German one. Thus the four centuries of subjugation of various African ethnic communities by European imperialism manifested as slave trade, colonialism and neo-colonialism (Rodney 1973) culminated in the establishment of a Western-type state called Kenya out of numerous ethnic communities.

The advent of the British invasion and subjugation of present-day Kenya commenced with the formal inauguration of the Imperial British East Africa Company rule in 1888, but more officially with the declaration of *British East African Protectorate* on the 1st of July, 1895 (Kihoro 2005, 8). An 1886 Anglo-German agreement had delineated the sovereignty of the Sultan of Zanzibar from the country's coastline to ten miles into the interior (Brennan 2008, 838). In 1895, the Sultan of Zanzibar leased the administration of the strip to the British. These events set in motion the process of placing different ethnic communities with their diverse systems of government within one large and new area of central administration (Olumwullah 1990, 88; Jonyo 2002, 90). The territory beyond the ten-mile coastal strip was declared to be "Kenya Colony" in 1920 (Omolo 2002, 213). Thus while the ten-mile coastal strip continued to be referred to as a Protectorate, the rest of the country was henceforth referred to as the *Kenya Colony* (Brennan 2008, 831). Nevertheless, the British administered the Protectorate and the Colony as a two-in-one unit out of expediency (Hassan 2002; Oduor 2012, 146-147).

Kenya's political independence in December 1963 was preceded by three constitutional conferences held in London's Lancaster House in 1960, 1962 and 1963 (Ndegwa 1997, 602-604). In those conferences, the contentious issues had to do with the structure of government (regionalism versus unitarism) rather than with the *Bill of Rights*. The *Kenya African National Union* (KANU), a party mainly of the numerically advantaged Kikuyu and Luo, was in favour of a unitary state. However, the *Kenya African Democratic Union* (KADU), supported by minority African communities such as the Turgen and the Giryama along with European settlers, favoured a regionalist (*majimbo*) system. To them, the prospect of Kikuyu-Luo dominance through KANU was real, since the two groups were larger, more politically conscious, and better organized than

the KADU groups, and presumably would win overwhelmingly at the polls (Odinga 1967, 227-228; Ndegwa 1997, 605; Atieno-Odhiambo 2002, 239). Consequently, the independence constitution provided for eight regions, namely, Nairobi, Coast, Eastern, Central, Rift Valley, Nyanza, Western and North-Eastern, each with its own legislative and executive bodies (Republic of Kenya 1963, Chapter VI).

At the dawn of its political independence, Kenya, like many other African countries, adopted a constitution that upheld the rights of the individual. Chapter 2 of Kenya's independence constitution was effectively its *Bill of Rights* titled "Protection of Fundamental Rights and Freedoms of the Individual", and acknowledged the typical individual rights such as freedom of association, movement, conscience and expression (Republic of Kenya 1963). According to that *Bill of Rights*, individual citizens were entitled to sue the state when they felt aggrieved by it. This outlook was in line with the Western liberal democratic tradition, whose belief in the autonomy of the individual was articulated by the ancient Greeks, but came to prominence with the European Age of Enlightenment in the eighteenth century C.E., finding significant practical expression in the American and French Revolutions. In the light of such an extensive *Bill of Rights*, it is rather surprising to find no single mention of the phrase "human dignity" in the independence *Constitution of Kenya*. Apparently, to the drafters of that document, the concept of human dignity was not central to the protection of the various rights of the individual citizen. In due course, Chapter 2 of the 1963 constitution was converted into Chapter 5 (Republic of Kenya 2008).

Furthermore, when Kenya attained her political independence in 1963, Jomo Kenyatta ascended to leadership, first as Prime Minister, then as President. The change from Prime Minister to President was crucial to the process of increasing Kenyatta's unchecked power. As Prime Minister, Kenyatta was directly answerable to parliament, and it is this accountability that he sought to put aside through a series of constitutional amendments.

First, Kenyatta's KANU government initiated a series of constitutional amendments that concentrated power in the hands of the central government at the expense of the district and regional authorities. These amendments produced a strong provincial administration, which became an instrument of central control.

Second, Kenyatta's government initiated amendments that produced a hybrid constitution, in which the inherited parliamentary system of governance was replaced by a strong executive

presidency without the checks and balances requisite for a meaningful separation of powers (Badejo 2006, 254-255).

Third, Kenyatta's government pressurized the opposition party, KADU, to dissolve itself and to have its Members of Parliament incorporated into the ruling party, KANU. The upshot was that in the absence of any legal and official opposition and despite the constitutional provision for parliamentary democracy, Kenyatta quickly created a highly centralized and authoritarian republic reminiscent of the colonial state (Mutua 2001, 97).

At the death of Kenyatta in 1978, Daniel arap Moi inherited an immensely powerful presidency, and took several measures to retain it and even to increase its power. The most significant step in this regard was his amendment of the constitution in 1982 to make Kenya a *de jure* one-party state. Furthermore, Moi's control of the single party, the *Kenya African National Union* (KANU) was almost absolute, so that the one-party rule was effectively a one-man rule (see Oduor 2012, 162-170).

During the period of *de jure* one-party state in Kenya from 1982 to 1991, there was increasing dissatisfaction with the way in which sections of the *Independence Constitution* were changed and power was concentrated in the presidency. Indeed, the many political, social and economic problems facing the country were attributed to deficiencies in the constitution. The pressure for a review of the constitution heightened as the movement for the restoration of multi-party politics initially championed by academics and politicians in the early 1980s gained momentum in the early 1990s, led by the *Citizens' Coalition for Constitutional Change* (4Cs) and religious organisations (Ndegwa 1997, 606-607; Atieno-Odhiambo 2002, 226; Lumumba 2008, 1).

In 1990, a number of forces were marshalled against Moi's single-party regime. Among these were the original radical tradition of dissent sustained by Oginga Odinga for three decades, opposition from several religious leaders, a tradition of protest sustained by groups of intellectuals and students at university campuses since the 1960s, a group of reformist constitutional lawyers, and Western bilateral and multilateral financiers (Atieno-Odhiambo 2002, 226; Badejo 2006, 156-176). It was against this background that the relevant organs of KANU met in early December 1991 to endorse the repeal of Section 2 (a) of the then *Constitution of Kenya*, thereby effectively ending a decade of *de jure* one-party rule (Oyugi 1997, 47).

Despite the return to multi-party politics in December 1991, the political infrastructure for a one-man dictatorship in Kenya continued to be in place for over a decade, mainly due to the disunity among the opposition parties that would have forced a change. Thus the Moi and Kibaki regimes repeatedly frustrated the process of writing a new constitution in order to retain power (Lumumba 2008; Oduor 2012, 211-213). However, after the crisis precipitated by the contested 2007 elections, the process of writing a new constitution made considerable progress due to intense pressure from the foreign governments and agencies that had facilitated the negotiations that led to the formation of the coalition government to end the crisis. Thus Kenyan voters ratified a new constitution in a referendum on the 4th of August, 2010, which was subsequently promulgated on the 27th of August, 2010.

However, a most regrettable fact is that the debate concerning the kind of constitution Kenya should have is often trapped in Western conceptions. Thus during the public debates over various drafts of what became the current Kenyan constitution (Republic of Kenya 2010), the citizens were made to believe that if they adopted a parliamentary system of governance, they would be bound to, at the very least, have both a president and a prime minister. Clearly the paradigm in view was the Westminster one, with a monarch as head of state and a prime minister as head of government. The possibility of adopting the South African model, where the president is both head of state and government, but is chosen by parliament, was rarely, if ever, considered, despite its evident advantages over the Westminster model (Oduor 2009, 23-24). Similarly, Kenyans were told that the only other option to the Westminster model was a presidential system after the pattern of the United States of America. Very little discussion was held on the possibility of incorporating elements of indigenous African political systems into the country's new constitution (see Ojanga 2009).

Provisions on Human Dignity in the Current Constitution of Kenya

We first meet the phrase "human dignity" in Article 10 of the current *Constitution of Kenya*, titled "National values and principles of governance", which sets out by stating:

> The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them— (a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions (Republic of Kenya 2010, Article 10 (1)).

It then goes on to state:

> The national values and principles of governance include— (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and

> participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; (c) good governance, integrity, transparency and accountability; and (d) sustainable development (Republic of Kenya 2010, Article 10 (2)).

At least two issues are unclear with regard to Article 10 of the Kenyan constitution. *First*, what is the distinction between "values" and "principles"? Did the drafters of the constitution assume that values and principles are indistinguishable? If so, why did they not choose only one term to refer to whatever the two terms denote? If not, why did they not make the distinction clear? *Second*, what did the drafters of the constitution see as the relationship between human dignity and the other "values and principles" that they listed in Article 10? Are some of the "values and principles" cardinal, or do they all enjoy an equal status? What is to happen if there is a conflict between or among the various "values and principles"?

We next find the word "dignity" in Chapter Four, which is the Bill of Rights. Article 19 is on "Rights and Fundamental Freedoms". It states that "the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings" (Republic of Kenya 2010, Article 19 (2)). Interestingly, in this sub-article, not only are individuals said to have dignity, but also communities. The same outlook is manifest in the national oath and affirmation to be executed by the President, Acting President, and Deputy President at their assumption of office, in which they undertake to "protect and uphold the sovereignty, integrity and dignity of the people of Kenya" (Republic of Kenya 2010, Third Schedule). This approach is alien to traditional Western liberal thought, which focuses on the rights of the individual, but strikes resonance with the agitation for group rights that is currently rising to a crescendo in many parts of the world, Kenya included (see Oduor 2012). Strangely, however, the very next sub-article reverts to a typical Western liberal orientation by asserting that the rights and fundamental freedoms recognised in the Bill of Rights belong to individuals (Republic of Kenya 2010, Article 19 (3) (a)).

In addition, the *Constitution of Kenya* provides that in interpreting the Bill of Rights, a court, tribunal or other authority shall promote "the values that underlie an open and democratic society based on human dignity, equality, equity and freedom" (Republic of Kenya 2010, Article 20 (4) (a)). Here again, it is not clear what "values that underlie an open and democratic society" are: we are told that such a society is based on "human dignity, equality, equity and freedom", but the phrase "values that underlie […]" a few words earlier in the formulation of this sub-article gives

the impression that such a society is guided by certain values that are not listed in the article. What is more, "human dignity, equality, equity and freedom" are listed without any indication of the relationships pertaining among them: is any one or a combination of them more basic than the rest? We are not told.

On the limitation of rights and fundamental freedoms, the constitution stipulates that a "right or fundamental freedom in the *Bill of Rights* shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors" (Republic of Kenya 2010, Article 24 (1)). Note that here the democratic society is said to be "based on human dignity, equality and freedom", thereby excluding "equity" which had earlier been included in Article 20 (4) (a). This is a cause for further concern that the conceptualization of a democratic society in this constitution was not sufficiently refined.

Besides, the *Constitution of Kenya* is very unclear about the meaning of "dignity". This fact is most evident in Article 28, which, although it is titled "Human Dignity", does not explicate the meaning, basis or scope of human dignity; instead, it simply states that "every person has inherent dignity and the right to have that dignity respected and protected." Furthermore, the constitution provides that a person with any disability is entitled "to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning" (Republic of Kenya 2010, Article 54 (1) (a)). Moreover, the constitution provides that the state "shall take measures to ensure the rights of older persons […] to live in dignity and respect and be free from abuse" (Republic of Kenya 2010, Article 57 (c)). The provisions of Articles 54 and 57 quoted above suggest that for the drafters of this constitution, there is a distinction between treating a person with dignity and treating him or her with respect. Such a distinction is problematic, in view of the fact that the idea of dignity is inextricably bound up with that of respect. Indeed, the *American Heritage Dictionary* defines "dignity" as the "quality or state of being worthy of esteem or respect" (The Editors of the American Heritage Dictionaries 2011).

Furthermore, on objects and functions of the *National Police Service*, the *Constitution of Kenya* states that the *National Police Service* shall, among other things, "train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity" (Republic of Kenya 2010, Article 244 (d)). Here again, the talk about "human rights and fundamental freedoms and dignity" suggests that the drafters of the constitution were uncertain or negligent about the relationships among these various concepts.

This is due to the fact that it is superfluous to mention "dignity" once one has listed "human rights and fundamental freedoms" which are usually understood to be based on the idea of human dignity. Indeed, even the phrase "human rights and fundamental freedoms" is itself superfluous, because the rights of the individual are inextricably bound up with his or her fundamental freedoms.

It is also noteworthy that in some instances, the *Constitution of Kenya* uses the term "dignity" in relation to offices and institutions. For example, in its provisions on leadership and integrity (Chapter Six), it attributes the term "dignity" to a public position rather than to a person or group of persons. Thus with regard to responsibilities of leadership, it states that authority assigned to a state officer is a public trust to be exercised in a manner that "brings honour to the nation and dignity to the office" (Republic of Kenya 2010, Article 73 (1) (a) (iii)). Furthermore, at the assumption of office, a *Cabinet Secretary* ("Cabinet Minister" under the former constitution), in the *Oath or Solemn Affirmation of Due Execution of Office*, undertakes to hold his or her "office as Cabinet Secretary with honour and dignity". Similarly, on the assumption of office, the *Chief Justice* and judges of various courts (*Supreme Court, Court of Appeal* and *High Court*) are required to undertake to "protect, administer and defend this constitution with a view to upholding the dignity and the respect for the judiciary and the judicial system of Kenya" (Republic of Kenya 2010, Third Schedule).

In the instances in the foregoing paragraph, the drafters of the constitution seem to have thought that there is a distinction between dignity on the one hand, and honour or respect on the other, contrary to the facts. It is also not clear why members of the *National Assembly* and of the *Senate* are not required to undertake to uphold the "dignity" of their positions. Moreover, of great interest to the present discussion is the nature of dignity when it is attributed to an institution or an office on the one hand, and to an individual or a group of individuals on the other. If at all such a distinction exists, the constitution does not make it clear.

In sum, the term "dignity" appears in many places in the *Constitution of Kenya*. However, the constitution does not spell out the meaning intended in the use of the term, neither can the meaning be determined from the context due to the reasons indicated in the foregoing discussion. What is more, unlike the German constitution where human dignity is the unequivocal basis of civil liberties, it is one among several "national values and principles of governance" in the Kenyan constitution (Republic of Kenya 2010, Article 10). The vagueness of the conception of human dignity in the current Kenyan constitution can be accounted for in terms of the importation

of Western thought without due reflection on it. Indeed, the current human rights discourse in Kenya, as in most parts of the world, is dominated by Western liberal ideas, with the concept of human dignity at their core. However, this is not clearly reflected in the *Constitution of Kenya*. This in itself would not have been a shortcoming if the constitution had presented a clear, internally consistent alternative to the Western framework.

Some Critical Remarks on Human Dignity in the German and Kenyan Constitutions: A Dialogue

In this section, we present a dialogue between the two of us on our sometimes divergent, sometimes convergent, views on human dignity in the constitutions of Germany and Kenya.

Does Human Dignity Have a Rational Basis in the Case of the So-called Marginal Humans?

Ebert. While the concept of human dignity has some intuitive appeal from a philosophical perspective concerned with human autonomy and self-determination, it runs into trouble in the case of human beings who lack the relevant capacities. Certain mental illnesses deprive the affected of their capacity to make free choices and, hence, to determine the course of their life autonomously. Since human dignity derives part of its meaning from the right to determine the course of one's own life, it is questionable how the claim that so-called marginal humans have full human dignity could be supported rationally. It seems to me that it is the free choices of moral agents (and the interests of moral patients) that ought to enjoy foremost protection rather than the dignity of human beings.[19]

Oduor. I concur that the notion of human dignity is often unduly exalted above the free choices of moral agents (and the interests of moral patients). This is certainly so in the cases that my colleague cites from the German experience. However, the term "marginal humans" is based on the idea that full humans are those who can determine the course of their lives through the exercise of their rational faculties. Such a Kantian conceptualization of the essence of the human person would presumably place humans who do not have the ability to exercise rationality under the category of "moral patients".

[19] Moral patients are animals, human or non-human, "who have desires and beliefs, who perceive, remember, and act intentionally, who have a sense of the future, including their own future […], who have an emotional life, who have a psychophysical identity over time, who have a kind of autonomy […], and who have an experiential welfare" (Regan 2004b, 153), but who are not morally accountable for what they do.

However, it seems to me that to exalt the rational aspect of humanness is to assume, quite unjustifiably, that there is a clear criterion for determining the line between humans who can exercise their rationality and those who cannot. In view of states such as "shock", "temporary insanity" and "being overcome by emotions", it seems to me safer to accept all human beings as fully human, and to aid any of them who, temporarily or permanently, are unable to exercise their rational faculty. In this regard, Lawrence Mute's insightful article, "Shattering the Glass Ceiling: Ensuring the Right to Vote for Persons with Intellectual Disabilities In Kenya" (Mute 2010), is particularly relevant. For example, concerning the widespread idea that "persons of unsound mind" should be barred from voting because they are incapable of properly using the vote, Mute observes that "non-disabled" electorates keep choosing "bad" leaders (Mute 2010, 8). The irrational manner in which Kenyan leaders and electorate precipitated the post-2007 elections crisis is hardly evidence that the "sound of mind" can do much better than the so-called "unsound of mind".

What is more, those who talk about "marginal humans" are probably confusing "humanness" and "personhood", in which case the recent philosophical discourse on "personhood" gives them an opportunity to reconsider their position (see for examples Taylor 1989; Wiredu 1996; Masolo 2010). For example, For Wiredu who rejects the dualism between mind and body, we are all humans at birth, but we are not persons. For us to become persons, the mind must be formed in us. For this to occur, communication from society to us has to take place (Wiredu 1996, 21-22). As Masolo (2010, 155) explains, for Wiredu, "we become persons through acquiring and participating in the socially generated knowledge of norms and actions that we learn to live by in order to impose humaneness upon our humanness." Thus according to this line of thinking, an individual who from birth is isolated from human society would be a human being but not a person (Masolo 2010, 173-174).

Does Human Dignity Cripple the Freedom of Competent Adults?

Ebert. Since human dignity is absolute, it also extends to cases of self-degrading behavior. Consequently, it can, and, as a matter of fact, has been used to restrict the freedom of those engaging in such behavior, such as actresses performing in peep shows (BVerwGE 64, 274). Respecting a competent human being first and foremost means respecting his or her free choices

insofar as these choices do not infringe upon the moral rights of others. Attempts to protect the dignity of a peep show actress against herself in the name of a moral view she may not share fails to respect the woman as an autonomous subject. The hierarchy of values formulated in the *Basic Law* constitutes an authoritarian imposition of its authors' moral view on all those living in Germany. In my opinion, this is an unfortunate contradiction to the anti-totalitarian spirit in which the *Basic Law* was written.

Oduor. The idea of refraining from interfering with the freedom of competent adults to act according to their own choices as long as they do not infringe upon the moral rights of others seems to be a version of J. S. Mill's harm principle, which he famously articulated in his 1859 essay, "On Liberty" (see Mill 1999). While it sounds like a reasonable imperative, it is extremely difficult to see where it actually applies. For example, if I eat "junk food" so regularly that I become obese and greatly increase the chances of my getting a heart attack, I could tell anyone who warns me about my action that it is "none of their business"; but is this really so? What if it is my wife who would be widowed by my getting a fatal heart attack? In view of the fact that humans are social beings, similar questions could be raised about almost any form of behaviour a competent adult might wish to engage in. As the Swahili people of East Africa say "*Mtu ni watu*", literally meaning "A person is people", that is, without society, the individual's personhood is meaningless. Even the English, despite their liberal outlook, say that "No man is an island". It therefore seems to me more realistic to admit that what is required is the balancing of the liberties of various competent adults who share a moral space rather than the aspiration for a realm of unquestioned liberties for any of them.

Does Human Dignity Put Serious Restraints on the Freedom of Expression?

Ebert. As evident from the Mephisto case and other examples we gave above, there are significant limits on the freedom of expression in Germany. In particular, political speech aiming at establishing a constitutional order different from the one defined in the *Basic Law* enjoys no legal protection, and could even result in criminal prosecution. Given that human dignity is an expressive concept and binds not only the state but also the individual, this is not surprising. In the words of Tarunabh Khaitan, "legal enforcement of expressive norms in horizontal (i.e. citizen-citizen) relationships is bound to be in tension with a citizen's right to freedom of expression" (Khaitan 2011, 27). The *Bundestag*, the lower house of parliament in Germany, however, is eternally bound by the eternity clause to protect the dignity of human beings in their private

relationships with other human beings, and hence has to find other means to advance the freedom of expression within the German legal framework.

Oduor. On this point I am in total concurrence with regard to the place of human dignity in the German constitution. For one citizen or a group of citizens to come up with a provision which they make the foundation of a country's constitutional order and which they then insulate from any amendments is authoritarianism of the worst kind. While the provision on the supremacy of human dignity in the German constitution was purportedly intended to protect Germany from ever falling into the fires of totalitarianism again, it seems to have the potential to result in the very situation it was intended to preempt. In the case of the Kenyan constitution, however, the concept of human dignity is so hazy in its formulation and so obscured by other moral concepts that it is highly unlikely to result in totalitarianism.

Is Human Dignity Speciesist?

Ebert. The concept of *human* dignity is morally objectionable because it wrongfully discriminates against non-human sentient beings. It makes an absolute moral difference between human beings and other animals,[20] where there is no morally relevant difference (Singer 1975; Regan 1983; Ebert 2007). It is wildly implausible to assume that any moral value could derive merely from being a member of the species *homo sapiens*. Moral philosophy must not essentially refer to species membership as such. The state, any state, should not do so either insofar as it seeks to protect the basic moral rights of those living within its jurisdiction. The worldview that several African theologians and philosophers frequently refer to, according to which human beings are worth incomparably more than other animals (Tempels 1959; Mbiti 1969), reminds one of Aristotle's hierarchy of being, which provided one of the first rationalizations of patriarchy and slavery. Today, we reject sexism and racism, and I believe we also need to reject this classical concept of natural hierarchy with regard to non-human animals. The struggle for women's rights, the movement for the abolition of slavery and the modern animal rights movement are intimately and inseparably connected.

Oduor. I share the concern for the need to eradicate sexism, slavery, racism and every other form of oppression in human society. However, I disagree with the claim that "the struggle for women's rights, the movement for the abolition of slavery and the modern animal rights movement are intimately and inseparably connected." For at least five reasons, I do not think that

[20] Human beings *are* animals. They are great apes, and the only living species of the genus *Homo*.

the agitation for animal rights, the struggle against "speciesism", is part of humankind's journey towards liberty for all.

First, the claim that the concept of natural hierarchy necessarily leads to oppression is debatable, because the fact that there are simple and complex forms of life is difficult to deny, and is what causes many to view the world as being ordered hierarchically. Thus to claim that the amoeba and the human being are equal simply because both are forms of animate life is to fly in the face of the facts.

Second, it is difficult to gainsay the fact that certain life forms depend on others. For example, the lion depends on the antelope for its food. Similarly, I depend on the cow to get some proteins, and so I cannot accept the accusation that I am being speciesist when I enjoy a piece of grilled steak. What I must ensure, as a moral agent, is that the cow from which I get the proteins I need does not undergo unnecessary suffering during its life and on the occasion of its death.

Third, the practice of medicine often involves finding ways to kill the various life forms that live in our bodies as parasites - worms and malaria protozoa are cases in point. If it is wrong to kill a cow so that I may eat beef, why is it right to destroy the colony of malaria parasites in my system so that I can live?

Fourth, the charge of "speciesism" seems to be based on neo-Darwinist evolutionism, which is a metaphysical rather than a scientific position. It is metaphysical because it is based on the assumption that the ultimate reality is matter, and is in opposition to another metaphysical position, idealism, which asserts that the ultimate reality is ideas. It is also metaphysical because it touches on the question of origins, yet it is impossible to demonstrate empirically that the various life forms came from a single biological ancestor. As such, it seems to me that the best that people with divergent metaphysical inclinations can do is to be open to dialogue among themselves.

Fifth, although the idea of dignity has been abused, it does not follow that it has no positive content. Interpreted naturalistically, it could be viewed as that sense of self worth that each of us has, and which each of us needs in order to choose and pursue our goals in life.

Ebert. Many people, both members of the general public and philosophers, resist the idea that humans and other animals are equals, as well as the idea that non-human animals have rights. Some of the objections raised by my colleague are among the most common objections voiced against these ideas. Hence, I would like to use this opportunity to respond to these objections, hoping to clear up some widespread misconceptions. Given the limits of this paper, I cannot do justice to the rich body of arguments in defense of animals that has been produced by moral philosophers in recent decades. My responses are necessarily brief and incomplete, and I recommend Singer (1975) and Regan (2004a) for those who would like to read more.

My colleague writes that "to claim that the amoeba and the human being are equal simply because both are forms of animate life is to fly in the face of the facts". If we take the word "equal" to mean "identical", he is right. Amoebas are not human. However, they are equal in a sense. They are equal in that they are both living organisms. When animal advocates say that humans and certain animals are equal, they do not mean to say that they are identical, but rather that they are relevantly similar, equal in a morally significant respect. When it comes to the question where to draw the line between those who have rights and those who do not have rights, species membership as such has no moral import. Drawing the line along species boundaries would be as arbitrary as drawing it along gender or ethnic boundaries.

American philosopher Tom Regan argues that we should draw the line between those who have a life that can go better or worse, from their point of view, and those who do not have such a life. He calls those who fall into the former category *experiencing subjects-of-life*: they have beliefs, desires, feelings, memory and a rich emotional life, and what happens to them matters to them. According to Regan, all experiencing subjects-of-a-life have equal inherent value, and have a right to be treated in a way that respects their inherent value.

In contrast, Australian philosopher Peter Singer, currently the *Ira W. DeCamp Professor of Bioethics* at *Princeton University*, argues that the community of moral equals includes those, and only those, who have interests, and that those, and only those, who have the capacity to experience pleasure and pain have interests. Equality, for him, means that all interests are given equal consideration, as interests are interests, no matter who has them (Singer 2011).

According to the best of our scientific knowledge (which, by the way, includes the theory of evolution), amoebas, malaria protozoa and worms meet neither Regan's nor Singer's criterion. Strictly speaking, the case for animal rights is a case for the rights of mammals, birds and amphibians, and maybe reptiles, fish, octopi, squids, crustaceans and mollusks (Ebert 2011). It is wrong to keep cows in factory farms and then kill them for food because we fail to treat them in a way that respects their inherent value when we use them as mere means for our ends, or, alternatively, because the brief moment of pleasure we gain from eating beef does not justify imposing a lifetime of suffering on a cow. Amoebas, malaria protozoa and worms, on the other hand, most likely neither have the capacity to suffer, nor do their lives matter to them. Hence, they do not deserve moral consideration.

Now I must admit that, as my colleague writes, "the lion depends on the antelope for its food", and predation indeed is a serious problem for the philosophy of animal rights. I have addressed this problem in detail elsewhere (see Ebert and Machan 2012), and I shall not repeat my arguments here. However, there is an important difference between us and the lion. While lions have to kill other animals to survive, we do not (see Cohen and Regan 2001, 215). Contrary to what my colleague writes, he does not "depend on the cow to get some proteins". A well-balanced vegan diet is healthy and is often said to decrease the chances of suffering from diseases such as diabetes, heart disease, stroke and some cancers (see Craig and Mangels 2009). It is also better for the environment. Going vegan is likely the single most effective step one can take toward protecting the planet. A vegan diet requires only a fraction of the land and water needed to produce a typical non-vegan diet, and a vegan diet produces only a fraction of the greenhouse gas emissions associated with a typical non-vegan diet.

Oduor. My colleague's explication of the meaning of the term "equal" as used by animal rights advocates does not seem to me to have addressed my concern. This is because I did not mean to suggest that the equality between humans and other animate life forms is "sameness". Indeed, the discussion we are having is a moral one, so the only relevant equality would have to be one with moral implications. Who decides on this kind of equality? I think an element of subjectivity in the making of this decision is inevitable. For example, if a lion accosted me, I would not hesitate to shoot it dead in the name of equality of different life forms.

My colleague further writes that, "when it comes to the question where to draw the line between those who have rights and those who do not have rights, species membership as such has no moral

import." The assertion is based on the idea of interests, and yet "interests" is being assessed from the animal rights advocates' own point of view. Thus concerning the claim that simpler life forms such as amoeba, malaria protozoa and worms do not experience pain and pleasure, and that therefore they have no interests, is one that is difficult to demonstrate for the simple reason that none of us can ever become an amoeba, a malaria protozoa or a worm. As such, the demarcation that my colleague makes between life forms with interests and those without seems to me to be as arbitrary as the claim that the idea of rights ought not to be limited to human beings. As for the assertion that a vegan diet is healthier than a diet that includes meat, it has not been demonstrated.

Is Human Dignity Idolatry towards the Dead?

Ebert. As clarified by the *Federal Constitutional Court of Germany* in its decision in the Mephisto case, human dignity extends to the deceased. Accordingly, a dead body may not be reduced to a mere object. Organs may, hence, be surgically removed after death only if the deceased consented prior to death or his or her relatives consent on his or her behalf. While even the dead enjoy absolute protection under German law, chimpanzees and other highly evolved mammals are not granted any legal rights by the *Basic Law*. I guess the absurd consequence would be that the torture and killing of any number of chimpanzees could legally be justified to protect the dignity of one dead body. The protection of a dead body as such is also bizarre in its own right. How can an action be wrong without wronging anybody?[21]

Oduor. I share the view that there is no moral justification for giving undue attention to the dignity of the dead at the expense of the welfare of the living. I am reminded of how many of my people, the Luo, are reluctant to contribute to the medical expenses of a sick person, only to show great enthusiasm to contribute towards the funeral expenses when the person dies.

Does Human Dignity Restrict Our Ability to Defend Ourselves and Others?

Ebert. While the *Court*'s decision to void § 14.3 of the German Aviation Security Act clearly shows that innocent lives may not be weighed against each other, it makes it equally clear that the killing of a person as such is not necessarily a violation of human dignity. According to the *Court*,

> § 14.3 […] is […] compatible with […] the *Basic Law* to the extent that the direct use of armed force is aimed […] exclusively at persons who want to use the aircraft as a weapon of a crime against the lives of people on the ground. It corresponds to the attacker's position as a subject if the consequences of his or her

[21] The same question suggests itself in the case of peep shows and dwarf throwing.

> self-determined conduct are attributed to him or her personally, and if the attacker is held responsible for the events that he or she started (Bundesverfassungsgericht 2006).

Now imagine the case of a child who came into the possession of a gun and started shooting at a crowd of people. Suppose the only way to stop this killing spree is to shoot the child in the head. In accordance with its argument in the § 14.3 case, the *Court* would have to find that killing the innocent child reduced him or her to a mere means to protect the lives of other people and, hence, violated Article 1. Therefore, the state may not order the police to shoot the child in order to save innocent lives. Similarly, a mentally ill person, neither morally nor legally responsible for his actions,[22] who hijacks an airplane and intends to crash it into downtown Frankfurt, could not be shot down.

Oduor. I agree with my colleague on this point. To enjoin a person to refrain from killing another person in self-defense, or in defense of those around him or her, on the basis of the human dignity of the assailant is to demand that he or she acts contrary to his or her natural inclination without a sound basis for the demand.

Does Human Dignity Prevent Us from Finding the Ticking Bomb?

Ebert. Part of what it means to uphold human dignity is to respect the physical integrity of people. Hence under German law, torture is unconditionally prohibited. Some years back, a police officer in the city of Frankfurt threatened a suspect with torture with the intention to coerce him to disclose the location of a child who had been kidnapped.[23] As a result, the police officer lost his job and was criminally prosecuted. In its verdict, the criminal court handling the case emphasized that torture can never be justified due to the absolute guarantee of human dignity within the jurisdiction of the *Basic Law* (Landgericht Frankfurt 2005). Accordingly, a terrorist who admits to having planted a ticking bomb in an unknown skyscraper in Frankfurt cannot be threatened with torture, let alone actually be tortured. Torture is uncivilized and inhumane, but one would be too quick to conclude that it is always morally wrong. If we have a moral right to kill attackers in acts of self-defense, why would we not have a right to inflict pain on criminals to defend others?

Oduor. Like the German constitution, the Kenyan one absolutely prohibits torture (Republic of Kenya 2010, Article 29, read with Article 24). Yet as my colleague correctly observes, there are occasions when we may be forced to use violence, including torture, to protect ourselves and

[22] In other words, he or she is merely a moral patient and not a moral agent.
[23] As a matter of fact, the child was already dead at the time at which the threat was made.

those around us. In fact, for the terrorist's "dignity" to be upheld by refraining from torturing him or her, are we not compromising his or her intended victims' right to life, and with it their dignity?

Is the Concept of Human Dignity Indeterminate?

Ebert. In a decision on abortion, the *Court* held that, "[w]herever human life exists, it merits human dignity; whether the subject of this dignity is conscious of it and knows how to safeguard it is not of decisive moment. The potential capabilities inherent in human existence from its inception are adequate to establish human dignity" (BVerfGE 39, 1). As a result, abortions are *de jure* illegal in Germany. However, doctors are not prosecuted in certain well-defined cases of early-term abortion. On the other hand, one could argue that by preventing a woman from performing abortion, the state instrumentalizes her as a means to protect the fetus' life.[24] The concept of "objectification" seems to be hopelessly vague and, hence, the object formula is inconclusive.

Oduor. I think that the court's ruling concerning the human dignity of the unborn child is justifiable on the ground that the unborn child did not force his or her way into the mother's womb. Except in the case of rape, the mother decided, passively or actively, to have a child. Even in the case of rape, repugnant as that act is, the unborn child is *not* the culprit - the rapist is. Besides, it should be obvious upon momentary reflection that aborting such a child would not reverse the heinous crime visited upon the mother. Above all, why should we appeal to the unacceptability of "objectification" or "instrumentalization" of the mother to justify the abortion, and not apply the same principle to the right of the unborn child - that by the mother aborting him or her, she is using him or her as a mere means to her convenience?

Is Human Dignity an Obstacle to Moral Progress?

Ebert. The rise of new technology, in particular in the fields of medicine and biology, is frequently accompanied by complex moral questions over which disagreement is reasonable. Examples that instantly come to mind are cloning, embryo and stem cell research, and pre-implantation diagnostics. As evident from the case of abortion, there is a real danger that human dignity is invoked to prematurely end discussions about legal issues relating to such new

[24] Abortion then becomes a case where the dignity of the fetus has to be weighed against the dignity of the woman concerned. This is a dilemma since the dignity of human beings cannot be weighed against each other.

technologies. Human dignity is a conversation-stopper and, hence, potentially detrimental to the democratic process. Its absoluteness and eternity prevents the German people from introducing competing values and making room for exceptions where appropriate in light of new developments in science and elsewhere.

Oduor. With regard to the German constitution, human dignity is an obstacle to moral progress. This is due to the fact that by restricting the citizens' freedom of expression, it discourages free thought which is indispensable to innovation. In the case of the Kenyan constitution, human dignity has been formulated so vaguely, and its application left so indeterminately, that it is of very little practical use. This has been evident in the debates over the numerous pieces of legislation to operationalize the constitution: rarely, if ever, does one hear reference to human dignity as a constitutional principle worth considering in the formulation of such legislation. Similarly, the numerous suits filed in Kenyan courts on the basis of the country's constitution do not focus on the issue of human dignity, but rather on various provisions of the constitution that have to do with citizens' or institutions' specific powers and entitlements. Consequently, if human dignity is an obstacle to moral progress in Kenya, it is because it is presented too vaguely in the country's constitution to be a point of informed moral debate.

Conclusion

This paper has interrogated the concept of human dignity in German and Kenyan constitutional law. It set out by presenting human dignity in the German constitution, and then outlined the place of human dignity in the Kenyan constitution, before presenting a dialogue between its two authors on the shortcomings of the formulations of human dignity in the two constitutions. In the light of the foregoing reflections, we conclude that, in the German constitution, human dignity has been formulated in such a way as to unnecessarily limit the freedom of action among the citizens and to stifle their right to engage in debate on pertinent issues. In the case of the Kenyan constitution, the formulation of human dignity is too vague to provoke meaningful discussion concerning it among the citizenry. In both cases, moral progress is stifled. We therefore propose that philosophers inside and outside these two countries give greater attention to the task of reflecting on the meaning, basis and scope of human dignity, with a view to stimulating informed public debate on this influential concept.

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