

What is the relationship among fundamental rights to equality, to liberty, and to dignity? In several political and legal contexts, developments in equality law tend to be stalled by reference to dignity and have traditionally been limited based on an understanding that equality collides with liberty – as in the ideological opposition between socialism and capitalist liberalism, as in most balancing theories, and as in philosophical concepts of rights that trump one another. In addition, all three fundamental rights have been conceptualized in rather ambivalent ways, with some dominant as well as some relatively silenced philosophical (including religious) interpretations. Equality, liberty, and, particularly ambivalent, dignity carry burdens that serve as entry points for rather problematic ways of interpreting these notions. Dignity is either defined as an abstract principle or narrowed down to a right against extreme abuse, and it has been charged with moralistic ideology. Liberty and equality have mostly been set on a collision course, balanced against each other, with ideological baggage of their own. Observations in comparative constitutionalism reveal that, in some jurisdictions, dignity tends to become a black box, while equality tends to be limited by using dignity and liberty tends to trump the other two. Such studies, however, also provide inspiration for a new approach to all three fundamental rights. I propose here that we rethink their histories as well as current developments. I suggest a triangle of fundamental rights as a more appropriate metaphor to understand the complexity of cases that arise in the area and to better decide them. Dignity, equality, and liberty are, then, the corners of a triangle rather than the ends of a scale or the top and sides of a pyramid, and thus inspire a more holistic understanding of what fundamental rights are about.

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Most constitutions contain guarantees of liberties and equality, and some explicitly recognize human dignity as well. However, not only is it controversial what these rights mean on their own, it is even less clear how they are related, or, as I will argue, such relation is framed in a fashion that does not do justice to all three rights involved. In this article I propose that all three rights need to be framed in a triangle, rather than as a pyramid or as conflicting interests on a collision course. The triangle, I argue, is an adequate concept to capture what dignity, liberty, and equality stand for, since it prevents us from overstating any one of these rights in isolation. Thus, I also argue that each right profits from being seen in light of the other two. Thus, equality rights, and particularly but not exclusively equality rights relating to gender, should be conceived of as inherently linked to the two other rights – liberty and respect for human dignity – yet should not be replaced by either. In turn, liberty, and particularly the liberty of self-determination in contracting with others, should be conceived of as inherently linked with, rather than clashing with, equality and dignity alike. Last but not least, a right to dignity, distinct from an abstract principle of recognition or a narrowly defined list of atrocities and different from an understanding of dignity as acquired honour, may be best understood as inherently linked to both liberty and equality, and thus as a fundamental human right to respect or to equal recognition. In the absence of such a triangulated linkage between fundamental rights, we tend to construct either/or dilemmas or to approach each problem as if only one isolated right were at stake, rather than addressing the complexity of the problems that judges, lawyers, and legal institutions are called upon to solve these days. I argue that without the triangle, either equality or freedom trumps dignity or it is an abstract (yet often paternalistic) or a very narrow notion of dignity that reigns. Instead, we could address concerns about equal conditions of freedom based on the recognition of diverse ways to live one's life, and we could address liberty's relation to dignity – in short, address equality, liberty, and dignity – in a systematic and more holistic way.

In the absence of a coherent concept of the relationships among our fundamental rights, dignity, liberty, and equality tend to be looked at in isolation, and they are interpreted in unsatisfying ways. Equality is then either substantive equality taken too far, running the risk of imposing particular 'egalitarian' results, or formal and symmetrical equality, which does not undo systemic injustice but upholds it as 'difference' or 'dissimilarity.' Dignity, then, tends to be either an abstract principle, often called 'value,' which opens the door for particularistic paternalism, or to be narrowly defined as a right against excesses only, which does establish a

threshold – but one that only rare cases ever meet. Liberty may be treated in a rather atomistic, property-like fashion, trumping other rights; this is part of the problem in the US legacy of *Lochner*, which prevents us from taking a systematic look at problems of ‘precarization,’ as new phenomena of material and sociocultural poverty or exclusion tend to be called in Europe.¹ Isolated from one another, none of the fundamental rights is thus able to do justice to the challenges that constitutional and human rights are, I believe, meant to address. In times of growing awareness of systemic inequalities and exclusion, one challenge is the recurring use of a simple and symmetrical equality standard to destroy fine measures of affirmative action or accommodation, measures that are derived from, and are much better understood as, more elaborate schemes of fundamental rights, meant to ensure respect for the individual and to avoid discriminatory exercises in groupism.² Another challenge is the abuse of economic power in the name of liberty to the detriment of all, an issue that, interestingly, has returned to political agendas in the wake of the global economic crisis. And yet another challenge is the recurrence of torture, or, more precisely, the prominent attempts to justify it – not only in police and military settings but also in so-called private circumstances, as in what tend to be called ‘new forms of slavery.’³

- 1 In *Lochner v. New York*, 198 U.S. 45 (1905), the US Supreme Court struck down employment regulations for bakers to treat them as ‘equal in intelligence and capacity to men in other trades,’ while the dissenting justices argued for reasonable limits of economic liberty. The concept of the *precariat* (or *precarity*) is based on sociological analysis of class attitudes, as *habitus*, developed by Pierre Bourdieu, *Travail et travailleurs en Algérie* (Paris: Mouton & Co., 1963). For further discussion see Louise Waite, ‘A Place and Space for a Critical Geography of Precarity?’ (2009) 3 *Geography Compass* 412.
- 2 Studies indicate that inequalities are on the rise, locally as well as on the global scale. See, e.g., World Bank, *World Development Report 2000/2001: Attacking Poverty* (Oxford: Oxford University Press, 2001); David Held & Ayse Kaya, *Global Inequality: Patterns and Explanations* (Cambridge: Polity Press, 2007). ‘Social exclusion’ marks the concept used by the European Union in the EU Strategy on Social Inclusion and Social Protection, launched in 2000 with the goal of eradicating poverty by 2010, as well as in New Labour policies in the United Kingdom; see John R. Hills, J. Le Grand, & D. Piachaud, eds., *Understanding Social Exclusion* (Oxford: Oxford University Press, 2002). For a critique of groupism see Rogers Brubaker, *Ethnicity without Groups* (Cambridge, MA: Harvard University Press, 2004) (critically discussing nationalism and identity politics); Susanne Baer, ‘Ungleichheit der Gleichheiten? Zur Hierarchisierung von Diskriminierungsverboten’ in Eckart Klein & Christoph Menke, eds., *Universalität – Schutzmechanismen – Diskriminierungsverbote* (Berlin: Berliner Wissenschafts-Verlag, 2008) 421 (discussing European equality politics and the lack of focus on individuals and systemic inequalities).
- 3 Dominant readings of human-rights law in the area limit it to protection against states. For further references see UN Human Rights Council, *Report of the Special Rapporteur on Contemporary Forms of Slavery, Including Its Causes and Consequences, Gulnara Shahinian*, UN Doc. A/HRC/9/20 (28 July 2008), online: UNHCR Refworld <<http://refworld.org/docid/45669d9d.htm>>

I thus propose here an alternative conception of a triangulated interpretation of fundamental rights. It has many implications, on the philosophical and doctrinal as well as on the political and practical levels. With respect to each of the three rights, the concept of the triangle suggests specific interpretations, some of which have already been subject to controversies across legal contexts. For example, I agree with those who frame gender equality as a substantive right, with a strong commitment to the elimination of gender and other subordination or hierarchy. This right to equality moves against gendered hierarchies in traditions as well as religions, in customary morality as well as in politics, just as it opposes more or less enlightened variations on formal equal treatment and challenges the construction of seemingly relevant sex or other naturalized differences. Even beyond this, such a notion of equality challenges policies and practices derived from notions of particular dignity interests, often employed to ‘protect’ women and, though less often, particular men. I thus argue that such perceptions need to be carefully scrutinized, and that a triangle helps us to do this in a consistent way. As another example, I urge that we resist the siren call of dignity, which offers a tempting instance of seemingly global consensus – a unifying common ground – but which also invites rather problematic notions of what it means to be dignified, or noble, in the arena of fundamental rights. Instead I propose a particular linkage of the three rights that helps to orient legal analysis so as to ensure that dignity does not turn into a black box to hide prejudice or to allow cultural stereotyping. Thus *dignity* ensures respect for all individuals, *equality* serves to address systemic injustice, and *liberty* safeguards freedom of choice under equal conditions. Such a link between dignity, liberty, and equality should, I hope, ensure a more refined way of addressing injustice as part of legal reasoning in all directions.

With the proposal of a triangle of fundamental rights, I hope to build a more convincing base for fundamental rights doctrine, making sense of all the rights at hand rather than isolating them from one another. This may be called a holistic approach, but continental lawyers could also call it mere systematic interpretation, something Friedrich Carl von Savigny suggested as one of four methods of legal interpretation as early as 1815.⁴ It calls

www.unhcr.org/refworld/docid/48c108c02.html > (addressing traditional slavery, sale of children, child prostitution, child pornography, exploitation of child labour, sexual mutilation of female children, use of children in armed conflicts, debt bondage, trafficking in persons and in human organs, prostitution, and practices under apartheid and colonial regimes). For further discussion on torture, see the last part of this article.

4 Friedrich Carl von Savigny, *System des heutigen Römischen Rechts* [*The System of Today's Roman Law*], vol. 1 (Berlin: Veit und Comp, 1840) at 213 (presenting methods of legal interpretation, the ‘*canones*’)

for recognition of the whole array of fundamental rights, rather than perceiving a single right as an interest to be shielded from but eventually colliding with the rest. This is what happens in many jurisdictions around the world, where fundamental rights are attributed to separate interests in a somewhat atomistic fashion. Rights are put together like building blocks, either in a hierarchical manner or on a collision course. It is a hierarchy when courts find either liberty or equality to be at stake and turn to the principle of dignity as their basis to inform both the others. But this leaves dignity either in abstract isolation or narrowly defined and reserved for extreme cases, such as torture. The same is true when liberty and equality are balanced to be applied in isolation, or, eventually, to collide, but with no guidance as to how to make room for both concerns. I argue instead that liberty and equality do not necessarily conflict but may coexist peacefully if they are properly understood. Both should be informed by a specific understanding of dignity, just as our concept of dignity should be informed by each of them. Instead of thinking in such either/or schemes or in a hierarchical pattern, I suggest that by linking liberty, dignity, and equality in a triangle, we can more adequately make sense of human rights today and better address pressing conflicts around fundamental rights. Therefore, each right needs to be assessed in light of the other two, as opposed to confounding them, using one to undermine another, or prioritizing one with no regard for the other fundamental interests at stake. A triangle approach will in fact, perhaps counter-intuitively, help us to better safeguard the distinct meaning of all three rights in question.

However, three caveats are needed with respect to history, comparative constitutionalism, and doctrinal use. First, such reassessment cannot be undertaken without diving into history. I shall thus present some aspects of the rich histories of ideas of all three rights. However, this does not make my argument a historical one, in the sense of a necessity to draw the conclusions I suggest. Second – and because fundamental rights are a global issue, be they part of international human-rights law, multi-level legal systems, or national constitutional law as we have come to know it – such work cannot be properly done without some comparative analysis. But I use comparative examples to illustrate what I propose, rather than arguing that any one concept of constitutionalism demands my model. That said, I do not present either a continental European or a (North) American perspective, neither of which I believe exists as such beyond the assumptions constructed to invent them; nor do I argue for a Western or any other such constructed point of view. Rather, I attempt to draw on a variety of concepts to allow for a transnational understanding of fundamental rights today. Third, and perhaps even worse, this article does not aspire to present the triangle of fundamental rights in the form of a refined doctrinal proposition. Rather, it

constitutes a preliminary step on the way to such theoretical as well as doctrinal development, an attempt to galvanize a different way of thinking about fundamental rights. This is not to say that my argument does not have, or should not have, doctrinal consequences. As I will briefly discuss in Part VI below, the triangle allows a critical revisiting of a number of substantive controversies at the intersection of the three rights.

Finally, then, my proposal of a triangle approach to fundamental rights is also based on both a critical and a self-critical move.⁵ On the critical side, as noted above, I seek to rearrange dignity, liberty, and equality, which are predominantly thought of as forming a pyramid or as sitting on a scale, in an alternative configuration, a non-hierarchical triangle, which I argue better serves our doctrinal needs. On the self-critical side, I seek to alter leading ideas, particularly in the rich traditions of feminist and other outsider jurisprudences, on the basis that an emphasis on equality needs to be supplemented with an emphasis on liberty and dignity. I am neither the first nor the only one to do so. For example, Herta Nagl-Docekal has long argued that liberty should not be forgotten in a feminist philosophy of rights.⁶ I attempt to elaborate on her point. Similarly, Beverly Baines has contributed to our understanding of equality in relation to dignity in very productive ways,⁷ just as several critical scholars have challenged particular notions of privacy⁸ as derivations of a

5 See Susanne Baer, *Würde oder Gleichheit? Zur angemessenen grundrechtlichen Konzeption von Recht gegen Diskriminierung am Beispiel sexueller Belästigung am Arbeitsplatz in der Bundesrepublik Deutschland und den USA* (Baden-Baden: Nomos, 1995) [Baer, *Würde oder Gleichheit?*].

6 Herta Nagl-Docekal, *Feminist Philosophy*, trans. by Katharina Vester (Boulder, CO: Westview Press, 2004); Herta Nagl-Docekal & Herlinde Pauer-Studer, *Jenseits der Geschlechtermoral: Beiträge zur feministischen Ethik* (Frankfurt: Fischer Taschenbuch, 1993). See also Lerke Osterloh, Art. 3, para. 244, in Michael Sachs, ed., *Grundgesetz*, 4th ed. (München: Beck, 2007) (equality encompasses the protection of liberty).

7 Beverly Baines, 'Equality, Comparison, Discrimination, Status' in Fay Faraday, Margaret Denike, & M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) 73. From a comparative perspective see Sven Mirko Damm, *Menschenwürde, Freiheit, komplexe Gleichheit: Dimensionen grundrechtlichen Gleichheitsschutzes: Der Gleichheitssatz im Europäischen Gemeinschaftsrecht sowie im deutschen und US-amerikanischen Verfassungsrecht* (Berlin: Duncker & Humblot, 2006) [Damm, *Menschenwürde*]. See also David Feldman, *Civil Liberties and Human Rights in England and Wales*, 2d ed. (Oxford: Oxford University Press, 2002) [Feldman, *Civil Liberties*] (discussing European human-rights law to establish standards of liberty, equality, and dignity for the United Kingdom).

8 Katherine Franke, 'The Domesticated Liberty of *Laurence v. Texas*' (2004) 104 *Colum.L.Rev.* 101 (critiquing US Supreme Court privacy jurisprudence); Kendall Thomas, 'Beyond the Privacy Principle' (1992) 92 *Colum.L.Rev.* 1431 (critiquing early US uses of privacy rights); Anne Peters, Art. 21, para. 52, in Rainer Grote & Thilo Marauhn, eds., *EMRK/GG: Konkordanzkommentar zum europäischen und deutschen*

dignity of sorts. In addition, there are several critical approaches to liberty, that is, emphasizing the relational aspect rather than reducing liberty to autonomy in isolation.⁹ However, we still need to integrate such visions into a fuller doctrinal concept of fundamental rights, one that takes equality, dignity, and liberty into systematic account. Here, too, I hope that my arguments go hand in hand with others'. In this context, the concept of the triangle of fundamental rights is a somewhat historical as well as a comparative lesson, but not a theoretical must. It is, I suggest, simply a better metaphor to rethink fundamental rights for the twenty-first century.

In Part II below I present some instances in which traditional approaches to equality, understood without reference to liberty or dignity, lead to problems rather than to convincing answers. In Part III, I focus on some important features of the rich intellectual history of traditional notions of the concepts in question – liberty, equality, dignity – to highlight their inherent opportunities and dangers. In particular, the history of dignity serves as a warning against uses of the concept that courts may feel tempted to adopt but should refrain from adopting because of the baggage these uses carry. Many courts, as well as scholars and politicians, tend to agree that liberty in isolation, as in Manchester capitalism, is as problematic an idea as equality in isolation, as in the case of Communism.

In Part IV, these considerations are supported by comparative legal material, introducing trends in jurisprudence both in the European and Anglo-American spheres and elsewhere. Here it is interesting to see that a constitutional document drafted by an unusually inclusive set of framers, the European Charter of Fundamental Rights, supports an approach to fundamental rights that is not atomistic but integrated, and which can be conceptualized as the suggested triangle.

In Part V, I expand on the idea of a triangle¹⁰ as an alternative vision for fundamental rights, contrasting it with a configuration of the rights as a

Grundrechtsschutz (Tübingen: Mohr Siebeck, 2006) (noting the close proximity between dignity and equality).

9 Relational liberty is the focus of Jennifer Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts, and Possibilities' (1989) 1 Yale J.L. & Feminism 7 [Nedelsky, 'Reconceiving Autonomy']. See also Onora O'Neill, 'Between Consenting Adults' (1985) 14 Phil. & Pub. Aff. 252 (elaborating on the Kantian idea of freedom); Nancy Davis, 'Using Persons and Common Sense' (1984) 94 Ethics 387 (discussing the Kantian notion of liberty and dignity).

10 There are other uses of the triangle metaphor. In the Indian context, for example, the Indian Supreme Court reads arts. 14 (equality), 19 (several liberties), and 21 (due process, life and liberty) of the Indian Constitution as the 'golden triangle,' stating that these rights form the touchstone of the basic or essential features of Part III of the Constitution, which shields such rights from amendment. See *Golak Nath v. State of Punjab AIR* (1967), S.C. 1643 (no amendment of fundamental rights in procedure set out in art. 368). Other usages are not related – e.g., the triangle of separated

pyramid and with a balancing approach. I point out where this concept already surfaces and what each right means when understood as part of the triangle concept, and illustrate the advantages attached to the triangulation of these rights by reference to some examples from the case law. Finally, in Part VI, I also discuss some potential consequences of applying such a concept, including, *inter alia*, a brief discussion of the Supreme Court of Canada's decision in *Lau*, in an attempt to show how a triangle approach would have improved, or may in the future improve, the analysis.

II *Inadequate configurations of dignity, liberty, and equality*

Most constitutions around the world, and in human-rights documents both at the level of the United Nations and at the regional level in Europe, Africa, Asia, and the Americas, contain guarantees of the right to liberty as well as the right to equality. Some documents also contain an explicit guarantee of the right to dignity. However, these fundamental rights are grounded in rather different understandings of constitutionalism, and of the injustices they may be meant to address, just as they are positioned differently toward one another. This disparity may best be illustrated in a brief account of developments in equality jurisprudence. Courts, lawmakers, and scholars did and do conceptualize the rights in question in very different ways, and only some address the social conflicts that fundamental rights should be able to solve (or, more precisely, to address convincingly), and for which we need elaborate doctrinal schemes to prevent losses on the way there.

It is through equality law that we can observe worrying tendencies in the struggle with gender inequality, both in the world of social relations and in the world of law. Socially, gender relations may be subject to more fundamental, far-reaching, and rapid change than any other social phenomenon, in that changed or challenged concepts of masculinities and femininities, as well as, in some contexts, more radical transgender politics, seem to have quite a heavy impact on every aspect of life everywhere. Legally, laws against discrimination and gendered violence develop or change as fast as laws on human reproduction and family relations, or on marriage and relationships, all with severe consequences for individuals across the globe – and not necessarily to the benefit of those historically disadvantaged in relation to sex and gender. When we look at the social inequalities of the world, particularly

in relation to women,¹¹ we find that gaps are widening, as attested by studies on gender pay gaps¹² as well as by the gender safety gap documented in recent UN data on violence against women.¹³ In addition, data become more complicated, inequalities more complex, and remedies more difficult to design when we understand inequalities as multidimensional – not reducing anything to a sex, ethnicity, or disability inequality alone but understanding the situation as an inequality shaped by interdependent inequalities, in specific contexts and with specific effects.

In some sense, equality issues are returning to the forefront. In some contexts, race is also thought of as class, gender is also related to age, and so on. Equality politics and equality law move from a focus on identities and assumed or attributed personal characteristics toward a recognition of systemic inequalities, like precarization, a new concept of a class – that is, class. On a global scale and in national, regional, and local settings, fundamental rights of dignity, liberty, and equality are not a reality for all to enjoy; often, and for many, they remain at the level of promises. Even more disturbing, those rights are sometimes interpreted as an instrument to silence or reject particular equality demands, as in some arguments levelled against certain kinds of affirmative action. Despite the fact that time obviously does not suffice to end systemic inequalities, affirmative action is still often constructed as an exception to the rule of equal treatment, rather than as one way to turn equality into a reality of equal opportunities. Similarly, poverty is a global threat not only to individuals but also to communities and societies. Yet fundamental rights tend to address economic disparities less often and less radically than in 1789, when the French Revolution was fought for,

- 11 The overarching question is whether we – or the people we entrust with that task – have delivered on our promises regarding fundamental human rights in treaties or constitutions. Empirically, the answer is quite easy: we have not, although one sometimes encounters rhetoric along the lines of ‘we did women’ or ‘we did sex/gender equality,’ and although there is recurring talk about a ‘death of feminism’ or about ‘post-feminism,’ ‘post-multiculturalism,’ and so on.
- 12 International Labour Organization, *Global Employment Trends for Women* (Geneva: International Labour Office, 2008), online: International Labour Organization <<http://www.ilo.org/public/english/employment/strat/download/get08.pdf>>; European Commission, Directorate-General of Employment, Social Affairs and Equal Opportunities, *Equal Pay: Exchange of Good Practices* (Brussels: Directorate-General, 2007), online: European Commission <http://ec.europa.eu/employment_social/publications/2007/ke7606199_en.pdf> .
- 13 See *In-Depth Study on All Forms of Violence against Women: Report of the Secretary-General*, UN GAOR, 61st Sess., UN Doc. A/61/122/Add.1 (2006), online: UN Documentation Centre <http://www.un.org/ga/search/view_doc.asp?symbol=A/61/122/Add.1&Lang=E>; United Nations Committee on the Elimination of Discrimination against Women, *Violence against Women*, UN GAOR, 11th sess., UN Doc. CEDAW/C/1992/L.1/A/47/38 (1992).

among other interests, bread, on the same principles that in art. 2 of the UN Declaration of Human Rights (as well as some regional treaties) seek to prohibit distinctions based on ‘property.’ For example, recent EU equality law does not list ‘class’ as a ground for discrimination, yet it addresses solidarity, which in fact consists of equal access to socio-economic resources. However, it is widely accepted that discriminatory policies may be acceptable if non-discrimination is costly or decreases profit. Some constitutional or human-rights provisions on equality may have not been meant by their founding authors to address such issues. Yet it is nonetheless worrying, in light of widespread social disparities, if a fundamental right to equality is not implied in these contexts.

Similarly, a withdrawal on equality rights is particularly devastating in the area of gender equality, given the gains that have been made and the foundational nature of gender as an equality concern.¹⁴ In the history of equality rights, it took effort to move from symmetrical and formalistic assessments of sex difference to asymmetrical and substantial standards for gender equality.¹⁵ For a long time, legislatures and governments, courts and scholars refused to recognize the very foundations of a meaningful concept of equality, not only for men and for women but, eventually, for all individuals harmed by being put into hegemonic sexualized gender boxes. Just as genocide and systemic injustice had been seen as consistent with a formalistic approach to equality, particularly in anti-Semitic and racist regimes,¹⁶ sex discrimination has been, and sometimes still is, seen as a legitimate distinction. This is why anti-racists, feminists, and others committed to social justice for a long time faced scepticism and even rejection when they advanced the argument that the right to equality was really a substantive right not to be discriminated against, a right against exclusion from opportunities to lead a self-determined life on the basis of equal freedom. In light of such lessons,

14 Much work on inequalities confines itself to a selected few, as in the classic trio of race, class, and gender. I understand all three, however, to be of a rather different nature. Gender, which also informs sexual orientation, seems to mark a specific political space. In Europe, gender equality tends to follow in the wake of diversity politics, while gender inequality continues to pervade exactly those spaces – like the workplace – that are subjected to diversity management. These developments are studied in the EU research project QUING, of which I am a part. See QUING: Quality in Gender + Equality Policies < <http://www.quing.eu> > .

15 For a full account of these concepts see Catharine A. MacKinnon, ‘Reflections on Sex Equality Under Law’ (1991) 100 Yale L.J. 1281.

16 German public law professor Ulrich Scheuner argued at the time, with a comparative reference to the decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896), that equality justifies a ‘separate but equal’ policy and thus also justifies the exclusion of those who are not considered equal – or, at the time, not considered ‘Aryan.’ See Ulrich Scheuner, ‘Der Gleichheitsgedanke in der völkischen Verfassungsordnung’ (1939) *Z.gesamte SWiss.* 245 [Scheuner, ‘Gleichheitsgedank’].

equality as a right against discrimination must mean more than formal equality; it must carry a meaning of anti-subordination¹⁷ as a right against hierarchy or dominance.¹⁸

So today, modern legal systems promise that all deserve and shall enjoy fundamental rights, yet the current state of affairs sees many effectively excluded from such protection. It is thus worrying that after many years of theorizing, doctrinal work, and litigation efforts, after many progressive instances of constitution making and so many inspiring decisions from constitutional courts and human-rights bodies around the world, we still hear voices in political and academic circles, in courts and in other law-making bodies, equivocating in their commitment to substantive equality or to explicit recognition of equality for people who have been subordinated in the past.¹⁹ Even the Supreme Court of Canada, often perceived as a trailblazer on issues of substantive equality, is, as some read decisions in the late 1990s and the early twenty-first century,²⁰ becoming more equivocal in this area. Also, there seem to be calls for judicial as well as legislative restraint on any further extension or development of rights. This is manifested particularly in the area of social equality, especially in the context of claims to extend explicit protection to, for example, people of different sexual orientations or transgender identities or to transsexuals and intersexuals, as well as in the context of rights claims by minority groups to accommodate collective interests. These issues, to be sure, raise complicated questions. I focus here on the tendency to withdraw from equality standards already achieved, either by allowing equality to be trumped by liberty concerns, as in conflicts around hate speech, or by

17 This terminology seems to go back to Owen Fiss, 'Groups and the Equal Protection Clause' (1976) 5 Phil. & Pub. Aff. 107; but see also Ruth Colker, 'Section 1, Contextuality, and the Anti-Disadvantage Principle' (1992) 42 U.T.L.J. 77.

18 Foundational is Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, MA: Harvard University Press, 1989); for the concept of a right against hierarchy see Baer, *Würde oder Gleichheit?*, supra note 5.

19 Some explain this from a pragmatist perspective; see, e.g., on German law, Werner Heun, Art. 3, para. 139, in Horst Dreier, ed., *Grundgesetz: Kommentar*, 2d ed., Bd. 1, Arts. 1–19 (Tübingen: Mohr Siebeck, 2004) [Dreier, *Kommentar*] ('It is not logical but pragmatic reasons which guide a decision on whether an equality test is adequate and in which order to pursue a test'). However, equality law is arguably not indeterminate as to the results of its applications. Similar are claims in transnational and international legal settings defending a margin of discretion for sub-units such as member states on matters of internal or personal status, which is a caveat to keep family and personal status laws incompatible with human rights. Other trends that inform challenges to a universal application of human-rights standards are labelled 'flexibilization' and 'privatization,' including deregulation to the advantage of governance by experts or companies.

20 I owe much to Fay Faraday, Margaret Denike, & M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) [Faraday et al., *Equality Rights*].

allowing equality to be modified by dignity considerations, as in recent decisions from North American courts (discussed in detail below).

The road to recognition is a long and winding one. Some may say that feminists and others committed to social justice had to wait for legal recognition of substantive equality until 1989, the year in which the Supreme Court of Canada, in *Andrews*,²¹ explicitly rejected formalistic notions and recognized substantive equality as a right against discrimination. Others might say that the pivotal year for substantive gender equality was really 1976, when the United Nations passed the Convention on the Elimination of All Forms of Discrimination against Women.²² Still others may hold that the moment most precious to advocates of substantive equality occurred in 1996, when the Constitutional Court of South Africa defined equality as a right against systematic sexism and racism in their decision in *Brink v. Kitshoff*;²³ or, more famously, in *Hugo*;²⁴ or, even more, distinctly when it decided the complaint brought by the National Coalition of Gays and Lesbians and the Human Rights Commission against criminalizing homosexual activity. ‘The desire for equality,’ the Court held in that case, ‘is not a hope for the elimination of all differences’;²⁵ quoting Michael Walzer, ‘[t]he experience of subordination – of personal subordination, above all – lies behind the vision of equality.’²⁶ Also note that the Massachusetts Supreme Court, in its remarkable decision on same-sex marriage, stated that the Massachusetts constitution, at least, ‘affirms the dignity and equality of all individuals. It forbids the creation of second class

21 *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at para. 19 (where the Court held that ‘[d]iscrimination [is] a distinction which, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing ... disadvantages ... not imposed upon others, or which withholds or limits access to ... advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual’s merits and capacities will rarely be so classed’).

22 *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 U.N.T.S. 13 (entered into force 3 September 3 1981) [CEDAW]. The disappointing fact is that CEDAW is the convention with more reservations made by states than any other. See ‘Statements on Reservations to the Convention on the Elimination of All Forms of Discrimination against Women Adopted by the Committee on the Elimination of Discrimination against Women’ in *Report of the Committee on the Elimination of Discrimination against Women*, UN GAOR, 53rd Sess., Supp. No. 38, UN Doc. A/53/38/Rev.1 (1998) 47.

23 *Brink v. Kitshoff*, [1996] 6 B.Const.L.R. 752.

24 *President of the Republic of South Africa v. Hugo*, [1997] 6 B.Const.L.R. 708.

25 *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs*, [1998] 12 B.Const.L.R. 1517 at para. 22.

26 *Ibid.* at para. 35, quoting Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1984) at xiii.

citizens.²⁷ In Europe, advocates of substantive equality had to wait for several decisions from the European Court of Justice (ECJ)²⁸ and from the European Court of Human Rights (ECTHR).²⁹ In Germany, I would refer to 1992, the year in which the Federal Constitutional Court (FCC) finally acknowledged that equality is really not about distinctions but about a right to ensure that 'traditional role conceptions that lead to increased burdens or other disadvantages for women may not be entrenched by state action.'³⁰ However, such developments are not solid gains.

In legal scholarship, there have always been prominent voices that reject a concept of equality directed against subordination, and whether this amounts to a threat to social justice depends on the status of scholarship in legal cultures. Today, however, we see an ambivalence about the application of substantive equality rights even in rather progressive courts and circles. In particular, as noted above, there is a certain fondness for dignity among constitutional justices and scholars³¹ that, I argue, has contributed to this ambivalence, with the *Law* decision by the Supreme Court of Canada as a case in point.³² One explanation for

27 *Goodridge v. Massachusetts (Department of Public Health)*, 440 Mass. 309, 798 N.E.2d 941 (2003).

28 The ECJ has been described as the engine behind European sex equality. See Sabine Berghahn, 'The Influence of European Union Legislation on Labour Market Equality for Women' in Janet Zollinger Giele & Elke Holst, eds., *Changing Life Patterns in Western Industrial Societies: Advances in Life Course Research*, vol. 8 (Amsterdam: Elsevier, 2004) 211.

29 A relevant decision is *Nachova v. Bulgaria*, [2005] ECHR 43577/98 at para. 145, in which the Court, including the Grand Chamber, applied art. 14 to racial discrimination, stating, 'Racial violence is a particular affront to human dignity and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism and racist violence, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of its enrichment.'

30 The FCC added that '[d]e facto disadvantages typically suffered by women may be made up for by rules that favour women.' See FCC (*Nocturnal employment*), BVerfGE 85, 191, 1 BvR 1025/82, 1 BvL 16/83, 10/91 (28 January 1992).

31 Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 *Eur.J.Int'l.L.* 655 (describing spread of the use of dignity in jurisprudence) [McCrudden, 'Human Dignity']; Vicky C. Jackson, 'Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse' (2004) 65 *Montana L.Rev.* 15 (describing use of dignity in transnational settings).

32 *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 [*Law*]. In *Law* the Court upheld an age-based distinction that prevented surviving spouses under age thirty from receiving any benefits from a national, compulsory, contributory social-insurance scheme unless and until they reached the age of sixty-five. Older spouses could collect either full or prorated benefits, depending on whether they were over or under the age of forty-five at the death of their spouse. This legislation was held not to discriminate on the grounds of age because, as

this fondness may be that in our post-metaphysical times, people crave a placeholder for what has been discarded in modernity. I want to show, however, that this craving should be resisted, since this is exactly the danger that dignity carries: it opens, if used in isolation, a space for metaphysics and moralistic particularities in law, just as liberty, in isolation, carries a danger of social Darwinism and equality, in isolation, carries a danger of egalitarianism (in the sense of crude equalization).

Thus, it is not only an infatuation with prioritizing dignity over other fundamental rights, effectively forming a pyramid (a metaphor I will discuss below), that has derailed the project of a more satisfying protection of fundamental rights. There is also a widespread ‘liberal’ preference for liberty over equality in many legal minds. This is particularly evident in defensive statements about ‘the market,’ as well as in legislative controversies around, for example, anti-discrimination law.³³ *In dubio pro libertate* has in some ways blinded legal thinking. I argue that liberty, or a default preference for liberty interests, cannot, by itself, deliver the concept of fundamental rights that constitutionalism envisions today. The preference for liberty, in fact, constructs a collision scale, with liberty on one side and equality on the other; but it also constructs a hierarchy in which liberty wins and equality loses. Moving beyond these images, I hold that we need to ask for equality in conjunction with both dignity and liberty, just as we need to understand dignity in light of liberty and equality, and liberty in light of equality and dignity. To put it differently, and again, we need to better understand what equality, dignity, and liberty mean in light of each other, in a triangle, in order to achieve what human and fundamental rights seem to be about – namely, equal conditions of freedom based on the recognition of diverse ways in which one can choose to live one’s own life.

Iacobucci J. wrote for the unanimous Court (at para. 108), they were ‘at a loss to locate any violation of human dignity.’ In addition, Justice Kennedy of the US Supreme Court more recently invoked dignity in *Rice v. Cayetano*, 528 U.S. 495 (2000) at 517 [*Rice*] (stating, apropos of affirmative action, that it ‘demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities’), and in *Lawrence v. Texas*, 539 U.S. 558 (2003) (on sodomy laws).

33 See Matthias Mahlmann, ‘Legal Parameters of European Anti-discrimination Law’ in Russell A. Miller & Peer Zumbansen, eds., *Annual of German and European Law*, vol. 1 (Oxford: Berghahn Books, 2004) 334 [Mahlmann, ‘Legal Parameters’]; Susanne Baer, ‘“The End of Private Autonomy” or Rights-Based Legislation? The Anti-discrimination Law Debate in Germany’ in Russell A. Miller & Peer Zumbansen, eds., *Annual of German and European Law*, vol. 1 (Oxford: Berghahn Books, 2004) 323; Rainer Nickel, ‘Widening the Scope: Anti-discrimination Law, Social Equality, and the Right to Equal Treatment’ in Russell A. Miller & Peer Zumbansen, eds., *Annual of German and European Law*, vol. 1 (Oxford: Berghahn Books, 2004) 353.

III *Notes from the past: Historical meanings of dignity, equality, and liberty*

Ideas around equality, liberty, and dignity³⁴ evidently have a long history, or, more precisely, have a vast array of histories that have been narrated around them. It is tempting, therefore, to reconstruct such narratives with a view to developing an argument about their ‘true meaning.’ However, history does not deliver up such unequivocal meanings. Instead, legal histories are, as narratives, accounts of controversy and political compromise, and of the constant fighting over meaning that often manifests itself in methodological controversies around texts.³⁵ Therefore, I do not claim that the concept of the triangle is a conclusion that follows naturally from an analysis of experience, or of our intellectual heritage. This is not a historical argument in the sense that modernity brought the triangle to light, or that enlightenment necessarily results in it. Rather, I claim that the diverse histories of equality, liberty, and dignity carry lessons that we should take into account in crafting contemporary fundamental rights jurisprudence. Some historical developments should serve as warnings against moving in a wrong direction, while others motivate us to emphasize specific notions. There is, I think, an overall reminder to look at liberty, equality, and dignity together rather than keeping them apart. In what follows, I want to highlight both the traditions that inform meanings today and the ambiguities these traditions contain.

Very briefly,³⁶ in Greek antiquity there was certainly a notion of freedom, conceptualized as freedom from coercion, as well as a concept of equality (conceptualized as *homoios*, meaning qualitative equality; *isos*, meaning quantitative equality; and *isonomia*, meaning

34 Danja Jaber, *Über den mehrfachen Sinn von Menschenwürde-Garantien* (Frankfurt: Ontos, 2003) at 97 [Jaber, *Über den mehrfachen Sinn*]; Man Yee Karen Lee, ‘Universal Human Dignity: Some Reflections in the Asian Context’ (2008) 3:1 *Asian J.Comp.L.* <<http://www.bepress.com/asjcl/vol3/iss1/art10/>> [Lee, ‘Universal Human Dignity’].

35 See Robert Post & Reva Siegel, ‘Originalism as a Political Practice: The Right’s Living Constitution’ (2006) 75 *Fordham L.Rev.* 545 (describing the diversity of views that inform ‘original’ meanings).

36 I am not aware of an integrated historical analysis of all three rights. Feldman, *Civil Liberties*, supra note 7, presents an account of fundamental rights in conjunction, in his analysis of European human-rights law and the United Kingdom. Beyond this, there are in-depth studies of each right in question. Some less well known aspects are discussed by Jaber, *Über den mehrfachen Sinn*, supra note 34, Lee, ‘Universal Human Dignity,’ supra note 34, and David Kretzmer & Eckart Klein, eds., *The Concept of Human Dignity in Human Rights Discourse* (The Hague: Kluwer Law International, 2002) (on dignity); Leonard Krieger, *The German Idea of Freedom: History of a Political Tradition* (Chicago: University of Chicago Press, 1972) (on liberty); Catharine A. MacKinnon, *Sex Equality*, 2d ed. (New York: Foundation Press, 2007) at 3–19 (on equality).

equality in law). However, Greek philosophy at the time lacked a concept of dignity as such. Thus, it is no coincidence that freedom was a class-based privilege, just as equality excluded some human beings from the club. The lesson? You need all three corners of the triangle to be fair to all.

Roman law included the notion of *aequitas*, legal and ethical justice, and of *aequalitas*, the Stoic idea of equality. Then there was the concept of liberty (again, from coercion) of all rational human beings. Dignity was addressed via two concepts. One is *dignitas*, referring to a position in public life; this may be distinction related to status, as in Cicero's '*excellentia et dignitas*,'³⁷ or it may be honour, either as recognition acquired from others³⁸ or as self-respect.³⁹ The other concept of dignity was a notion beyond *status*, since in Stoic philosophy the realization gradually emerged that human dignity may be the underlying assumption of all participating in rationality. Even then, however, dignity was closely tied to obligations, implying conformity with majoritarian norms rather than an emphasis on respect for diverse individuality – and this heritage of status that carries ambivalent notions of obligation is something to which the jurisprudence on dignity returns again and again.

Obligations are also prominent in religious conceptions, as in Christian theories of equality and dignity, although a distinction between metaphysical and worldly principles seems to pose more of an explanatory challenge. In the Christian tradition, equality first appeared as equality in the eyes of the Christian God but allowed for the simultaneous existence of the worldly concepts of *disparitas* and *diversitas*, which served to legitimize social hierarchies. Here, equality did not contradict inequality but served a specific function on a metaphysical level. Turning to the world, the Lutheran concept of equal standing of all those who believe in their faith challenged such a notion. Yet both Christian versions of equality, as well as notions of dignity as an obligation to hold God's gift of life precious, were generally opposed to any social idea of equal dignity for all.⁴⁰ Interestingly, we do find close connections

37 This concept features some obviously male/masculine characteristics; see Jaber, *Über den mehrfachen Sinn*, supra note 34 at 54.

38 This must be distinguished from an understanding of dignity as the 'opportunity of successful self-presentation,' as in Niklas Luhmann, *Vertrauen: ein Mechanismus der Reduktion sozialer Komplexität* (Stuttgart: F. Enke, 1968) at c. 4.

39 Jaber, *Über den mehrfachen Sinn*, supra note 34 at 11; Hubert Cancik, "'Dignity of Man" and "Personal" in Stoic Anthropology: Some Remarks on Cicero, *De Officiis* I, 105–107' in David Kretzmer & Eckart Klein, eds., *The Concept of Human Dignity in Human Rights Discourse* (The Hague: Kluwer Law International, 2002) 19.

40 Dreier, *Kommentar*, supra note 19 at paras. 7, 8; Jaber, *Über den mehrfachen Sinn*, supra note 34 at 104 (elaborating on the Christian tradition of a concept of dignity). For the Catholic tradition, see Regis A. Duffy & Angelus Gambatese, eds., *Made in God's Image: The Catholic Vision of Human Dignity* (New York: Paulist Press, 1999).

between equality and liberty in the Christian tradition, although liberty was treated mainly as internal liberty from worldly pressures. The Letter from Paul to the Galatians argues that all people are equal in Christ and thus free, thereby presenting equality as a condition of liberty. Similarly, Martin Luther argued that people are free, yet equally bound by social responsibility and mutual recognition. A similar trend can be observed in Confucianism,⁴¹ a tradition that has informed Asian jurisprudence on the matter until today. Islam also has a tendency to emphasize obligations as part of a dignified life.⁴² Where obligations figure prominently, they necessarily carry the problem of adherence to majoritarian standards as a prerequisite for recognition and respect.

The close connection between liberty and equality, by now explicitly directed against inequality of status, was further developed in the era commonly termed the Enlightenment, which enlightened some but certainly not all. It was in this era – or rather, in our reconstructions of it – that the concept of individual liberty as autonomous self-realization of reasonable beings grew to prominence. Up to the present day, many endorse a notion of autonomy that is based on a certain concept of rationality and on a distinction between culture and nature, as well as on a notion of independence and a property-like concept of self-realization.⁴³ However, there were early variations on this current notion. For example, John Stuart Mill, in *On Liberty* in 1859, strongly emphasized what later came to be called the ‘harm principle,’ according to which liberty carries a strong claim against subordination and toward equal respect or dignity for all. This is why Kevät Nousianen emphasizes that ‘social justice and equality, rather than formal equality, are “acquis de notre modernité.” Social justice and equality are what modernity had to offer.’⁴⁴ Here, modernity is not the trap outlined by post-World War II philosophers Theodor Adorno and Max Horkheimer⁴⁵ (and, later, by several postmodern philosophers) but, rather, a vision of a better future, without the injustices that some versions of modernity lived through.

41 Lee, ‘Universal Human Dignity,’ supra note 34 at 16–20 (discussing notions of individual but egalitarian humanity in Confucianism as closely linked to honour).

42 Ibid. at 22–6 (discussing readings of the Qur’an and jurisprudence in India and Malaysia).

43 For a US critique see Patricia Williams, ‘On Being the Object of Property’ (1988) 14 *Signs: Journal of Women in Culture and Society* 5.

44 Kevät Nousianen, ‘On the Limits of the Concepts of Equality’ in Eva-Maria Svensson, Anu Pylkkänen, & Johanna Niemi-Kiesiläinen, eds., *Nordic Equality at the Crossroads: Feminist Legal Studies Coping with Difference* (Aldershot, UK: Ashgate Publishing, 2004) 195 at 197 [Nousianen, ‘Limits’]. Nousianen focuses on the conceptual history of equality (compare discussion of the history of ideas at 197).

45 Theodor Adorno & Max Horkheimer, *Dialectic of Enlightenment* [1944], trans. by John Cumming (New York: Continuum, 1973).

Although some may still tell the story as pertaining to liberty alone, both equality and dignity have a place in the story too. If enlightenment is, as Immanuel Kant explained, emancipation from the chains of *Unmündigkeit*, immaturity, or, rather, from enslavement,⁴⁶ then enlightenment also provides us with a strong notion of dignity as autonomy. Here autonomy is understood not as radical independence but as a fundamental notion of respectful interaction among equals. This implies a foundational concept of rational equality in law. This reading of the Kantian idea of rational autonomy encompasses equality in the notion of equal self-government, albeit with very little conceptual work within a legal frame. But such a version of autonomy may be based on a notion of legally established peaceful coexistence, or, as Jennifer Nedelsky frames it with respect to modern and postmodern challenges today, it may be a concept of *relational autonomy*.⁴⁷ If that were the case, autonomy would be a frame for liberty as well as for equality interests, with the place of dignity somewhat unclear. However, prominent thinkers of this period were content to live with what they saw as legitimate inequalities; for example, Rousseau espoused a then-radical idea of natural equality of people, yet maintained an unequal natural state for woman and man.⁴⁸ Yet, despite these blind spots, crucial Enlightenment ideas may nonetheless be seen to integrate the concepts of fundamental rights in ways that may inspire their arrangement in a triangle formed by social equality and individual liberty, implying dignity of all.

As the understanding of each of the three concepts has fluctuated over time, so the relation of each concept to the others has varied. Different dimensions of equality have enjoyed different levels of sympathy at times – as legal, social, and political equality – just as different notions of liberty or dignity have had their high and low seasons. It may be said that what has been termed ‘liberal’ constitutional history is indeed a history of changing configurations of liberty, equality, and dignity.⁴⁹ As I

46 Kant is often viewed as the leading authority on ‘Western’ notions of dignity, e.g., by Giovanni Bogneri, ‘The Concept of Human Dignity in European and U.S. Constitutionalism’ in Georg Nolte, ed., *European and US Constitutionalism: The Science and Technique of Democracy* (Cambridge: Cambridge University Press, 2005) 75 at 79. References to Kant usually focus on Immanuel Kant, *Metaphysics of Morals*, trans. by Mary J. Gregor (Cambridge: Cambridge University Press, 1996) at s. 38.

47 Nedelsky, ‘Reconceiving Autonomy,’ supra note 9.

48 Jean-Jacques Rousseau, *Emile; Or, On Education* (1762), trans. by Allan Bloom (New York: Basic Books, 1979); and on gender or women in the canons of philosophy see Susan Moller Okin, *Justice, Gender and the Family* (New York: Basic Books, 1989); Annegret Stopczyk, *Muse, Mutter, Megäre: Was Philosophen über Frauen denken* (Berlin: Aufbau Taschenbuch Verlag, 1997) (collecting original sources on the issue of constructions of women in philosophy).

49 History never points in one direction: dignity is invoked in Germany against the Holocaust, equality in Canada against historical disadvantages suffered by groups,

intimated earlier, equality theorists not only tolerated abundant inequalities but engaged in paternalistic equalization, which does in fact endanger individual liberties. In addition, liberty – and particularly economic liberty in a ‘free market’ – has been, and often is, overemphasized at the cost of severe inequalities. Similarly, dignity is a fundamental component of equal respect, but it has also become charged with certain rather problematic ideas early on, and we need to be critically aware of that heritage.

Thus, according to my reading, dignity, equality, and liberty not only have rich histories of changing, and sometimes contradictory, meanings but also are not ever to be understood in isolation. I therefore suggest that we give simultaneous consideration to the three values as ingredients of a rights-based theory of justice.⁵⁰

IV *Current versions and visions: The European Charter of Fundamental Rights and some national constitutions*

Equality, liberty, and dignity are prominent features not only of Western philosophical traditions but also of its positive law. They form part of a common sense of constitutionalism. They also represent the beginning of most fundamental rights documents in the world and form part of the vision of fundamental rights in the European Union of the twenty-first century.⁵¹ In many instances, liberty and equality are seen to be on a collision course, while in others they tend to be balanced against

and freedom of religion or speech in many constitutional settings against past oppression by authoritarian political regimes; and all operate with dominant historical narratives, while opponents to these claims may attempt to highlight voices different from these. On the role of history in constitutional law see Renáta Uitz, *Constitutions, Courts and History: Historical Narratives in Constitutional Adjudication* (Budapest: CEU Press, 2005) at 11 (using concepts drawn from Robert Cover, ‘Nomos and Narrative’ [1982] in Martha Minow, Michael Ryan, & Austin Sarat, eds., *Narrative, Violence and the Law: The Essays of Robert Cover* (Ann Arbor: University of Michigan Press, 1992) 95).

50 See Stephan Gosepath, *Gleiche Gerechtigkeit: Grundlagen eines liberalen Egalitarismus* (Frankfurt: Suhrkamp, 2004) (propounding a philosophical argument to ground justice in both liberty and equality) [Gosepath, *Gleiche Gerechtigkeit*].

51 In the European Union, equality is a foundational concept in at least two ways, as is liberty: The EU was designed as a common market, with an emphasis on related liberty interests, but that very market transcended national borders and ethnic perceptions of ‘the other,’ thus also emphasizing the equality of European member states and the principle of non-discrimination with respect to goods and services, as well as non-discrimination between nationals in relation to travel, work, and social security. More recently, EU law also guarantees non-discrimination beyond nationality, thus cross-cutting to protect against inequalities relating to sex, sexual orientation, ethnicity, disability, age, and religion or belief. See arts. 12, 13, and 141 (formerly 119) EC, as well as the obligation of gender mainstreaming in arts. 2, 3 EC. However, the notion of dignity is absent at least from early EU law, while one

each other in an unstructured, *ad hoc* decision-making process – rather than using a triangle of dignity, liberty, and equality to structure decision making in such a way that it is focused on the concerns that constitutional law endorses as relevant. These emergences of the triangle are the instances I want to emphasize. I do not claim that there is a global or regional tendency that endorses this concept; rather, comparative constitutionalism is used as a heuristic tool to understand what we do, and what we could be doing better. The presence of the triangle in some working legal contexts may inspire more serious and pragmatic considerations and prevent us from easily discarding the triangle as yet another fancy theoretical endeavour. Yet, and primarily for reasons of space, this is a rather eclectic search.

To illustrate what a triangle of dignity, liberty, and equality might do to our understanding of fundamental rights, I will first and briefly discuss the European Charter of Fundamental Rights (ECFR), which is declared but not binding.⁵² The ECFR entertains a specific focus on all three of the fundamental rights under discussion, rather than one or two, with strong articulations not only of specific liberties but of differentiated guarantees for dignity, liberty, and equality in the sense of solidarity. In addition, I will refer to German constitutional law, since all components of the triangle are explicit parts of the German Constitution and have figured prominently in the jurisprudence of the FCC. Finally, some interesting arguments may be deduced from a look at Canada and at South Africa, as well as at other nation-states.

First, the ECFR. Its architecture already reveals an understanding that all three fundamental rights are of the utmost importance, and is quite different from that of the Canadian Charter of Rights and Freedoms,

may argue that it has gradually made its way in as the EU strives to be more responsive to its citizens rather than just to its member states.

52 EC, *Charter of Fundamental Rights of the European Union*, [2000] O.J. C 364/1 [ECFR]. The ECFR is not formally binding, but it has been taken up by EU institutions to guide their actions. A specific version of the charter was part of the European Constitution, which was signed in October 2004 (Brussels, CIG 86/04) but failed to be ratified after referendum defeats in France and the Netherlands. The ECFR is used by the European Commission as a human-rights standard and has been referred to by some advocates general as well as, in one case, by the ECJ. See *European Parliament v. Council of the European Union*, C-540/03, [2006] 2 E.C.R. 461, as well as arguments in cases concerning access to services of general economic interest (*TNT Traco SpA v. Poste Italiane SpA*, C-340/99, [2001] E.C.R. I-4109); access to documents (*Hautala v. EU Council*, C-353/99, [2001] E.C.R. I-9565); the right to paid annual leave (*R. (on the application of the Broadcasting, Entertainment, Cinematographic and Theatre Union) v. Secretary of State for Trade and Industry*, C-173/99, [2001] E.C.R. I-4881); and the right to dignity in light of biotechnological inventions (*Netherlands (supported by Italy and another) v. European Parliament and another (supported by the European Commission)*, C-377/98, [2001] E.C.R. I-7079).

which starts with limitations, then moves to freedoms and much later to equality. The European document begins with c. I on Dignity, c. II on Freedoms, and c. III on Equality, and has additional chapters on solidarity, citizens' rights, and justice. One could interpret this list as implying a hierarchy, but a closer look both at the charter itself and at its heuristic and philosophical heritage reveals a triangle, with dignity, freedom, and equality at the corners.

In the ECFR, dignity is defined as a right,⁵³ and the chapter on dignity also mentions life and the integrity of the person.⁵⁴ The ECFR shows a concern with protection from exploitation, whether in the form of slavery and forced labour or in terms of the use of the human body for financial gain.⁵⁵ Here, the ECFR already signifies that we are in the twenty-first century, in which biotechnology poses potential challenges to our understanding of humankind. In c. II, many of the freedoms listed express freedom as a right to self-determination, including protection of one's private life, individually,⁵⁶ with others, or in a family;⁵⁷ protection of one's data and communication;⁵⁸ and protection of one's religion and beliefs.⁵⁹ Here the ECFR signifies an understanding of liberty beyond isolated autonomy, in that it systematically takes relationships and communication into account.

Next, the chapter on equality addresses discrimination based on 'sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation'⁶⁰ – an interesting and non-exhaustive list! – and then pays specific attention to a recognition of cultural and linguistic diversity,⁶¹ gender equality,⁶² and children.⁶³ Although ECJ jurisprudence has long developed a fundamental right to equality as a foundational principle of the European Union,⁶⁴ the

53 ECFR, supra note 52 at art. 1.

54 Ibid. at arts. 2, 3.

55 Ibid. at arts. 5, 3.

56 Ibid. at art. 7.

57 Ibid. at art. 9.

58 Ibid. at art. 8.

59 Ibid. at art. 10. The problem here, as in all human-rights law, is that of leaving important decisions to member states, thus allowing for the construction of cultural identity in shaping gender relations and, in particular, in governing women's bodies.

60 Ibid. at art. 21.

61 Ibid. at art. 22.

62 Ibid. at art. 23.

63 Ibid. at art. 24.

64 Famous recent cases are *Mangold v. Helm*, C-144/04, [2005] E.C.R. I-9981, [2006] 1 C.M.L.R. 43 (age); *Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH*, C-71/02, [2004] E.C.R. I-3025 and *Maruko v. Versorgungsanstalt der deutschen Bühnen*, C-267/06, [2008] All E.R. (EC) 977 (sexual orientation); *Coleman v. Attridge Law*, C-303/06, [2008] I.C.R. 1128 (disability discrimination by association); and *Centrum voor*

ECFR, as Mark Bell puts it, ‘reveals a degree of imagination and innovation’⁶⁵ that deserves further attention.

In particular, the ECFR combines dignity with equality and liberty considerations, as in the context of the rights of the elderly. Art. 25 states that ‘the Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.’ Respect and dignity, independence and equal participation – such combinations illustrate how closely connected the three rights under discussion really are. As another example, the ECFR begins c. I with the guarantee that ‘[h]uman dignity is inviolable. It must be respected and protected’; it then addresses bioethical issues, which encompass concerns around autonomous decision making, as when art. 3(2) emphasizes the ‘free and informed consent of the person concerned’ in the fields of medicine and biology. In addition, c. I contains a prohibition of slavery, a classic case of the violation of dignity, but also adds human trafficking,⁶⁶ a modern practice deeply rooted in racist and sexist global inequalities. Thus it moves beyond a narrow focus on dignity to take systemic injustices into account as well. Such recognition of structural inequality may be even more obvious as the ECFR adds a chapter on solidarity,⁶⁷ which covers guarantees such as workers’ rights but also includes equal access to health care and other basic services.⁶⁸ These guarantees may be understood as core aspects of a dignified life, as in theories of justice referring to basic needs.⁶⁹ Additions are a chapter on citizens’ rights,⁷⁰ including the right to vote and stand in

gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV, C-54/07 [2008] (direct discrimination without an identifiable victim). For an overview of EU developments see the *Bulletin on Legal Issues in Equality*, published by the European Commission but compiled by external experts, online: EC <http://ec.europa.eu/employment_social/gender_equality/legislation/bulletin_en.html> .

65 Mark Bell, ‘The Right to Equality and Non-discrimination’ in Tamara Hervey & Jeff Kenner, eds., *Economic and Social Rights under the EU Charter of Fundamental Rights: A Legal Perspective* (Oxford: Hart Publishing, 2003) 91 at 91. See also Mark Bell, ‘Walking in the Same Direction? The Contribution of the European Social Charter and the European Union to Combating Discrimination’ in Gráinne de Búrca & Bruno de Witte, eds., *Social Rights in Europe* (New York: Oxford University Press, 2005) 261. Bell criticizes the fact that the national origin of non-EU citizens has not been taken up in this context (at 98–9). For a critical assessment from another perspective see Kees Waaldijk & Matteo Bonini-Baraldi, *Sexual Orientation Discrimination in the European Union: National Laws and the Employment Equality Directive* (The Hague: T.M.C. Asser Press, 2006).

66 ECFR, supra note 52 at arts. 5(1), 5(3).

67 Ibid. at c. IV.

68 Ibid. at art. 34 (social security), art. 35 (health care).

69 See Martha C. Nussbaum & Amartya Sen, *The Quality of Life* (Oxford: Oxford University Press, 1993).

70 ECFR, supra note 52 at c. V.

European and municipal elections,⁷¹ and a chapter on justice,⁷² commencing with the right to an effective remedy and a fair trial.⁷³ In sum, then, the ECFR illustrates an approach to fundamental rights that addresses pertinent aspects of our existence equally, rather than positioning them in a hierarchy.

However, the ECFR represents a very recent legal development in fundamental rights law. It is a strong statement of human-rights standards today, which emerged from an interesting drafting process characterized by unusual openness to the participation of those usually disadvantaged in representative politics⁷⁴ – a fact that may suggest a correlation between such concerns and a triangle approach to fundamental rights.

The ECFR was also drafted in light of the constitutional traditions of EU member states, and much of its content can in fact be traced to such heritage. Yet older constitutions around the world, in particular, pay very different levels of attention to different fundamental rights. From a comparative perspective, the concepts of dignity, liberty, and equality do not fare equally well in these texts. There is frequent explicit recognition of equality, and much care is invested in spelling out specific liberties; and both are much more in evidence than is dignity, of which one may say accordingly that it has a long philosophical and a short constitutional history. But one may claim nonetheless that all three components of the triangle form the basis of modern constitutional law. A constitution

71 Ibid. at art. 39 (European elections), art. 40 (municipal elections).

72 Ibid. at c. VI.

73 Ibid. at art. 47.

74 To accommodate the widest possible range of voices into the constitution-making process, the European Union invented a specific procedure, the ‘Convention Method,’ and one may argue that this procedure and the content of the ECFR are closely connected. The convention was an assembly of delegates from both member-state parliaments and member-state governments, headed by a legal scholar and with systematic openings to civil-society deliberations, that framed constitution making as a political but also a philosophical and sociocultural endeavour. This framework differs from settings in which governments or non-elected elites are the driving forces. The convention linked representational democracy to the mechanisms of international treaty law and expanded deliberation and negotiation beyond working groups and the auditorium through the use of the Internet: the secretariat put all relevant documents online, including many drafts and comments; organized live and online fora; and accepted online contributions from a wide variety of civil-society actors. Some may see the convention as a Habermasian space for deliberation, while empirical studies reveal particular participation gaps nonetheless. See Gráinne de Búrca & Jo Beatrix Aschenbrenner, ‘European Constitutionalism and the Charter’ in Steven Peers & Angela Ward, eds., *The European Union Charter of Fundamental Rights* (Oxford: Hart Publishing, 2004) 3; Helena Schwenken, ‘Citizenship in der Europäischen Grundrechtecharta: Zur politischen Partizipation von Migrantinnen in der Europäischen Union’ [2001] *Femina politica* 38 (presenting critical analysis on participation in the convention to draft the ECFR).

is more than its text.⁷⁵ Even in extremely text-based legal cultures, constitutions are still dynamic texts, quite contrary to posited theories of original meanings or ‘strict constructivism.’ Rather, the level of explicit recognition accorded to a concept is linked to a phenomenon Louise Arbour described during the 2007 commemoration of twenty-five years of the Canadian Charter of Rights and Freedoms in Toronto.⁷⁶ Since it has always been particularly difficult in elite and/or majoritarian political systems, she argued, to address equality, this very equality needs textual recognition. Conversely, I would add that since recognition of human dignity as the assumption underlying the legal subject *per se* is so foundational to law as such, it has sometimes escaped textual attention, because the concept serves as the bedrock on which to construct a constitutional order. Therefore, constitutional texts feature equality prominently and emphasize certain liberties, while dignity often stays behind the curtain. One may thus argue that the ECFR represents an elaborate and explicit version of constitutionalism today, while other constitutional texts explicitly recognize, depending on the political history of the document in question, those concerns most pertinent to those who were in charge. Yet all should be seen in light of what Lorraine Weinrib has called the post-World War II consensus,⁷⁷ a strong ‘never again’ after 1945.⁷⁸

75 In addition, not all constitutional states have a constitution. However, some of those entities without a constitution demonstrate the triangle in key domestic laws. Israel passed a specific Law on Human Dignity and Liberty in 1992, which was amended in 1994 to add that ‘[f]undamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free.’ In the EU, many argue that the existing treaties already form a constitution: see Ingolf Pernice, *Elements and Structures of the European Constitution* (WHL-Paper 4/02) (treaties should be called a constitution), but see also Alexander Somek, ‘Postconstitutional Treaty’ (2007) 8 German L.J. 12 <<http://www.germanlawjournal.com/article.php?id=879>> .

76 Louise Arbour, ‘Beyond Self-Congratulations: The Charter at 25 in an International Perspective’ (12 April 2007), online: UN High Commissioner for Human Rights <<http://www.unhchr.ch/hurricane/hurricane.nsf/view01/01E4BD392D1A7AE4C12572C20079EF52?opendocument>> . In relation to the choice to engage in fundamental rights jurisprudence, and to protect, as I would put it, a triangle, Arbour has said, ‘[t]hat choice effectively provides a megaphone to the voices of those who are not otherwise always heard loudly enough in other democratic institutions.’

77 Lorraine E. Weinrib, ‘“This New Democracy . . .”: Justice Iacobucci and Canada’s Rights Revolution’ (2007) 57 U.T.L.J. 399; see also McCrudden, ‘Human Dignity,’ *supra* note 31 (describing the emphasis on dignity as a reaction against Nazi ideology); Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001) at 227 (‘The Declaration [of Human Rights] was far more influenced by the modern dignitarian rights tradition of continental Europe and Latin America than by the more individualistic documents of Anglo-American lineage’).

78 Already during World War II, the German resistance had drafted a constitution that included ‘respect of inviolable dignity of the human person as a basis of legal

In addition, constitutional text may be less explicit on specific concerns as a result of the shared paradox at the heart of the protection of fundamental rights. In the founding moment, as well as in moments of revision or amendment, the call is for a majority to protect minorities, in a political sense. Evidently, this does not always happen. For example, the French declaration of 1793 (more poignant than that of 1789) states that ‘[t]ous les hommes sont égaux par la nature and devant la loi.’ But around the same time, there were also, for example, feminist critics, such as author and activist Mary Wollstonecraft, who published her ideas in 1792⁷⁹ and, in France, Olympe de Gouges, whose declaration famously begins, ‘Man, are you capable of being just? It is a woman who poses the question; you will not deprive her of that right at least.’⁸⁰ De Gouges challenged implicit limitations of equality and, to some extent, demanded equal liberties for all. The majority did not respond. Why rights are not included is certainly a matter of history. However, this is only the beginning of an enquiry, and a methodologically complicated task. We need to employ notions of constitutionalism that go beyond literalism, not only to protect the rights of women but, more generally, to tune constitutional law into our times. Thus, constitutional text matters, but, again, constitutionalism should not be reduced to mere textualism. In constitutionalism, though certainly depending on one’s political, ethical, philosophical assumptions, a triangle concept of dignity, liberty, and equality may inform an adequate understanding of fundamental rights.

Some may, and do, argue that concerns that do not make it into a given constitutional text are simply not recognized as rights. But this is not an adequate response to fundamental concerns of recognition. The triangle

order’; see Dreier, *Kommentar*, supra note 19 at para. 20 (discussing concepts present at the time). Dignity has also been enshrined in contexts in which Catholic and/or socialist influence was strong, e.g., the ILO’s Philadelphia Declaration (1944); *Spaniard’s Charter*, the Spanish fundamental law of 1945 (guiding principle); the 1950 constitution of India (Preamble); the 1946 constitution of Japan (art. 24 on marriage and family); and Germany’s Basic Law of 1949 (art. 1).

79 Mary Wollstonecraft, *A Vindication of the Rights of Women: With Strictures on Political and Moral Subjects*, 2d ed. (London: J. Johnson, 1792).

80 Olympe de Gouges, *Déclaration des droits de la femme et de la citoyenne* (1791; reprint, Paris: Mille et une nuits, 2003) (declaration of rights of women, as a critique of the declaration of human rights in France in 1789). Note art. I (‘Woman is born free and lives equal to man in her rights. Social distinctions can be based only on the common utility’) and art. IV (‘Liberty and justice consist of restoring all that belongs to others; thus, the only limits on the exercise of the natural rights of woman are perpetual male tyranny; these limits are to be reformed by the laws of nature and reason’). The English translations given here are quoted from *Women in Revolutionary Paris 1789–1795: Selected Documents*, transl. by Daline Gay Levy, Harriet Branson Applewhite, & Mary Durham Johnson (Urbana: University of Illinois, 1979) at 87–96, via Sunshine for Women <<http://www.pinn.net/~sunshine/book-sum/gouges.html>> .

of concerns most fundamental to our globally shared understandings of what life is and should be about still has a place even where all three concerns are not expressly acknowledged in a text. The U.S. Declaration of Independence, with its statement that ‘all men are created equal,’ is capacious in its intentions. However, and just as in France, there were feminist critics who gathered at the Seneca Falls Convention in 1848 to express much more explicit claims to equality, liberties, and equal respect.⁸¹ Although an Equal Rights Amendment has consistently failed in the United States, this is no reason to interpret the constitutional text so as to confine it to issues that were of prime concern to a majority of the framers. One reason for this is that equality was and is closely tied to liberty, based on a fundamental respect for humans that one may today call ‘dignity.’ As Nousisianen points out in her account of a history of legal concepts, equality against slavery actually meant emancipation, and thus a realization of liberty, which remains a leading frame in the development of international law, and particularly of ILO law against exploitation of labourers.⁸² To put it differently, they said ‘equality’ but had in mind ‘emancipation’ as a specific notion of collective liberty. Again, liberty and equality are not juxtaposed but, rather, form an integrated concern.

For another example of fundamental rights jurisprudence with a tendency toward the triangle, one may turn to Germany, a country with a very active constitutional court and an elaborate doctrine on the issues discussed here, in which different metaphors have been used to describe a constitutional assortment of fundamental rights. In Germany, as elsewhere, fundamental rights have had their high and low seasons. Yet Germany is also a country in which fundamental rights have been entirely absent and systematically violated and denied in relatively recent times. We can use this recent history as a lesson on fundamental rights. In light of those violations, dignity, liberty, and equality have distinct and rich histories of their own that imply specific relations to one another. The constitution has explicitly recognized the general principle of legal equality since 1818, yet equality was predominantly understood in formalistic terms.⁸³ In the

81 For a punk rock version see the Distillers’ song ‘Seneca Falls’ on their 2002 album *Sing Sing Death House* (‘The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her. To prove this, let facts be submitted to a candid world’).

82 Nousisianen, ‘Limits,’ supra note 44 at 204. See International Labour Organization, *Social Policy (Non-metropolitan Territories) Convention*, C82 (1947), 19 June 1954; ILO, *Right to Organise and Collective Bargaining Convention*, C98 (1949); ILO, *Abolition of Penal Sanctions (Indigenous Workers) Convention*, C104 (1955).

83 For the development of equality jurisprudence see Susanne Baer, ‘Equality: The Jurisprudence of the German Constitutional Court’ (1999) 5 *Colum.J.Eur.L.* 249 at 279 (‘liberating equality law from its comparative prison’).

Weimar constitution, equality was only a declaratory fundamental principle,⁸⁴ and dignity served as the guarantee of public welfare.⁸⁵ The Nazis used formalistic equality, with explicit reference to Aristotle as well as to racist early US jurisprudence, to conceptualize ethnic homogeneity and to defend genocide.⁸⁶ But the West German constitution of 1948, following World War II, was meant to serve as the legal expression of a 'never again' stance in relation to Nazi Germany, informed by considerable international influence.⁸⁷ With that in mind, dignity, liberty, and equality became the first three foundational rights in the West German Basic Law, still in effect today: dignity in art. 1, liberty and self-determination in art. 2, and equality in art. 3. Some read this as a pyramid, with dignity at the top and liberty and equality as specific guarantees.⁸⁸ However, in its contemporary jurisprudence, the FCC has also applied a scheme of 'practical concordance,' developed by scholar Konrad Hesse,⁸⁹ which requires the Court to consider each and every right in

84 *Verfassung des Deutschen Reiches, Deutsches Reichsgesetzblatt* Bd. 1919, no. 152, Seite. 1383–1418, art. 109, s. II.

85 *Ibid.* at art. 151: 'dignified life of all'; in a prior draft, the economic liberty of each individual. Jaber, *Über den mehrfachen Sinn*, supra note 34 at 161 (drafting histories in German constitutional law). Critique at the time came from the influential scholar Hans Nawiasky, *Der Bundesstaat als Rechtsbegriff* (Tübingen: Mohr, 1920), who argued that 'because it says so much it actually says nothing' [translated by author]. This idea inspired art. 37 of the 1947 Italian constitution: dignity as the limit of economic liberty and the criteria for minimum pay.

86 Scheuner, 'Gleichheitsgedank,' supra note 16; Georg Weippert, *Das Prinzip der Hierarchie* (Hamburg: Hanseatische Verlagsanstalt, 1932). This was complemented by the development of the logic of 'friend and enemy' by Carl Schmitt, *The Concept of the Political* (1927; 2d ed., 1932), trans. by George D. Schwab, expanded ed. (Chicago: University of Chicago Press, 2006).

87 See *Basic Law for the Federal Republic of Germany, Bundesgesetzblatt* Seite 1 (23 May 1949), art. 3 (Equality before the law): '(1) All persons shall be equal before the law. (2) Men and women shall have equal rights.' In 1994, art. 3 was amended as follows: 'The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.' Section (3) originally read, 'No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions.' As amended in 1994, 'No person shall be disfavoured because of disability.' Art. 1(1) reads, 'Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.'

88 Dreier, *Kommentar*, supra note 19 at art. 1, para. 16 (lead commentary on the Basic Law endorsing the pyramid metaphor). In addition, the German constitution endorses dignity as the core notion of fundamental rights in its 'eternity clause' (art. 79(3) BL). See also Damm, *Menschenwürde*, supra note 7 at 379, 382, as well as the philosophical concept by Alan Gewirth, 'Human Dignity as the Basis of Rights' in Michael J. Meyer & William A. Parent, eds., *The Constitution of Rights: Human Dignity and American Values* (Ithaca, NY: Cornell University Press, 1992) 10.

89 Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 20th ed. (Heidelberg: C.F. Mueller, 1999) at para. 72 ('praktische Konkordanz'). The concept is particularly relevant in conflicts around freedom of art or speech: e.g., FCC

question in such a way as to give the fullest possible meaning to each, and thus to assess limitations in light of other rights implied in a case, constituting a specific form of proportionality.⁹⁰ To be sure, this is neither balancing nor proportionality but, rather, a distinct application of systematic legal interpretation. For example, the Court uses dignity to specify liberty claims, as in the construction of a right to informational self-determination. The lead case is a census case that arose in 1983 when citizens, protesting what they saw as an early version of an Orwellian security state, engaged in civil disobedience by ripping apart data-collection forms for the census that they thought requested information that the state had no right to know, hold, or use. The Court, with no privacy clause and nothing on data in the text of the constitution, considered the issue to be of prime importance to our times and used the guarantee of human dignity in conjunction with the liberty principle to construct a fundamental ‘right to informational self-determination.’ It did not ‘invent’ a right to privacy, nor did it refrain from protecting individuals against state power for lack of an explicit discussion of modern technologies in the text. Rather, the Justices argued that ‘at the centre of the constitutional order there stand the value and the dignity of the person, who, in free self-determination, acts as part of a free society.’⁹¹ In 2008, the FCC used this as a starting point to limit police surveillance of IT communication in a decision emphasizing the social dimension of liberties, since they are part of the right to (one may add, *equally*) participate in social life.⁹² It is noteworthy that dignity and liberty are referred to explicitly while equality, as the social context in which such rights gain relevance, lurks in the shadow.

As another example in a long line of decisions on welfare concerns, the German FCC argued for a right to minimum subsistence.⁹³ It held, with no explicit clause similar to those guaranteed in the ECFR’s chapter on solidarity or in the International Covenant on Economic, Social and Cultural Rights,⁹⁴ that fundamental rights should also make sense to

(*Josefine Mutzenbacher*), 1 BvR 402/87, BVerfGE 83, 130 (27 November 1990) (protection of children limits artistic freedom).

90 See generally Dieter Grimm, ‘Proportionality in Canadian and German Constitutional Jurisprudence’ (2007) 57 U.T.L.J. 383. The concept of concordance has also been used in France (Cons. constitutionnel, 18 January 1995, *Loi d’orientation et de programmation relative à la sécurité*, Rec. 1995. 1154, 94-352 DC) and in Portugal.

91 FCC (*Census*), 1 BvR 209, 269, 362, 420, 484/83, BVerfGE 65, 1 (15 December 1983) at para. 152 [translated by author].

92 FCC (*IT surveillance*), 1 BvR 370/07, 1 BvR 595/07 (28 February 2008) at para. 176.

93 FCC (*Orphan’s pension II*), 1 BvL 4/74, BVerfGE 40, 121 (18 June 1975) (establishing doctrine of a right to minimum subsistence); FCC (*Tax free subsistence*), 1 BvL 20, 26, 184, 4/86, BVerfGE 82, 60 (29 May 1990) (elaborating on doctrine of minimum subsistence).

94 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976).

those without the means to freely use them. The Court argued that allowing individuals to live their lives, and thus to decide freely how they define what is dignified in a social setting, is part of constitutionalism. The German parliament rephrased this idea in its Social Security Code, which states, as of 2009, that it 'shall contribute to the realization of social justice and social security by shaping social subsidies' and shall contribute 'to secure a dignified life; equal conditions for the free realization of one's personality, particularly for young people; protect and support the family; enable the gain of means to sustain one's life in a freely chosen activity; and prevent and compensate for exceptional burdens, as well as by helping people to help themselves.'⁹⁵ Here we see a social concern for distributive and compensatory justice hand in hand with respect for individuals' liberty to lead a dignified life. However, it should be noted that the legislature remains unclear as to whether the definition of a dignified life remains with the individual or whether it is for the state to establish, an ambiguity that could be easily used to justify paternalism. Thus, one may argue that although there is a triangle at work, this does not absolve us from a closer look into each of its corners.

Besides Europe and Germany, there are several other instances in which one may observe such interesting arrangements of fundamental rights. This is particularly evident when we look at dignity. In many constitutional and human-rights documents, dignity, as a foundational concept in constitutional law, gained particular prominence after 1945.⁹⁶ In the Universal Declaration of Human Rights, it appears three times.⁹⁷ In Canada, the 1982 Charter dropped 'dignity,' although the term had been part of the Canadian Bill of Rights, the preamble to which referred to the 'dignity and worth of the human person.'⁹⁸ If my earlier suggestion is correct and constitutions address that which is endangered and do not necessarily make explicit those matters on

95 *German Federal Social Security Code*, Art. I of the Law of 11 December 1975, BGBl. I at 3015, para. 1, s. 1 (as amended) [translated by author].

96 Dignity's presence in constitutional law began before 1945, however, appearing in the constitutional documents of Mexico (1917, art. 3(c)), Weimar Germany (1919, art. 151), Finland (1919, Pt. I), Portugal (1933, art. 45), Ireland (1937, Preamble), and Cuba (1940, art. 32), and then in UN law and many others.

97 *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948); McCrudden, 'Human Dignity,' supra note 31 (giving an account of the history of events and positions negotiated at the time). With an idea of humanity in mind, we have learned to generously reinterpret the 'brotherhood' in art. 1 to include sisterhood as well.

98 *Canadian Bill of Rights*, S.C. 1960, c. 44, Preamble: 'The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions.'

which there is a consensus ‘behind the curtain,’ then there is a plausible explanation for this; again, text is not all there is to constitutional law, and a triangle may be lurking in the shadows. In Canada, respect for human beings was so foundational to constitutional law that an explicit formula seemed redundant. Thus, the Supreme Court has been right in arguing that dignity is important,⁹⁹ in close connection with both liberty¹⁰⁰ and equality.¹⁰¹ By way of contrast, there is ample evidence that dignity, equality, and liberty are fully present – or, as Christopher McCrudden puts it, are ‘routinely incorporated’¹⁰² – in most constitutions drafted more recently, as well as in theoretical accounts of fundamental concerns of justice.

In the wake of new nationalisms, new genocides, and new instances of torture, and particularly in those contexts in which countries transition from an inherently unequal regime to democracy, we find the triangle. Here, the prime example is South Africa. Section 1 of the South African constitution states ‘human dignity, the achievement of equality and the advancement of human rights and freedoms’ as the first set of foundational values, and the Bill of Rights in c. 2 features equality, human dignity, and several liberties (in that order). In addition, s. 39 provides that when interpreting the Bill of Rights a court, tribunal, or forum ‘must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.’¹⁰³ Similarly, the preamble to the 1995 Constitution for Bosnia and Herzegovina opens with a statement of ‘respect for human dignity, liberty, and equality.’¹⁰⁴ And the list could be expanded.¹⁰⁵ Thus, in many cases there is a triangle.

99 *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at paras. 94, 97, 121–2; *Reference Re Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Jones*, [1986] 2 S.C.R. 284.

100 *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at para. 227, *per* Wilson J.

101 See *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483 at para. 102; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at para. 293; *Egan v. Canada*, [1995] 2 S.C.R. 513 at paras. 36, 128 [*Egan*]. Peter Hogg has argued that the Supreme Court of Canada almost inevitably had to declare an opposite-sex requirement unconstitutional in conflicts around marriage, since any other decision would deny equal respect to gays and lesbians: Peter W. Hogg, ‘Canada: The Constitution and Same-Sex Marriage’ (2006) 4 Int’l J.Const.L. 712.

102 McCrudden, ‘Human Dignity,’ *supra* note 31 at 668.

103 *Constitution of the Republic of South Africa* (1996). The new constitution was approved by the Constitutional Court on 4 December 1996 and took effect on 4 February 1997.

104 *Constitution of Bosnia and Herzegovina* (1995), online: Constitutional Court of Bosnia and Herzegovina <http://www.ccbh.ba/eng/p_stream.php?kat=518> .

105 *E.g.*, the moderate Islamic constitution of Afghanistan (which was therefore attacked by the Taliban) states in art. 6, ‘The state shall be obligated to create a prosperous and progressive society based on social justice, preservation of human dignity, protection of human rights, realization of democracy, attainment of national unity as well as equality between all peoples and tribes and balance development of all areas of the

V *Beyond isolated rights*

Envisioning a foundational triangle protecting fundamental rights in constitutional law is a starting point for reconsidering some inadequacies in contemporary approaches to fundamental rights. As mentioned, the alternatives to the triangle are a pyramid and a scale. I will now briefly discuss why both these alternatives are inadequate to make full use of fundamental rights, before turning to the distinct corners of the triangle in order to discuss what may happen to each right if it is framed in isolation.

Many seem to imagine fundamental rights as a pyramid, with dignity as foundational and equality and liberty as elaborations of dignity. It makes sense to understand respect for human dignity as the core idea of human rights as such, equivalent to a very basic recognition of humans as subjects. However, while this a good starting point for ethical considerations, it may not be such a good idea for constitutional and human-rights law. To the extent that dignity is indeed basic and foundational, it is also removed from the daily injustices that constitute systemic inequalities and deprivation of liberties. In a pyramid, very abstract notions of dignity may then even inform the interpretation of equality and liberty, turning them into devices that protect only against those injustices severe enough to meet a dignity threshold far removed from the daily experiences of many people. One may feel tempted, indeed, to supplement the abstract notion of a foundational right or value with the very concrete notion of dignity as a right against extreme cases such as torture or cruel and degrading punishment. While this understanding of dignity served as a building block for a global consensus, at least for a while, it also removed cases from more precise ways of inspecting them as violations of fundamental rights. Dignity has been seen as inviolable and of untouchable importance, but this has also left us unable to address what happens when human dignity is violated. As a result, when the world faced new cases of torture in Abu Ghraib and Guantánamo, while still ignoring many similar instances in local police activities, the military, and prisons, there were attempts either to redefine torture to escape the verdict of inviolability or to simply break the consensus and allow torture to be justified. To escape that either/or scenario, one may, I suggest, reject the pyramid

country.' See *Constitution of Afghanistan* (2004), unofficial English translation, online: Afghanistan Online <http://www.afghan-web.com/politics/current_constitution.html>. The Preamble to the Namibian constitution is to similar effect. See *Constitution of the Republic of Namibia* (1990), online: Orusovo.com <<http://www.orusovo.com/namcon/>>. Also compare the proposed constitution for Israel explicitly based on the three principles: Adalah, 'The Democratic Constitution' (2007), online: Adalah: The Legal Center for Arab Minority Rights in Israel <http://www.adalah.org/eng/democratic_constitution-e.pdf>.

arrangement of fundamental rights, rather than sacrificing dignity, and refer to a triangle instead.¹⁰⁶

A triangle is also not a scale. As an alternative to a pyramid that allows one to see equality and liberty as rights of equal standing, there is also a strong tradition of conceptualizing fundamental rights as conflicting interests. In particular, and with dignity sometimes absent from explicit human-rights catalogues, it is equality and liberty that are seen as opposites. Freedom of speech then trumps equality concerns, as in arguments that defend all forms of pornography as free speech; or sex equality trumps freedom of contract, as in arguments that demand laws against all forms of discrimination by private actors in all circumstances. In a milder, less ideological, and more pragmatic version, liberty and equality do conflict but are understood to be amenable to being adequately balanced in cases of conflict.¹⁰⁷ However, balancing is not a free-floating device to accommodate conflicting interests. Therefore, I suggest, as an alternative, seeing both equality and liberty as components of humanity, as parallel and harmonious interests of human subjects, rather than as the two sides of an intrinsic conflict. The issue then is equal liberty in respect of everyone's dignity, an interpretation of fundamental rights in which the rights inform each other. This is an approach discussed in some strands of theories of equality, which could just as well explicitly account for all of its sources, rather than remaining in one corner by itself. However, a triangulated interpretation of fundamental rights may do justice to all three concerns involved. If we are to develop such a triangle, the three corners now need to be further explained.

A ONE CORNER: LIBERTY

One corner of the suggested fundamental rights triangle is liberty. But what is the meaning of liberty? I offer only a short sketch here, as so much energy is continually devoted to refining doctrine on this concept. In liberal democracies, there is a certain infatuation with liberty interests, as if they were the only rights that counted; this concentration makes it seem as though liberty interests were particularly easy to agree on, or as if there is no problem with privileging the use of liberties. Liberties are certainly a core element of modernity and capitalism. I argue, however, that liberty on its own is never enough to fully address

106 The consensus is also stated by Henry J. Steiner *et al.*, *International Human Rights in Context: Law, Politics, Morals*, 3d ed. (New York: Oxford University Press, 2008) at 224 ('if anything is a human right then it's the right not to be tortured') [Steiner *et al.*, *International Human Rights*]; however, the authors then present a variety of arguments that justify torture, at least in certain instances.

107 For a critical discussion of the conflict tradition see Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977) at c. 12.

a controversy, which is one reason to consider the concept of a triangle of fundamental rights.

At least in what we usually call Western thought, there is an emphasis on rational choice and on autonomy as a highly individualistic and privatized concept. But as a first and rather simple point, liberty cannot be the exclusive source of individual rights in a constitutional legal system. If all fundamental rights were derived from liberty, liberty would become the unrestricted use of one's capabilities, with no consideration of costs; libertarian scholars fond of law and economics will especially agree with me that costs matter. As long as there is more than one human being present, the liberty of each is inherently limited by the presence of the others. Some constitutions, by reference to the concept of human dignity, do in effect make an explicit point that other human beings matter based on their sheer existence. And most constitutions make an explicit point that other human beings matter in that they need to be treated as equals. Many constitutions, in their equality clauses, also spell out that, in effect, substantive equality should be the norm, despite *de facto* inequalities regarding sex, race, ability, and so on. To summarize, liberty makes sense only in close connection to equality, and it is inherently based on recognition of dignity, understood as self-determination.

The second, more controversial point is that liberty and equality are better seen as part of a triangle, and not as opposed and necessarily competing interests. As I have pointed out above, it is commonplace to think of these rights as conflicting, and, accordingly, as needing to be balanced against each other. This image is informed by ideological assumptions according to which equality (long associated with socialism and Marxism, and now often associated with the welfare state) endangers liberty (long associated with capitalism, and now with the market). This dualistic approach is a misunderstanding. If fundamental rights are about the construction of a social entity, a society, or even some version of 'the state,' equality addresses the question of who is part of it, and participates, while other principles address the question of what it is that someone participates in.¹⁰⁸ Equality is about who enjoys a liberty, while liberty is about what you enjoy – inherently a limited endeavour, since you have to accommodate the liberty of others. Applying this insight to the market, we see that it is the liberty of one's contract partner that limits one's liberty to design the terms of a contract, and that both liberties are based on each partner's recognition of the other as a human being, deserving of respect. The necessity of recognizing the other as a

108 Gosepath, *Gleiche Gerechtigkeit*, supra note 50 at 293 (developing a participatory theory of justice). Note that equality concerns may well transcend national borders and be applied to foreigners or refugees, and that dignity may very well inform our understanding of how far equality reaches.

human being is also why there can be no contract – in recognition of limits to objects of contracting – in slavery.¹⁰⁹

Recognition of the other as equal informs the contract despite the fact that systemic bias and the effects of systemic exclusion reign in social relations. Here law has the task of ensuring that inequalities do not translate into legal realities. This is why, for example, the German FCC, in the face of stark criticism from the civil law community, has subjected contracts between citizens and banks to judicial scrutiny,¹¹⁰ as well as contracts that limit employment opportunities even for top employees after they have left a company.¹¹¹ In both instances, liberty is not all there is to contracting; equality is applied as a complementary standard. The Court argues that a certain ‘parity’ between contracting parties is the prerequisite to understanding such agreements as formations of free will rather than effects of hierarchy or of a dependent position. Thus, if there is a disturbed parity in contracting (*gestörte Vertragsparität*), fundamental rights protect individuals from being bound by the contract. For example, a sales agent has a constitutional right not to be subjected to a contract clause to which he or she agreed while (and in order to be) employed that prohibits economic activity after the contract has been terminated. Similarly, children have a right not to be subjected to a loan guarantee that was part of a contract between a bank and their parents, since without detailed information and much care to allow for a free decision, such a clause cannot be assumed to be based on a liberty but, rather, must be seen as part of a policy on the part of the bank to gain as much loan security as possible, even from people who neither profit from the loan nor know whether they will ever be able to guarantee it, and of a situation in which it is most likely that the parent–child hierarchy informs the ‘decision.’ In both cases, the Court argued that social inequality as well as respect for and recognition of the individual inform an assessment of liberty.

More generally, equality and liberty, as well as dignity, may be seen as different sides of a given issue, informing each other, not automatically conflicting as opposites. One example of this may be conflicts around freedom of speech, which should be seen as liberty issues informed by questions about equal access to and effects of speech, where these

109 In a similar vein, the liberal tradition of contractual legitimation of the state has been described as flawed as long as it is based on a stated underlying inequality between men and women. See Carole Pateman, *The Sexual Contract* (Cambridge: Polity Press, 1988).

110 FCC (*Loan guarantee*), 1 BvR 567, 1044/89, BVerfGE 89, 214 (19 October 1993) (an enforcement of loan guarantees to banks may violate both liberty and equality rights if given in a situation of gross disparity between contracting parties – in this case, a bank versus a daughter who guarantees a loan for her father).

111 FCC (*Sales agent*), 1 BvR 26/84, BVerfGE 81, 242 (7 February 1990) (enforcement of employment contract clause may violate individual rights in light of gross disparity between contracting parties – in this case, a company versus an individual sales agent).

effects include silencing, as well as by dignity concerns around respect and recognition. Another example may be conflicts around reproductive rights, which should be understood as liberty interests, but taking into account the presence or absence of the conditions of choice (thus, equality), which also touch directly upon fundamental concerns of an understanding of oneself and others (thus, with dignity at stake). And yet another example may be rights to relationships and intimacy, which are often framed as equality issues but which also imply foundational aspects of self-determination and freedom of expression.

B ANOTHER CORNER: EQUALITY

What, then, is the meaning of equality? Equality – understood as more than the general principle of the equal application of the law to all, and also as more than a formalistic call to rational distinctions – is necessarily part of a triangle, and thus is never a right adequately understood on its own. But since many political movements tend to emphasize equality in isolation, while their opponents reject equality as if it were a dangerous and equally isolated concern, this needs to be explained.

One prominent thinker frames equality as a right against subordination; for Catharine MacKinnon, equality is a crack in the wall of dominance.¹¹² This is why feminist and queer, as well as anti-racist and postcolonial, scholarship are quite intrigued by equality. If one looks at the conundrum of fundamental rights from the perspective of a democracy committed to the self-determination of all, and if one sees constitutionalism as an asset of such a democratic government, equality helps to ensure that democracy works. Equality ensures that majorities do not trump minorities, and it is necessarily courts, as a check on parliaments and the executive branch, that are its guardians. Looked at from the perspective of social welfare, equality helps guarantee that fundamental rights are a reality for all, and thus serves as a distributive principle. This aspect is emphasized in equality's combination with dignity as respect for basic needs, or with liberty as the foundation that gives liberties their meaning. For Canada, as Mayo Moran has put it, 'there is no doubt that equality plays a complex and multifaceted role – perhaps because of its importance – in our legal system.'¹¹³ Equality thus figures, more or less prominently, in every fight for fundamental rights.

112 Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, MA: Harvard University Press, 1987).

113 Mayo Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (Oxford: Oxford University Press, 2003) at 169. The passage at 301–16, aptly titled 'Rethinking the Reason, Not the Person,' suggests the rather realistic empirical standard of asking for attentiveness to others or, in the negative, culpable indifference, since one ideal person will not cater to the existing social diversity.

In the United States, after the 1954 decision in *Brown v. Board of Education*, equality became the ‘mantra of the politically unrecognised in the United States.’¹¹⁴ And this is the case in many other constitutional battles as well, ranging from litigation on behalf of lesbians, gays, bisexuals, transsexuals, transgender people, and intersexuals (LGBTI rights), to accommodation of religious or linguistic minorities, to the right to live a life without unnecessary barriers, commonly called ‘disability rights.’

However, as the functions of equality already signal, the right to equality, taken in isolation, is as inadequate to the performance of those functions as liberty or dignity taken in isolation. For one thing, equality can represent a dangerous ideal. It can be understood as a call for equalization rather than as a call for equal rights. Taken to the extreme, equality moves in the direction of symmetry, of equality of results, of assimilation and uniformity, something a liberal constitutional system should not set out to foster.¹¹⁵ In this vein, we should remind ourselves that the term ‘equality’ has been abused by fascist regimes, but it was the symmetrical formalistic version of equality that was abused in that context, not a concept of equality as a right against discrimination.¹¹⁶ An over-emphasis on equality in isolation from other values has also been part of the history of socialist regimes, paving the way to problematic normative constructions of a good socialist citizen. Again, it should be noted that the socialist vision was not one of equality as a complex right against discrimination, as is more and more prevalent today.

In the wake of this history, flawed interpretations of equality have been, and still are, used as political arguments to stigmatize opponents. Mostly, this is an intentional obfuscation of claims for justice. Fundamental rights had, and have, performative power and need not be conflated with a description of the present state of affairs. Thus, a right to equality does not mean that people *are* equal but claims that they *should be seen as*

114 Gretchen Ritter, *The Constitution as Social Design: Gender and Civic Membership in the American Constitutional Social Order* (Stanford, CA: Stanford University Press, 2006) at 215. See also Robin West, ‘Toward a First Amendment Jurisprudence of Respect: A Comment on George Fletcher’s *Constitutional Identity*’ (1993) 14 *Cardozo L.Rev.* 759.

115 Gosepath, *Gleiche Gerechtigkeit*, supra note 50 at 294, argues that this is, from a philosophical point of view, based on a confusion of levels rather than on a substantive disagreement.

116 Equality, as a legal concept, was used to justify the Holocaust, with explicit references to the US racist jurisprudence of the time and to the leading principle of symmetrical equality attributed to Aristotle (see note 86 supra and accompanying text). Also see James Q. Whitman, ‘On Nazi “Honour” and the New European “Dignity”’ in Christian Joerges & Navraj Singh Ghaleigh, eds., *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism Over Europe* (Oxford: Hart Publishing, 2003) 243 (arguing that there is a continuum in the interpretation of dignity); contrast Gerald L. Neuman, ‘On Fascist Honour and Human Dignity: A Skeptical Response’ in Christian Joerges & Navraj Singh Ghaleigh, eds., *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism Over Europe* (Oxford: Hart Publishing, 2003) 267.

such, in light of what equality demands at a particular historical juncture.¹¹⁷ This is why claims that certain people should be seen as equals, articulated at a politically inauspicious time and place, are called radical and have been fought harshly. During the French Revolution, Olympe de Gouges, who claimed that women deserved that equal recognition, was executed because the revolutionary elite thought of this demand as ‘exalted imagination.’¹¹⁸ Today, there are still many instances in which critics of the *status quo* are similarly situated or characterized.

People often conflate levels and meanings of equality when they fight the extension of equal opportunities to others than themselves. I suggest that it may be more appropriate, and may help to address such objections, to claim equality as a right in conjunction with, necessarily, liberty and closely connected to dignity. Equality, if we understand it as part of a triangle, is not about equalization, symmetry, or formalism but about the inherently liberal right to be different without suffering as a consequence of that difference. In short, equality and liberty are aspects of a recognition of the individual, and therefore they do not conflict.¹¹⁹ For example, in conflicts around affirmative action, the issue is not equality of results but equal opportunities to enjoy freedom of choice in employment, according as much respect to the individual as possible. This is why both the European Court of Justice¹²⁰ and EU

117 In philosophy, equality is again controversial, in a conflict between egalitarians, who defend notions of distributive justice, and so-called humanitarians, who limit equality to access to basic conditions of equal opportunities. The two streams of thought thus approach the problem of injustice from two different directions: the first by looking at the starting conditions (all should be equal), and the second by looking at the effects (no one should be seriously harmed). For a humanitarian approach see Angelika Krebs, *Gleichheit oder Gerechtigkeit: Texte zur neueren Egalitarismuskritik* (Frankfurt: Suhrkamp, 2000); for an excellent discussion much closer to my argument see Gosepath, *Gleiche Gerechtigkeit*, supra note 50.

118 Nouisänen, ‘Limits,’ supra note 44 at 202, referring to Joan Scott.

119 See Mahlmann, ‘Legal Parameters,’ supra note 33 at 349, 351 (equality law could be ‘not the wicked foe, but the silent ally of freedom’); Matthias Mallmann, ‘Gleichheitsschutz und Privatautonomie’ [2002] *Z.EuRecht.Stud.* 407 (equality and autonomy as complementary values). See also Dagmar Schiek, ‘Freedom of Contract and a Non-discrimination Principle: Irreconcilable Antonyms?’ in Titia Loenen & Peter R. Rodrigues, eds., *Non-discrimination Law: Comparative Perspectives* (The Hague: Kluwer Law International, 1999) 77 (arguing that European anti-discrimination law is based on notions of both equality and liberty).

120 *Marschall v. Land Nordrhein-Westfalen*, C-409/95, [1997] E.C.R. I-6363, clarifying *Kalanke v. Freie Hansestadt Bremen*, C-450/93, [1995] E.C.R. I-3051 (affirmative action compatible with EU equality law); see also *Re Badeck and others*, C-158/97, [2000] E.C.R. I-1875 (equal-opportunity plans and management compatible with EU equality law, including reserved training positions for members of an underrepresented sex); *Abrahamsson, Anderson v. Fogelqvist*, C-407/98, [2000] E.C.R. I-5539 (equal qualification an indispensable component of affirmative-action policies).

treaty law¹²¹ define positive measures to ensure equality of women and men as compatible with the right to equality, as long as individual concerns of all applicants are taken into account, while guarding against reintroducing bias through the back door. Therefore, equality measures cannot give automatic preference to anyone but must provide adequate mechanisms to ensure equal opportunities, while remaining sensitive to the effects of affirmative measures on other interests at stake. Thus, in a context where women are under-represented, rules may state that women must be hired where male and female applicants are equally qualified for a position, while providing an opening for men if they are specifically disadvantaged, not in the guise of a mythologized, and in fact privileged, 'suffering white heterosexual male' but, as with the assessment of positive measures for women, where warranted in a given case.¹²² Beyond this starting point, such measures also need to address the inequalities that cut across and may even modify the whole notion of sex inequality, including race and class inequalities as well as other discriminatory categorizations.¹²³

Thus equality is not an empty concept, as some have provocatively stated;¹²⁴ as others have observed in analysing the use of the concept to provide political window-dressing,¹²⁵ quite the contrary. To be sure, equality adds nothing to law if it collapses into the very meaning of law,

121 Art. 141 ET, the former art. 119 (right to sex equality in employment, including equal pay and affirmative action).

122 See Robert W. Connell, *Maculinities*, 2d ed. (Cambridge: Polity Press, 2005) (discussing hegemonic masculinity discriminating against both women and men).

123 The issue is discussed, using different approaches, as 'intersectionality' (Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] U.Chicago Legal F. 139, rpt. in David Kairys, ed., *The Politics of Law: A Progressive Critique*, 2d ed. (New York: Pantheon, 1990) 195); 'multidimensional' discrimination (Dagmar Schiek & Victoria Chege, eds., *European Union Non-discrimination Law. Comparative Perspectives on Multidimensional Equality Law* (London: Routledge-Cavendish, 2008)); and 'interdependency' (Katharina Walgenbach *et al.*, *Gender als interdependente Kategorie* (Opladen: Barbara Budrich, 2007) (presenting the concept of gender as an inherently intersectional category, in that it is constituted by its interdependency with other similar categories such as age, sexuality, and ethnicity)).

124 Peter Westen, 'The Empty Idea of Equality' (1982) Harv.L.Rev. 95 at 537, 543. The *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221, Eur.T.S. 5 at art. 14 (the European Convention on Human Rights), explicitly accords equality only in conjunction with other rights, yet the Court uses strong language to emphasize its importance: see *D.H. and others v. Czech Republic*, no. 57325/00, 13 November 2007, online: UNHCR <<http://www.unhcr.org/refworld/docid/473aca052.html> > .

125 See Mieke Verloo & Maro Pantelidou Maloutas, 'Editorial: Differences in the Framing of Gender Equality as a Policy Problem across Europe' (2005) 117 *Greek Review of Social Research* 3 (critiquing the use of equality in European equity politics).

meaning simply that laws should be general in their application. But this is not the case with fundamental rights. Beyond its performative power, equality also becomes empty rhetoric if applied as a formalistic comparative exercise in which people are required to become the same before they have a right to be treated as equals. This is not the interpretation I advance here, and it is also not the meaning of equality as an individual right held in most contemporary constitutional systems. Such systems hold meaningful – and thus necessarily more substantive – concepts of equality ranging from a right against harm, as in Mill’s harm-principle, to a right against subordination or oppression or, as in MacKinnon’s writings, against dominance or against hierarchy. But equality claims then need additional standards in order to assess harm, subordination, dominance, or hierarchy, and such standards must allow for differentiation between a harm of injustice and harm and suffering caused by accident, this last, in turn, distinct from a harm caused with or without intention.¹²⁶ In addition, there is the need to avoid risks inherent in designing equality claims as group rights, which then clash with exactly those equality interests that one wishes to protect.¹²⁷ ‘Groupism’ is not an answer to the claims of individuals who want to be recognized as themselves rather than being reduced to one group identity.¹²⁸ Equality needs may thus be better satisfied by reference to liberty, as well as to dignity, since they serve as shields against collectivist stereotyping. The move to substantive equality, then, may be called the move from an understanding of discrimination as difference, and from an understanding of equality as a group right, to an understanding of discrimination as disadvantage. Such a move turns equality into a right to respect and recognition, enabling people to exercise their right to self-determination and to lead a dignified life.

The argument for the claim that equality should be seen in a triangle with liberty and dignity is formulated so as to add a necessary ingredient to fundamental rights, alerting us to subordination, to systemic bias and exclusion, to false collectivism and abused autonomy.¹²⁹ For example, in

126 The famous elaboration on this is Judith N. Shklar, *The Faces of Injustice* (New Haven, CT: Yale University Press, 1990), but her analysis needs supplementation from anti-discrimination theory, and particularly from work on disparate-impact discrimination.

127 Nousianen, ‘Limits,’ supra note 44 at 210, argues that equality has moved to a concept of harm as socially produced neglect of our fundamental needs, and thus to a concept that does not necessarily endorse group rights but does pay attention to group characteristics and stereotyping – a ‘collective rather than an individual concept’ (at 212), but nonetheless an individual right.

128 See Brubaker, *Ethnicity without Groups*, supra note 2.

129 In human-rights law, equality has been defined in the *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 U.N.T.S. 195

light of the triangle approach, a free-speech case requires us to consider not only the liberty interest in expressing oneself but also the social dynamics of expression, including the potential of speech to articulate recognition or to harm people. This is the difference between US free-speech absolutism and, for example, Canadian free-speech jurisprudence.¹³⁰ The Canadian Court assesses the consequences of expression not in moral terms but in terms of ‘the very real harm which it causes,’ and links that to the individual’s dignity¹³¹ as well as to self-fulfilment.¹³² Another set of examples is provided by the accommodation cases. Often, groups claim equality rights to pursue a distinct liberty important to them, such as freedom of religious practice. It is clear that such cases raise equality concerns, challenging the hidden norms of hegemonic cultures, but adequate answers to such problems also require us to understand the liberty and dignity interests of individuals at stake, both of those who seek the equality right in question and of those who belong to the group but do not endorse the practice. This complexity of problems is the reason that careful and complex proportionality considerations may replace broader schemes to address collective concerns.

C THE THIRD CORNER: DIGNITY

What is the meaning of dignity? And why – more specifically, and responding to a trend not confined to Canadian law – is dignity *not* the one decisive point of reference for equality jurisprudence, just as it may not be the only right we should invoke when thinking about torture?¹³³

Dignity, as scholars emphasize again and again, is foundational to any notion of fundamental rights. It informs the broader concepts of personhood and autonomy, and thus has been linked to liberty, just as it informs our understanding of equal respect, and thus has also been linked to equality. However, these links have been rather thin and hierarchical. It may be seen as a consequence of that foundational status of dignity that it is often framed as a ‘value,’ or a ‘principle,’ instead of as an

at art. 1(1) (entered into force 4 January 1969), with a focus on ‘distinction, exclusion or restriction made on the basis of’ any of the named categories ‘which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise ... of human rights and fundamental freedoms,’ as well as in *CEDAW*, supra note 22.

130 See *R. v. Keegstra*, [1990] 3 S.C.R. 697 [*Keegstra*]. On US absolutism compared to Germany see James Q. Whitman, ‘“Human Dignity” in Europe and the United States: The Social Foundations’ (2004) 25 H.R.L.J. 17; Edward J. Eberle, *Dignity and Liberty: Constitutional Visions on Germany and the United States* (Westport, CT: Praeger, 2002) at 231–6, 263.

131 *Keegstra*, supra note 130 at 64, 65.

132 *Ibid.* at 93.

133 See discussion at Part VI below.

individual right. In light of this, dignity has been conceptualized both at a very abstract level and in very concrete ways. Although this may seem contradictory, it actually makes sense. Yet both abstraction and concrete definition constitute reasons to argue that dignity, on its own, cannot provide a sufficient standard in constitutional law.¹³⁴

There is, at least in legal and philosophical circles, widespread consensus that since people are inherently different, beyond the humanity they have in common, positive accounts of dignity must by necessity stay very abstract.¹³⁵ In positive terms, then, a modern right to dignity, understood to mean more than, and to be independent from, status, tells us that we need to recognize one another as human equals. This is so much the common idea of human rights¹³⁶ that, as noted above, lawmakers either do not spend much time settling on a meaning for the term¹³⁷ or actually ignore it; courts then reintroduce the notion as a shared understanding beyond legal text.¹³⁸ But while a very abstract notion of dignity may be common ground, and may serve as an important point of reference in human-rights discourses, politics, and culture,¹³⁹ its use tells us very little about the content of that right in a given conflict. As McCrudden has shown, dignity surfaces all over the judicial globe, yet the concept seems to be functionalized rather than filled with independent content.¹⁴⁰ Now, some may make such a functional argument with respect to any and all rights. In addition to abstraction, however, there seem to be specific ‘fillings’ that dignity attracts. This is where either paternalism or extremism enters the scene.

The tendency toward paternalism, as one way to fill an abstract concept of dignity, consists of a return to narratives of dignity that

134 See McCrudden, ‘Human Dignity,’ supra note 31 at 712 (summarizing how dignity is used to cover a wide range of approaches, with no consensus on a core meaning).

135 Dignity is a ‘consensus on a high level of abstraction’: Dreier, *Kommentar*, supra note 19 at para. 24.

136 See Joel Feinberg, *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy* (Princeton, NJ: Princeton University Press, 1980).

137 This seems to have been the case once dignity had made it into UN documents: see McCrudden, ‘Human Dignity,’ supra note 31 at 673.

138 An example is the US Supreme Court in *Rice*, supra note 32.

139 Susanne Baer, ‘Menschenwürde zwischen Recht, Prinzip und Referenz: Die Bedeutung von Enttabuisierungen’ (2005) 53 *Deutsche Zeitschrift für Philosophie* 571 [Baer, ‘Menschenwürde’].

140 McCrudden, ‘Human Dignity,’ supra note 31 at 724, argues that when any specific conception used by courts to date ‘is adopted, dignity loses its attractiveness as a basis for generating consensus with those who do not share that tradition,’ which is why ‘a significant use is institutional: providing a language in which judges can appear to justify how they deal with issues such as the weight of rights, the domestication and contextualization of rights, and the generation of new or more extensive rights.’ I suggest that more substance could and should be sought in conjunction with liberty and equality.

understand dignity as acquired status, a good way to lead one's life, a dignified existence, an honourable way of being in the world. As noted above, there are strong and, in particular, religious traditions that even emphasize an obligation to do so, that see dignity as the status a person needs to earn, rather than as the status a person has *per se*. This view resonates with our use of 'dignity' (not 'human dignity') in everyday life, since the term tends to evoke, at least in many instances, a noble or a dignified way of being in the world. 'Human dignity' tends to mark a philosophical ideal of dignity for all, while 'dignity' signifies a characteristic that some people have and some don't, or something one feels strongly about, such that a particular version of dignity is closely tied to that characteristic. Thus, an understanding of dignity as a particular way to lead one's life is not only one part of the rich history of the concept but also a widespread non-legal connotation of the term. This adds to the temptation to use such particularities in law, too. It is then *dignitas*, not human dignity, and one of the reasons certain regimes that we do not wish to emulate have been infatuated with dignity at times, such as Franco's Spain.¹⁴¹ Again, a problematic heritage resurfaces: such moralistic particularities are incompatible with constitutionalism. In law, such a filling for the black box of dignity imposes particular visions of what a good life looks like on all people. With an abstract concept of dignity, we thus risk providing a vehicle for problematic expectations antithetical to the variety of ways in which people want to express themselves. To provide an example, the Federal German Administrative Court held that peep shows violate the dignity of the women who perform in them¹⁴² but never asked the women why they were there; what they did, wanted, or had to do; or how they felt about it. The Court never inquired into the existence or nature of the activity, instead attributing what it perceived as harm. This harm was, then, a violation of specific morals rather than economic deprivation or sexual violence, both well-documented as aspects of prostitution.¹⁴³ Thus, the Court used the notion of dignity to regulate rather than to liberate the women involved. Similarly, in assisted-suicide cases as well as in the context of abortion, courts risk ignoring the surrounding inequalities, and engage in rather paternalistic or moralistic considerations, when they focus on dignity

141 For Spain see Dreier, *Kommentar*, supra note 19 at para. 19 (dignity under the Franco regime). McCrudden points out the religious strategies to conceptualize dignity and emphasizes the Catholic influence on law, *e.g.*, in Germany or in the work of Jacques Mauritian; McCrudden, 'Human Dignity,' supra note 31.

142 Federal Administrative Court, BVerfGE 64, 274 (15 December 1981), BVerfGE 84, 314 (30 January 1990). For a discussion in light of equality law see Baer, *Würde oder Gleichheit?*, supra note 5 at 212.

143 For an extensive discussion and references see MacKinnon, *Sex Equality*, supra note 36 at 1233–332.

alone.¹⁴⁴ And, as I will discuss below, the use of dignity in equality cases poses a similar threat.

The other way to define dignity is to reduce it to apply only in some extreme cases. This is also tempting, for various reasons. One might want to avoid abstraction, or to complement an abstract definition with some concrete examples, so as not to render a right only a principle. One might also want to invoke the history of dignity, discussed above, as in the ‘never again’ response to the Holocaust in human-rights law. After all, dignity reminds us of those atrocities that form the backdrop of post–World War II constitutionalism. A violation of dignity, then, is an ultimate form of neglect, as in slavery, genocide, or torture. It reminds us of things we sometimes struggle to even describe, precisely because they are so atrocious. We may not know what dignity is, then (and thus keep it rather abstract), but we know when it has been violated. This approach suits a legal culture that emphasizes fundamental rights as negative rights and can easily live without an affirmative definition of what we hold precious when we protect it. As a result, dignity then tends to be invoked in extreme situations only. It is used to emphasize an injustice rather than to produce an argument about where injustice starts or ends. As a result, the narrow consensus on dignity as a prohibition of atrocities is very useful in many socio-political contexts, since people can refer to dignity to galvanize concern, simultaneously establishing a taboo. In law, however, taboo is silence on a controversial matter, and we need more than a scandal to argue a case.

In addition, a narrow focus on atrocities can operate to render much injustice invisible. Two examples may illustrate the point. In German constitutional law, dignity doctrine consists mostly of a rather unsystematic list of violations of dignity, including genocide, humiliation, torture, and the denial of subjectivity, in light of which other claims look petty – like ‘small change’ – in comparison. Thus, teachers beating children at school was not previously understood as a problem of dignity, although some such cases may indeed be reminiscent of torture. As another example, law against sexual harassment in the EU was initially framed in light of dignity; however, this rendered the law incapable of dealing with the ‘small change’ that harassment very often consists of. Sexist jokes do not invoke a claim that is usually meant to prohibit torture. As a consequence, courts did not give sexual-harassment claims the weight necessary to characterize them as violations of the relevant legal standard (*i.e.*, dignity). Instead, courts individualized concerns, considering them as petty sensitivities, and failed to address the systemic context of

144 For comparative material and analysis see Norman Dorsen *et al.*, *Comparative Constitutionalism: Cases and Materials* (St. Paul, MN: Thomson/West, 2003) at c. 5(c), and discussion below.

inequalities in the workplace.¹⁴⁵ The law tended to ask for individual reactions to harassment, thus invoking a tendency to blame the victim for what had happened to her, or, rarely, him. Here the law isolated the actors from the scene, focusing on the act in question and its direct impact, and did not address the systemic limitations of liberty that are one effect of unequal working conditions and are always part of a harassment case. The courts referred to criminal law standards, despite the setting of the disputes in labour law, in that, for example, they required evidence of severe physical force before accepting that an activity constituted harassment. Since dignity was the normative focus, the threshold for an act to constitute a violation was set very high. But since that did not (and does not) protect people against harassment, legislation eventually shifted to another frame. Armed with law against inequality, with references to dignity as well as liberty, courts may now be better prepared to accord justice to those who need it.¹⁴⁶ Thus it is women, among others, who have suffered from the interpretation of dignity as prohibiting only extreme cases, just as the fillings of abstract notions of dignity allow for the imposition of not only very particular but also very heavily gendered, and thus discriminatory, concepts on people.¹⁴⁷

To avoid both abstraction, which invites paternalism, and extremism, which ignores systemic injustice, we should, I argue, reconsider what we understand dignity to mean. In its rich history, we do find aspects that remind us that dignity is the promise of recognition of diverse senses of self, all deserving of equal respect. In such accounts, dignity is not

145 Baer, *Würde oder Gleichheit?*, supra note 5; Susanne Baer, 'Dignity or Equality: Responses to Workplace Harassment in European, German and U.S. Law' in Catharine A. MacKinnon & Reva B. Siegel, eds., *Directions in Sexual Harassment Law* (New Haven, CT: Yale University Press, 2004) 582. The foundational analysis of sexual harassment is still Catharine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (New Haven, CT: Yale University Press, 1979).

146 An impact study of the dignity law made for the German government showed clearly not only that no successful sexual-harassment cases were brought but that stereotypes were left intact. Judges argued that they refused to administer morals, established extreme cases as the only ones that met the relevant legislative requirements, and did not take inequality as a contextual factor into account. See Susanne Baer & Almut Pflueger, *Das Beschäftigtenschutzgesetz in der Praxis* (Berlin: Bundesministerium für Familie, Senioren, Frauen und Jugend, 2005), online: BMFSFJ <<http://www.bmfsfj.de/RedaktionBMFSFJ/Abteilung4/Pdf-Anlagen/beschaeftigtenschutzgesetz-kurzfassung.property=pdf.pdf>> . Today, both sexual and racial harassment are part of equality legislation in directives based on art. 13 EC.

147 See Sara Hossain & Lynn Welchman, *Honour: Crimes, Paradigms and Violence against Women* (London: Zed Books, 2005) (analysing how gendered norms of honour affect sexual violence); Ute Frevert, *Men of Honour: A Social and Cultural History of the Duel*, trans. by Anthony Williams (Cambridge, MA: Blackwell, 1995) (discussing male notions of dignity in historical perspective).

constructed in isolation; rather, the notion of dignity invokes equality as well as liberty, both equally important. It is equality that provides the emphasis on *human* dignity – for all people, regardless of status, class, and so on. And it is liberty that ensures that each individual defines his or her own sense of self, rather than having authorities define it. One may relate that liberty to the Kantian notion of the prohibition on instrumentalizing a person for another’s needs, what has been termed the ‘object formula’ in interpreting dignity in German jurisprudence.¹⁴⁸ But one may not want to stay with a purely rational account of autonomous liberty, since that would be a rather flawed account of human life. Some recent understandings of dignity thus invoke a larger variety of concerns. As an example, the philosopher Martha Nussbaum carves out notions of instrumentality, denial of autonomy, inertness, fungibility, ownership, and the denial of subjectivity.¹⁴⁹ This approach is still Kantian at heart yet also acknowledges the levels on which dignity deserves to play a role. Justice Iacobucci may be expressing a similar idea in the Supreme Court of Canada’s decision in *Rodriguez* when he writes that ‘[h]uman dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment.’¹⁵⁰ This is not *dignitas*, the status acquired in society, but dignity as recognition of integrity as such – a complex concern. For legal purposes, and to avoid such pitfalls, I thus suggest characterizing relevant concerns of dignity by using liberty and equality as additional normative standards, in a triangle of fundamental rights.

148 Günter Dürig, ‘Der Grundrechtssatz von der Menschenwürde’ (1956) 81 A.O.R. 117 at 127 (introducing *Objektformel* in German constitutional law); FCC (*Life imprisonment*), 1 BvL 14/76, BVerfGE 45, 187 (21 June 1977) at 228 (‘It is contrary to human dignity to make the individual the mere object of the state. The principle that “each person must always be an end in himself” applies unreservedly to all areas of the law; the intrinsic dignity of the person consists in acknowledging him as an independent personality’ [translated by author]). See also Andrew Brennan & Y.S. Lo, ‘Two Conceptions of Dignity: Honour and Self-Determination’ in Jeff Malpas & Norelle Lickiss, eds, *Perspectives on Human Dignity: A Conversation* (Dordrecht: Springer, 2007) 43; James Q. Whitman, ‘The Two Western Cultures of Privacy: Dignity versus Liberty’ (2004) 113 Yale L.J. 1151. See also Menachem Mautner, ‘From “Honor” to “Dignity”: How Should a Liberal State Treat Non-liberal Cultural Groups?’ (2008) 9 Theor.Inq.L. 609 (suggesting a human-rights-based understanding of dignity as humanness rather than referring to a notion of the ‘person’). See also Denise Réaume, ‘Indignities: Making a Place for Human Dignity in Modern Legal Thought’ (2002) 28 Queen’s L.J. 61 (discussing the universality of dignity).

149 Martha C. Nussbaum, ‘Objectification’ (1995) 24 Phil. & Pub. Aff. 249; Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge, MA: Belknap Press/Harvard University Press, 2006).

150 *Rodriguez v. British Columbia (A.G.)*, [1993] 3 S.C.R. 519.

Many constitutional courts around the globe do expressly connect equality with dignity and liberty in their decisions, as do several scholars and proponents of human-rights policies. I have already referred to a few examples in which I believe that, instead of the image of a pyramid or a scale, a triangle approach could be used to refine doctrine so that it would more adequately address the injustices at hand. I now focus briefly on some prominent cases in which a revised understanding of fundamental rights as a triangle might change our standards.

To start with, there is the prominent decision of the Supreme Court of Canada in *Law*, in which the Court began searching for additional standards to decide more definitively what violates equality rights and what does not. It is my impression that the Court looked to one corner of the triangle, the dignity corner, in deciding this case.¹⁵¹ However, I would suggest that the other corner needs attention, too, and that dignity, in particular, needs to be reconsidered in the light of liberty as well as equality in order to avoid the reintroduction of problematic paternalism into constitutional law. References to liberty, equality, or dignity treated in isolation from one another will not suffice.

The *Law* case challenged federal legislation that based eligibility for Canada Pension Plan (CPP) survivor benefits in part on a minimum age of forty-five years. In its decision, the Supreme Court of Canada summarized its equality jurisprudence and emphasized the role of human dignity in an equality analysis that came to be known as the *Law* framework. However, the case was also about a woman who survived her spouse and was left without economic resources and, more generally, about the rules a society employs *vis-à-vis* relationships structured by traditional images of male breadwinners and dependent wives. The decision has been criticized thoroughly by scholars concerned with equality issues, more in relation to its doctrinal than in relation to its substantive effects. Although the Supreme Court of Canada is known for an impressive interpretation of equality rights, many felt that with this case it weakened its equality standard¹⁵² – despite the Court’s advancing a rather triangulated understanding of the purpose of equality jurisprudence:

151 *Law*, supra note 32. Beverly Baines has argued that human dignity was adopted to resolve judicial differences about the analysis of equality claims and did not succeed, as can be seen in *Law* and in *Trociuk v. British Columbia (A.G.)*, [2003] 1 S.C.R. 835. According to Baines, ‘[t]he Court’s approach is simply too abstract, too individualistic, and too assimilationist.’ Beverly Baines, ‘Human Dignity and Sex Equality’ (2007), [unpublished, on file with author] at 9.

152 McCrudden, ‘Human Dignity,’ supra note 31 at 35–7, describes the trend toward invoking dignity as a reaction to what Owen Fiss, ‘The Fate of an Idea Whose Time Has Come: Anti-discrimination Law in the Second Decade after *Brown v. Board of*

In general terms, the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.¹⁵³

The problem occurs when this complex picture is reduced to a standard of dignitary harm, giving rise to at least two different issues.

First, there is a problem of particularism, that is, of using dignity as the placeholder for a particular morality. The Court in *Law* stated that equality had to be interpreted not in the light of liberty and dignity but in the light of a particular version of dignity alone.¹⁵⁴ This also positions dignity at the top of a pyramid, rather than at the corner of a triangle. It leads the Court to a rather abstract, semi-subjective standard, known to be problematic:

The contextual factors which determine whether legislation has the effect of demeaning a claimant's dignity must be construed and examined from the perspective of the claimant. The focus of the inquiry is both subjective and objective. The relevant point of view is that of the reasonable person, in circumstances similar to those of the claimant, who takes into account the contextual factors relevant to the claim.¹⁵⁵

Why reasonableness based on dignity rather than equality as a right against discriminatory disadvantage, protecting equal liberties for each and every individual? The Court was aware of the ambiguity attending the concept of reasonableness,¹⁵⁶ yet applied it nonetheless, stating that '[h]uman dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns

Education' (1974) 41 U.Chi.L.Rev. 742, calls the 'proliferation of the protectorate,' to the shift from formal to substantive notions, and to attacks on courts that have 'gone too far' on issues around gender equality, such as sexual harassment. It can also be seen as the use of dignity to prevent particular changes in the world; see Faraday *et al.*, *Equality Rights*, supra note 20 (arguing that the use of dignity limits the progress of women's rights).

153 *Law*, supra note 32 at para. 88.

154 *Ibid.* at para. 54 ('The overriding concern with protecting and promoting human dignity in the sense just described infuses all elements of the discrimination analysis').

155 *Ibid.* at para. 59, referring *Egan*, supra note 101 at para. 56, *per* L'Heureux-Dubé J.

156 *Ibid.* at para. 61:

I should like to emphasize that I in no way endorse or contemplate an application of the above perspective which would have the effect of subverting the purpose of s. 15(1). I am aware of the controversy that exists regarding the biases implicit in some applications of the 'reasonable person' standard. It is essential to stress that the appropriate perspective is not solely that of a 'reasonable person' – a perspective which could, through misapplication, serve as a vehicle for the imposition of community prejudices. The appropriate perspective is subjective-objective.

the manner in which a person legitimately feels when confronted with a particular law.¹⁵⁷ But who defines how a person should *legitimately* feel? The idea of equality, and particularly of the distributive side of equality, is directed precisely at forestalling the introduction of particular moralistic values into legislation; against allowing majoritarian visions of legitimate feelings to reign, or to inspire certain feelings in conformity with problematic norms in those individuals addressed by legislation; and against an understanding of equality that combats only those injustices that are generally agreed on. Justice Iacobucci points in the desired direction when he argues that ‘human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits.’¹⁵⁸ But this is not really an argument of reasonableness; rather, it is a definition of stereotyping and categorization, and thus an equality argument. Along these lines, equality serves to ensure access to all areas and aspects of society, based on the notion of dignity in the sense of recognition for each and every individual and bound to the notion of equal opportunities to exercise one’s liberties. By way of contrast, an equality claim suffers from the imposition of reasonableness considerations, in that such considerations introduce an additional threshold for equality claims that is potentially based on majoritarian and normalizing conceptions of what is reasonable.

The second problem with the Court’s use of dignity is paternalism. The Court added that a legislative ameliorative purpose is important, arguing that the ‘clear ameliorative purpose of the pension scheme for older surviving spouses is another factor supporting the view that the impugned CPP provisions do not violate essential human dignity.’¹⁵⁹ But amelioration has been a purpose behind many laws that, in effect, supported inequalities. For example, the commonly employed prohibition on women’s working night shifts was meant to recognize women’s duties at home but served in effect to perpetuate a sexual division between paid and unpaid as well as between well-paid and poorly paid labour.¹⁶⁰ In addition, amelioration for some may amount to discrimination for others, as in laws that protect the interests of employed people at the cost of the unemployed, or in cases in which family law reform may advance the position of mothers and fathers at the cost of non-traditional families. What some call ‘benign’ actually turns out to

157 Ibid. at para. 53.

158 Ibid.

159 Ibid. at paras. 72–3.

160 In the EU, the ECJ declared such prohibitions a violation of sexual equality rights, an argument upheld by the German constitutional court a little later. For extensive discussion see Dagmar Schiek, *Nachtarbeitsverbot für Arbeiterinnen: Gleichberechtigung durch Deregulierung* (Baden-Baden: Nomos, 1992).

be invidious in many cases.¹⁶¹ Here, an analysis based not only on dignity but on equality ensuring liberty for all could help us to see, in a legally structured argument, that restoring particular versions of dignity does in fact destroy opportunities for others, and could help to prevent us from legitimizing invidious rules. If one is committed to equal liberty to freely decide how to lead one's life, 'reasonable behaviour' is not a good standard but a dangerous invitation to particularistic, or simply majoritarian, value judgements. But if dignity is read as one component in the triangle of dignity, equality, and liberty, it is not about being dignified, or about 'legitimately feeling' a certain way, but about recognizing human dignity in all its diversity. In line with the equality aspect of targeting systemic injustice, the concept of a triangle thus allows us to think this through.

Beyond the *Law* case in Canada, there are other examples to illustrate the potential of the triangle as a doctrinal concept. Prominent US Supreme Court decisions in abortion cases illustrate the ambiguous nature of dignity claims as much as they invite a more coherent way to assess all rights implied in complex factual settings.¹⁶² In *Carhart*,¹⁶³ a 2007 decision, dignity was used to limit access to abortion, while in *Casey*,¹⁶⁴ decided in 1992, it was used to support a claim of decisional autonomy, and thus to allow access to abortion. This contrast supports the observation that dignity is a black box and a concept with an ambiguous history, open to varying and even conflicting interpretations. Some have suggested that such openness is a good idea, since it allows for adaptation over time and space¹⁶⁵ as well as across political beliefs.¹⁶⁶ But because we are dealing with a human right, I argue, ambiguity that allows for the imposition of problematic particularities is not a satisfying

161 For extensive analysis see MacKinnon, *Sex Equality*, supra note 36 at 286.

162 Kennedy J. refers to dignity in several instances, including *Lawrence v. Texas*, 539 U.S. 558 at 573–4 (2003) (discrimination on the basis of sexual orientation); on this point see Katherine Franke, 'The Domesticated Liberty of *Lawrence v. Texas*' (2004) 104 *Colum.L.Rev.* (queer critique of dignity-based account of liberty). Here I focus on abortion cases only.

163 *Gonzales v. Carhart*, 550 U.S. 124 (2007), 127 S.Ct. 1610 at 1633 (2007) (dignity as a reason for the state to restrict abortion).

164 *Planned Parenthood v. Casey*, 505 U.S. 833 at 851 (1992) (dignity as a reason for the state to allow abortion).

165 See Louis Henkin, 'Dignity and Constitutional Rights' in Michel J. Meyer & William A. Parent, eds., *The Constitution of Rights: Human Dignity and American Values* (Ithaca, NY: Cornell University Press, 1992) 210 at 227 (giving an account of the rich history of diverse meanings); David Feldman, 'Human Dignity as a Legal Value – Part I' [1999] *P.L.* 682 (distinguishing levels of human species, groups, and individuals as well as subjective and objective aspects of dignity).

166 Judith Resnik & Julie C. Suk, 'Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty' (2003) 55 *Stan.L.Rev.* 1921.

state of affairs, since it does not guide us to adequately address claims of people in need of protection in complex cases. Cases around reproductive rights involve aspects of liberty; equality of conditions of choice; concerns around the body, intimacy, and relationships; and much more. If we are not to deal with them in an *ad hoc* fashion, we need a frame of systematic decision making. Therefore, I suggest rethinking these cases with the triangle in mind. The right to dignity could then supplement equality, which leads us to conceptualize a right to decide (a liberty claim) under conditions of equal opportunities free from oppression and subordination (equality), in respect of and recognizing all parties involved (dignity), be it a second parent or a human being in its *status nascendi*. This would call for an in-depth analysis of the social and cultural meanings of pregnancy, giving birth, parenting, and family. It would also call for a systematic analysis of whether and how systemic inequalities, such as those relating to gender, class, or other such categories, affect choice, both in terms of the choices that are available and in terms of the choice actually made. In addition, it would urge us to understand the complexity of connection, both the radical bond between mother and foetus and the relationship between father, if present or known, and child. This is not the extent of an argument, but I claim that this approach does give us additional standards to affirm fundamental rights.¹⁶⁷

A final example that may illustrate practical implications of a triangle concept of fundamental rights is torture. Despite the fact that torture has been exactly that against which most people agree that fundamental rights protect, we have seen prominent attempts to shatter this consensus.¹⁶⁸ And despite the fact that torture is the concrete case widely believed to indicate the paradigmatic, and thus extreme, violation of human dignity, we have seen many arguments that, despite the atrocity, allow for that very dignity to vanish when higher interests are said to be at stake.¹⁶⁹ One might argue that this is simply a move back to

167 For an equality analysis of reproductive rights see MacKinnon, *Sex Equality*, supra note 36 at c. 9 (also discussing US case law that moves beyond a privacy framework).

168 Steiner *et al.*, *International Human Rights*, supra note 106 (discussing various positions on torture); Winfried Brugger, 'May Government Ever Use Torture? Two Responses from German Law' (2000) 48 *Am.J.Comp.L.* 661 (justifying torture in some cases). For opposing views see Karima Bennouna, 'Terror/Torture' (2008) 26 *Berkeley J.Int'l L.* 1; Ralf Poscher, 'Terrorism and the Constitution: Looking at the German Case' (2009) 56 *Dissent* 13; Andreas Fischer-Lescano, 'Torture in Abu Ghraib: The Complaint against Donald Rumsfeld under the German Code against Crimes under International Law (*Völkerstrafgesetzbuch*)' (2005) 6 *German L.J.* 3 <<http://www.germanlawjournal.com/article.php?id=583>> .

169 Such discussions arose in the US administration around Guantánamo; see Karen Greenberg, ed., *The Torture Debate in America* (New York: Cambridge University Press, 2006). For comparative discussions see Florian Jessberger, 'Bad Torture – Good

authoritarian notions of state power, with a worrying trend toward the disregard of fundamental rights. But one might also say that such arguments indicate a need to come to terms with more complex situations. In cases ranging from specific interrogation practices to shooting down a civilian aircraft with passengers and crew if the aircraft is being used as a weapon,¹⁷⁰ there seems to be a need for more than a reference to an absolute protection of dignity. The human-rights consensus around torture, then, serves to make torture taboo¹⁷¹ but does not enable us to argue a case. Therefore, one might want to rethink torture as a violation of fundamental rights that inform each other. Torture then constitutes a violation of individual dignity. But it does more than that: torture also infringes on the right to equal respect for any person – whether a terrorist, a petty criminal, or someone less labelled – when she is put in a class of people less valuable than ‘regular criminals.’ In addition, torture violates the right to dignity of a subordinate who is ordered to commit such an act by turning him into an instrument of abuse, thereby also abusing the freedom to enter into an employment contract, or to enter the military, by establishing a hierarchy incompatible with a notion of equality that does not allow for subordination. Finally, liberty considerations may also allow us to convincingly reject attempts to justify torture as a last resort in rare cases (to find the bomb, to save the victim of kidnapping, etc.), since torture does not meet the standard of proportionality commonly applied in liberty cases: it is not effective as a means to the legitimate end, in that there is no guarantee that will produce the necessary information, and it is inappropriate, or disproportional in the narrower sense, in that it does not respect a minimum of human dignity as such. Again, I suggest that a triangle of fundamental rights helps us to understand such problems better and, last but not least, to safeguard fundamental rights.

Dignity, liberty, and equality are cornerstones of constitutionalism. When we think of fundamental rights, we should consider all three of them in relation to one another. Because of equality and liberty, dignity is not a status such as *dignitas* or a moralistic vision of dignified behaviour. Because of dignity, equality is not symmetry but the right to be different, free from subordination; and because of liberty, equality is the claim to

Torture? What International Criminal Lawyers May Learn from the Recent Trial of Police Officers in Germany’ (2005) 3 J.Int’l Crim.J. 1059; Helen Keller & Magdalena Forowicz, ‘A Tightrope Walk between Legality and Legitimacy: An Analysis of the Israeli Supreme Court’s Judgment on Targeted Killing’ (2008) 21 Leiden J.Int’l L. 185.

170 FCC (*Aviation Security Act*), 1 BvR 357/05, BVerfGE 115, 118 (15 February 2006) (German constitutional court struck down act to allow passenger aircraft to be shot when used in terrorist attack, based on right to life in conjunction with right to liberty).

171 Baer, ‘Menschenwürde,’ supra note 139 at 129 (discussing dignity as right, principle, and point of reference in light of cultural taboo).

make different uses of one's liberties and not suffer from that. Thus equality, liberty, and dignity form a foundational triangle of constitutionalism. Again, this is not a lesson from history, since there are many lessons to be drawn from different narratives across time. This is also not a firmly established doctrine, although some legal decisions and scholarly analyses point toward the triangle. But it is, I argue, a productive way to stop those who use dignity to retrench equality rights or to justify paternalism, and to stop those who sacrifice dignity in states of emergency. Fundamental rights, if seen in light of one another, serve as reciprocal warnings against the isolated use of any one of them, or of any right merely to trump another. Each fundamental right has distinct meaning; yet they are not alone but are better understood as relating to one another, like a triangle.