



Does human germline genome editing violate human dignity? An African perspective

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ABSTRACT

It has been variously claimed that alterations to the human genome for reproductive purposes ought to be prohibited on the basis that doing so is contrary to human dignity. This claim leads to the conclusion that germline genome editing (GGE) ought to be categorically banned in all states committed to upholding human dignity as a right recognized in international human rights documents, and which has been entrenched in the constitutions of many liberal democracies. But is it the case that the right to human dignity is necessarily opposed to GGE? This paper explores this question through critical examination of the concept of human dignity in international human rights, and how it has been interpreted by individual states. Recognizing that the interpretation of human dignity is shaped by cultural context, the paper explores an African perspective on this issue, using South African constitutional jurisprudence on human dignity as an example. It concludes that when viewed through the lens of the African ethic of Ubuntu, there is no justification for a categorical prohibition on GGE, on the grounds that it is contrary to human dignity. This illustrates the need for a global discourse on the regulation on genome editing to be sensitive to varying perspectives—specifically on value-laden questions such as the interpretation of human rights.

KEYWORDS: Reproductive technologies, CRISPR-Cas9, germline gene editing, human dignity, human rights, bioethics

I. INTRODUCTION

In the global discourse regarding germline genome editing (GGE) in humans stirred up by the discovery of CRISPR-Cas systems, there has once again been an upsurge

in literature considering the question of whether using genetic technologies to select for particular genetic traits in future offspring is legally and ethically permissible.¹ A common thread in the debate is reference to the argument that alterations to the human genome for reproductive purposes ought to be prohibited on the basis that doing so is contrary to human dignity.²

A prominent example of this line of argument may be found in the Universal Declaration on the Human Genome and Human Rights (UDHGHR) produced by UNESCO's International Bioethics Committee.³ The UDHGHR does not directly address GGE, but it does contain certain provisions related to the manipulation of the human genome.⁴ Of particular relevance is Article 11, which provides: 'Practices which are contrary to human dignity, such as reproductive cloning of human beings, shall not be permitted'. This raises the question of whether GGE is a 'practice contrary to human dignity', which in turn begs the questions 'what is human dignity, and why does altering the human genome violate it?'. It is of high importance that these questions be answered, as the claim that the practice of using genetic technologies to alter the human genome is contrary to human dignity has potentially far-reaching consequences. If true, it would invariably lead to the conclusion that the use of genetic technologies like CRISPR—or other similar genetic technologies such as zinc finger nucleases and transcription activator-like effector nucleases—for GGE ought to be categorically banned in all states committed to upholding human dignity as a right, as recognized in international human rights documents, and which has been entrenched in the constitutions of many liberal democracies.⁵

At the heart of the debate surrounding human dignity and GGE, are issues such as the nexus of human moral worth.⁶ The varying perspectives on this issue are reflected in the two predominant conceptions of human dignity, namely, human dignity as a constraint to individual liberty and human dignity as the empowerment of individual liberty.⁷ This paper seeks to highlight how the former conceptualization is what the claim the GGE is contrary to human dignity is based on. However, this conception is not one that is universally accepted, particularly in states which place a high premium

1 See: Bartha Maria Knoppers & Erika Kleiderman, *Heritable Genome Editing: Who Speaks for "Future" Children?*, 2 CRISPR J. 285–292 (2019); Donrich Thaldar & Bonginkosi Shoji, *Procreative Non-Maleficence: A South African Human Rights Perspective on Heritable Human Genome Editing*, 3 CRISPR J. 32–36 (2020); Erika Kleiderman, Minh Thu Nguyen & Bartha Maria Knoppers, *Of the Rights and Best Interests of Future Generations*, 20 AM. J. BIOETH. 38–40 (2020).

2 See, for example, John Harris, *Germline Modification and the Burden of Human Existence*, 25 CAMB. Q. HEALTHC. ETHICS 6–18 (2016); Jodi Halpern et al., *Societal and Ethical Impacts of Germline Genome Editing: How Can We Secure Human Rights?*, 2 CRISPR J. 293–298 (2019); Seppe Segers & Heidi Mertes, *Does Human Genome Editing Reinforce or Violate Human Dignity?*, 34 BIOETHICS 33–40 (2020).

3 UNESCO INTERNATIONAL BIOETHICS COMMITTEE, UNIVERSAL DECLARATION ON THE HUMAN GENOME AND HUMAN RIGHTS (1997).

4 See, for example, article 4, which provides that '[t]he human genome in its natural state shall not give rise to financial gains'. In terms of this article, patents on the discovery of stretches of DNA and their functions shall not be patentable, but stretches of DNA modified by CRISPR-Cas9 may be, since the subsequent DNA sequence is no longer in its natural state.

5 Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT. LAW 655–724, 664 (2008).

6 See, the section 'Questioning the Basis of Human Moral Worth' below.

7 DERYCK BEYLEVELD & ROGER BROWNSWORD, HUMAN DIGNITY IN BIOETHICS AND BIOLAW 1 (2001).

on giving respect to human rights—which tend to prefer the latter conception. In addition to these two conceptions of human dignity, and in light of the recognition of the need of non-Western voices in the global debate on GGE,⁸ this paper also examines human dignity from an African perspective. This third conceptualization is based on human moral worth and the significance of the human genome, viewed through the lens of the Bantu philosophy of Ubuntu—the dominant ethic of African communities in sub-Saharan Africa.

It is important to clarify from the outset that the author does not purport to present the definitive African position on human dignity, as African philosophical thought is too varied and diverse to be reduced to a singular ‘African perspective’. Rather, the author here presents a view of human dignity which, is (i) based on an African theory of personhood that is seen as among the most prominent in the literature and jurisprudence; and (ii) relevant and useful to current debates, particularly as it advocates for a view of dignity which moves beyond the limiting binary of human dignity as either a constraint or empowerment. This, it is suggested, is illustrative of the wide range of views on human dignity—a diversity of views that has thus far been underexplored in the discourse on this topic.

The paper is divided into four sections. The first section explores the intersection between human dignity and the human genome, and why this connection has led to several states in Europe adopting a prohibitive stance on GGE. The second section explores more deeply the concept of human dignity, and how its role as the so-called foundation of international human rights flowed from the concept’s roots in Western philosophy. The third part examines how the concept of human dignity has been interpreted outside of Europe and North America, with reference to the human rights jurisprudence of South Africa. Finally, in the fourth part, this paper considers how human dignity may be understood from the perspective of the African philosophy of Ubuntu. In conclusion, I argue that human dignity—viewed through the lens of Ubuntu—does not accommodate an interpretation of human dignity that is necessarily hostile to GGE, rather, it requires that we acknowledge the freedom of individuals to use GGE technologies—provided such uses are not contrary to the Ubuntu ethic’s invocation that we act with ‘humanness’. Therefore, the analysis conducted in this paper ultimately proves that GGE does not necessarily violate human dignity when the concept is viewed through a non-Eurocentric lens and advises against categorical claims regarding human rights and the alteration of the human genome in the global discourse on CRISPR-Cas.

II. HUMAN DIGNITY AND THE HUMAN GENOME

In order to understand the argument that human dignity is violated by alterations to the human genome, it is necessary to refer to the Council of Europe’s Convention for the protection of Human Rights and Dignity of the Human Being with regard to the

8 Bonginkosi Shoji, *A Critical Review of the Ethical and Legal Issues in Human Germline Gene Editing: Considering Human Rights and a Call for an African Perspective*, 13 SOUTH AFR. J. BIOETH. LAW 62–67, 67 (2020).

Application of Biology and Medicine: Convention on Human Rights and Biomedicine.⁹ This document, commonly known as ‘the Oviedo Convention’, provides in Article 13 that:

An intervention seeking to modify the human genome may only be undertaken for preventative, diagnostic or therapeutic purposes and ‘only if its aim is not to introduce any modification in the genome of any descendants.’¹⁰

While not explicitly stated in this article, a reading of the Convention as a whole suggests that the various offences prohibited therein are deemed unlawful because they are contrary to human dignity as it is understood within the European Union (EU).¹¹ This is supported by the statement made by the European Parliament in the wake of the birth of the first cloned mammal, Dolly the Sheep. Amid discussions about the prospects of using cloning technology on humans, it was stated that the use of genetic technologies in humans ‘permits a eugenic and racist selection of the human race, it offends human dignity’, and that it must be prohibited in order to protect the rights of each individual to ‘his or her own genetic identity’.¹² This is similar to the view taken on interventions on the human germline taken in the UDHRHG mentioned above and seems to indicate a generally bioconservative view toward genetic selection (whether by reproductive cloning or GGE) held by those responsible for the development of these documents.¹³ But is this view that the use of genetic technologies to select for particular traits ‘offends human dignity’ justified?

Assertions about genetic selection being a violation of human dignity such as these have been met with skepticism because of the absence of a coherent account for human dignity, and the lack of a clear reason why an act such as genetic selection would infringe upon it.¹⁴ For instance, bioconservatives have frequently made claims along the lines that persons have a right to be born with a ‘unique genetic identity’, but this claim has been criticized on the grounds that it is unclear how a parent selecting for particular genetic traits of their prospective child can violate the so-called right to a unique genetic identity of a person who does not exist and is thus not a bearer of rights.¹⁵ It may be responded that this is because a child born with a modified genome will suffer harm by virtue of knowing they were born with a modified genome. However, as Timothy Caulfield observes:

9 Council of Europe, *Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine: European Treaty Series No. 164 – Oviedo*, 4.4. 1997, BEDEUT. PHILOS. FÜR RECHTSWISS. – DARGESTELLT AM BEISP. MENSCHENRECHTSKONVENTION ZUR BIOMED. 67–80 (2001).

10 *Id.*, article 13 (emphasis added).

11 DERYCK BEYLEVELD & ROGER BROWNSWORD, HUMAN DIGNITY IN BIOETHICS AND BIOLAW 30 (2001). See, also, Segers & Mertes, *supra* note 2, at 35.

12 European Parliament, *Resolution of March 12, 1997*, 40 OFF. J. EUR. COMMUNITIES 1–244, 92 (1997) at para B, and clause 1.

13 The term ‘bioconservative’, as used in this paper, refers to a school of thought in bioethics characterized by an aversion to biotechnologies because of the extent to which they are viewed as opposed to such concepts as ‘human nature’, the will of God, and the ‘sanctity of human life’. See, Shoji, *supra* note 8, at 64.

14 Deryck Beyleveld & Roger Brownsword, *Human Dignity, Human Rights, and Human Genetics*, 61 MOD. LAW REV. 661–680, 661 (1998).

15 BEYLEVELD & BROWNSWORD, *supra* note 9, at 161.

[I]t is the pressure or social expectations (expectations that are necessarily informed by an inaccurate view of the role of genes) placed on the individual clone that challenge the clone's human dignity, not the process of reproductive cloning.¹⁶

In a similar vein, in relation to GGE, Kerry Macintosh has recently outlined how unduly strict regulation of genetic selection propagates social and legal stigma, which may be more harmful toward children born with modified genomes than the knowledge of being born with a modified genome is likely to be.¹⁷ It is important to note that both sides of the argument regarding the future impact of GGE on the child to be are, at this point, speculation, due to the absence of empirical evidence. But what these arguments do establish are some of the patent difficulties in claiming that human dignity is violated by genetic selection.

It has also been claimed that genetic selection is contrary to human dignity, insofar as it treats the prospective child in an instrumental way, in the sense that it allows the prospective parent to 'treat the desirable genetic traits of their descendants as a product they can shape according to a design of their own liking'.¹⁸ Such claims place reliance on the Kantian concept of human dignity as constituted by the Categorical Imperative,¹⁹ as such, to treat an individual (ie the prospective child) as a means to an end, is to fail to show respect for their human dignity. This argument assumes that the act of genetic selection necessarily entails viewing a child as a mere end—a presumption that seems particularly inappropriate in relation to genetic interventions made for the well-being of the prospective child, such as to prevent the child from being born with a serious genetic disorder. Additionally, this argument entails a presumption that the use of genetic technologies emanates from the desire of parents to tailor the genes of their prospective children. Whether this is the case in reality, however, is disputable. Beyleveld and Brownsword argue that the interest of most parents in utilizing genetic technologies is not because they have an interest in determining their children's genes per se, but rather, in determining certain phenotypical features, which they believe to be controlled by genes. Therefore, 'they view genetic selection not as an end in itself, but merely as a means towards the selection of phenotypic characteristics'.²⁰ From this viewpoint, using preimplantation genetic diagnosis or handpicking donor gametes in order to select for particular genes is no different from having a child with someone who one views as having 'good genes'; these are all different paths that lead to the same destination: the selection of particular traits for the prospective child.²¹ Therefore, if it offends human dignity to use genetic technologies in human reproduction as one of the paths, it is not apparent why all these methods should not be prohibited. And yet, no country that prohibits GGE has similarly outlawed all alternative means of

16 Timothy Caulfield, *Human Cloning Laws, Human Dignity and the Poverty of the Policy Making Dialogue*, 4 BMC MED. ETHICS 3, 4 (2003).

17 Kerry Lynn Macintosh, *Heritable Genome Editing and the Downsides of a Global Moratorium*, 2 CRISPR J. 272–279, 276–277 (2019).

18 JÜRGEN HABERMAS, *THE FUTURE OF HUMAN NATURE* 13 (2003).

19 Beyleveld & Brownsword, *supra* note 14, at 664.

20 *Id.* 147.

21 A similar argument is progressed by Paul Rabinow in: *IS HUMAN NATURE OBSOLETE?: GENETICS, BIOENGINEERING, AND THE FUTURE OF THE HUMAN CONDITION*, 123 (Harold W. Baillie & Timothy K. Casey eds., 2004).

genetic selection—nor has this proposal been endorsed in UDHRHG or the Oviedo Convention.²²

The debates surrounding human dignity and its connection to the human genome discussed above are instructive of the contested nature of the concept of human dignity. The number of questions around dignity and how it might apply to genetic technologies has led some to dismiss the concept as being entirely useless, or to label allusions to dignity as little more than a guise to promote conformity with traditional morality.²³ These criticisms reinforce how reference to human dignity in the UDHRHG and the Oviedo Convention relies on a particular formulation of the concept, which is not universally accepted, and may not reflect the view of human dignity held by states who prize respect for human dignity but are not bound by commitments to these instruments. It is worth noting that the signatories of the Oviedo Convention (including non-EU members) are almost entirely either from Europe or North America.²⁴ The question then, for states seeking to develop policy relating to the use of genetic technologies in human reproduction such as CRISPR, is whether this vision of human dignity is the way in which the concept ought to be viewed globally. In order to explore this, in the next section, I consider how the concept of human dignity is understood in international human rights law—by reflecting on how this concept rose to prominence.

III. HUMAN DIGNITY IN INTERNATIONAL LAW

III.A. The International Bill of Rights

Human dignity enjoys a long and complex history as a concept in legal and philosophical thought. Its genesis is often traced to the Roman idea of *dignitas hominis*, which, roughly translated, means ‘status’ or ‘reputation.’²⁵ Unlike the now common-place view of human dignity as being universally possessed by all persons simply by virtue of being born human, *dignitas* was said to only be possessed by persons of distinguished social status, by virtue of which they were entitled to be treated with respect. Human dignity has since evolved into a distinct legal concept, apart from *dignitas*, influenced by early classical Roman writings on the concept of human beings as possessing unique moral standing.²⁶ In the modern era, human dignity has become one of the most prominent concepts in international human rights jurisprudence, as indicated by its foundational role in the texts of the so-called international bill of rights. The Universal Declaration on Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESAR), and the International Covenant on Civil and Political Rights (ICCPR) all contain in their preambles a declaration that human rights

22 And for good reason, for a law, which prohibited individuals from choosing specific partners or having free choice in choosing donor gametes, would clearly be a violation of their procreative freedom—a freedom entrenched in international human rights law through the freedom to form a family as per the UDHR. See, Bonginkosi Shoji, *Something Old, Something New: Applying Reproductive Rights to New Reproductive Technologies in South Africa*, 36 SOUTH AFR. J. HUM. RIGHTS 1–24 (2020).

23 Richard Ashcroft, *Making Sense of Dignity*, 31 J. MED. ETHICS 679–682, 680 (2005).

24 Council of Europe, *Chart of Signatures and Ratifications of Treaty 164*, TREATY OFFICE (2020), <https://www.coe.int/en/web/conventions/full-list> (accessed Sep. 2, 2020).

25 McCrudden, *supra* note 5, at 656.

26 *Id.* at 657.

emanate from a recognition of the ‘inherent dignity and of the equal and inalienable rights of all members of the human family.’²⁷

No definition of the concept emerges from either the UDHR, ICCPR or the ICESAR, and several scholars have expressed reservations about whether there even is one to be found.²⁸ These reservations are justifiable, given that it appears the use of the term in the UDHR is nothing more than shorthand for the ‘sanctity and ultimate value of human personality’, which is the statement that originally appeared in the original draft before it was abridged by the editors.²⁹ Furthermore, it seems that the indistinct nature of the term was both deliberate and an important factor in its inclusion. Its ephemeral nature allowed for a rhetorically compelling statement that is open to interpretation—and to ensure it remained that way, several parties involved in the drafting process insisted it remain uninterpreted.³⁰

Despite this, certain core elements have been observed by scholars, which elucidate, at least to some extent, what the drafters intended for its inclusion to convey:

These provisions are firmly tied to an important cluster of preambular ideas: namely, that each and every human being has inherent *dignity*; that it is this *inherent* dignity that grounds (or accounts for) the possession of human . . . ; that these are *inalienable* rights; and that because all humans have dignity, they hold these rights equally.³¹

Clearly, then, the possession of human dignity entitles human beings to special moral privileges in the form of human rights, but this naturally raises questions: What is the claim that human beings possess ‘inherent dignity’ based on? What is it that qualifies us for this special moral status?

III.B. The Foundation of Inherent Moral Worth

The answer most commonly given in response to the above-mentioned question is that we all possess some unique characteristic or trait inherent to human beings, which ascribes unique moral significance to us.³² The exact nature this characteristic, however, is heavily contested—and has been for a long time.³³ This was a point of contention among Western scholars during the Enlightenment, and while views diverged significantly, these scholars generally prescribe criteria such as self-awareness, or a sense of self that is maintained through time—as what made humans uniquely morally ‘special.’³⁴ This trend persisted beyond the end of the Enlightenment. At the birth of our modern epoch, Giovanni Pico della Mirandola wrote his ‘Oration on the

27 Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966 993 U.N.T.S. 3; S. Exec. Doc. D, 95-2 (1978); International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Rep. 102-23, 999 U.N.T.S. 171.

28 Beyleveld & Brownsword, *supra* note 12, at 661.

29 Paweł Łuków, *A Difficult Legacy: Human Dignity as the Founding Value of Human Rights*, 19 HUM. RIGHTS REV. 313–329, 319 (2018).

30 *Id.* at 321.

31 BEYLEVELD & BROWNSWORD, *supra* note 9, at 13.

32 *Id.* at 23.

33 John Doyle, *What Does It Mean to Be Human? Humanness, Personhood and the Transhumanist Movement*, 1 ETHICS BIOL. ENG. MED. 107–131, 107–108 (2010).

34 John Doyle, *What Does it Mean to be Human*, January 19, 2017.

Dignity of Man’, which became the manifesto of the Renaissance.³⁵ Mirandola argued that man has no archetype, and could thus determine his own nature through his own free will. It is this self-transformative power of man that he perceived as the basis for man’s dignity—as evident in his remark: ‘Oh wondrous and unsurpassable felicity of man, to whom it is granted to have what he chooses, to be what he wills to be!’³⁶ These kinds of arguments regarding the particular quality that makes humans worthy of special moral status, continue to be prominent in the domain of bioethics.³⁷

As alluded to above, the characteristic often described (or implied) to be the nexus of human beings’ moral worth is their unique capacity for autonomous choice. This is a concept that first gained popularity in Christian theological spheres, which advocated the idea of man alone having the capacity for free will, and it is this ‘gift from God’, which justifies why man must be treated as having special moral status, ie dignity.³⁸ The development of this line of thought during the Enlightenment led to the now common idea of the moral significance of man (and accordingly, his dignity) being founded on his capacity for reason.³⁹ Thus, to treat an individual with dignity has come to be commonly understood as showing respect for their capacity for autonomous choice, and, by extension, the choices they make. This vision of human dignity remained highly influential in the early 20th century when the first international human rights instruments were drafted, and when several prominent national constitutions were crafted—in the wake of World War Two. As McCrudden observes, there is an unquestionable correlation between the events of World War Two and dignity taking center stage, as reference to it prior to this point was ‘marginal’.⁴⁰ This is because the concept of human dignity in post-war constitutionalism was viewed as expressing the global response of repulsion to the horrific treatment of human beings during the war. This accounts for the rhetorical weight behind human dignity which the drafters of the UDHR sought to draw upon, while at the same time not committing the various member states to any well-defined obligations. It should be noted that the status of human dignity as foundational to human rights is heavily disputed.⁴¹ And yet this formulation of human dignity has, nevertheless, become quite prominent in constitutions around the world—particularly in Europe. This has been attributed to the far-reaching influence of Roman-Catholic thought as a result of colonialism, and the popularity of the German Basic Law—which has been highly influential in post-war constitutionalism, and for many states served as a model constitution.⁴²

35 GIOVANNI PICO DELLA MIRANDOLA, ORATION ON THE DIGNITY OF MAN (1996).

36 *Id.* at 8.

37 See, for example, FRANCIS FUKUYAMA, OUR POSTHUMAN FUTURE: CONSEQUENCES OF THE BIOTECHNOLOGY REVOLUTION (2003).

38 McCrudden, *supra* note 5, at 659.

39 *Id.* This is supported by Steven Pinker, where he describes the capacity and exercise of reason as one of the defining features of humankind as one of the defining themes of the Enlightenment, see: STEVEN PINKER, ENLIGHTENMENT NOW: THE CASE FOR REASON, SCIENCE, HUMANISM, AND PROGRESS 8 (2018).

40 McCrudden, *supra* note 5, at 664.

41 Łuków, *supra* note 29, at 314.

42 *Id.* at 314.

III. C. Two Concepts of Human Dignity

In light of this history, what are we to make of the meaning of human dignity as the foundational value which grounds human rights? In what is arguably the pre-eminent work on the concept of human dignity, ‘Human Dignity in Bioethics and Biolaw’, Derek Beyleveld and Roger Brownsword seek to respond to this very question. They observe that human dignity as a concept in international human rights has two core conceptualizations: human dignity as ‘empowerment’, and human dignity as ‘constraint’.⁴³ The former is observed in the number of human rights documents, which recognize the individual as having some manner of inherent moral worth by virtue of being human, and it is this moral worth—termed human dignity—which is the basis of all human rights and liberties.⁴⁴ The latter conception of human dignity is observed in provisions within international human rights documents where human dignity is referred to not as a quality possessed by a singular person, but rather by humanity as a whole.⁴⁵ This collective human dignity is something which, as members of the ‘human family’, we all have a duty to uphold. Thus it is often used as a justification for prohibiting what is deemed to not to be aligned with human dignity—in other words: undignified conduct.⁴⁶ As Beyleveld and Brownsword put it:

[I]f we think of respect for human dignity as one of the constitutive values of our society . . . , then those individual preferences and choices that are out of line with respect for human dignity are simply off limits.⁴⁷

There is undeniably a potential for conflict here, which becomes evident in cases where an individual’s human dignity empowers him or her to choose a course of action which the state or the general public perceive as offending human dignity. For example, while most perceive the freedom of sexual expression as a fundamental ingredient of human dignity, the prohibition of sodomy has been justified on the grounds that it ‘degrades human dignity’.⁴⁸

Conflicts of this nature often arise in the biosciences, as controversial technologies present possibilities, which some perceive to be unpalatable, while others view the use of these technologies to be an expression of their human rights.⁴⁹ This is precisely what has occurred in the debates around genetic selection. While some—such as the European Parliament—have used dignity as a constraint to justify prohibitions

43 BEYLEVELD & BROWNSWORD, *supra* note 9, at 1.

44 *Id.*

45 *Id.*

46 For ease of reference, I will use the expression ‘undignified conduct’ as shorthand for acts, which are deemed to be contrary to or violations of human dignity for the remainder of this paper.

47 BEYLEVELD & BROWNSWORD, *supra* note 9, at 23.

48 Living Zimbabwe, *Gays and Lesbians in Zimbabwe Fighting For Their Rights*, LIVING ZIMBABWE (2009), <http://www.livingzimbabwe.com/gays-and-lesbians-in-zimbabwe-and-their-rights/> (accessed Jul. 20, 2020).

49 Shozi, *supra* note 8, at 65. See, also: JOHN A. ROBERTSON, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* (2003); LEE M. SILVER, *REMAKING EDEN: HOW GENETIC ENGINEERING AND CLONING WILL TRANSFORM THE AMERICAN FAMILY* (2007); JOHN HARRIS, *ENHANCING EVOLUTION: THE ETHICAL CASE FOR MAKING BETTER PEOPLE* (2010); Julian Savulescu et al., *The Moral Imperative to Continue Gene Editing Research on Human Embryos*, 6 *PROTEIN CELL* 476–479 (2015).

of genetic manipulation, their opponents have also argued for a right to use these technologies by relying on human dignity as empowerment.⁵⁰ This speaks to what has been described as the ‘fragility’ of human dignity—which refers to the fact that the indistinct nature of the concept permits it to be formulated both for and against the same proposition.⁵¹

In conclusion, the use of the concept of ‘human dignity’ in international law is sufficiently open to interpretation that it cannot be definitively said that human dignity is either opposed or in support of GGE. As alluded to above, this appears to have been an integral element of its design. Rather than prescribing a singular meaning to human dignity, individual states are left free by the international bill of rights to give this concept their own interpretations. Ergo, whether a commitment to respect for human dignity demands the prohibition of GGE in any particular state is not something that can be determined with reference to international human rights documents alone, but, rather, turns on the conceptualization of human dignity within a particular state. To further illustrate this point, I now consider how the concept of human dignity has been interpreted in South Africa.

IV. HUMAN DIGNITY IN SOUTH AFRICAN LAW

IV.A. Overview of Constitutional Court Jurisprudence

Human dignity appears as one of the founding provisions of the South African Constitution:

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.⁵²

What’s more, human dignity is also one of the rights contained in the Bill of Rights in section 10, which provides:

Everyone has inherent dignity and the right to have their dignity respected and protected.⁵³

Human dignity has played a central role in setting the tone for South Africa’s new constitutional dispensation. It is often referred to as the ‘touchstone of the new political order.’⁵⁴ The influence of human dignity is so pronounced that Anton Fagan observes that: ‘In no legal system does human dignity play a greater role than in the South African one’, and it is for this reason South African law serves as a useful point of reference for the analysis of human dignity as a legal concept.⁵⁵

50 Segers & Mertes, *supra* note 2, at 38.

51 Beylveled & Brownsword, *supra* note 12, at 61.

52 S. Afr. Const., 1996 § 1.

53 *Id.* § 10.

54 S v. Makwanyane, (3) SA 391 (CC) para. 329 (S.Afr., 1995).

55 Anton Fagan, *Human dignity in South African law*, in THE CAMBRIDGE HANDBOOK OF HUMAN DIGNITY, 401 (Marcus Duwell et al. eds., 2014).

De Waal et al. remark that the central role played by dignity in both the drafting and development of the Constitution was strongly influenced by post-war European constitutionalism.⁵⁶ This legacy is credited for the conceptualization of human dignity as broader than placing a negative duty on the state to protect individual liberty, as it is also understood to place a positive duty on the state to use its power to realize a dignified life for its citizens by ensuring they are treated equally and that their socio-economic needs are met.⁵⁷

The South African courts have yet to provide a concrete meaning to human dignity,⁵⁸ but have acknowledged that at its most basic level it connects to the concept of inherent moral worth, as evidenced by the Constitutional Court's comments in *National Coalition for Gay and Lesbian Equality v. Minister of Justice*⁵⁹ that human dignity, 'requires us to acknowledge the value of and worth of all individuals as members of society.'⁶⁰ South African case law on human dignity further indicates a clear link between the recognition of the inherent moral worth of human persons, and the freedom of the individual to conduct themselves as they wish, which goes as far back as the Interim Constitution. In *Ferreira v. Levin* the Constitutional Court held:

Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity.⁶¹

Since the Interim Constitution, the value of human dignity has been held by the courts to be the foundation of freedom to exercise a wide array of individual rights, including the right to vote,⁶² the right to participate in the legislative process,⁶³ the right to choose a vocation,⁶⁴ and the right to security of tenure⁶⁵—to name a few. The connection between the exercising of human rights and the value of freedom made in these cases is an illustration of how Beyleveld and Brownsword term human dignity as empowerment, and highlight how this view of human dignity is central to South Africa's human rights jurisprudence. This is further evidenced by the fact that human dignity as empowerment is not only limited to rights contained in the Bill of Rights. It may also be observed in the number of cases relating to freedoms that are not—strictly speaking—provided for in the Constitution, including the freedom to own property,⁶⁶ freedom

56 JOHAN DE WAAL, IAIN CURRIE & GERHARD ERASMUS, *THE BILL OF RIGHTS HANDBOOK* 250 (2000).

57 *Id.* at 251.

58 *Id.*

59 *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, (1) SA 6 (CC) (S.Afr., 1999).

60 *Id.* para. 29.

61 *Ferreira v. Levin*, 1996 (1) SA 984 (CC) para. 40 (S.Afr.). This case was cited with approval in *M.E.C for Education, KwaZulu-Natal v. Pillay* 2008 (1) SA 474 (CC) para. 63 (S.Afr.).

62 *August v. Electoral Commission*, 1999 (3) SA 1 (CC) para. 17 (S.Afr.).

63 *Matatiele Municipality v. President of the Republic of South Africa*, 2007 (6) SA 477 (CC) para. 234 (S.Afr.); cited with approval in *Land Access Movement of South Africa v. Chairperson, National Council of Provinces*, 2016 (5) SA 635 (CC) para. 58 (S.Afr.).

64 *Affordable Medicines Trust v. Minister of Health*, 2006 (3) SA 247 (CC) para. 59 (S.Afr.).

65 *Daniels v. Scribante and Another*, 2017 (4) SA 341 (CC) para. 1–3, 7 (S.Afr.).

66 *Shoprite Checkers (Pty) Ltd. v. M.E.C for Economic Development, Eastern Cape*, 2015 (6) SA 125 (CC) para. 50 (S.Afr.).

of testation,⁶⁷ and freedom of contract.⁶⁸ The jurisprudence surrounding freedom of contract, in particular, speaks to how human dignity in South Africa exemplifies dignity as empowerment, in how the court judgments have routinely framed human dignity in terms emphasizing how closely tied it is to autonomy and self-determination. Relying on the oft-quoted dictum by Ngcobo J in *Barkhuizen v. Napier* that '[s]elf-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity'⁶⁹ —the court in *Paulsen v. Slip Knot Investments*⁷⁰ held that:

There is a countervailing policy consideration, also founded on constitutional values, which comes into play here. That is the respect for freedom of contract which, as this court has noted, 'gives effect to the central constitutional values of freedom and dignity'. Holding a debtor bound to the interest obligation contained in an agreement regardless of the double having been reached may be seen to accord with freedom of contract; and 'thus with the rights to freedom and dignity.'⁷¹

Despite the nexus between the founding value of freedom and human dignity evident here, human dignity has also occasionally been utilized as a justification for the limitation of individual freedoms.⁷² This may be observed in the judgment of *De Reuck v. Director of Public Prosecutions*,⁷³ in which the Constitutional Court upheld the constitutionality of the criminalization of the possession of child pornography. In this case, the Constitutional Court acknowledged that legislation providing for this may be a limitation of the rights to freedom of expression and privacy. However, it was held that the limitation was legitimate insofar as it served to protect the 'dignity of children':

Children's dignity rights are of special importance. The degradation of children through child pornography is a serious harm, which impairs their dignity and contributes to a culture which devalues their worth. Society has recognised that childhood is a special stage in life, which is to be both treasured and guarded. The State must ensure that the lives of children are not disrupted by adults who objectify and sexualise them through the production and possession of child pornography. There is obvious physical harm suffered by the victims of sexual abuse and by those children forced to yield to the demands of the paedophile and pornographer, but there is also harm to the dignity and perception of all children when a society allows sexualised images of children to be available. The chief purpose of the statutory prohibitions against child pornography is to protect the dignity, humanity, and integrity of children.⁷⁴

Note that Langa DCJ here mentions two separate 'harms' to dignity: (i) the physical and psychological harms to the dignity caused to children who are made to participate in child pornography, and (ii) the harm to the collective 'dignity . . . of children'. What may seem at first to be inconspicuous exposition on the foulness of child sexual

67 *B.O.E Trust N.O.*, 2013 (3) SA 236 (SCA) para. 27 (S.Afr.).

68 *Barkhuizen v. Napier*, 2007 (5) SA 323 (CC) para. 57 (S.Afr.).

69 *Id.*

70 *Paulsen v. Slip Knot Investments*, (3) SA 479 (CC) (S.Afr., 2015).

71 *Id.* para. 70 (emphasis added).

72 Fagan, *supra* note 55, at 402.

73 *De Reuck v. Director of Public Prosecutions*, 2004 (1) SA 406 (S.Afr.).

74 *De Reuck* para. 63.

exploitation, and the devastating impact this has on all children—upon closer inspection raises pressing legal questions. Most significantly, whether Langa DCJ is here to be understood as asserting that dignity, in addition to being a right held by individual children (as bearers of human rights), is also a right which is held collectively by all children.

Such an assertion would contradict the well-established legal principle that rights in the Bill of Rights are only afforded to legally recognized persons, (ie a bearer of rights), and so one cannot institute legal action for a breach of rights unless their own rights have been violated.⁷⁵ Additionally, if we accept that human dignity, as a right, can be attributed to an entire group of persons, then we must accept that an act may violate said dignity, even if no one individual's rights were directly affected. In such cases, we not only see human dignity being used as a constraint, but how that constraint has been justified (much like in the Oviedo Convention and UDHRHG) on what has been termed an 'extra-personal' account of human dignity.⁷⁶ While speaking of dignity in this way is not necessarily bad in law, and is convenient in expressing disapproval of heinous acts, the inherently vague nature of human dignity makes it quite difficult to ascertain exactly what acts are contrary to human dignity, and which are not—because of the absence of a person who is harmed by the act in question.⁷⁷

IV.B. Considering the Right to Human Dignity as Extra-Personal

To illustrate the dangers of an extra-personal account of human dignity, reference to the Constitutional Court judgment of *S v. Jordan* is necessary.⁷⁸ In this case, the Sexual Offences Act⁷⁹ was subject to a constitutional challenge on the grounds that section 20(1)(aA) of the Act, which criminalized prostitution, was a violation of several rights of sex workers—including the right to human dignity.⁸⁰ From the perspective of dignity as empowerment, it is easy to see how the criminalization of sex work constrains the autonomy of sex workers, and thereby, arguably, infringes their dignity—as the applicants in this case argued. But Ngcobo J, writing for the majority, did not agree with this view. He concluded that '[t]his case is concerned with the commercial exploitation of sex, which . . . involves neither an infringement of dignity nor unfair discrimination.'⁸¹ This finding was not preceded by any critical engagement with the concept of human dignity and its link with autonomy in South African human rights jurisprudence. Ngcobo J merely expressed his agreement with the conclusion reached in the judgment of the minority on the question of dignity,⁸² which stated:

75 See, *Christian Lawyers Association of SA v. Minister of Health*, 1998 (4) SA 1113 (T) (S.Afr.).

76 Donrich Jordaan, *Stem Cell Research, Morality, and Law: An analysis of Brüstle v. Greenpeace from a South African Perspective*, 33 *SOUTH AFR. J. HUM. RIGHTS* 429–451, 441 (2017).

77 It is worth noting that venturing into this problematic territory may not be necessary, as reliance on dignity as a constraint was not essential to Langa DCJ's conclusion regarding the unconstitutionality of child pornography.

78 *S v. Jordan*, 2002 (11) BCLR 1117 (CC) (S.Afr.).

79 *Sexual Offences Act 23 of 1957* (S.Afr.).

80 *Jordan* para. 27.

81 *Id.* para. 28.

82 *Id.* para. 1.

Our Constitution values human dignity which inheres in various aspects of what it means to be a human being. One of these aspects is the fundamental dignity of the human body which is not simply organic. Neither is it something to be commodified. Our Constitution requires that it be respected. We do not believe that section 20(1)(aA) can be said to be the cause of any limitation on the dignity of the prostitute. To the extent that the dignity of prostitutes is diminished, the diminution arises from the character of prostitution itself. The very nature of prostitution is the commodification of one's body. Even though we accept that prostitutes may have few alternatives to prostitution, the dignity of prostitutes is diminished not by section 20(1)(aA) but by their engaging in commercial sex work. The very character of the work they undertake devalues the respect that the Constitution regards as inherent in the human body.⁸³

The Court's approach to the question of dignity in this case has been heavily criticized for its lack of depth, flawed logic, and problematic reinforcement of harmful stereotypes about sex work—and justifiably so.⁸⁴ The above-quoted statement by the Constitutional Court is replete with confounding claims and non-sequiturs, and falls well short of the kind of thorough engagement such a sensitive topic calls for. This discussion will touch on but a few of the problems with how the court dealt with the application of human dignity in *Jordan*.

Firstly, the Constitutional Court in *Jordan* was called upon to consider the question of whether the criminalization of prostitution was a violation of the prostitute's right to dignity, which (as discussed above) encompasses their freedom to exercise autonomy and self-determination. The Court entirely side-stepped this question, instead of focusing on the so-called 'dignity of the human body'—thereby leaving a critical legal issue unresolved. This leads to the second major issue with the Court's statement quoted above: are we to understand the court as saying the human 'body' is a bearer of human rights? While there are provisions in the South African Constitution that refer to the human body, such as the right to bodily integrity,⁸⁵ it is readily apparent from the wording that these rights exist to protect the person, who is the bearer of rights, and not the body per se. This is made abundantly clear in section 12(2)(b), which provides that everyone has a right 'to security in and control over their body'. However, perplexingly, the Constitutional Court in *Jordan* took the view that human dignity favored not the prostitutes' right of control over their body, nor their entitlement to autonomy and self-determination, but the so-called dignity of the human body.

Given there is not a single provision in the Constitution, which suggests that the right to human dignity is 'inherent to the human body', one can only postulate that the language of the Court was intended to communicate the view that the act of prostitution was contrary to the Court's and the state's view of dignified conduct. This is reminiscent of the European Court of Justice's embrace of the extra-personal

83 *Id.* para. 74.

84 See, Rósaan Krüger, *Sex Work from a Feminist Perspective: a Visit to the Jordan Case*, 20 SOUTH AFR. J. HUM. RIGHTS 138–150 (2004); Elsje Bonthuys, *Women's Sexuality in the South African Constitutional Court*, 14 FEM. LEG. STUD. 391–406 (2006); Stewart Cunningham, *Reinforcing or Challenging Stigma? The Risks and Benefits of 'Dignity Talk' in Sex Work Discourse*, 29 INT. J. SEMIOT. LAW—REV. INT. SÉMIOT. JURID. 45–65 (2016); Ntombizozuko Dyani-Mhango, *Reflecting on Former Chief Justice Ngcobo's Approach to Gender Equality: Revisiting the Jordan and Volks Judgments: Research*, 32 SOUTH. AFR. PUBLIC LAW 1–33 (2017).

85 S. Afr. Const., 1996 §12(2).

account of human dignity, in order to legitimize the prohibition of activities, it viewed as morally repugnant; such activities ranging from the controversial act of patenting human pre-embryos, to more mundane and harmless pastimes like playing laser-tag.⁸⁶

Herein lies the fundamental problem with the extra-personal account of human dignity. It permits the framing of what activities are an affront to human dignity—in other words, what constitutes undignified conduct—to be based purely on the viewpoint of judges and lawmakers on that activity, which are often shaped by popular sentiment. This can lead to absurd and far-reaching consequences when we move beyond conduct that is widely accepted to be undesirable such as the sexualization of children and bestiality⁸⁷—to less clear cases where reasonable men and women may differ on whether a particular act is so morally objectionable as to be prohibited on the grounds that it is contrary to human dignity.

Take for instance, the renowned French case in which the courts held it was contrary to human dignity for women to wear burqas or other full-face coverings, even where women themselves wanted to wear them.⁸⁸ While one might retort that such a judgment could never be sustained in South Africa given prior judgments by the Constitutional Court on freedom of religious expression,⁸⁹ it is not apparent why a limitation to this effect could not be justified using the same reasoning as the court employed in *De Reuck* and *Jordan* above, namely: it is contrary to human dignity that a religion requires women to cover their bodies, and the dignity of the women's bodies is demeaned by this practice. Even if the women involved engaged in this practice freely and of their own volition, and thus no individual woman's right to dignity can be said to be infringed, a court may declare that the practice of head and face covering for religious reasons is contrary to the dignity of women. That this line of thinking, if employed by our courts, would be hostile to South African jurisprudence on the integral link between individual freedom and human dignity is patent.

Neomi Rao opines that the ability to use dignity to justify whatever position the judges prefer is part of the reason the concept has become popular with constitutional courts around the world:

Dignity may be appealing as a legal concept precisely because it obscures difficult choices about what we value and the type of freedom and rights we wish to protect. The obfuscation may allow judges to use dignity with the hope that it can mean a number of different things and that perhaps there need not be a tradeoff between the dignity of individual liberty and autonomy and the dignity of social belonging and equality. But the choices and tradeoffs between values are part of the human condition.⁹⁰

Dignity talk is thus used to avoid critical engagement about the nature of the balance between individual freedom and widely held opinions on a particular activity which is an exercise of freedom. If, '[s]elf-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part

86 *Jordaan*, *supra* note 76, at 12.

87 *S v. M*, 2004 1 BCLR 97 (O) para. 15, 24 (S.Afr.).

88 Conseil constitutionnel [CC][Constitutional Court] decision No. 2010-613DC, Oct. 7, 2010, J.O. 18345 (Fr.).

89 See, for example, *M.E.C for Education: KwaZulu-Natal v. Pillay* 2008 1 SA 474 (CC) (S.Afr.).

90 Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME LAW REV. 183-271, 190.

of dignity'⁹¹ and '[t]o deny people their freedom is to deny them their dignity';⁹² then it follows that a law which limits individual freedom violates human dignity, and as such may only stand if it meets the requirements prescribed in section 36 of the Constitution.⁹³ But, by relying on an extra-personal account of human dignity, courts have justified constraints on individual freedom without meaningfully engaging in the limitations inquiry—which exists precisely to resolve conflicts in the constitution.⁹⁴ Put differently, a limitation on autonomy does not need to meet the standards of being 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom' as long as the judges deem the act in question to not be dignified conduct, ie contrary to an extra-personal account of human dignity. In my view, that this can be the case undermines the rule of law.

The *De Reuck* and *Jordan* cases paint a picture of the danger of extra-personal accounts of human dignity being utilized in framing dignity as a constraint: it paves the way for arbitrary enforcements of pure morality dressed in human rights talk. And so, when judges and lawmakers speak of certain conduct as violating human dignity, such limitations may themselves be violating human dignity by failing to meet constitutional muster as limitations that are reasonable and justifiable in an open and democratic society. Our courts have thus far only alluded to the existence of an extra-personal human dignity in very few cases. As such, there has yet to be a critical assessment of this concept, and, in my view, the way it has been applied thus far would not survive proper judicial inspection.

I suggest that part of the reason for this is that the extra-personal account of human dignity—as employed by our courts thus far—is heavily steeped in Eurocentric ideologies about inherent moral worth, autonomy, and the limitation thereof, and therefore we ought to adopt an approach to utilizing dignity as a constraint in a way that recognizes our commitment to treating individuals with Ubuntu. In the following section, I expand on this argument.

V. AN AFRICAN PERSPECTIVE ON HUMAN DIGNITY

V.A. African Communitarianism and Genetic Determinism

The preceding discussion elucidates how the view of dignity as contrary to genetic selection espoused in the Oviedo Convention and UDHRHG is contingent on human personhood being linked to the concept of a unique human genome. This view of human dignity exemplifies genetic determinism, as it presupposes that the moral significance of the human person (ie their dignity) is intrinsically linked to their genomes.⁹⁵ To illustrate the extent to which this view of human dignity may be incompatible with

91 *Barkhuizen* para. 57.

92 *Ferreira* para. 40.

93 S. Afr. Const., 1996 § 36 provides that: '(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

94 *De Lange v. Methodist Church and Another*, 2016 (2) SA 1 (CC) para. 77 (S.Afr.).

95 Shoji, *supra* note 8, at 65.

the way the concept is understood in non-Western states, in this section I outline how the normative significance of the human person—and therefore human dignity—is viewed through the lens of the African normative philosophy of Ubuntu.

Before proceeding this discussion, it is important to reiterate that the argument presented in this paper (nor any other) cannot claim to present the sole and complete ‘African perspective’ on human dignity. There are varying perspectives on human personhood and, by extension, varying conceptions of human dignity in African philosophical thought.⁹⁶ For instance, notable scholars have suggested that human dignity emanates from human beings possessing a unique living essence or ‘divine spark.’⁹⁷ However, this paper focuses on a particular conception of human personhood based on the philosophical concept of Ubuntu, which grounds human moral worth in the capacity of humans for communal relations and the act of realizing this capacity throughout life, but in order to understand the reasons for this, it is first necessary to expand upon what Ubuntu is and why it matters.

Ubuntu refers to the philosophy observed in indigenous African cultures—predominantly in the sub-Saharan region—and loosely translated means ‘humanness.’ Reference to Ubuntu is prominent in ethics literature in Southern Africa, because it is said to embody the various areas of commonality in the value systems, beliefs, and practices of African cultures.⁹⁸ Muleki Munyuka and Mokgethi Motlhabi argue this is evidenced in how variations of the word ‘ubuntu’ feature in most African languages, and even in those languages in which it does not appear, the concept exists under a different name.⁹⁹

Ubuntu is a virtue ethic, in that it enjoins its adherents to ‘become a human being,’ by embodying the qualities which exemplify Ubuntu.¹⁰⁰ Central to this philosophical outlook’s perspective of human moral worth, is the idea that personhood is not a static property that one possesses from birth (whether by virtue of a gift from God, or by having unique genetic composition), but rather an ontological journey which one goes on as a member of a community.¹⁰¹ Thus, the status of personhood is something, which is achieved by behaving in a manner fitting of a human person, within a community.¹⁰² Michael O. Eze delineates this view of personhood from the Western perspective as such:

The term ‘person’ must be understood differently from the enlightenment codification of a person as essentially rational, where ‘rationalism’ remains a sole criterion for sub-

96 See, Thaddeus Metz, *Dignity in the ubuntu tradition*, in *THE CAMBRIDGE HANDBOOK OF HUMAN DIGNITY* 310–318, 312 (Marcus Duwell et al. eds., 2014).

97 *Id.* at 312–313.

98 Mogobe B. Ramose, *The Philosophy of Ubuntu and Ubuntu as Philosophy*, in *PHILOSOPHY FROM AFRICA: A TEXT WITH READINGS*, 230 (Pieter Hendrik Coetzee & A.P.J. Roux eds, 2002).

99 Muleki Munyuka & Mokgethi Motlhabi, *Ubuntu and its Socio-Moral Significance*, in *AFRICAN ETHICS: AN ANTHOLOGY OF COMPARATIVE AND APPLIED ETHICS*, 63 (Munyaradzi Felix Murove ed., 2009). A similar argument is made in T.W. BENNETT & P. JACQUES JACOBS, *UBUNTU: AN AFRICAN JURISPRUDENCE* 10 (2018).

100 Ramose, *supra* note 98, at 232.

101 Ifeanyi A. Menkiti, *On the Normative Conception of the Person*, in *A COMPANION TO AFRICAN PHILOSOPHY*, 49 (Kwasi Wiredu ed., 2008).

102 Pieter H. Coetzee, *Particularism in Morality and its Relation to Community*, in *PHILOSOPHY FROM AFRICA: A TEXT WITH READINGS*, 276 (Pieter Hendrik Coetzee & A.P.J. Roux eds, 2002).

jectivity. While we presuppose rationality to all persons, rationality need not be the only criterion to determine who is a human being. More critical for the current purposes is the understanding of a person as located in a community where being a person is to be in a dialogical relationship in this community. Accordingly, a person's humanity is dependent on the appreciation, preservation, and affirmation of other persons' humanity.¹⁰³

This theory of personhood, which I term the African communitarian theory of personhood, is central to the Ubuntu ethic. There are, broadly speaking, two tenets to this theory: (i) Personhood is essentially a journey of self-realization, and one progresses along this journey by acting in a morally upright or virtuous way; (ii) The attainment of said self-realization can only occur in communion with others (ie a community), because of the fundamentally social nature of the human being.¹⁰⁴

Clearly, the community here plays a crucial role. The point of the community, in terms of the communitarian view of personhood, is to be the prescriber of norms and values. Through communion with one's community members, the community imparts upon the individual the virtues, which ought to guide their journey of personhood, and these virtues are themselves developed and shaped through communal discourse. This relationship between the person and the community is demonstrated by renowned Ubuntu philosopher Mogobe B. Ramose, where he cites metaphorical expressions used by Sub-Saharan African communities as being illustrative of the African communitarian theory of personhood, such as the Sotho expressions 'ke motho' or 'gase motho'—words of affirmation said to a person, which literally mean 'he/she is a human person.'¹⁰⁵ This affirmation is not a literal recognition of a person as a member of the human species. Rather, it is a recognition that they have acted as a person ought to act toward other humans. This view of personhood may also be observed in the impact of this philosophy on the South African legal system. As evident from the words of Sachs J in *Port Elizabeth Municipality v. Various Occupiers*¹⁰⁶, the effect of Ubuntu has not been to depart from recognizing the value of the individual, but rather to redefine it.¹⁰⁷ Understood through the lens of Ubuntu, the moral worth of the individual, and legal rights, emanate from the deep desire to treat others with respect because such respect is essential to communal harmony—and not because of some ineffable quality shared by all humans by virtue of being human.

How does this relate to how one might perceive human dignity? Metz, who argues that the Ubuntu ethic provides the most tenable case for an African theory of human dignity, describes this theory as follows:

A . . . conception of human dignity that has a recognizably African pedigree is the idea that we are more special than rocks, plants and animals in virtue of our capacity for communal relationship. When it is said that a person is a person through other persons, we have seen that this means that one should develop one's personhood or virtue, something one does insofar as one enters into community with others. The relevant others with

103 Michael O. Eze, *What is African Communitarianism? Against Consensus as a regulative ideal*, 27 SOUTH AFR. J. PHILOS. 386–399, 387 (2008).

104 Motsamai Molefe, *Personhood and Rights in an African Tradition*, 45 POLITIKON 217–231, 225–226 (2018).

105 Ramose, *supra* note 98, at 232.

106 *Port Elizabeth Municipality v. Various Occupiers*, 2005 (1) SA 217 (CC) (S.Afr.).

107 *Id.* para. 37.

whom to commune, according to the present theory of dignity, are those who in principle are the ‘most capable of communing.’¹⁰⁸

In other words, according to the African communitarian theory of personhood, the capacity for personhood is the nexus of human dignity; however, this capacity alone does not make a complete person, as personhood must be actualized through dialogical human relations. As such individuals, must have the freedom to commune with other persons in their community (who also have this capacity), but the legitimate expression of this freedom requires individuals always treat others with Ubuntu.¹⁰⁹

The African communitarian theory of personhood provides a compelling reason to be skeptical of, and to depart from, the genetic determinism ingrained in the view of human dignity as espoused in the Oviedo Convention and UDHRHG. From the perspective of African communitarianism, all biology provides is the ‘capacity’ for acquiring moral virtue by giving a person the means to enter into dialogical relations with their fellow humans and form a community.¹¹⁰ But, it is only by engaging in dialogical relations with their fellow man that one can actualize personhood and fully become a bearer of rights and duties. Accordingly, ‘the composition of one’s genome is of little consequence, provided no alteration of the genome interferes with the capacity to—once born—become part of the community.’¹¹¹

Indeed, unlike bioconservative scholars who suggest that particular physical or cognitive traits, which are genetically determined, form the basis of what it is to be human, African scholars like Ifeanyi Menkiti maintain that ‘the African view of man denies that the person can be defined by focusing on this or that physical or psychological characteristic of the individual.’¹¹² In a similar vein, the lack of emphasis on the physical capacities of humans to establish moral worth in communitarianism was expressed by John S. Mbiti, where he remarked that the process of birth is inconsequential to the attainment of personhood: ‘Physical birth is not enough: the child must go through rites of incorporation so it becomes fully integrated into the entire society.’¹¹³ This statement by Mbiti is useful in conveying the relationship between the physical body and the metaphysical person in African communitarianism: personhood is not commensurate with conception; a particular stage of embryonic or fetal development; nor with birth, *per se*¹¹⁴—for a child born either without the capacity to commune (for instance, because they were genetically engineered to lack some feature fundamental to human connection such as empathy or emotion), would not be regarded as a person

108 Metz, *supra* note 96, at 315.

109 AUGUSTINE SHUTTE, *UBUNTU: AN ETHIC FOR A NEW SOUTH AFRICA* 30 (2001).

110 Kwame Gyekye, *Person and Community in African Thought*, in *PHILOSOPHY FROM AFRICA: A TEXT WITH READINGS*, 304 (Pieter Hendrik Coetzee & A.P.J. Roux eds, 2002).

111 For a similar argument regarding genetic enhancements, see: Thaddeus Metz, *Chapter 4 A Bioethic of Communion: Beyond Care and the Four Principles with Regard to Reproduction*, in *THE ETHICS OF REPRODUCTIVE GENETICS: BETWEEN UTILITY, PRINCIPLES, AND VIRTUES* 49–66, 62 (Marta Soniewicka ed., 2018).

112 Ifeanyi A. Menkiti, *Person and Community in African Traditional Thought*, 3 *AFR. PHILOS. INTROD.* 171–182, 171 (1984).

113 JOHN S. MBITI, *AFRICAN RELIGIONS & PHILOSOPHY* 141 (1990).

114 Interestingly, Metz uses this reasoning to argue that abortion and PGT are not necessarily unethical, even for the purpose of genetic selection, since the embryo lacks moral standing as a person. However, he does make the important qualification that this does not mean they do not have any moral worth at all. See, Metz, *supra* note 111, at 55–59.

proper.¹¹⁵ This is not to say that the human body/human genome is bereft of moral significance in the Ubuntu ethic. To be sure, because of the importance given to hereditary in African cultures, the genome as the unit of hereditary commands respect. But this respect does not entail co-opting the Western approach of tying the moral significance of human beings to their genomes, and thus equating genetic selection to human selection.

What this view means in practical terms for the ethical implications of genetic selection, is that if an individual were to use CRISPR to prevent their child from being born with Down's syndrome, this is not something which—from the perspective of the Ubuntu ethic—would constitute undignified conduct. This is because of how viewing personhood as determined by the 'capacity to commune'¹¹⁶ does not link the inherent moral worth of the human person to the human genome. That said, if a potential application of GGE technology caused a child to be born with no capacity for autonomy, this would render that child unable to engage with his community in the manner needed to develop his or her personhood, and become a fully actualized person. This kind of genetic modification would be viewed as undignified conduct.¹¹⁷ It is thus evident that—from an African communitarian perspective—one cannot justify a categorical prohibition of GGE by citing human dignity, but there may be grounds for prohibiting certain applications.

V.B. Viewing Human Dignity through the Lens of Ubuntu

In summation, the critique against the extra-personal account of human dignity is primarily that it relies on the attribution of legal rights to non-persons, that is, the construct of humanity as a whole or a particular society. An idea which, in liberal democracies like South Africa that view rights as something intrinsically tied to personhood, cannot hold. What's more, it views this collective right to human dignity as having equal standing with those of the individual, which as we have seen leads to significant in-roads on the freedoms of individuals, justified on poorly articulated ideas of what constitutes undignified behavior. Again, this is a problematic position for any state in which respect for individual rights is taken seriously, and are regarded as either wholly inviolable, or as only capable of being limited within specific circumstances. Simply put, human dignity as a constraint, based on the extrapersonal account, seems to be unjustifiable in the context of liberal democracy which regards respect for individual liberty as a highly regarded value. Does it then follow from this that dignity as empowerment is the lens through which the global discourse should assess GGE?

While this might be the case for some states, even with this conceptualization of human dignity, it is important to be mindful of the fact that it emerges from a particular philosophical tradition, and was shaped by a cultural reality, which is not universal. Once again drawing on the example of South Africa, this may be observed in the trend which has emerged from the interpretation of rights through the lens of Ubuntu as an acknowledgement of the need for individual autonomy to not be framed in an atomistic and overtly individualistic way. This was expressed in *South African Police Service v. Solidarity obo Barnard* as follows:

115 Note that this does not mean that such a person would have no moral status whatsoever. They simply could not be regarded as a person, and as a bearer of rights and duties, as other persons are.

116 I borrow this terminology from Metz. See: Metz, *supra* note 111, at 50.

117 This may also be an infringement of the right to human dignity of the prospective child.

An atomistic approach to individuals, self-worth and identity is not appropriate. This Court has recognised that we are not islands unto ourselves. The individual, as the bearer of the right to dignity, should not be understood as an isolated and unencumbered being. Dignity contains individualistic as well as collective impulses. Its collectivist attributes, including that we are 'social beings whose humanity is expressed through . . . relationships with others' find resonance in the South African idea of Ubuntu.¹¹⁸

What the Constitutional Court makes clear in this case is that while Ubuntu may be viewed in some ways as having collectivist leanings, the version of this does not preclude the existence and protection of individual human rights. This moderate formulation of communitarianism under Ubuntu has been endorsed by the Constitutional Court since *Makwanyane*, in recognition of the extent to which Ubuntu demands exhibiting concern and respect for others.¹¹⁹

However, it is important to also note that the Constitutional Court here speaks of the right to human dignity in a way that departs from the traditional Kantian deontological formulation of dignity as the moral worth of individuals as result of their capacity for reason, and thus holds that individual autonomy is infinite and inviolable. Instead, it alludes to the emphasis Ubuntu places on communal relations—which are the grounding of human personality and dignity. This is an important qualification, for as Fagan observes, there are difficulties in rationalizing the role of human dignity has in South Africa law in Kantian terms for a number of reasons.¹²⁰ For instance, in how it precludes human dignity from being 'infinite' and therefore not capable of ever being violated. In South African law all rights, including human dignity, may be limited under certain specified circumstances, as alluded to above, and human dignity has often played an active role in assessing the legitimacy of limitations.¹²¹ These difficulties, I suggest, speak to the divergence of views in the context of conceptualization of human dignity as empowerment, which requires individual liberties always win out, and human dignity viewed through the lens of African communitarianism, which requires a more nuanced approach to the promotion of individual liberties while also occasioning that collectivism not eclipse the significance of individual rights. I will expand on this view below.

These above-mentioned comments by South Africa's highest court speak to the fact that the inherently relational nature of human personhood in the Ubuntu ethic requires a departure from the adversarial conceptions of human dignity as empowerment or constraint. Instead, this view of personhood motivates moving toward an integrated view of person and community, in terms of which both the individual and the community are empowered and constrained by Ubuntu. In terms of this view, human dignity can be both empowerment and constraints, but there are boundaries regarding when the interests of the community should win out over individual freedoms.

118 *South African Police Service v. Solidarity obo Barnard (Police and Prisons Civil Rights Union as amicus curiae)*, (10) BCLR 1195 (CC) para. 174 (S.Afr., 2014).

119 *S v. Makwanyane*, (3) SA 391 (CC) para. 224 (S.Afr., 1995). For further references to cases that illustrate Ubuntu and as respect for persons, see C. Himonga, M. Taylor & A. Pope, *Reflections on Judicial Views of Ubuntu*, 16 POTCHEFSTROOMSE ELEKTRON. REGSBLAD 372–429, 412 (2013).

120 Fagan, *supra* note 55, at 404–405.

121 *Id.* at 404.

The reason for this is that the communitarianism of Ubuntu is prefaced on the recognition that culture is a central resource from which all members of the community draw their way of life, world view, and, to a large extent, their moral values. The corollary of this being that the community defines the outer limits of ethically permissible behavior. As Coetzee, puts it, ‘an individual’s way of life is a choice constrained by the community’s pursuit of shared ends.’¹²² In the Ubuntu ethic, these parameters are defined as conduct, which shows respect for the humanness of others—something which is shaped by communal consensus.¹²³ It is important, however, to be mindful of the fact that the communal nature of the Ubuntu ethic does not accommodate majoritarian determinations of right and wrong, nor can individual liberties be arbitrarily limited in the name of the community. As Gyekye describes, while the cultural community has ontological primacy as the origin of values, and the originator of the range of life goals individuals may pursue—it is not the case that the community has ‘an all-engulfing moral authority to determine all things about the life of the individual.’¹²⁴ Rather, in cases dealing with the conflict between the interests of individuals and communities, what Ubuntu calls for is not dominance by community or individual, but rather a recognition of their interrelated relationship, and a balancing of the interest of society against those of the individual.¹²⁵

Indeed, the dynamic between the individual and the community in African philosophy is designed to serve the ‘basic interests of all the members of the community’,¹²⁶ which are all identical, in that they consist of those interests that are common to all members of the community. This is to be a differentiated from the utilitarian aggregation of the interests of the members of the community—which may be described as that which does the greatest good for the greatest number—as well as the determination of what is in the public interest based on majoritarian consensus.¹²⁷ Rather, as Molefe puts it, the common good consists of the basic needs which all humans share.¹²⁸ It is for this reason that the ‘common good’ cannot be construed as demanding a course of action that is contrary to the interests of several members in the community, while simultaneously not clearly setting back the interests of any other individual in a substantial way—as is often the case with controversial biotechnology. And it is here we see the distinction between the African communitarian view of human dignity, and the extra-personal account—the extra-personal account of human dignity is based on the attribution of rights to the collective group of humanity or a society, and these so-called rights take precedence over individual liberties. However, from the perspective of African communitarianism, the rights of the individual are given recognition, and only limited where there is a strong, and evidenced communal interest that must be protected, or, to use the language of the South African Constitution, the proposed

122 Coetzee, *supra* note 102, at 275.

123 *Id.* 278.

124 Gyekye, *supra* note 110, at 301.

125 Makwanyane para 250.

126 Kwame Gyekye, *African Ethics*, THE STANFORD ENCYCLOPAEDIA OF PHILOSOPHY (FALL 2011 EDITION) (2010), <https://plato.stanford.edu/archives/fall2011/entries/african-ethics/> (accessed Jul. 15, 2020).

127 M.O. Eze, ‘What is African Communitarianism? Against Consensus as a regulative ideal’ (2008) 27 *South African Journal of Philosophy* 386–99, at 386.

128 Molefe, *supra* note 104, at 10.

limitation must be ‘reasonable and justifiable in an open and democratic society.’¹²⁹ Had the Court in *Jordan* and *De Reuck* considered the right to human dignity from the perspective of Ubuntu, it would not have been justifiable to treat the rights of the individuals involved in so arbitrary and superficial a manner as it did.

It is for these reasons that an extra-personal account of human dignity, which permits arbitrary limitations on individual autonomy, is unacceptable. It treats the individual in a paternalistic way. These kinds of limitations fail to show respect for the freedom of the individual, and thus fail to treat him or her with Ubuntu. They also attempt to justify this with a construction of communal interests/good which is out of step with the view of the common good which communitarianism demands. Accordingly, with regard to South Africa’s commitment to the value of Ubuntu, the country simply cannot accommodate an account of human dignity which constrains individual autonomy without meaningful engagement with whether there are significant justifications for this limitation.

The prohibition of GGE on the grounds that it is contrary to human dignity calls upon an unrestrained version of the extra-personal account of human dignity and seems founded on little more than the EU’s commitment to the view of genetic selection as being undignified conduct. Accordingly, the communitarian view of human dignity cannot accommodate the conceptualization of human dignity contained in the Oviedo Convention and the UDHR because of its reliance on this version of an extra-personal account of dignity, insofar as it seeks to elevate to the status of law a particular value judgment—even though it shares broad communal support. This approach is deficient in that it fails to account for the interests of individuals, who may have need and moral justification for genetic selection using GGE, and in so doing, fails to treat these individuals with Ubuntu.

VI. CONCLUSION

In conclusion, I have shown while it may be asserted by some that GGE is contrary to human dignity, a critical examination of the conceptualization of human dignity as used in these arguments reveals that they rely on an extra-personal account of human dignity to rationalize its use as a constraint. In South African law, however, human dignity is, in the main, viewed as empowerment—and where it has been applied as a constraint, I have argued that the court failed to meaningfully engage with this issue, as this view of human dignity may conflict with the core values of the Constitution insofar as it permits state or communal interest to completely overshadow the interests of the individual. I have further argued that, from an African perspective, the conception of human dignity found in the OVIEDO Convention and the UDHR is unconvincing, as its attribution of moral significance to a ‘unique genome’ and its framing of dignified conduct based on little more than popular sentiment are both contrary to African views on the moral significance of the person, and also contrary to the Ubuntu ethic. This illustrates the need for a global discourse on the regulation of genetic technologies to be sensitive to varying perspectives—specifically on value-laden questions such as the interpretation of human rights.

129 S. Afr. Const., 1996 § 36.

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