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CORE ANALYSIS

Questioning legal personhood: a critique of the legal and jurisprudential underpinnings of EU immigration and asylum law

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Abstract

Using the lens of immigration and asylum, this Article develops a new understanding of legal personhood on the basis of *equal human dignity*, as the interface between legal personhood, equality and human rights, in order to address the dual-faceted and opposing reality of immigrants and asylum claimants in relation to their equality as humans in the order of nature and their inequality within the social/political order of Europe, where they are subjected to a constant process of depersonification and reification. This reformulated approach to legal personhood not only seeks to remove the debasement and dehumanisation that has come to characterise European Union (EU) immigration and asylum law but also intends to address the limitations of the Common European Asylum System (CEAS) as a valid platform for translating the EU's own self-proclaimed commitment to human rights into justiciable normative claims.

Keywords: legal personhood; human rights; human dignity; EU immigration and asylum law

1. Introduction

The Article develops a new understanding of legal personhood using *equal human dignity* as the interface between legal personhood, equality and human rights in order to address the dual-faceted and opposing reality of immigrants and asylum claimants in relation to their 'equality' as humans in the *order of nature* and their 'inequality' within the *social/political order* of Europe, where they are subjected to a constant process of de-personification and reification. While the existence of humans in the biological sense may not be disputed, the existence and exercise of their rights – which may include fundamental rights enjoyed by other more privileged members of society – are dependent on the operation of law (and in particular on legal constructions of personhood), which may withdraw or temporarily withhold them.[1] Consequently, they may be unable to 'assert and/or enforce the society's recognition of their[2] existence or right to participate in society'.[3]

The proposed reformulated approach to legal personhood builds on a reconsideration of the triptych of equality, human rights and human dignity and their connection to legal personhood. The result is the formulation of *equal human dignity*, which is at the epicenter of the proposed new vision of legal personhood. The latter not only seeks to remove the debasement and

[1]KE Bravo, 'On Making Persons: Legal Construction of Personhood and Their Nexus with Human Trafficking' 31(3) (2011) Northern Illinois University Law Review 467, 476.

[2]In the original text 'his/her'.

[3]Bravo (n 1) 476.

dehumanisation that increasingly has come to characterise European Union (EU) immigration and asylum law, but also intends to address the limitations of the Common European Asylum System (CEAS) as a valid platform for translating the EU's own self-proclaimed commitment to human rights into justiciable normative claims. The central aim is to rethink the existing philosophy of EU immigration and asylum law so that they do not rest 'upon a theory of interpretation at the expense of a theory of justice',[4] thereby avoiding the risk of conceiving questions of justice in a way that wrongly excludes certain subjects from consideration, which in turn would lead to a situation of 'meta-injustice', ie the denial to 'press first-order justice claims in a given political community' in the form of 'meta-political misrepresentation'.[5] This situation 'arises when states and transnational elites monopolise the activity of frame-setting, denying voice to those who may be harmed in the process, and blocking creation of democratic arenas where the latter's claims can be vetted and redressed'.[6]

With that in mind and in order to meet its purported aim, the paper is structured as follows. Section 2 provides an analysis and critique of the concept of legal personhood. In this context it examines how it has been constructed over time and its significance in the field of EU immigration and asylum law, particularly in relation to the umbrella dichotomy of 'citizen-alien'. The examination sheds light on the role of law and, in particular, on how contemporary legal constructions of personhood can create preconditions of exploitation of vulnerable groups and individuals in society. The account purposely provides the basis for challenging these legal conceptualisations of personhood, which undermine immigrants and asylum claimants' human rights entitlements and effective protection, and for designing a new understanding of legal personhood. Section 3 offers an in-depth evaluation of human rights entitlement and its connection to legal personhood. After giving an overview of the different conceptual understandings of human rights and their functions for individuals in society, with a resulting normative disagreement over what they mean, what their role is and whom they are for, the Article proceeds to show how the way the correlation between a person and human rights is legally constructed can lead to a hierarchy or stratification of legal personhood, building on and strengthening the citizen–alien divide to the detriment of the latter. The remaining part of the section examines the way legal personhood is conceived as a foundation for human rights entitlement under International and European/EU human rights law. In this context, the analysis extends to selected cases of the European courts to show how their dynamic and purposive interpretative approach can help to dismantle legal stratifications of personhood and how they can have, therefore, a key protective function for immigrants and asylum claimants' socio-economic (and other) entitlements. Here the analysis is premised on a distinction between 'thin' and 'thick' legal personhood and is centred around the notion of substantive equality. Section 4 examines the concept of legal personhood in the context of EU immigration and asylum law. It starts with a critical assessment of the Return Directive (RD) and the treatment of irregular migrants, examining how the Court of Justice of the EU's (CJEU) hermeneutical approach helps to bring about a more protective function of the Directive. It then moves to EU asylum law, looking at material reception conditions in Europe and, in particular, housing rights. These two case studies have been selected as they concern an area of law and policy where ensuring adequate and dignified standards of human rights protection of certain vulnerable groups of third country nationals (TCNs) is particularly important. Section 5 first provides a detailed account of human dignity and its significance in legal and constitutional contexts. It then puts forward the legal concept of *equal human dignity* as the foundation for a reformulated approach to legal personhood. The conclusion brings together the main points and findings of the article.

[4]A Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law' 29(3) (2009) Oxford Journal of Legal Studies 549, 552.

[5]N Fraser, 'Reframing Justice in a Globalizing World' 36 (November/December) (2005) New Left Review 69, 77.

[6]Ibid., 85.

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2. Understanding the concept of legal personhood

A. The positioning of legal personhood in immigration and asylum

This Article analyses the notion of legal personhood in the context of the person/non-person divide, a conceptual scheme which is deeply embedded in Western legal thought and is employed to understand and categorise the norms of Western legal systems. Paradigmatic concepts such as legal personhood, legal subjectivity and subjective right are basic legal categories which underpin 'the conceptual space for modern law'.[7]

Legal personhood is a concept that elicits much discussion because of the diverse interpretations of the legal status(es) attached to personhood, that is, the nature of rights/entitlements and responsibilities/obligations, and *in primis* the required attributes for human beings to acquire legal personhood and be a subject of law.

What essential characteristics define and qualify personhood? Who is a person? Are, and should, all human beings be persons? Should we assume that personhood and humanity ought to (automatically) overlap? What is its relationship with equality of status and access to justice? What does it *mean* to be a legal person and to *be recognised* and *treated as such* in everyday life?[8] Does it signify access to all the tools and benefits provided by law? In answering these questions, the Article deliberately intends to problematise the paradigmatic concept of legal personhood in Western legal thought.

In legal scholarship and parlance there are numerous assumptions pertaining to the notion of legal personhood that are widely accepted and seldom challenged. Insofar as we can clearly distinguish persons from non-persons the individual components that make up personhood remain consistent with each other, that is, there is no conflict between them. However, legal disputes show that the law is rife with cases where the components of the notion of personhood pull in opposite directions.[9] It follows that the concept of personhood, in spite of having taken centre stage, is not as solid and reliable as it might appear at first sight.[10]

Using the lens of immigration and asylum in Europe, the Article revisits and reappraises orthodox understandings of legal personhood and seeks to depart from a dichotomic approach to the notions of legal subject and legal object. The intended aim is not a rejection of the main tenets of legal personhood but rather to demand a new understanding of it and its core elements.

It draws on critical constructivism[11] to unravel and challenge elitist assumptions that underlie existing knowledge and certain forms of knowledge production that have become pervasive in order to deconstruct and to revisit settled understandings and assumptions about legal personhood, thereby fostering the inclusion in mainstream discourse and practice of previously excluded and marginalised individuals and/or groups in society. It also builds on Thym's approach of 'contextually embedded doctrinal constructivism'[12] to reconfigure the notion of legal personhood on the assumption that 'law can also structure an extra-legal normative universe',[13] by creating 'new vocabularies for claim making', 'encouraging new forms of *subjectivity* to engage

[7]K Touri, *Critical Legal Positivism, Applied Legal Philosophy* (Routledge 2002) 186–8; VAJ Kurki, *A Theory of Legal Personhood* (Oxford University Press 2019) 4.

[8]In his seminal work on legal personhood, Kurki asks these questions probing the very essence of legal personhood in Western legal thought, Ibid., 3; emphasis added; see further, T Selkälä and M Rajavuori (eds), 'Special Issue. Traditions, Myths, and Utopias of Personhood' 18(5) (2017) German Law Journal 1017.

[9]JD Ohlin, 'Is the Concept of the Person Necessary for Human Rights?' 105 (1) (2005) Columbia Law Review 209, 230.

[10]The meaning of the term is contested and it is difficult to pin it down because 'it straddles not only metaphysics, biology, and religion, but also value theory, such as moral philosophy and the law', Ibid., 214.

[11]JL Kincheloe, *Critical Constructivism Primer* (Peter Lang 2005).

[12]According to Thym 'legal concepts can have a semi-autonomous significance and [. . .] academia may contribute to their rationalization', D Thym, 'Ambiguities of Personhood, Citizenship, Migration and Fundamental Rights in EU Law' in L Azoulai et al (eds), *Constructing the Person: Rights, Roles, Identities in EU Law* (Hart 2016) 111, 124.

[13]S Benhabib, 'Claiming Rights across Borders: International Human Rights and Democratic Sovereignty' 103 (4) (2009) American Political Science Review 691, 696.

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with the public sphere, and interjecting existing relations of power with anticipations of justice to come',[14] through a process of 'jurisgenerativity'.[15] The proposed reformulated approach to legal personhood builds on a reconsideration of the triptych of equality, human rights and human dignity and their connection to legal personhood. The result is the formulation of *equal human dignity*, which is at the epicenter of the proposed new vision of legal personhood.

The Article probes the ontology of contemporary legal constructions of personhood and their necessity for immigrants and asylum claimants' human rights entitlement and effective protection. In this context, it looks at the role of law and, in particular, at how legal constructions of personhood can create 'preconditions of exploitation of vulnerable groups and individuals'[16] in society. It is posited that law plays a decisive role in shaping and defining the identity and place of individuals and categories of people within societies and communities. Legal norms may either provide for or facilitate racial, economic and other forms of subordination or permit exploitation, more or less in an overt manner. While contemporary laws, including international human rights instruments may prohibit *de jure* multi-faceted forms of abuses, current legal doctrines and practices may facilitate *de facto* exploitation.[17] Hence, as constructed legal personhood 'is also a power dispositive[18] whose unquestioned adoption prevents human rights from being the kind of rights possessed by "all human beings simply in virtue of their humanity"'.[19]

Put differently, there can be instances where there is no reference to personhood *in* law and yet legal attributes of personhood are granted or withheld *by* law.[20] This occurs when the law breaks all or some links between personhood and 'humanity': when the legal notion of person coincides with the biological meaning of 'human being' as a pre-condition for a full set of entitlements, legal norms will provide for full personhood both within the *order of nature* and within the *social/political order*; conversely, when the legal notion of person is made to coincide with the narrower notion of 'citizen-national' as a pre-condition for a full set of entitlements, then legal norms will provide for full personhood only within the legally constructed *social/political order*. What follows is an asymmetry between the *order of nature* where all human beings are equal (and treated as equals) and the *social/political order* where human beings are not all equal (and are not all treated equally). This argument is visually illustrated in Figure 1.[21] At the centre of the graph we have the individual; on the left side we have the 'socio-political status' of the individual, namely, personhood and the 'legal-political status', namely 'nationhood' on the right.[22] At the top end of the graph, we have the 'biological status', namely, the individual as a 'human being'. At the opposite end of the spectrum, we have 'citizenship', corresponding to a full legal status. The double

[14]Ibid., emphasis added.

[15]Ibid., 695–99.

[16]Bravo (1) 469.

[17]Ibid., 472.

[18]G Agamben, *What Is an Apparatus? And Other Essays* (Stanford University Press 2009); R Esposito, 'Dispositif of the Person' 8 (1) (2012) Law, Culture & the Humanities 17–30.

[19]M Vatter and M de Leeuw, 'Human Rights, Legal Personhood and the Impersonality of Embodied Life' 19 (1) (2019) Law, Culture & the Humanities 106, 107 also citing J Tasioulas, 'On the Nature of Human Rights' in J-C Heilinger and E Gerhard (eds), *The Philosophy of Human Rights: Contemporary Controversies* (Walter de Gruyter 2011) 17, 26.

[20]Bravo (n 1) 474.

[21]The argument here presented employs and, to some extent, re-interprets Rancière's concepts of *order of nature* and *social order*, J Rancière, 'Who is the Subject of the Rights of Man?' 103 (2/3) (2004) South Atlantic Quarterly 297–310 and A Schaap, 'Enacting the Right to Have Rights: Jacques Rancière's Critique of Hannah Arendt' 10 (1) (2011) European Journal of Political Theory 22–45. The structure of this diagram is a reproduction of the Nolan Chart created by the American libertarian activist David Nolan, which is used to provide a basis for carrying out political view analysis. While I rely on the actual structure, the purpose and the way it is here used differ. See D Nolan, 'Classifying and Analyzing Politico-Economic Systems' *The Individualist* (January 1971) 5–11; further information available at: <https://libertarianism.fandom.com/wiki/Nolan_Chart#References> accessed 15 July 2023.

[22]Art 2 of the European Convention on Nationality which defines 'nationality' as the legal bond between a person and a State, Council of Europe, *European Convention on Nationality* (6 November 1997) ETS 166.

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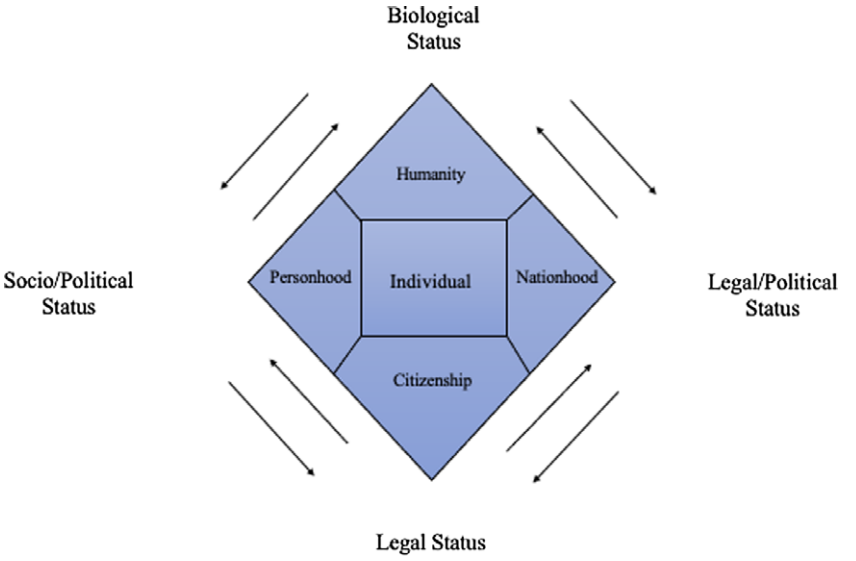

Figure 1. The Human Being Chart.

axes on the four sides of the spectrum indicate the interactive and interdependent relationship between each status and how this dynamic relationship directly impacts on the status and treatment of an individual. If the law was to conceive and premise the notion of person (= Legal Status) as a 'Human Being' (= Biological Status) for both 'Citizens' and 'Aliens' then there would not be any asymmetry between the *order of nature* where all human beings are equal (and treated as equals) and the *social/political order* where human beings are not all equal (and are not all treated equally). Conceived in this way, the concept of personhood has a broader remit in comparison with the narrower notions of 'Citizenship' and 'Nationhood' and it would not require membership to a given community (= Political Status) to be entitled to equal and fair treatment before the law.

Hence, the power of states to decide whether, to what extent, and under what conditions individuals who are not members of a given political community or society – the 'outsiders' – may, firstly, enter its territory and, secondly, share certain material rights brings with it the view that an individual is more deserving by virtue of his or her status as citizen or national – the 'insider' – than an individual who is not,[23] illustrating how the law is instrumental to stratifications of personhood. The orthodox conception of legal personhood is also intertwined with Westphalian conceptions of state sovereignty and territoriality thus encompassing also jurisdictional questions.[24] 'The (international) legal identity of the individual or collective Self is conceived as part of a broader concept of personal or collective identity'.[25] To put it differently, international legal personhood is premised and constructed on the same orthodox conceptualisation of legal personhood in relation to the individual. Nijman explains this very clearly in saying that the 'individual and the collective (eg the state) Self are (philosophically) intertwined. This is

[23]S Velluti, 'The Revised Reception Conditions Directive and Adequate and Dignified Material Reception Conditions for Those Seeking International Protection' 2 (3) (2016) International Journal of Migration & Border Studies 203, 204; see also SS Juss, 'Complicity, Exclusion and the Unworthy in Refugee Law' 31 (3) (2012) Refugee Survey Quarterly 1–39.

[24]L Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton University Press 2006).

[25]JE Nijman, 'Paul Ricoeur and International Law: Beyond 'The End of the Subject'. Towards a Reconceptualisation of International Legal Personality' 20 (2007) Leiden Journal of International Law 25, 31.

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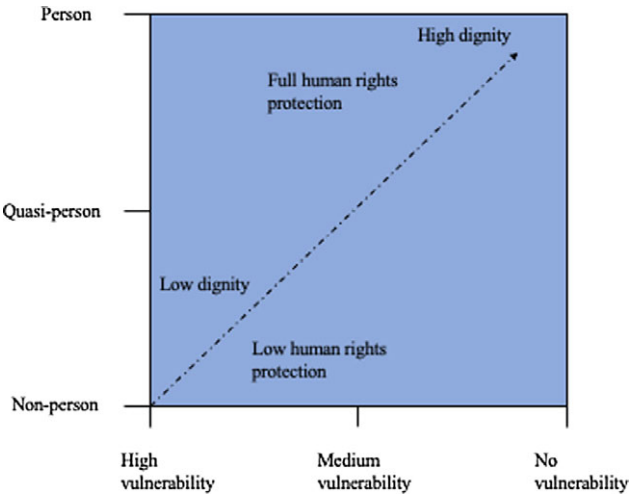

Figure 2. The Vulnerability Chart.

self-evident as the individualist, subjectivist perspective has marked the deep structure of international law'.[26]

Law and, specifically, legal constructions of personhood acting as legal fictions can create 'legal disabilities' to which some human beings can be subjected, by way of exclusion from a set of legal protections[27] and material rights. In turn, this can lead to the creation of an inferior form of legal personality, namely, a quasi- or semi-personhood that invites different forms and degrees of victimisation and vulnerability.[28] Figure 2 illustrates how this stratification of personhood operates: the lower the level of legal recognition as a person the lower the level of human rights protection and the moral worthiness of an individual and their dignity *de jure* and/or *de facto*. In this context the notion of private property:

> fulfils an important ideological function in assuring the *prioritisation* of property and the interests of the propertied in liberal legal systems. This explains why entities serving the interests of propertied elites present no difficulty as putative legal persons, unlike the marginalised human beings who can never represent paradigmatic instances of legal personhood.[29]

The Article relies on Bravo's[30] contextualised understanding of personhood and the status of person in society defined as:

> the legal recognition of the rights, duties, and obligations (including, for example, human rights and civil rights) that enable access to the full range of human potential of individuals and groups in a given society. Recognition (or non-recognition) and enforcement (or lack of

[26]Ibid., 26.

[27]Bravo (n 1) 469.

[28]Ibid.; on the notion of vulnerability in Europe, see U Brandl and P Czech, 'General and Specific Vulnerability of Protection-Seekers in the EU: Is There an Adequate Response to Their Needs?' in F Ippolito and S Iglesias-Sánchez (eds), *Protecting Vulnerable Groups* (Hart 2015) 247–70; S Iglesias-Sánchez, 'Irregular Migrants in Europe: Deprivation of Status as a Type of State-Imposed Vulnerability' in F Ippolito and S Iglesias-Sánchez (eds), *Protecting Vulnerable Groups* (Hart 2015) 429–51.

[29]E Blanco and A Grear, 'Personhood, Jurisdiction and Injustice: Law, Colonialities and the Global Order' 10 (1) (2019) Journal of Human Rights and the Environment 86, 100.

[30]Bravo (n 1) 475.

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enforcement) of such rights by the legal system interact with economic, social, cultural, and political forces such that it is not solely the legal personality of affected groups and individuals that is shaped and constructed; those factors also affect their capacity to function as equals within a society.

This definition will be used as the Article's lens of analysis. It builds on Rancière's[31] critique of Arendt's vision of human rights according to which the subject of human rights emerges through a process of political action and speech in order to verify the existence of and exercise those rights 'that are inscribed within the self-understanding of the political community'.[32] According to Rancière it is precisely through this process that political subjects demonstrate the reality of both their 'equality' as humans within the *order of nature* and their 'inequality' within the *social order*. On this account, immigrants and asylum claimants can demonstrate, on the one hand, that they do not enjoy the full set of rights that they are supposed to have according to various international human rights treaties: by making public their exclusion immigrants and asylum claimants draw attention to their plight and the ways in which they are denied the same universal human rights from which states claim to derive their legitimacy. On the other hand, by raising awareness of their situation they act as political subjects and demonstrate, therefore, that they have legal entitlements despite the fact that they cannot (fully) enjoy them. In so doing, they demonstrate their 'equality' as humans, despite being excluded from politics and being deprived of legal personhood.

While legal personhood, as traditionally construed, intends to grant all humans an inherent and equal recognition before the law, positive law limits or can also negate these rights as it ties rights to the nation-state through an idea of citizenship based on membership to a domestic political community.[33] With countries withholding or limiting the attributes of full personhood, immigrants and asylum claimants are made vulnerable through exclusion from the more privileged status of 'citizen-national'.[34] Moreover, such a narrow notion of legal personhood does not capture the various porous phases of legality and illegality/irregularity that they can be forced to go through.

B. Legal personhood: past and present

In a traditional sense legal personhood is not controversial. Reference to persons or legal persons as legal subjects can be found in abundance in the law, particularly (but not limited to) that of civil law traditions.[35] The notion of legal subject refers to an entity – either a natural or a juristic person – recognised or accepted as being capable of holding rights, duties and capacities, and legal object as something or someone in respect of which a legal subject may hold rights, duties and capacities.[36]

Historically, not all human beings qualified as legal persons.[37] Under Roman law slaves were not considered to pertain to the category of *persona*; rather they were characterised as *res*, that is, as an object.[38] Thym maintains that Roman jurists employed the term largely to describe a human

[31]Rancière (n 21).

[32]Schaap (n 21) 34.

[33]E Guild, *The Legal Elements of European Identity: EU Citizenship and Migration Law* (Kluwer International 2004) 235.

[34]For an examination of nationality as a mechanism for exclusion and for keeping inequalities in place, see K de Vries, 'The Non-national as "The Other" What Role for Non-discrimination Law?' in J Moritz (ed), *European Societies, Migration, and the Law. The 'Others' amongst 'Us'* (Cambridge University Press 2020) 192, 193–8.

[35]See further J-R Trahan, 'The Distinction Between Persons & Things: An Historical Perspective' 1 (1) (2008) Journal of Civil Law Studies 9–20.

[36]A Skelton et al, *The Law of Persons in South Africa* (Oxford University Press 2010) 11–3; Kurki (n 7) 7, 11–2.

[37]Thym (n 12) 112.

[38]This was certainly the case in the fully developed Roman Law; see ES Shumway, 'Freedom and Slavery in Roman Law' 49 (11) (1901) University of Pennsylvania Law Review 636–53. For further analysis, see S Drescher and P Finkelman, 'Slavery' in

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being and that the primary contribution of Roman law is to have focused on the *status* or rather *stati* of a person, such as for example *status libertatis*, *status civitatis* and *status familiae*.[39] This status-oriented approach was subsequently utilised by civil law jurisdictions to describe categories of legal relations between members of society without much legal substance or conceptual depth up to the 18th century. The more substantive concept of personhood, which is closer to today's notion of personhood was developed by natural lawyers and moral philosophers defining person as a self-reliant moral actor and a legal subject who is entitled to and exercises rights, this being inherent in all human beings.[40] This understanding of personhood is intertwined with human dignity which is at the basis of contemporary ideas of human rights as unalienable entitlements.[41]

German 19th-century theories of law, rights and legal personhood – inspired largely by Roman civil law – have had a significant impact on certain core aspects and categories of legal personhood, which are still used in present times in many civil law countries. One of their most important contributions is the fundamental classification of natural persons (*natürliche Personen*; *personnes physiques*) – denoting human individuals who are legal persons – and artificial or juristic persons (*juristische Personen*; *personnes morales*), meaning any other type of legal persons, such as associations, limited liability companies, and foundations, all of which can own property and enter into contracts using their own legal names.[42] Additionally, civil law scholars often contrast the legal person (*persona*) with the legal thing (*res*). Legal thinghood can have three meanings. First, 'thing' can refer to anything, or at least any physical object, that is susceptible to being owned. This understanding is reflected in phrases such as 'rights *in rem*' ('rights to things', namely, property rights) as opposed to 'rights *in personam*' ('rights in relation to persons', such as contractual rights). Second, *res* according to ancient Roman law denoted largely what we refer to as rights and duties. This meaning is still used today, such as for example, the common-law phrase 'thing in action' (or 'chose in action'), basically referring to the right to sue. Third, and in its broader meaning, 'thing' can denote anything that is not a person.[43]

From this perspective, everyday life comprises a network of clearly identifiable legal relationships among legal subjects concerning their rights or duties and covering claims that a legal subject has or may have on a legal object.[44] As Nijman eloquently puts it: 'legal personality is a mode of identity (ie the ethical–moral identity of the Self) at a particular scale: in relations with a third person or Other mediated by cosmopolitan institutions'.[45] In this context, it is possible to discern two types of relationship: a 'subject–subject relationship' between the bearer of the right and other legal subjects, and a 'subject–object relationship' between the right-bearer and the legal object of his or her right.[46] To put it differently, the status of 'person in law' is granted to beings designated by the law as 'right-holders' even though in certain circumstances those same persons become 'objects of rights' and 'objects of obligations' (or 'duty-bearers') held by other persons in law.[47] Here, Kurki suggests introducing a distinction between 'legal subject' or 'legal person', which is a cluster concept (discussed below), and 'subject of law/right(s)' (*rechtssubjekt*; *sujet de*

B Fassbender and A Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012) 890–916.

[39]Thym (n 12) 112–3.

[40]Ibid., 113.

[41]Ibid.

[42]Kurki (n 7) 7.

[43]On this and for further detailed historical analysis, see Kurki (n 7) Ch 3.

[44]S Velluti, 'Beyond Rhetoric? Social Conditionality in the EU's External Trade Relations' in S Bardutzky and E Fahey (eds), *Framing the Subjects and Objects of Contemporary EU Law* (Hart 2017) 243, 245.

[45]Nijman (n 25) 31.

[46]Skelton et al (36) 11–3; there is some resonance here with Hohfeld's concept of rights; this notion is used insofar as it helps us to understand the meaning and purpose of rights and how they relate to certain aspects of legal reasoning and legal interpretation; see WN Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' 26 (8) (1917) Yale Law Journal 710.

[47]T Pietrzykowski, *Personhood Beyond Humanism* (Springer 2018) 1, 7.

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droit), which is a term referring to one's status within a field of law or with regard to a legal institution.[48] Being merely a 'rights-holder' or an 'object of rights' or 'duties' ascribed to others should not qualify an entity as such, but it does. In spite of its putative neutrality[49] the legal construct of the person thus performs a political function.[50] Within the traditional realm of legal personhood, including legal philosophy and ethics, the notion of person has been deployed to denote beings or entities considered worthy of moral and/or legal concern, to the exclusion of others.[51] This can lead to inequity and injustice, which can occur also through homogeneity without there necessarily being willful intent.

Structurally, legal personhood is co-constitutive with the attribution of legal rights.[52] In this sense Douzinas maintains that: 'the subject is a creation of the law, an artificial entity which serves as the logical support of legal relations. Right and subject come into life together',[53] though the actual content of the relationship will change, also in the light of various theories of rights and legal personhood.[54]

C. Unpacking legal personhood

While there is no agreement about how precisely to elaborate a definition of legal personhood and there is thus no universally accepted notion, the key element of traditional approaches to legal personhood seems to be the ability to bear rights and duties.[55] Relatedly, and drawing on the *capacities* of legal persons taxonomy, we can identify *passive* and *active* elements of legal personhood, each referring broadly to the categories of *legal capacity* and *legal competence*.[56] The term person is thus used to configure the legal personality of actors within society, ie their rights and obligations within the framework of a given state's or polity's policies and ideals.[57] From this perspective, Ohlin[58] talks about personhood as a 'cluster concept', which is well-explicated by Naffine[59] who maintains that:

> Legal personality is made up of a cluster of things: specifically, it comprises single or multiple clusters of rights and/or duties, depending on the nature and purpose of a particular legal relation. Rights and duties [...] can come in thick and thin bundles, in larger and smaller clusters, which means that we are actually *different legal persons* in *different legal contexts*.

Similarly, Kurki considers legal personhood as a 'cluster property' consisting of 'incidents', which are separate but interconnected; these incidents can have an active and passive dimension

[48]Kurki (n 7) 122.

[49]For example, Art 6 UDHR affirms everyone's 'right to recognition everywhere as a *person* before the law'. Emphasis added. See also the 2008 UN Convention on the Rights of Persons with Disabilities; Art 12(1) provides that: 'States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law'; United Nations Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) UNTS 2515 Art 12.

[50]Blanco and Grear (n 29) 99.

[51]Ibid.

[52]Ibid.; for critical analysis see Section 3.

[53]C Douzinas, *The End of Human Rights* (Hart 2000) 233.

[54]A Nékám, *The Personality Conception of the Legal Entity* (Harvard University Press 1938); A Peacocke and G Gillet, *Persons and Personality: A Contemporary Inquiry* (Blackwell 1987); N Naffine, 'The Nature of Legal Personality: Its History and Its Incidents' in M Davies and N Naffine (eds), *Are Persons Property? Legal Debates about Property and Personality* (Ashgate 2001) 51–73.

[55]A Dyschkant, 'Legal Personhood: How We Are Getting It Wrong' 5 (2015) University of Illinois Law Review 2075, 2076; B Smith, 'Legal Personality' 37 (3) (1928) Yale Law Journal 283–99; *Black's Law Dictionary* (9th ed) 791; Kurki (n 7) 39.

[56]N MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford University Press 2007) 77.

[57]Bravo (n 1) 4.

[58]Ohlin (n 9) 229–33.

[59]N Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin, and the Legal Person* (Hart 2009) 46; emphasis added.

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involving the endowment of a given person with particular types of claim-rights, responsibilities, and/or competences.[60] Here we can draw further on Hohfeld's eight-term schema for the analysis of legal relations, on the basis of which all legal relations are a combination of eight 'atomic' (or 'basic') legal positions, which can be metaphorically described as 'molecules'.[61] When we link this schema to rights we find that most rights have a complex internal structure because they are 'ordered arrangements' of basic components, just as molecules are 'ordered arrangements' of chemical elements.[62] In this context, we can distinguish 'first-order' from 'higher-order' Hohfeldian positions.[63] Broadly, 'first-order positions' establish whether a given conduct is required, permitted or forbidden, whereas 'higher-order positions' define how legal relations can be changed and are only indirectly associated with whether a conduct is permissible or compulsory.[64] 'First-order positions' are: *duty*, *privilege* (also known as *liberty*), *claim-right* (also labelled simply as *claim* or *right*), and *no-right* (sometimes known as *no-claim*). A person who has the *duty* to a certain conduct that is required under the terms of some legal norm(s) entails that another person has a *claim* (or a *claim-right*) to this conduct. This correlative axiom entails that with every conduct or action there will always be a *duty* towards another party.[65] The other key correlatives are *liberty* (also known as *privilege*) and *no-right* (occasionally labelled *no-claim*). If the content of an act provides that it is to be done by the 'right-holder', then the right in question is actually a *privilege*; if the content establishes that the act is to be done by the holder of the correlative, then the right is a *claim-right*.[66] For instance, to say that anyone has a right to pick up a seashell that they find on the beach is to say that they have *no duty not* to pick it up.[67] They will not be violating any duty not to pick up the shell should they decide to do so.[68] As Kurki aptly maintains: 'the concept of no-right is one example of how our everyday language of rights and duties can be misleading'[69] in that the term 'right' is commonly and interchangeably used to describe situations that in reality refer to what Hohfeld would define as *privileges* or *liberties*.

Hohfeld's eight-term schema indirectly demonstrates the artificial nature of legal constructions of person. The orthodox view of legal personhood equating 'X's legal personhood with the holding of legal rights and bearing of legal duties by X', which may have worked in the context of 19th-century notions of rights and duties, is no longer viable in present times.[70]

While alluring for its simplicity, the orthodox view of legal personhood presents problems of circularity and illustrates the woolly nature of a rights language.[71] In other words, it fails to fully capture both morally and legally the irrefutable fact of 'simply being a human', that is, the biological dimension of personhood with its intrinsic equal moral worth, rather than personhood in and of itself as a purely normative determination and static legal fiction.[72] Vatter and de Leeuw talk about the reality of legal fiction as 'a self-referential insulation of the legal person from embodiment and biological life' thus becoming 'problematic from the perspective of human

[60]Kurki (n 7) 5.

[61]Kurki (n 7) 57; HM Hurd and MS Moore, 'The Hohfeldian Analysis of Rights' 63 (2) (2018) American Journal of Jurisprudence 295, 299–307.

[62]L Wenar, 'Rights – The Form of Rights: The Hohfeldian Analytical System' Section 2A, *The Stanford Encyclopedia of Philosophy* (Edward N Zalta 2020), available at: <https://plato.stanford.edu/entries/rights/#FormRighHohfAnalSyst> accessed on 22 September 2022.

[63]Kurki (n 7) 57.

[64]Ibid.

[65]Wenar (n 62).

[66]Hurd and Moore (n 61) 303.

[67]Wenar (n 62). This is a basic example which assumes that the beach is not privately owned or part of a military or protected area and also that the seashell does not pertain to protected marine life. I am indebted to Visa Kurki for these points.

[68]Ibid.

[69]Kurki (n 7) 57.

[70]Ibid., 5.

[71]Ibid.

[72]Ohlin (n 9) 238.

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rights'.[73] Making the access to and exercise of rights dependent solely on membership of a national community, that is nationhood and citizenship, is also problematic. The way the correlation between a person and human rights is legally constructed leads to a hierarchy or stratification of legal personhood.

Jean Thomas's critique of legal formalism further shows the limitations of an orthodox conceptualisation of legal personhood.[74] The premise is the recognition that rights exist in a value pluralism or contestation context and the resulting acknowledgement that normative disagreement over rights is about whether they are morally fundamental or instrumental. A value-neutral and descriptive theory of rights that assigns rights solely with an instrumental role that is meant to serve a multiplicity of values[75] will be refuted by those who argue that rights are morally fundamental, specifically that they constitute incommensurable ethical commitments. The main underlying reason of disagreements about rights is that they encapsulate essentially substantive normative questions: it is difficult to make sense of these disagreements, and therefore resolving them by way of a mere logical entailment, without taking into account the moral considerations underlying them.[76]

The above forces us to rethink and revisit the concept of legal personhood by grounding it in the legal concept of *equal human dignity*. This approach is necessary to counteract the more or less explicit tendency towards the establishment of a hierarchy of humanity which leads to the treatment of some as less than human or the creation of the *Untermenschen*, ie a category of 'sub-humans' not worthy of the same human rights or the same level of protection under the law.

3. Legal personhood and human rights

A. The notion and meaning of human rights

Strictly linked to the notion of legal personhood is that of human rights, generally conceived as basic guarantees that people in all countries are endowed with, can enjoy and exercise, and invoke against others.[77] Human rights, in their literal sense, 'are ordinarily understood to be the rights that one has simply because one is human. As such they are equal rights, because we either *are* or *are not* human beings, equally'.[78] Relatedly, human rights are perceived as inalienable in nature 'because being or not being human usually is seen as an inalterable fact of nature, not something that is either earned or can be lost'.[79] In this sense, 'human rights are considered "universal" because they are held "universally" by all human beings' – what Donnelly coins as 'conceptual universality',[80] although their universality is contested by many. Sen's proposition is perhaps more convincing. He maintains that: 'proclamations of human rights are to be seen as articulations of ethical demands'[81] rather than 'principally "legal", "proto-legal" or "ideal-legal" commands. Even though human rights can, and often do, inspire legislation',[82] this is because human rights are

[73]Vatter and de Leeuw (n 19) 4.

[74]J Thomas, 'Thinking in Three Dimensions: Theorising Rights as a Normative Concept' 11 (4) (2020) Jurisprudence 552, 554–5 and 558–60.

[75]In this sense, see L Wenar, 'The Nature of Rights' 33 (3) (2005) Philosophy and Public Affairs 223–53.

[76]Thomas (n 74).

[77]J Nickel, *Making Sense of Human Rights* (Wiley 2007).

[78]J Donnelly, 'The Relative Universality of Human Rights' 29 (May) (2007) Human Rights Quarterly 281, 282; emphasis highlighted.

[79]Ibid., 283. The Preambles to the 1948 UDHR and both the 1966 UN International Covenant on Civil and Political Rights (ICCPR) and the ICESCR recognise the inherent dignity and the equal and inalienable rights of all human beings as the foundation of freedom, justice and peace in the world and as forming the basis for these rights.

[80]Donnelly (n 78) 283; in a similar vein see, J Raz, 'Human Rights in the Emerging World Order' 1 (1) (2010) Transnational Legal Theory 31, 41.

[81]A Sen, 'Elements of a Theory of Human Rights' 32 (4) (2004) Philosophy & Public Affairs 315, 320.

[82]Ibid., 319 and 326–7.

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'claims about how a society *ought* to treat individuals rather than how their actual laws are configured.'[83]

Because of their very nature, human rights act as standards of justification and parameters for criticism of public and private action. On this point, Rawls refers to human rights as denoting 'limits to a regime's internal autonomy', which 'express a special class of urgent rights', the violation of which is equally not tolerated by either 'reasonable liberal peoples and decent hierarchical peoples'.[84] It is for this reason that, according to Rawls, human rights generally receive international consensus. However, the question as to whether there are any such universal rights, where they are located (with the exception of internationally recognised human rights), what type of remedies have been put in place for their violation, and who can enforce them – what can loosely be termed 'functional universality'–[85] is subject to debate, and remains a divisive point.[86] Moreover, many scholars have expressed deep disenchantment with human rights' ideology, discourse, practice and law, questioning their potency and legitimacy 'as flawed, inadequate, hegemonic, confining, overreaching, apolitical, peripheral, or pointless'.[87] De Búrca neatly summarises the main tenets of this critical scholarship by saying that human rights 'have been accused of being tools of Western imperialism, an elitist and bureaucratic legal paradigm, a limiting expert discourse which crowds out emancipatory political alternatives, which limits its ambitions and hides its own "governmentality", an intellectually 'autistic' culture, an anti-politics, and a companion to neoliberalism'.[88]

While acknowledging that the human rights project is not devoid of limitations and weaknesses, it is continuously evolving and still retains appeal and significance as it relates to core values such as human dignity, human welfare, and human freedom that – in their different meanings and readings – have acquired universal acceptance.[89] On this point, Goodale argues that a radically reformulated or reimagined approach to human rights can provide a fundamentally reconfigured framework for global justice, which abandons universality in favour of 'translocality'.[90] The Article embraces this third way approach to human rights.

B. The relationship between legal personhood and human rights under international human rights law

In spite of the exegetical difficulties examined so far, the concept of legal personhood continues to be considered as a useful and necessary foundation for human rights entitlement.[91] As Ohlin puts it: 'personhood is a talisman that confers status, respect, and moral worth, and for this reason the concept is deeply ingrained in legal discourse in general and in human rights in particular'.[92] In this context, law (intermeshed with cultural, moral and ethical values and principles of a given society) plays a decisive role in constructing the key elements for the recognition of personhood as a premise for the exercise and enforcement of human rights, as well as their restriction or

[83]D Bilchitz, 'Fundamental Rights as Bridging Concepts: Straddling the Boundary Between Ideal Justice and an Imperfect Reality' 40 (1) (2018) Human Rights Quarterly 1, 119, 126.

[84]J Rawls, *The Law of Peoples: With 'the Idea of Public Reason Revisited'* (Harvard University Press 1999) 79.

[85]Donnelly (n 78) 286–8.

[86]eg S Hopgood, *The Endtimes of Human Rights* (Cornell University Press 2013); E Posner, *The Twilight of Human Rights Law* (Oxford University Press 2014); S Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard University Press 2018); M Tushnet, 'An Essay on Rights' 62 (8) (1984) Texas Law Review 1363; P O'Connell, 'On the Human Rights Question' 40 (4) (2018) Human Rights Quarterly 962.

[87]G de Búrca, *Reframing Human Rights in a Turbulent Era* (Oxford University Press 2021) 2–6, 8–10 and 15–6.

[88]Ibid., 2.

[89]Ibid., 3.

[90]M Goodale, *Reinventing Human Rights* (Stanford University Press 2022) Ch 1.

[91]Ohlin (n 9) 212.

[92]Ohlin (n 9) 211.

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limitation, by groups or individuals in society.[93] It is posited that the notion of human rights should have a distinctively narrow meaning 'to denote rights that constitute the human'.[94] Put differently, 'human rights are the rights that make us human'.[95]

In legal reasoning,[96] scholarly literature on rights[97] and international human rights instruments, such as the United Nations (UN) Universal Declaration of Human Rights (UDHR),[98] rights are granted to (legal) persons as valid bearers of moral claims. Hence, 'the notion of human interrelates with the notion of justice to produce a conception of rights that is constitutive of humanity'.[99] In this narrower context, 'justice governs the becoming of beings'.[100] The UDHR's inclusion of the right to legal personhood for everyone in Article 6 indicates law's key role in ascribing and enforcing the Declaration's rights.[101] Through a combined reading of the Declaration's Preamble, and Articles 1 and 6 as well as its other articles, it appears that the term person refers to human beings.[102] According to Thym,[103] Article 6 UDHR guided the drafting of Article 16 ICCPR which provides that: 'Everyone shall have the right to recognition everywhere as a person before the law'. This Article is considered as a general guarantee of legal personhood understood as a bearing of rights and obligations rather than in the narrower meaning of legal capacity to enter into legal obligations autonomously.[104] It exemplifies the 'equal moral worth of all persons'[105] that underlies all international human rights instruments.[106]

The main limitation of Article 16 ICCPR is that it provides a 'thin' formal guarantee rather than encompassing a 'thick' notion of legal personhood covering also substantive rights and equality.

[93]Bravo (n 1) 473.

[94]M Lattimer, 'Two Concepts of Human Rights' 40 (2) (2018) Human Rights Quarterly 406.

[95]Ibid.

[96]In refugee case law on the principle of non-*refoulement* this construal of legal person can be found in landmark rulings of the ECtHR where the emphasis on the absolute nature of Art 3 ECHR signifies the importance of the right to life, encompassing also the right to a dignified life, eg *M.S.S. v Belgium and Greece* App no 30696/09 (ECHR, 21 January 2011) – and the EU equivalent, Joined Cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Department and ME and others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* ECLI:EU:C:2011:865. We can equally find examples outside the field of refugee law: in *SW v UK* App no 20166/92 (ECHR, 22 November 1995) – a case concerning retrospective criminal measures – the European Court referred to the respect for human dignity and human freedom as the very essence of the fundamental objectives of the European Convention (para 44), which was re-stated in *Pretty v UK* App no 2346/02 (ECHR, 29 April 2002) – a case concerning euthanasia and assisted suicide – where the ECtHR spoke about dignity in relation to Art 8 ECHR and the notion of quality of life (para 65).

[97]This is particularly the view of natural lawyers, eg J Finnis, *Natural Law and Natural Rights* (Clarendon 2011).

[98]UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), see eg Art 1: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'; Art 6: 'Everyone has the right to recognition everywhere as a person before the law'. The use of the words 'all human beings' in Art 1 is subsequently used interchangeably with words such as 'everyone' or 'no one'; see also Art 16 of the International Covenant on Civil and Political Rights (ICCPR), which provides that: 'Everyone shall have the right to recognition everywhere as a person before the law', see The United Nations General Assembly. 1966. International Covenant on Civil and Political Rights. *Treaty Series* 999 (December): 171.

[99]Lattimer (n 94) 413.

[100]Ibid., citing Douzinas (53) 25–6.

[101]Bravo (n 1) 478.

[102]Ibid.

[103]Thym (n 12) 115.

[104]M Nowak, *U.N. Covenant on Civil and Political Rights – CCPR Commentary* (Engel Publishers 2005), Art 16, paras 2–3. The 1950 ECHR and the 2000 EU Charter do not contain a similar guarantee. However, both human rights instruments can be said to build on the UDHR and constitute its regional manifestation in Europe, given that they apply to everyone independently of nationality or residence status. In the case of the EU Charter the only exception is represented by Title V on 'Citizens' Rights'.

[105]I borrow this expression from Thym (n 12) 115. A similar provision exists in the UN Disability Convention, which also extends to legal capacity, see United Nations Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) UNTS 2515, Art 12.

[106]For example the Preamble to the Charter of the United Nations reaffirms the people's faith 'in the dignity and worth of the human person', see United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

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We thus need to look elsewhere. The key general guarantees to equality are found in Article 2(1) ICCPR which states that: 'the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status', and Article 26 ICCPR, which provides that: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law'. This provision affords a far-reaching, free-standing, and autonomous level of protection, prohibiting 'discrimination in law or in fact in any field regulated and protected by public authorities'.[107]

As to social and economic rights, Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that everyone has the right to 'an adequate standard of living for himself and his family including adequate food, clothing and housing, and to the continuous improvement of living conditions'. Article 12(1) ICESCR provides that: 'the States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.' Further guidance can be found in Article 25 UDHR which states that:

> (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. (2) Motherhood and childhood are entitled to special care and assistance. All Children, whether born in or out of wedlock shall enjoy the same social protection.

Moreover, Article 3 ICESCR provides a positive duty on States Parties to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the Covenant. Other provisions, such as Articles 6(1), 7, 9, 13 and 15 ICESCR, provide for the right to work, including the enjoyment of just and favourable conditions of work to ensure among others 'a decent living for themselves and their families', the right of everyone to social security, including social insurance, the right to education and the right to cultural life. In addition, Article 31 of the European Social Charter provides for the right to housing which includes access to housing of an adequate standard; the prevention, reduction and gradual elimination of homelessness and accessible price of housing to those without adequate resources. Reference to *adequate standard of living* in these provisions encompasses the guarantee of key basic rights concerning an individual's mental and physical health, subsistence and general well-being. Read together, these provisions aim at ensuring a 'thick' notion of legal personhood extending to substantive rights and equality.

C. The relationship between legal personhood and human rights under European/EU human rights law

As to the European/EU context, although there is no equivalent of the right to *equal personhood* in either the European Convention on Human Rights (ECHR) or the EU Charter of Fundamental Rights (EUCFR), the universal application of the rights protected under each human rights instrument rests upon the underlying idea of the moral equality of all human beings, and can be identified by the reference to terms such as persons, people, the individual, human community and everyone in the EU Charter,[108] and in the ECHR by the reference to person, everyone and no one throughout, as well as a combined reading of its Preamble referring to equality of all persons

[107]HRC, 'General Comment No 18: Non-Discrimination', UN doc HRI/GEN/1/Rev.6 (12 May 2003) 148–9, para 12.
[108]See Charter of Fundamental Rights of the European Union (2000) OJ C364/01.

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with its Articles,[109] which overall seems to suggest that there is an implicit recognition of *equality of legal personality*.

As to a 'thick' notion of legal personhood covering also equality and substantive rights, the key general guarantee to equality in the European Convention is Article 14 ECHR entitled 'Prohibition of discrimination', which provides that: 'the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'. This provision presents a number of limitations. In part this is because non-discrimination under the Convention does not have the 'same, specific, foundational designation'[110] as it does in the UN Charter.[111] There is also no provision in the ECHR that corresponds to the text of Article 26 ICCPR which, as explained above, aims at providing a high degree of protection against any form of discrimination in all areas regulated by the state.[112] In addition, Article 14 ECHR is a parasitic provision as it only applies to the European Convention's rights, freedoms and Protocols.[113] Protocol 12 to the Convention[114] aims at addressing this limitation. As maintained by Harris and others, 'the advance offered by the Protocol is that the narrow field to which Article 14 currently restricts non-discrimination standards is extended to "any right set forth by law"',[115] even though it still remains a weaker text than that of Article 26 ICCPR.[116]

Nevertheless, the ECtHR's dynamic interpretation of the European Convention's provisions, together with the application of the principle of effectiveness, has ensured the protection of certain substantive rights. For example, in *Stec and Others v UK* the Court held that Article 1 of the First Protocol to the Convention[117] applied to individuals who have 'an assertable right under domestic law to a welfare benefit'.[118] Specifically, it held that non-contributory social security benefits were within the ambit of that Article in the same way as contributory benefits. This admissibility decision has enabled Article 14 ECHR to have the potential to apply to a large number of national social security provisions.[119] Moreover, '[w]hile the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature'.[120]

When considering Article 3 ECHR cases, the ECtHR has consistently held that the lack of resources of a state cannot normally justify the failure to fulfil their obligations under the Convention. In particular, in a series of cases concerning the provision of social welfare services by the state, the Court found that its insufficient provision particularly in cases of complete dependency on state support may be incompatible with human dignity.[121] The Court has found

[109]See European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No.005.

[110]D Harris et al, *Law of the European Convention on Human Rights* (Oxford University Press 2018) 765.

[111]United Nations, *Charter of the United Nations* (24 October 1945) 1 UNTS XVI.

[112]Harris et al (n 110).

[113]Ibid.

[114]Council of Europe, *Protocol 12 to the European Convention on Human Rights and Fundamental Freedoms on the Prohibition of Discrimination* (4 November 2000) ETS 177.

[115]Harris et al (n 110) 802.

[116]For a comprehensive and critical account, see Harris et al (n 110) Ch 17.

[117]Council of Europe, *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (20 March 1952) ETS 9.

[118]*Stec and Others v UK* Apps nos 65731/01 and 65900/01 (ECHR 12 April 2006) para 34.

[119]Harris et al (n 110) 804.

[120]*Airey v Ireland* App no 6289/73 (ECHR 9 October 1979) para 26.

[121]*Budina v Russia* App no 45603/05 (ECHR 12 February 2008); see also, *Larioshina v Russia* App no 56869/00 (ECHR 23 April 2002) (inadmissibility decision); for further analysis on socio-economic rights in the case law of the ECtHR, see I Leijten, *Core Socio-Economic Rights and the European Court of Human Rights* (Cambridge University Press 2018).

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that poor reception conditions for asylum claimants provided by host states can amount to a breach of Article 3 ECHR. In *M.S.S.*,[122] a case concerning a Dublin transfer,[123] the ECtHR held that the fact that an asylum claimant had spent months living in a state of extreme poverty, unable to cater for his most basic needs in combination with prolonged uncertainty and the total lack of any prospects of his situation improving amounted to a violation of Article 3 ECHR.[124] Significantly, in *M.S.S.*, the Court used EU asylum standards to find a lack of protection that went beyond the traditional Conventional rights.[125] In particular, the ECtHR found that there is a positive obligation on Member States stemming from the EU Reception Conditions Directive (RCD)[126] to provide asylum claimants with accommodation and decent material conditions and it used the 'particularly serious' deprivation of material reception conditions to extend the notion of inhuman and degrading treatment to the extremely poor living conditions of destitute asylum claimants.[127] It can be seen that the right to human dignity requires that the quality of life of an applicant for international protection must be one that is of a sufficient standard and specifically one that respects the intrinsic worth of mankind.[128] In *Limbuela*[129] the United Kingdom (UK) House of Lords followed a similar approach and held that failure by the state to provide social support, thus exposing an individual to a real risk of becoming destitute, will in certain circumstances constitute inhuman and degrading treatment and will be contrary, therefore, to Article 3 ECHR. Significantly, Lady Hale said that Article 3 ECHR 'reflects the fundamental values of a decent society, which respects the dignity of each individual human being, no matter how unpopular or unworthy she may be'.[130] Hence, in cases where states are dealing with a particularly vulnerable group such as asylum claimants minimum reception conditions need to be ensured to meet the standard under Article 3 ECHR.[131]

The analysis shows that the ECtHR's hermeneutic approach enables the definition and can facilitate the application of a 'thick' notion of legal personhood in the legal framework of the European Convention, tied in with human dignity.

With regard to the EU Charter, the question about a possible violation of human dignity arose in relation to another Dublin transfer case. In *Jawo*[132] the CJEU recognised that a situation of extreme material poverty that does not allow a recipient of international protection to meet his most basic needs puts that person 'in a state of degradation incompatible with human dignity'.[133] Prior to adopting a transfer decision, the competent national authorities of the requesting Member State must therefore carry out an assessment to rule out the existence of systemic or generalised deficiencies in the receiving Member State affecting the living conditions of those receiving international protection, that attain a particularly high level of severity so as to place the person

[122] *M.S.S.* (n 96).

[123] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (2013) OJ L180/31-180/59.

[124] *M.S.S.* (n 96) paras 263–64.

[125] F Ippolito and S Velluti, 'The Relationship Between the European Court of Justice and the European Court of Human Rights: the Case of Asylum' in K Dzehtsiarou et al (eds), *Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and ECHR* (Routledge 2014) 156, 178.

[126] Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (2013) OJ L180/96-105/32.

[127] *M.S.S.* (n 96) para 250.

[128] Velluti (n 23) 209.

[129] *R. (Adam, Limbuela and Tesema) v Secretary of State for the Home Department* (2005) UKHL 66.

[130] Ibid., para 76.

[131] Ibid.

[132] Case C-163/17 *Abubacarr Jawo v Bundesrepublik Deutschland* ECLI:EU:C:2019:218. For academic discussion, see G Anagnostaras, 'The Common European Asylum System: Balancing Mutual Trust against Fundamental Rights Protection' 21 (6) (2020) German Law Journal 1180, 1182–8 and 1192–6.

[133] *Jawo* (n 132) para 92.

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concerned in an involuntary situation of extreme material poverty.[134] In practice, in *Jawo* the CJEU introduced an additional ground for non-transfer and imposed a new exception to the principle of mutual trust in CEAS, thus going beyond the *N.S.* case law.[135] At the same time, the Court also established a high threshold by holding that it does not extend to 'situations characterised even by a high degree of insecurity or a significant degradation of the living conditions of the person concerned, where they do not entail extreme material poverty'.[136] This hermeneutic approach of the CJEU in relation to the obligation contained in Article 4 EUCFR seems to be in contrast with the position of ECtHR vis-à-vis the absolute nature of the prohibition established in Article 3 ECHR.

As to equal legal personality, Article 20 EUCFR laconically provides that: 'Everyone is equal before the law'. In order to understand the meaning of this provision we need to look at the Explanations on the Charter, which state that: 'this Article corresponds to a general principle of law which is included in all European constitutions and has also been recognised by the Court of Justice as a basic principle of Community law'.[137] This seems to suggest that the purpose of this Article is to reassert equal treatment, a long-standing general principle of EU law.[138] Hence, although this provision is rather concise, 'it enounces a universalistic claim [...] and its field of application is amongst the broadest' (circumscribed only by Article 51 EUCFR), which also explains why 'it is not connected to certain pieces of EU legislation'.[139]

However, a closer look suggests that equality before the law as embodied in Article 20 EUCFR is associated with formal equality and the equal application and enforcement of the law centred around procedural justice.[140] Because of its broad application, the provision has been defined as enunciating an 'abstract concept'[141] and as reflecting an 'empty idea of equality', which 'threatens to swallow "rights" that once ranked far above it'.[142] In general, the fluid nature of formal equality and its failure to ensure objectivity may perpetuate inequality[143] for failing to tackle the root causes of inequality[144] with the related risk of legitimising social and legal practices that can reproduce disadvantage.[145]

Article 21 EUCFR on non-discrimination somewhat addresses the limitations of its sister provision. The aim is to ensure substantive equality and its focus is on the content of law, which should not differentiate between individuals on arbitrary grounds. The Explanations on the Charter provide that the first paragraph draws on Article 19 TFEU, Article 14 ECHR[146] and

[134]Ibid., paras 91–2.

[135]Anagnostaras (n 132) 1188; *Jawo* (n 132) para 89; Case C-411/10 *N.S. and Others v Secretary of State for the Home Department* ECLI:EU:C:2011:865.

[136]*Jawo* (n 132) para 93. Anagnostaras rightly points out that 'the Court has adopted a very restrictive interpretation of the notion of degrading living conditions on this matter that is not completely in line with the definition given under the ECHR', Anagnostaras (n 132) 1193 and 1196.

[137]Explanations relating to the Charter of Fundamental Rights (2007) OJ C 303/17, (hereafter Explanations on the EU Charter).

[138]The Court has interpreted the provision in this sense in *Nagy* (the first judgement on Art 20 EUCFR), see Case C-21/10 *Károly Nagy v Mezőgazdasági és Vidékfejlesztési Hivatal* EU:C:2011:505, para 47.

[139]M Bell, 'Article 20 Equality before the Law' in S Peers et al (eds), *The EU Charter of Fundamental Rights. A Commentary* (Hart 2014) 563, 563–5.

[140]Art 20 EUCFR is thus linked to other provisions of the Charter with the general aim of applying procedural justice, eg Art 41 EUCFR on the right to good administration and Art 47 EUCFR on the right to an effective remedy and to a fair trial.

[141]Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* ECLI:EU:C:2006:552, Opinion of Advocate-General Ruiz-Jarabo Colomer, para 88.

[142]P Western, 'The Empty Idea of Equality' 95 (3) (1982) Harvard Law Review 537, 538.

[143]Bell (n 139) 571; for further discussion, see PJ Neuvonen, *Equal Citizenship and Its Limits in EU Law* (Hart 2016) Ch 2.

[144]S Fredman, *Discrimination Law* (Clarendon 2011) 11.

[145]L Betten, 'New Equality Provisions in European Law: Some Thoughts on the Fundamental Value of Equality as a Legal Principle' in K Economides et al (eds), *Fundamental Values* (Hart 2000) 69–84.

[146]Insofar as it corresponds to the right enshrined in this provision, it must be conceived as having the same meaning and scope, as per Art 52(3) EUCFR. However, Martin rightly points out that: 'in practice, the ECJ and the ECtHR have differed in

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Article 11 of the Convention on Human Rights and Biomedicine as regards genetic heritage. The Explanations further clarify that whereas Article 19 TFEU acts as a legal basis for the Union to adopt legislative acts to combat certain forms of discrimination, Article 21 EUCFR 'does not create any power to enact anti-discrimination laws in these areas of Member State or private action, nor does it lay down a sweeping ban of discrimination in such wide-ranging areas'.[147] Instead, it only addresses discriminations by the institutions and bodies of the Union themselves, when exercising powers conferred under the Treaties, and by Member States only when they are implementing Union law'. Many of the grounds included in Article 21 EUCFR are also to be found in EU secondary legislation which has been adopted with a view to give effect to the principle of non-discrimination as protected in the Charter. In contrast to the provision in Article 20 EUCFR which acts as a *lex generalis*, Article 21 EUCFR can thus be considered with some caution as akin to *lex specialis* in the field of EU discrimination.[148]

The EU equality requirement, together with the prohibition of discrimination – in Bruun's words–[149] seems to contain four separate norms imposing negative and positive obligations on the Member States'.[150]

Specifically, that Member States shall:

(1) guarantee equality before the law;
(2) guarantee the equal protection of the law;
(3) prohibit any discrimination; and,
(4) guarantee to all persons equal and effective protection against discrimination, including positive action

Nevertheless, the underlying question in relation to Articles 20 and 21 EUCFR remains unaddressed, namely, who is a legal person. Both notions of equality contained in these articles are intended to represent a universal moral truth and are based on the presumption that legal personhood corresponds to the status of being human and, therefore, extends to all persons indistinctly. This is also why equality in broad terms has a long pedigree in Western legal thought. However, while human rights instruments prohibit *de jure* breaches of human rights and discrimination, the application of law may facilitate *de facto* violations and abuses thereby invalidating this universal construction of legal personhood and equality.

Moreover, the EU constitutional and legal framework has some important limitations. A closer look at the Charter shows that, in spite of acquiring the same legally binding status as the EU treaties, it has not had the desired impact in relation to the qualification and place given to social rights as only individual social rights are fully justiciable.[151] Moreover, while the EU Charter accords rights to individuals, the application of the standing rules under Article 263(4) TFEU makes it very difficult for a person who claims that his rights have been infringed by EU law to be able to meet the requirements of individual concern.[152] Linked to this, there is the additional limitation concerning the EUCFR's application to Member States, ie only when they are

their approach to examining "discrimination" and the underlying "comparability" analysis,' see D Martin, 'Article 21' in M Kellerbauer et al (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) 2164, 2165.

[147]Explanations on the EU Charter (n 137).

[148]Bell (n 139) 565.

[149]N Bruun, 'Articles 20 and 21 – Equality and Non-discrimination' in F Dorssemont et al (eds), *The Charter of Fundamental Rights of the European Union and the Employment Relation* (Hart 2019) 383, 384.

[150]O de Schutter, *International Human Rights Law* (Cambridge University Press 2014) 647.

[151]S Velluti, 'The Promotion and Integration of Human Rights in EU External Trade Relations' 32 (83) (2016) Utrecht Journal of International and European Law 41, 45.

[152]P Craig and G De Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press 2011) 510.

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'implementing' Union law,[153] the meaning and scope of which is yet to be fully understood.[154]

Hence, international and European/EU human rights instruments offer limited assistance in relation to the content of legal personhood and how human rights relate to humanity,[155] thereby hindering a coherent approach in human rights practice. The analysis carried out in this section shows that the centrality of the concept of legal personhood rather than offering sustenance to human rights claims can in fact contribute to hierarchies and stratifications of personhood and, in particular, subjects some humans to the assignment of a lesser or quasi-personhood.[156] However, through their dynamic and purposive interpretative approach European courts can play a key protective role in relation to substantive rights, particularly, but not only, in relation to socio-economic rights entitlement of all persons, thereby helping to dismantle contemporary legal stratifications of personhood.

4. Rehumanising immigration and asylum in the EU: the Court of Justice's interpretation of human dignity as a normative foundation and foundational right in the EU legal order

A. Introduction

With immigration and asylum becoming areas of shared competence pursuant to the changes made by the 2000 Treaty of Amsterdam,[157] the CJEU has increasingly adopted a dignity-conformed interpretation of EU rules in relation to the movement of TCNs, most significantly in relation to the treatment of irregular migrants and asylum claimants. As posited by Bačić Selanec and Petrić,[158] the Court has been constructing 'the rules of EU asylum and irregular migration law against what it perceives as their underlying *telos* – the protection of human dignity'. Grounding the interpretation of EU rules in human dignity enables the Court to give the latter practical expression and 'breathe life' into its otherwise abstract connotation as well as to step in where the legislator has failed as regards compliance with certain fundamental rights, which *de facto* are a concretisation of human dignity.[159] In the ensuing analysis, the focus is on the role played by human dignity in ensuring adequate protection of fundamental rights for two categories of particularly vulnerable TCNs, namely, irregular migrants and asylum claimants. In particular, the analysis will look at human dignity in selected cases of the Court concerning the treatment of irregular migrants in the context of repatriation policies and concomitant national implementation of the RD.[160] This will be followed by an examination of the Court's case law on the national provision of material reception conditions for asylum claimants under the EU RCD and the key role played by human dignity therein.[161]

[153]Art 51(1) EUCFR; see eg Case C-617/10 *Åklagaren v Åkerberg Fransson* EU:C:2013:105; Case C-434/11 *Corpul National al Polifiçtilor* EU:C:2011:830; Case C-206/13 *Cruciano Siragusa v Regione Sicilia* EU:C:2014:126; Case C-50/16 *Grodecka v Konieckza* EU:C:2016:40; Case C-218/15 *Paoletti v Procura della Repubblica* EU:C:2016:748.

[154]Eg Case C-198/13 *Julian Hernández and Others v Government of Spain and Others* EU:C:2014:2055, para 34; Cases C-483/09 and 1/10 *Gueye and Salmerón Sánchez* EU:C:2011:583, paras 69–70; Case C-370/12 *Pringle v Government of Ireland and Others* EU:C:2012:756, paras 104–5 and 180–1.

[155]Ohlin (n 9) 211.

[156]Bravo (n 1) 471.

[157]See Part Two, Title V, Ch 2 TFEU.

[158]N Bačić Selanec and D Petrić, 'Migrating with Dignity: Conceptualising Human Dignity Through EU Migration Law' 17 (3) (2021) European Constitutional Law Review 498, 503.

[159]Ibid., 502–3; eg right to life (Art 2 EUCFR), prohibition of torture and inhuman or degrading treatment or punishment (Art 4 EUCFR), prohibition of slavery and forced labour (Art 5 EUCFR) and the respect for private and family life (Art 7 EUCFR); in this sense, see J Jones, '"Common Constitutional Traditions": Can the Meaning of Human Dignity Under German Law Guide the European Court of Justice?' (Spring) (2004) *Public Law* 167, 168–74.

[160]Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (2008) OJ L 348/98-348/107.

[161]RCD (n 126).

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B. Personhood under EU immigration law: the Return Directive and the treatment of irregular migrants

The RD[162] sets out common standards on return procedures with the aim of harmonising national return procedures, in line with the Schengen *acquis*. It has wide territorial scope applying to all Member States, with the exception of Ireland, as well as associated Schengen countries. It applies to TCNs staying illegally on the territory of a Member State.[163] Under the RD, 'illegal stay' 'means the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State'.[164]

The RD has been one of the most criticised and litigated EU instruments of migration management.[165] It has been defined as the 'Shameful Directive' for diluting human rights and procedural guarantees for TCNs.[166] This is in spite of the fact that the Directive makes reference to fundamental rights and human dignity throughout. In the Preamble, repatriation policy is defined as one 'based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity'.[167] This extends to TCNs in detention who must be treated in a 'humane and dignified manner',[168] ensuring that detention should, as a rule, take place in specialised detention facilities.[169] Relatedly, it is stated that the use (as a last resort) of coercive measures for the purpose of removal must be carried out 'in accordance with fundamental rights and with due respect for the dignity and physical integrity of the third-country national concerned'.[170]

Over the years the CJEU, together with domestic courts, has been building the protective dimension of the Directive. The judicial dialogue between these courts has been central in ensuring the effective implementation of the Directive, particularly in safeguarding the protection of irregular migrants' fundamental rights.[171] This has been achieved by 'limiting the criminalisation of irregular migration, prioritising voluntary departure over pre-removal detention, and providing more judicial control over administrative detention and other coercive measures of immigration law enforcement'.[172]

Worryingly, there has been an increasing trend among Member States to extend the notion of illegality to asylum procedures with the practice of considering unsuccessful asylum applications at first instance as falling within the scope of the RD.[173] This has led to the concomitant running of return and appeal asylum procedures.[174] The Court has been somewhat incoherent in this respect

[162]RD (n 160).

[163]RD (160) Art 2(1).

[164]RD (160) Art 3(2); Art 3(2) and Art 2(5) of the Schengen Borders Code, Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (2006) OJ L105/1-105/32.

[165]M Moraru, 'EU Return Directive: A Cause for Shame or an Unexpectedly Protective Framework?' in E Tsourdi and P de Bruycker (eds), *Research Handbook on EU Migration and Asylum Law* (Elgar 2020) 435–54; for detailed analysis of litigation at national and EU level, see M Moraru, G Cornelisse and P de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* (Hart 2020).

[166]V Mitsilegas, *Immigration Detention, Risk and Human Rights* (Springer 2016) 27.

[167]RD (n 160) Recital 2.

[168]RD (n 160) Recital 17.

[169]Ibid.; see also RD (n 160) Art 16(1).

[170]RD (n 160) Art 8(4).

[171]G Cornelisse and M Moraru, 'Introduction: Judicial Dialogue on the Return Directive – Catalyst for Changing Migration Governance?' in Moraru, Cornelisse and de Bruycker (eds) (n 165) 17, 20.

[172]Ibid., 18.

[173]Moraru (n 165) 438.

[174]For an examination of Member States' return procedures and practices, see K Eisele, I Majcher and M Provera, The Return Directive 2008/115/EC – European Implementation Assessment (EPRS | European Parliamentary Research Service, PE 642.840 – June 2020).

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and seems to have engendered a certain level of confusion in national authorities.[175] This situation, combined with the criminalisation of irregular migration, (also coined 'crimmigration')[176] has significantly weakened the position and effective protection of TCNs' fundamental rights. In response to this trend, the Court 'has placed strict limitations on the Member States' power to enforce criminal sanctions to irregular migrants by differentiating treatment and imposing numerous conditions'.[177] Crucially, with *El Dridi*[178] the Court has circumscribed Member States' powers to criminalise irregular migrants. The case concerned Mr El Dridi, an Algerian national, who had entered Italy irregularly and had failed to obtain a valid residence permit. In 2004 a deportation decree was issued against him, on the basis of which a subsequent deportation order was issued against him in 2010. Mr El Dridi was sentenced to one year's imprisonment for failing to comply with the order. It became apparent to the Court that Italy had failed to transpose the RD into national law[179] and, relatedly, that even though the Italian authorities had issued a return decision, the removal procedure provided for by the Italian legislation at issue in the main proceedings was not in line with that established by that Directive.[180] Besides issues of proportionality and effectiveness of EU law that the imprisonment of one year raised,[181] the Court found that the establishment of a proper removal and repatriation policy, as provided in the RD, was one based on common standards for persons to be returned in a humane manner and with full respect for their fundamental rights and [...] their dignity.[182] As Bačić Selanec and Petrić point out, given that 'protection of human dignity is one of the goals of return procedures, [...] the Court's reliance on the argument related to the effectiveness of those procedures implies respect for the human dignity of individuals subject to those procedures. [...] An "effective removal policy" can thus only be an "effective dignity-conforming removal policy"'.[183] The consequence of interpreting the RD provisions in line with human dignity, therefore, led the Court to conclude that there should be no application of national laws that fail to ensure adequate and dignified standards in the treatment of TCNs during return procedures.[184] In broader terms, the *El Dridi* judgement was a reminder for Member States to ensure that return procedures should be carried out in compliance with fundamental rights. In this regard, *El Dridi* made it clear that although Member States had the power to impose national criminal law provisions to irregular migrants, they had to so in line with their obligations under EU law.[185] This reasoning was later confirmed in *Achughbabian*[186] where the Court once again held that 'the criminalisation of irregular stay cannot be an aim in itself, but is ultimately linked to the objective of the return of the third-country nationals affected'.[187] In another line of cases concerning the detention of irregular TCNs pending

[175]See Case C-181/16 *Sadikou Gnandi v État belge*, ECLI:EU:C:2018:465 and compare with Case C-534/11 *Mehmet Arslan v Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie* ECLI:EU:C:2013:343.

[176]J Stumpf, 'The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power' 56 (2) (2006) American University Law Review 368, 379.

[177]N Vavoula, 'C-61/11 PPU – *El Dridi*. Criminalisation of Irregular Migration in the EU: The Impact of El Dridi' in V Mitsilegas et al (eds), *The Impact of European Union Law on National Criminal Law Challenges and Constraints to Individual Liability in the Member States* (Hart 2019) 273, 274.

[178]Case C-61/11 PPU *El Dridi* ECLI:EU:C:2011:268.

[179]Ibid., para 45.

[180]Ibid., para 50.

[181]In particular, Member States cannot impose a term of imprisonment on a TCN for the sole reason of remaining on national territory contrary to a return order.

[182]*El Dridi* (n 178) para 31; see also *Arslan* (n 175) para 42.

[183]Bačić Selanec and Petrić (n 158) 504.

[184]V Mitsilegas, 'The Changing Landscape of the Criminalisation of Migration in Europe: The Protective Function of European Union Law' in MJ Guia, M van der Woude and J van der Leun (eds), *Social Control and Justice* (Eleven International Publishing 2013) 87, 101.

[185]*El Dridi* (n 178) paras 33, 36–9, 43 and 45; for further analysis, see Vavoula (n 177) 279–81.

[186]Case C-329/11 *Alexandre Achughbabian v Préfet du Val-de-Marne* ECLI:EU:C:2011:807.

[187]Vavoula (n 177) 283.

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removal, the Court has held that in order to respect their human dignity they cannot be detained in ordinary facilities with ordinary prisoners, that is even when they consent to that.[188]

Another case which illustrates the dignity confirming and human rights-based interpretative approach of the Court is *Abdida*.[189] The judgement handed down in this case concerned the identification of appropriate judicial remedies for an illegally staying TCN and the right to remain in the host Member State on grounds of medical treatment. Significantly, the Court held that the provisions of the Directive are to be interpreted with full respect for the fundamental rights and dignity of the persons concerned.[190] This hermeneutic approach entailed that a TCN must be able to challenge a return order with suspensive effect and that pending the appeal they should also be entitled to social assistance to cover their basic needs. The decision is important in many respects. First, the Court reached this conclusion even though the wording of the Directive does not require that the remedy should necessarily have suspensive effect.[191] It did so by saying that such a remedy must be determined in a manner consistent with Article 47 EUCFR, which constitutes a reaffirmation of the principle of effective judicial protection.[192] Paragraph 1 of this Article provides that: 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article'.

Second, in recalling Article 19(2) EUCFR, the Court pointed out that the principle of non-*refoulement* enshrined in that provision must be understood in a manner consistent with the case law of the ECtHR.[193] Linking this to the facts of the case at hand, it meant that a return order forcing a TCN suffering from a serious physical or mental illness to be sent back to a country where the facilities for the treatment of the illness are inferior to those available in that state may raise an issue under Article 3 ECHR in very exceptional cases, where the humanitarian grounds against removal are compelling.[194] It followed that the enforcement of a return decision entailing the removal of a TCN suffering from a serious illness to a country in which appropriate treatment is not available may constitute, in certain cases, an infringement of Article 5 RD read together with Article 19(2) EUCFR.[195] The Court thus held that Articles 5 and 13 RD, taken in conjunction with Articles 19(2) and 47 EUCFR, must be interpreted as precluding national legislation which does not make provision for a remedy with suspensive effect in respect of a return decision whose enforcement may expose a TCN to a serious risk of grave and irreversible deterioration in his state of health.[196] It is worthy of mention that the Court, in clarifying the relationship between non-*refoulement* and the removal of a seriously ill TCN to a country in which appropriate treatment is unavailable, went further that the ECtHR thanks to the combined reading of the provisions of the RD and the EUCFR.[197] As a result, in *Paposhvili* the ECtHR has aligned its case law with that of the CJEU.[198]

The above jurisprudence shows that the role of the Court remains pivotal in ensuring a system of checks and balances of state power as well as the respect for fundamental rights of irregular TCNs, particularly when considering that the legislative Institutions of the EU remain seemingly

[188]For example Case C-474/13 *Thi Ly Pham v Stadt Schweinfurt, Amt für Meldewesen und Statistik*, ECLI:EU:C:2014:2096, paras 20–3; and Case C-18/19 *WM v Stadt Frankfurt am Main*, ECLI:EU: C:2020:130, paras 37 and 46.

[189]Case C-562/13 *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v Moussa Abdida* ECLI:EU:C:2014:2453.

[190]Ibid., para 42.

[191]RD (n 160) Art 13(1); see also *Abdida* (n 189) para 44.

[192]*Abdida* (n 189) para 45.

[193]Ibid., (n 189) paras 51–2.

[194]Ibid., (n 189) para 47.

[195]Ibid., (n 189) paras 48–49.

[196]Ibid., (n 189) para 53.

[197]G Cornelisse and M Moraru, 'Judicial Interactions on the European Return Directive: Shifting Borders and the Constitutionalisation of Irregular Migration Governance' 7 (1) (2022) European Papers 127, 145.

[198]*Paposhvili v Belgium* App no 41738/19 (ECHR 13 December 2016); Cornelisse and Moraru (n 197) 145.

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anchored to a migration management and securitisation logic, thus maintaining the divide between immigration and fundamental rights. According to Moraru, while the CJEU has developed a code of conduct on administrative hearings in immigration status determination proceedings based on Article 47 EUCFR and general principles of EU law, 'the transformative effect of the Court's jurisprudence has had more impact on domestic judicial review than on EU legislation'.[199] This point seems to be buttressed by the proposed measures to relaunch CEAS. The 2018 Recast Return Directive proposal presents a new mandatory return border procedure and links return policies to asylum by requiring the issuing of a common administrative decision for both the rejection of an asylum claim and return decision.[200] Given the absence of an accompanying Commission impact assessment, the European Parliament has conducted a targeted substitute impact assessment, which concluded, among others, that there is no clear evidence that the Commission proposal would lead to more effective returns of irregular migrants.[201] This impact assessment also found several protection gaps and shortcomings regarding various aspects of the RD, which could lead to fundamental rights violations for irregular migrants. In spite of these findings, the 2020 EU Pact on Migration and Asylum – with which the EU asylum system has been relaunched and where return procedures feature prominently – increases procedural harmonisation to the detriment of procedural safeguards and strengthens the nexus between asylum and return policies, thereby weakening the position of asylum claimants.[202]

The above CJEU jurisprudence evidences that human dignity plays an important role in ensuring adequate protection of TCNs' fundamental rights in EU immigration law, thus providing the basis for reducing discriminatory measures against TCNs and approximating the treatment of foreign nationals to that of Union nationals: by carefully exercising a certain degree of judicial diplomacy the Court has been able to reconcile various conflicting interests, principles and policies[203] and to gradually inject a human dignity approach into the interpretation of the RD provisions, thereby fostering a more protective function of the Directive, which is more in line with International human rights law.

C. Personhood under EU asylum law: the case of material reception conditions in Europe

Adequate reception conditions are a conduit for a fair and efficient asylum procedure and constitute an essential part of any asylum system.[204] However, many Member States have increasingly relied on various forms of collective accommodation in large reception facilities, such

[199]M Moraru, 'The European Court of Justice Shaping the Right to Be Heard for Asylum Seekers, Returnees, and Visa Applicants: An Exercise in Judicial Diplomacy' 14 (May) (2022) European Journal of Legal Studies 21, 49.

[200]Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), COM(2018) 634 final, 12.9.2018.

[201]Eisele et al (n 174).

[202]Communication from the Commission on a New pact on Migration and Asylum COM(2020) 609 final; see also C Dumbrava, K Luyten and A Orav, EU Pact on Migration and Asylum. State of Play (Briefing, European Parliament, EPRS, PE 739.247 – December 2022). The pact, among others, introduces new legislative proposals on screening TCNs at the external borders (Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, COM(2020) 612 final, 23.9.2020), on asylum and migration management (Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX (Asylum and Migration Fund), COM(2020) 610 final, 23.9.2020) and on crisis and force majeure (Proposal on a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum COM(2020) 613 final, 23.9.2020).

[203]Moraru (n 198) 57.

[204]ECRE, Comments from the European Council on Refugees and Exiles on the Amended Commission Proposal to recast the Reception Conditions Directive (COM(2011) 320 final), September 2011, 3, available at: <https://ecre.org/wp-content/uploads/2016/07/Comments-on-the-amended-Commission-Proposal-to-recast-the-Reception-Conditions-Directive.pdf>, accessed 17 July 2023.

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as hotspots, transit facilities, and controlled processing centres.[205] These reception centres are a confirmation of how CEAS has increasingly become driven by emergency solutions rather than by considered legal responses. The use of these collective forms of accommodation and, specifically, the way asylum claimants are received and treated in these camps with problems of overcrowding and very poor living standards, illustrates the concurrence of reception and deterrence measures and is a manifestation of the exclusion or 'othering' of asylum claimants,[206] which can be further encapsulated in the notion of semi-personhood. Through a process which Kreichauf terms as 'campisation',[207] collective reception centres have become an instrument for biopolitical control in order to decrease migratory flows and confine unwanted subjects.[208] Enforced collective seclusion from the society of the recipient country combined with bureaucratic procedures associated with material reception conditions lead to a stratification of personhood and actualise processes of 'othering'.[209] The inadequacy of these collective reception centres does not allow Member States to assess special reception and procedural needs for the most vulnerable and when proper examination is actually carried out, the identification of vulnerability is often done in a very superficial manner and may only lead to identifying self-evident cases.[210]

At EU level, the initial aim to ensure more coherence with higher standards of reception conditions has been seriously watered down.[211] Under the proposed Recast Reception Conditions Directive (RCD) Member States retain a wide margin of discretion. This is partly explained by problems of competence as reception conditions are closely related to the welfare systems of the Member States, which are still a national domain.[212] With regard to material reception conditions, while Member States must ensure that they guarantee adequate standards of living for applicants,[213] Article 17(5) Recast foresees 'less favourable treatment to asylum applicants compared to nationals [...], where it is duly justified'. In practice this provision allows Member States to grant unacceptably low levels of material reception conditions as the extent to which treatment may be less favourable compared to nationals is not qualified and could well be below what is an adequate standard of living as required under Article 17(1) Recast. Under Article 20(1) Recast Member States also have a wide margin of discretion in relation to the withdrawal material reception conditions. While Article 20(5) RCD and Article 19(3) Recast both refer to 'ensuring dignified standard of living for all applicants', they leave the decision as to what amounts to 'dignified standard of living' entirely to the Member States.

[205]H Segarra, 'The Reception of Asylum Seekers in Europe' in J Moritz (ed), *European Societies, Migration, and the Law. The 'Others' amongst 'Us'* (Cambridge University Press 2020) 213–29; D Bouteillet-Paquet and K Pollet, Principles for Fair and Sustainable Refugee Protection in Europe. ECRE's Vision of Europe's Role in the Global Refugee Protection Regime, Policy Paper 2, February 2017, 6, available at: <https://ecre.org/wp-content/uploads/2017/04/Policy-Papers-02.pdf>, accessed 17 July 2023.

[206]Segarra (n 205) 213.

[207]R Kreichauf, 'From Forced Migration to Forced Arrival: The Campisation of Refugee Accommodation in European Cities' (2018) 6 (7) Comparative Migration Studies 1–22.

[208]Segarra (n 205) 222.

[209]Ibid., 223–8.

[210]Bouteillet-Paquet and Pollet (n 205) 7.

[211]Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (Recast), COM(2008) 815 final, 3.12.2008; compare with Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (Recast), COM(2016) 465 final, 13.7.2016. For further analysis, see S Velluti, *Reforming the Common European Asylum System – Legislative Developments and Judicial Activism of the European Courts* (Springer 2014) 62–8; J Vedsted-Hansen, 'Reception Conditions as Human Rights: Pan-European Standard or Systemic Deficiencies' in V Chetail et al (eds), *Reforming the Common European Asylum System* (Brill – Nijhoff 2016) 317.

[212]H O'Nions, *Asylum – A Right Denied. A Critical Analysis of European Asylum Policy* (Ashgate 2014) 140.

[213]RCD (n 211) Art 16(2).

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The withdrawal or reduction of reception conditions below an adequate standard of living is not consistent with the requirements of human rights law.[214] Article 4 EUCFR is the EU equivalent of Article 3 ECHR and the line of reasoning of the ECtHR in relation to Article 3 ECHR can also be applied to Article 4 EUCFR.[215] Accordingly, if Member States provide material reception conditions that are insufficient, thus exposing the applicant to a real risk of poverty, it could potentially raise an issue under Article 4 EUCFR. Member States should be allowed to withdraw reception conditions only where it is shown that the asylum claimant concerned has sufficient means of support to guarantee dignified standard of living.[216]

Given this embedded ambivalence in the Recast RCD, the role of the CJEU is pivotal in ensuring adequate standards of material reception conditions, as illustratd by *Saciri*.[217] The case concerned minimum standards for ensuring the right to family housing for destitute asylum claimants as the family was denied both public asylum seeker accommodation and a financial allowance to rent in the private market. The Court held that the RCD's purpose and general scheme, together with the observance of fundamental rights, is to prevent an asylum claimant from being deprived of the protection of the minimum standards provided in the Directive. Material reception conditions, therefore, must be available to the asylum claimant from the day he makes the application for asylum, as provided also by Article 17(1) RCD.[218] Significantly, the Court confirmed its judgement in *Cimade and Gisti*[219] where it held that the right to human dignity must be respected and protected at all times[220] and that Member States must guarantee minimum reception conditions to asylum claimants, even to those in respect of whom it decides to call upon another Member State as responsible for examining their application for asylum to take charge of or to take back those applicants.

Specifically, in *Saciri* the Court held that financial allowances must be sufficient to ensure a dignified standard of living by enabling them to obtain housing, if necessary, even on the private rental market and preserve family unity.[221] The Court held that saturation of the reception networks cannot be used as a justification for not meeting the minimum standards set out in the RCD.[222] In practice, Member States have an obligation to guarantee housing even in circumstances where asylum seeker accommodation is full.[223] This part of the judgement is particularly important considering the persistent problems of overcrowding and insufficient accommodation in many Member States.

In another case about material reception conditions, *Haqbin*,[224] the Court held that the RCD prohibits Member States from withdrawing material reception conditions in the event of a breach of the rules of accommodation centres, or in the context of violent behaviour within those centres,

[214]eg *M.S.S.* (n 96). On the withdrawal of material reception conditions and, more broadly, on the deprivation of socio-economic rights to create hostile environment policies at national level, as examples of 'planned destitution' by the Member States, see J Wessels, 'Planned Destitution as a Policy Tool to Control Migration in the EU: Socio-Economic Deprivation and International Human Rights Law' (EU Migration Law Blog 2023) <https://eumigrationlawblog.eu/planned-destitution-as-a-policy-tool-to-control-migration-in-the-eu-socio-economic-deprivation-and-international-human-rights-law/#more-8649> accessed 22 July 2023.

[215]According to the Explanations of the Charter, it has the same meaning and scope as Art 3 ECHR (Praesidium of the Convention 2007).

[216]*M.S.S.* (n 96) para 263.

[217]Case C-79/13 *Federaal agentschap voor de opvang van asielzoekers v Saciri and Others* ECLI:EU:C:2014:103.

[218]Ibid., para 34.

[219]Case C-179/11 *Cimade, Groupe d'information et de soutien des immigrés (GISTI) v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration* ECLI:EU:C:2012:594.

[220]Ibid., para 42; see also Case C-179/11 *Cimade* ECLI:EU:C:2012:298, Opinion of Advocate General Sharpson, paras 55–6.

[221]*Saciri* (n 217) paras 39 and 42; 41 and 45. That said, the choice of housing is left to the Member States, see para 43.

[222]*Saciri* (n 217) para 50.

[223]Similarly, in *VL* the CJEU ruled that the lack of places in a reception facility cannot justify holding an applicant for international protection in detention, see C-36/20 PPU *Ministerio Fiscal v VL* ECLI:EU:C:2020:495, paras 104–13.

[224]Case C-233/18 *Zubair Haqbin v Federaal Agentschap voor de opvang van asielzoekers* ECLI:EU:C:2019:956.

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as this would be a disproportionate sanction[225] and violate the human dignity of the asylum claimant, as laid down in Article 1 EUCFR. Respect for human dignity requires that asylum claimants should not find themselves in a situation of extreme material poverty which would prevent them from meeting their most basic needs such as living, eating, clothing and personal hygiene, which would harm his or her physical or mental health, or put them in a state of degradation incompatible with human dignity.[226] It follows that any sanction imposed under Article 20(4) RCD resulting in the complete withdrawal of material reception conditions, even temporarily, would be inconsistent with the requirement of ensuring a dignified standard of living under Article 20(5) RCD.[227] Moreover, where the applicant is an unaccompanied minor, Member States must take into account the minor's specific situation, the proportionality of the sanction imposed and, as a primary consideration, the best interests of the minor.[228] Significantly, *Haqbin* is one in a line of cases of the CJEU that emphasise that the basic needs of applicants for asylum or other forms of international protection must be met throughout the entirety of the application process.[229]

The jurisprudence of the CJEU examined in this section shows that applying an *equal human dignity* frame to EU immigration and asylum law meets a twofold objective: in a narrow sense, and specifically in relation to revisiting the notion of legal personhood, it allows to overcome the citizenship hurdle (ie membership to a given community) by surpassing the constructed distinction between a *biological status* and a *socio-political status* of the person which underlies the law; in a broader sense, it provides an overarching operational standard for the EU and, in particular, it fosters an aretaic turn by helping to remove the debasement and dehumanisation that has increasingly come to characterise EU immigration and asylum law.

5. In dignity we stand: embedding equal human dignity into legal personhood

When it comes to human dignity, it becomes readily apparent that it has a complex internal structure and that it constitutes an essentially contested concept:[230] 'by relying on concepts such as humanity, rights, duties, freedom, and equality, all candidates to essential contestability in their own right, human dignity was bound to be one itself'.[231] At the same time, the concept's open-ended nature and interpretative malleability explains its general acceptance internationally and why it has provided a common moral basis for the international human rights regime.[232] As a consequence, appeals to human dignity have become ubiquitous and so widespread to lead some scholars to maintain that as a legal concept human dignity has become of trivial significance.[233]

[225]Art 20(4) RCD.

[226]CJEU *Haqbin* (n 224) para 46.

[227]Ibid., para 47.

[228]Ibid., paras 54–5. Here, the Court referred explicitly to Art 24 EUCFR on the rights of the child.

[229]For example *Jawo* (n 132). Here the CJEU held that asylum claimants cannot be transferred under the Dublin system (Regulation (EU) No 604/2013, (n 130) to a Member State where their basic needs would not be guaranteed, should they be granted refugee status in that other Member State (see analysis above in Section III); Joined Cases C-540/17 and C-541/17 *Bundesrepublik Deutschland v Adel Hamed and Amar Omar* ECLI:EU:C:2019:964. Here the Court held that a Member State cannot reject an asylum application based on the fact that asylum has been granted in another Member State if refugee status in that other Member State would expose that individual to a serious risk of inhuman or degrading treatment in breach of Art 4 EUCFR.

[230]P – A Rodriguez, 'Human dignity as an essentially contested concept' 28 (4) (2015) Cambridge Review of International Affairs 743–56, 747–8.

[231]Ibid., 748.

[232]Ibid., 750; in a similar vein, see also C McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' 19 (4) (2008) European Journal of International Law 655–724.

[233]As reported by Kleinig and Evans, see J Kleinig and NG Evans, 'Human Flourishing, Human Dignity, and Human Rights' 32 (5) (2013) Law and Philosophy 539, 548; S Moyn, 'The Secret History of Constitutional Dignity' 17 (2014) Yale Human Rights & Development Law Journal 39–73; for a critical account of dignity's usage, see M Rosen, 'Dignity: The Case Against' in

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While to some extent these claims might hold true, human dignity still has value in contemporary legal thought and practice. Moreover, as will be shown in the ensuing analysis, linking equality to human dignity ensures that the latter avoids the pitfalls of hierarchy.

In 'Why dignity rights matter,' May and Daly extol the key role played by dignity by arguing that it is critical for two fundamental reasons: first, because dignity does not merely concern the violation of an abstract set of rights such as those of due process, equal protection, liberty or property, but 'reflects the human experience, as humans experience it'.[234] Every time someone is deprived of their basic needs or subject to multi-varied forms of abuse, inhuman or degrading treatment 'these are all experienced as harms to human dignity because people know that they are being treated as less than human, in a way that violates their right to equality but also, more fundamentally, violates their own sense of humanity'.[235] In this sense, the subsumption of a right to well-being or dignified living (as examined in Section 4), or la *vida digna* or *Menschenwürde*, in judicial reasoning corroborates the fact that human dignity is intimately related to 'an essential humanity that must be respected'.[236] Hence, from a normative perspective, given that dignity is inherent in every person and that everyone has the same incommensurable amount of dignity, it follows that we are all *equal in dignity*.[237] The deontological implications that stem from this legal reading of *equal dignity* are of great significance: 'no one can assert their will over anyone else, no one can use someone else [merely][238] as an *object* for their own ends'.[239] Under this light dignity (and by extension equal dignity) is conceptualised as a status or subjecthood recognised within a society's normative system.[240] In the words of Bačić Selanec and Petrić, it would amount to 'a status that allows an individual to be an acting subject and express themselves and argue about the law as it applies to them; and to do so in a legal forum consisting of stable procedures. Hence, human dignity as a status appears as the "right to argue about rights" or the "right to claim rights"'.[241]

As Falk maintains: 'a concern with justice is a matter of fairness that is particularly sensitive to severe deprivation of rights: poverty, oppression, gross inequalities. It also offers a means of liberating the political and moral imagination to envisage a future for humanity that is dedicated to the fulfillment of the potentials of *all persons* for a life of dignity'.[242] From signifying high (aristocratic) status and being associated with special privileges,[243] over time the meaning of dignity has undergone a process of deep change to represent *equal dignity of persons*, becoming a basic presumption of the law or, to put it differently, 'law's backbone', 'connecting abstract moral ideals with the requirement of justice'.[244] As May and Daly neatly put it: 'dignity stands outside of law, and yet is intrinsic to the very notion of rule of law. It limits and defines the boundaries of law

C McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2014) 143–54; M Dan-Cohen, 'Dignity and Its (Dis)content' in J Waldron, *Dignity, Rank, and Rightsrr* (M Dan-Cohen, ed, Oxford University Press 2012) 3–10; L Yona, 'Coming Out of the Shadows: The Non-Western Critique of Dignity' 27 (1) (2021) Columbia Journal of European Law 34–66.

[234]JR May and E Daly, 'Why Dignity Rights Matter' 19 (2) (2019) European Human Rights Law Review 129, 132.

[235]Ibid.; on the centrality in legal practice of relying methodologically on human experience for deciding legal claims of human dignity, see PG Carozza, 'Human Rights, Human Dignity, and Human Experience' in C McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) 615–29.

[236]May and Daly (n 234) 132.

[237]JR May and E Daly, *Human Dignity and Law* (Elgar 2020) 42; emphasis added.

[238]Author's addition; I am grateful to Visa Kurki for suggesting the addition of this adverb to the quote.

[239]May and Daly (n 237) 42.

[240]Bačić Selanec and Petrić (n 158) 511 citing P Sourlas, 'Human Dignity and the Constitution' 7 (1) (2016) Jurisprudence 30, 42.

[241]Ibid.

[242]R Falk, *(Re)Imagining Humane Global Governance* (Routledge 2013) 44; emphasis added.

[243]J Waldron, 'Lecture 1: Dignity and Rank' in *Dignity, Rank and Rights* (n 233), 13.

[244]TRS Allan, 'Why the Law Is What It Ought to Be' 11 (4) (2020) Jurisprudence 574–96, 576–7.

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[...] while animating its outer contours: where there is no dignity there is no law'.[245] In short, dignity is central to the very notion of a '*just* rule of law'.[246]

Unsurprisingly, human dignity has gained increasing constitutional currency over time: since 1945 the constitutions of almost 160 countries in the world recognise a right to human dignity.[247] Notably, courts across the world are listening and are deliberately relying on human dignity, rather than other grounds that are also constitutionally recognised, to decide cases on a variety of legal issues.[248] The constitutional incorporation of dignity through courts' jurisprudence renders the meaning of dignity elastic and its application culturally and context specific, becoming relevant to people's lives in countries across the world.[249] There is now general consensus that the core constitutional meaning of dignity has been and remains the definition and protection of humanity,[250] which 'increasingly reflects the state of present political realities: an international community in political transition from a system premised on sovereign states toward a more fragmented global politics, constrained only by the threshold of preserving "humanity"'.[251] Significantly, human dignity can function as the foundation for human rights[252] but also as a ground for the critique of certain interpretations or language/discourses of human rights because as a normative paradigm and benchmark it reminds us that 'the life of a human being has an intrinsic moral worth'.[253] Hence, 'human dignity refers to the inherent *humanness* of each person. It is not an attribute or an interest to be protected or advanced, like liberty or equality or a house or a free speech. Rather, human dignity is the essence of our being, without which we would not be human'.[254] Dignity thus 'matters as a norm, a stand-alone right, and as a right that animates other rights and remedies'.[255] As a constitutional value or right human dignity limits positive law:[256] a fortiori, *equal human dignity* can address the contemporary challenge of human rights protection against a background of changes in the public and private sphere of action. As Foucault reminds us: 'one never governs a state, a territory or a political structure. Those whom one governs are people, individuals or groups'.[257] Hence, human dignity (and by extension *equal human dignity*), 'amounts to the right of every individual human being to have a place in the world, the right to keep belonging to humanity – "the right to belong to a political community and never to be reduced to the status of stateless animality"'.[258]

Embedding the notion of *equal human dignity* in legal personhood ensures that every person has an inherent entitlement – by the very fact of being a human– to be included in a given polity and to have access to certain rights, breaking the 'citizenship–foreigner–cleavage'; to put it

[245]May and Daly (n 237) 40.

[246]Ibid., emphasis added.

[247]May and Daly (n 234) 131; for an analysis of human dignity in the EU context, see D Petrić, '"Different Faces of Dignity": A Functionalist Account of the Institutional Use of the Concept of Dignity in the European Union' 26 (6) (2019) Maastricht Journal of European and Comparative Law 792–814.

[248]See the jurisprudential analysis in May and Daly (n 237) Chs. 3–7; see also D Shulztiner and GE Carmi, 'Human Dignity in National Constitutions: Functions, Promises and Dangers' 62 (2) (2014) American Journal of Comparative Law 461–90.

[249]May and Daly (n 237) 36–7.

[250]C Dupré, 'Human Dignity in Europe: A Foundational Constitutional Principle' 19 (2013) European Public Law 319–41.

[251]R Teitel, 'For Humanity' 3 (2) (2004) Journal of Human Rights 225–37; for further discussion, see R Teitel, *Humanity's Law* (Oxford University Press 2013).

[252]Kleinig and Evans (n 233) 559; for a stimulating discussion about human dignity as a foundation for human rights, see J Tasioulas, 'Human Dignity and the Foundations of Human Rights' in C McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) 293–314.

[253]Ohlin (n 9) 227.

[254]E Daly and JR May, 'Dignity Rights: A Synopsis' (The Widener University Delaware Law School 2017) available at: <https://delawarelaw.widener.edu/files/resources/dignityrightssynopsisjuly2017.pdf> accessed 22 July 2023; emphasis added.

[255]May and Daly (n 234) 133.

[256]May and Daly (n 237) 7.

[257]M Foucault, *Security, Territory, Population: Lectures at the College de France 1977–78*, (Palgrave Macmillan 2007) 122.

[258]Bačić Selanec and Petrić (n 158) 514, citing J Douglas Macready, 'Hannah Arendt and the Political Meaning of Human Dignity' 47 (4) (2016) Journal of Social Philosophy 399–419.

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differently, *equal human dignity* is the necessary link that provides a meta-entitlement via personhood to a set of rights posited in law. This revised notion of legal personhood intends to achieve a twofold objective. First, it departs from a legal formalist perspective whereby personhood is a pre-determined normative artificial entity which serves to act merely as a logical support of legal relations. Second, it breaks the asymmetry between the *biological status* and the *socio-political status* of personhood, by removing the divide between persons as 'human beings' and persons as 'citizens'. This reconstructed notion of legal personhood allows for the underlying essential moral considerations to be included in any evaluation of human action. The erstwhile meta-entitlement that *equal dignity* bestows exists not only in instances where persons can claim specific rights but also when they are not able to do so.[259] From this we can infer that the constitutional value of *equal human dignity* evolves in and supports democracies, but equally acts as a catalyst for change in systems that lack core democratic features.[260] Hence, by embedding *equal human dignity* in legal personhood 'the gap between man and citizen is transformed into a true site of politics and right-bearing'.[261] For Rancière, exposing this gap in the context of human rights means 'first, demonstrating the gap between the principle of universality and equality in access to rights as specified in international [and European/EU law][262] law and the lack of such access to rights in practice, and, second, claiming those rights and acting as if they are provided'.[263] To quote Rancière, this means that 'the Rights of Man are the rights of those who have not the rights that they have and have the rights that they have not'.[264] It is through these practices of 'dissensus' that those without rights turn into subjects of politics who will then encourage others who are in unequal positions to participate in these practices to become new subjects of politics.[265] Using material reception conditions as an example, the starting point is that these should ensure an adequate standard of living in line with international and European/EU human rights law (as examined in Sections 3 and 4). In the case of poor material reception conditions, asylum claimants turn into subjects of politics by exposing the violation of certain socio-economic rights committed by national authorities that fail to provide dignified standards of living to them. In so doing they demonstrate that in practice they do not have access to the rights that they are entitled to under certain human rights instruments. By acting in this way, asylum claimants behave as subjects of rights and exercise the rights that are denied to them.[266] It is here that, by injecting an *equal human dignity* approach, the law (through a process of legislative and/or judicial change) can act as a bridge and can establish a relationship between a new construal of legal personhood and (access to) human rights.[267]

[259]This point draws on a re-interpretation of Hannah Arendt's intuition of the 'right to have rights' and has been developed through the influence of Andrew Schaap's reading of Jacques Rancière's critique of her work; May and Daly (n 237) 47; H Arendt, *The Origins of Totalitarianism* (Harcourt Brace Jovanovich 1973/2020) Ch 9; Schaap (n 21); for further discussion, see C Menke, 'Dignity as the Right to Have Rights: Human Dignity in Hannah Arendt' in M Düwell et al (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press 2014) 332–42.

[260]A Barak, *Human Dignity. The Constitutional Value and the Constitutional Right* (Cambridge University Press 2015) 131; on the significance of equal dignity outside democratic contexts, see May and Daly (n 237) 46.

[261]A Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012) 124.

[262]Author's addition.

[263]M Kmak, 'The Right to Have Rights of Undocumented Migrants: Inadequacy and Rigidity of Legal Categories of Migrants and Minorities in International Law of Human Rights' 24 (8) (2020) International Journal of Human Rights 1201–17, 1205.

[264]Rancière (n 21) 302.

[265]Kmak (n 263) 1206, quoting T May, *The Political Thought of Jacques Rancière: Creating Equality* (Penn State University Press 2008).

[266]To elaborate this example, I draw on Kmak (n 263) 1206 and Kesby (n 261) 128.

[267]This point draws on Rancière's idea of 'dissensus' and emancipatory practices, but somewhat departs from his theoretical approach, as he relies heavily on the agency of the individual and remains skeptical of the role of law.

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Hence, rather than neutrality, protecting rights necessarily requires taking a position[268] and Ignatieff's idea of 'dignity as agency'[269] appositely captures this role that the law ought to have. The idea of dignity as agency ensures an inter-cultural understanding of what human rights rules entail in specific situations and that what matters is the right of people to construe dignity in a cultural relativistic manner: 'individuals are deliberative equals whose views are entitled to a respectful hearing in all moral discussions about how universal standards should apply in each instance'.[270] Put differently, 'a form of universalism that also allows substantial space for important (second order) claims of relativism'[271] and particularism – what Donnelly coins 'relative universality' of human rights – is called for.[272]

As a constitutional foundation of any legal system based on the rule of law human dignity is a response to times of inhumanity and it carries the hope that the regime created by a given constitution (which is based in dignity) will foster a democracy (comprising the setting up of appropriate human rights and institutional design) in which human beings can lead a meaningful life and shape their personal and political destiny.[273]

It follows that the respect for the right to human dignity should not be construed atomistically but socially, thus becoming a right to *equal human dignity* and necessarily underpinning human flourishing.[274] The latter has two dimensions encompassing, at the same time, a negative obligation on states and other actors of non-interference with an individual's right to human dignity, and a positive obligation on states to ensure that an applicant's right to dignity is not breached.

As to the legal definition of *equal human dignity*, it is possible to identify a 'core' meaning by looking at specific provisions of international human rights instruments. For example, the Preamble to the 1945 UN Charter reaffirms the people's faith 'in the dignity and worth of the human person'. The minimum content of *equal human dignity*, therefore, consists in the fact that every human possesses an innate worth, just by being human, which needs to be respected and recognised.[275] Various provisions of the 1948 UDHR and of the 1966 ICCPR and the ICESCR emphasise the centrality of human dignity *vis-à-vis* humanity and human rights.[276]

[268]In this context, and contesting the neutrality of legal personhood, Blanco and Grear emphasise the significant implications that different constructions of legal personhood have, Blanco and Grear (n 29) 102; on all forms of legal personhood as being a *constructus*, see also A Grear, 'Law's Entities: Complexity, Plasticity and Justice' 4 (1) (2013) Jurisprudence 76, 84.

[269]M Ignatieff, *Human Rights as Politics and Idolatry* (Princeton University Press 2001) 164–5.

[270]Ibid., 170.

[271]Donnelly (n 78) 282.

[272]See also Nathan's concept of 'tempered universalism' to take into account that human rights are also embedded in the local dimension of their exercise and practice, AJ Nathan, 'Universalism: A Particularistic Account' in L S Bell et al (eds), *Negotiating Culture and Human Rights* (Columbia University Press 2001) 349.

[273]Dupré (n 250) 324–5.

[274]In this sense, see Gilabert who maintains that human rights are based on a humanist self-understanding and that they are 'held by everyone [...] in virtue of their common humanity, not their membership in any specific institutional structure', P Gilabert, 'Humanist and Political Perspectives on Human Rights' 39 (4) (2011) Political Theory 439, 444.

[275]McCrudden (232) 679.

[276]The Preamble to the UDHR (UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III)) and the ICCPR (UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, 171) and the ICESCR (UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, 3) recognise the inherent dignity and the equal and inalienable rights of all human beings as the foundation of freedom, justice and peace in the world and as forming the basis for these rights. Art 1 UDHR refers to all human beings as born free and equal in dignity and rights and other provisions of the UDHR refer to the realization of economic, social and cultural rights as indispensable for the dignity and free development of the personality of human beings (Art 22) and to the right to just remuneration to ensure an existence worthy of human dignity (Art 23). See also *Bouyid v Belgium* App no 23380/09 (ECHR 28 September 2015), paras 45–53, where the ECtHR examined the recognition of the concept of human dignity in key international human rights treaties.

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In the EU context, human dignity is conceived as a fundamental constitutional value,[277] a general principle of EU law[278] and a fundamental right in the EUCFR.[279] As constructed, human dignity has acquired the legal status of EU primary law. AG Stix-Hackl elaborated a legal concept of human dignity in some detail in the *Omega* case.[280] According to the Advocate General, 'human dignity is an expression of the respect and value to be attributed to each human being on account of his or her humanity. It concerns the protection of and respect for the essence or nature of the human being per se – that is to say the "substance" of mankind'.[281] Human dignity 'reflects the idea that every human being is considered to be endowed with certain inherent or inalienable rights',[282] and because of 'his ability to forge his own free will he is a person (*subject*) and must not be downgraded to a *thing* or *object*'.[283] Similarly, AG Maduro in its Opinion in *Coleman*[284] considered human dignity to be one of two underlying values of equality, thus maintaining that: 'At its bare minimum, human dignity entails the recognition of the *equal worth* of every individual. One's life is valuable by virtue of the mere fact that one is human, and no life is more or less valuable than another. [...] Individuals and political institutions must not act in a way that denies the intrinsic importance of every human life'.[285] In this context, dignity is considered in its negative connotation as 'indignity' to illustrate how the lack of dignity is to be understood also in terms of humiliation.[286] In this sense, Barak maintains that 'the humiliation and degradation of human beings limits their humanity'.[287] This dimension of dignity brings to the fore the degree of humiliation, stigmatization, and inhumanity that migrants and asylum claimants are exposed to in a given host society, being always compared to the accepted status of citizen: the further away they are positioned legally from the status of citizen, the higher discriminatory treatment they will receive from various societal institutions and, consequently, the lesser protection they will have.[288] The loss of self-respect and self-worth occurs not only when they are refused any kind of social support or relief, but also when they are denied the right to work and are subject to other forms of exclusion, which will increase their sense of worthlessness and therefore undermine their dignity. In the words of Kleinig and Evans, 'the denial of dignity will impact on welfare, and the denial of welfare will impact on dignity. [...] Education, food, and healthcare, as well as a range of social opportunities may be claimed as human rights if people are to develop and flourish as beings possessing dignity'.[289] As Horn posits: 'the rights endowment of an individual within a community gives the subject the feeling of dignity and inclusion. [...] Even if "rights" represent only a partial and general basis for the individual development of self-esteem, recognition as a legal person transports the basic understanding of oneself and the other as a carrier of legitimate individual entitlements'.[290]

[277]Art 2 TEU.

[278]Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der. Bundesstadt Bonn* EU:C:2004:614, para 34.

[279]Art 1 EUCFR.

[280]Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der. Bundesstadt Bonn* ECLI:EU:C:2004:162, Opinion of Advocate General Stix Hackl, paras 74–94.

[281]Ibid., para 75.

[282]Ibid., para 77.

[283]Ibid., para 78; emphasis added.

[284]Case C-303/06 *Coleman,* EU:C:2008:61, Opinion of Advocate General Maduro.

[285]Ibid., para 9; emphasis added.

[286]A Margalit, 'Human Dignity Between Kitsch and Deification' in C Cordner (ed), *Philosophy, Ethics and a Common Humanity: Essays in Honour of Raimond Gaita* (Routledge 2011) 106–20.

[287]Barak (n 260) 369.

[288]This is elucidated in Figures 1 and 2 above; in this sense, see also Kmak (n 259) 1211.

[289]Kleinig and Evans (n 233) 563–64.

[290]AS Horn, *Moral and Political Conceptions of Human Rights: Rethinking the Distinction* 20 (6) (2016) International Journal of Human Rights 724, 734.

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Equal human dignity, therefore, morally entitles individuals to a certain treatment by others that acknowledges their status as normatively determining beings and this recognition will undergird many of their basic rights claims.[291] In this way it is possible to establish a public space where the human rights that human dignity bestows are realised by allowing everyone to live in common.

6. Conclusion

This Article presented a reconstructed approach to legal personhood to reassign center stage to the human being in law-making and human rights practice, with particular attention to EU immigration and asylum law on the basis of what may be defined as a 'humanist human rights idea'[292] of *equal human dignity*. As maintained by Federico, Moraru, and Pannia, 'asylum-seekers, refugees and immigrants do not have a say (at least directly) in the law-making and decision-making processes that so crucially affect their lives'.[293] The twofold premise of this reformulated approach to legal personhood is the understanding that every person has equal moral worth and 'the recognition of human unity or the interdependency of *all* peoples and individuals, [which] cannot exclude any one person or collectivity from the validation of other's choices'.[294] It thus carries with it the imagery and hope of a better life for every human being. A fortiori, *equal human dignity* is a concept, right, value, and principle that can and should command widespread support in national and international legal, constitutional and human rights instruments as it has a powerful normative and motivational function: the shared narrative(s) that it evokes 'allows a rational, intellectual, but also an affective identification and commitment of individuals worldwide'.[295]

Grounding legal personhood in *equal human dignity* allows us to address the current shortcomings of EU immigration and asylum law where there has been a growing shift towards securitisation and dehumanisation. In this respect, the analysis carried out in the preceding sections has shown how both European and domestic courts can provide TCNs 'with a public forum to voice their demands for justice'.[296] In this sense, human dignity (and by extension *equal human dignity*) has a deontological connotation founded in justice.[297] The broader objective of the Article has been to consider the multifaceted questions of equality, human rights, and justice that are germane to this investigation. In so doing, it dovetails with a wide body of scholarship that seeks to rethink and change the extant rationale of EU immigration and asylum law.

Competing interests. The author has no conflicts of interest to declare.

[291]Kleinig and Evans (n 233) 562.

[292]Horn (n 290) 735.

[293]V Federico, M Moraru and P Pannia (eds), 'The Growing But Uneven Role of the European Courts in (Im)migration Governance: A Comparative Perspective' Editorial (May) (2022) European Journal of Legal Studies 1, 17.

[294]MJ Rabbani, *The Development and Antidevelopment Debate. Critical Reflections on the Philosophical Foundations* (Routledge 2011) viii.

[295]Ibid.

[296]Federico, Moraru and Pannia (n 293) 18.

[297]Bačić Selanec and Petrić (n 158) 516.

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