

Dignity, Rights, and Legal Philosophy within the Anthropological Cross of Decision-Making

By Winfried Brugger*

A. Actions within the Anthropological Decisional Cross

The law must correspond with human nature and be based on criteria equal to all human beings. Many schools of legal philosophy agree on these points. However, many of them tend to disagree as soon as more detailed criteria for “humanity” and the “nature of man” are suggested. This is where the empirical understandings of basic needs clash with loftier concepts such as “reason” and “spirit” over what the actual indicators of humanity are. Relativistic schools point skeptically to the plurality and historicity of many legal convictions. Proceduralists look for a way out of the vagueness and controversy of appropriate indicators of humanity and human law by relying on concretization processes. Such processes are expected to exclude at least violence and in the best case include as much integration as possible of all those affected by legal provisions. This paper proposes that the most important insights into good and human law can be discovered by analyzing the character of human agency (*Handeln*). All life forms usually act in a functional manner, doing what is required to preserve themselves; many animals are able to learn and communicate to a certain extent. By contrast, humans not only “behave”, rather, they “act” - they sense, interpret, evaluate, articulate and decide. As trivial as that sounds, using “human action” as an indicator of what aspects a good legal system should represent is an illuminating starting point. This is especially true concerning hard cases in the law that, in spite of being typically contested, lead to legally binding decisions. They are burdened by the “anthropological cross of decision-making” or, as one could also say, the “decisional cross”.¹ The question we will turn to is the meaning of the decisional cross.

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¹ The following remarks are based on the author’s book, WINFRIED BRUGGER, DAS ANTHROPOLOGISCHE KREUZ DER ENTSCHEIDUNG IN POLITIK UND RECHT (2ND ED. 2008) (providing many citations and sources

Human action can be divided up roughly into two: routine actions and problematic actions. Routine behavior runs off of habits that we practice day-in and day-out in order to manage our everyday problems in a timely fashion. However, once a routine way of dealing with a particular situation does not lead to the desired results anymore, a case of disturbance or crisis arises. It transforms our habits in decisional situations, revives our attentiveness, and forces conscious considerations. Within those situations that require a conscious selection of the proper course of action to follow, one can distinguish between decisions that can be taken light-heartedly, such as “should I go to see a movie or stay at home?” and those that put a real burden on our shoulders. The latter situations remind us of the phrase “to bear our cross.” In the original and narrower religious sense, this phrase alludes to the Christian cross, labor, pain and suffering. The term, however, has undergone a kind of secularization. Colloquially, this phrase nowadays refers to all situations in which one is stressed or heavily burdened by someone or something and is swaying between various options. This colloquial understanding of the term is also present in the literary “crux.” A literary crux – probably deriving from the Latin “*crux interpretum*” – refers to a text that is difficult to interpret and resolve because of significant defects that lead the interpreter to different options of elucidation instead of to the one, self-evident meaning. When one speaks of the “crux of the decision,” one is also referring to this everyday understanding of pointing to the core of a decision that has been – or should be – influenced by several competing aspects.² We can be more precise with regard to the kind of situations that challenge human agency. Whenever we feel the “decisional cross” as a serious burden on our shoulders, we are faced either alternatively or aggregately with (1) morally contested courses of action, with (2) actions loaded with heavy consequences, and/or (3) actions that define or transform our innermost being, our

that are left out here), and the article *Würde, Rechte und Rechtsphilosophie im anthropologischen Kreuz der Entscheidung*, in *RECHTSPHILOSOPHIE IM 21. JAHRHUNDERT*, 50-71 (Winfried Brugger & Ulfrid Neumann & Stephan Kirste eds., 2008). For discussions of the “decisional cross” from different disciplines, ranging from philosophy and law to psychology and economics, see *ÜBER DAS ANTHROPOLOGISCHE KREUZ DER ENTSCHEIDUNG* (Hans Joas & Matthias Jung eds., 2008).

² See, for example, the following formulation taken out of a court decision: “This is the crux of the decision: The arrest warrants are retained even though they are, at least in part, based on the torture declaration”, SUMMARY OF IMMIGRATION BOARD’S DECISION, available at www.peoplescommission.org/files/ivan/IvanSummaryOfDecision.pdf, last accessed 25 September 2008. Or see the article *The Crux of the Decision*, NOVATOWNHALL, 17 April 2008, available at <http://novatownhall.com/2008/04/17/the/>, last accessed 25 September 2008, on the difficulty of deciding between Hillary Clinton and Barack Obama as presidential candidate of the U.S. Democrats.

identity.³ On first inspection the “decisional cross” only reveals an awkward predicament, a problem, not a solution for decisions regarding the task of leading a good life, either individually or collectively. On closer inspection it is possible to develop a systematic anthropology of human action that helps orient the actor toward leading an individual life as well as to orient collective actions, such as those taken in politics and law. In order to develop these standards, we first have to describe and distinguish two different ways of analyzing hard cases in human decision-making.

Only human beings understand one another, communicate and interact in a timeframe of past, present, and future—including the knowledge about the finiteness of one’s life and to say nothing of the phenomenon of the subjunctive case of what one “could, should, would have done” in complex cases. This is, visually and metaphorically speaking⁴, the horizontal axis of the cross of decision-making.⁵ In the here and now of a problematic decision, the past - one’s former life experiences and biography - pushes from behind and the future pushes from in front in order to gain consideration amongst the options for a plan of action. Goals must be selected. Considerations of choosing which means or which end must be taken into account. The worth of the goal, compared to other goals, needs to be assessed, as well as the chances of achieving it, at what cost, and in light of all relevant social circumstances. Whether anything at all is decided or whatever finally is decided will have an effect on the reassurance, correction or abandonment of previous lines of continuity and biographical understandings. Further, any decision taken will have an effect on the chances of carrying out future plans within the same context.

The visual and metaphorical vertical axis of the cross of decision-making comes into play because humans are not entirely determined by their instincts. Man is “his

³ Taken to its extreme, one can see the link to existentialism that in its many forms deals with human beings having to create themselves in the face of, for example, dread that results from the fact that the decision to be taken is morally suspicious and loaded with far-reaching consequences.

⁴ As to the enlightening accomplishments of visualization and metaphorical thought, see Ralf Konersmann, *Einführung*, in *WÖRTERBUCH DER PHILOSOPHISCHEN METAPHERN*, WISSENSCHAFTLICHE BUCHGESELLSCHAFT (Ralf Konersmann ed., 2007).

⁵ In social and legal philosophy, references to “horizontal” and “vertical” arguments and reflections abound, as is demonstrated in the many citations in my book. See, BRUGGER, *supra* note 1. The “decisional cross” offers, for the first time, a systematization of these two levels of reflection for a specified area of situations.

own project—he is a being that takes stances” and “is what he makes of himself.”⁶ Although many basic needs pressure human beings, ranging from the desire for food and drink, or from sexual contentment to recognition and love, repose and activity, the exact ways and the selection of proper objects to satisfy these needs as well as their specific worth are not detailed in the genetic code of human beings. Rather, due to the influence of God, nature, and/or evolution, we humans are inevitably faced with the torment of having to make up our mind about every hard case of decision-making. We are faced, as the German language aptly puts it, with the *Qual der Wahl*, the torment of choice. In hard cases, humans are confronted with the torment of choice between means, ways, and ends in their external relations to the world of objects, with regard to fellow humans and social rules of appropriate behavior. Connected with this torment of choosing externally is the torment of inner guidance through one’s self or identity which is composed of a complex mixture of vital impulses, emotions, cognitions and ideals. All these complications find themselves on the map of human anthropology between initial impulse and ultimate execution, and they transform behavior into action. They create the characteristic of human destiny, which in every hard case of decision-making has to master interpretive tasks, even while pursuing the impulses “from below.” Think of the different ways we deal with hunger: We may dine, eat, or devour our food, and each term carries a different connotation dealing with hunger and food.

According to Kant, humans are influenced but not necessarily determined by their urges and inclinations, which is why they can and should be responsive to social and legal norms that can be scrutinized and approved of by everyone concerned, using the categorical imperative. Thus, according to Kant, humans have the task to discipline, cultivate, civilize, and moralize their empirical inclinations.⁷ Psychoanalysis is one of the disciplines that has systematized the main drift of these ideas. Sigmund Freud speaks of the configuration of the human psyche in the categories of Id, Ego, and Super-Ego. The Id is our animalistic nature pressuring the ego “from below,” representing our most basic human needs and their desire for satisfaction.⁸ The norms and ideals of what is beautiful, good, just, and transcendent, herald “from above,” visually and metaphorically speaking. These highest ideals - fostered in all individuals through their socialization and

⁶ See the German anthropologist ARNOLD GEHLEN, *DER MENSCH. SEINE NATUR UND SEINE STELLUNG IN DER WELT*, 32 (12TH ED. 1978).

⁷ For an analysis of these Kantian themes, see Gerhard Funke, “Kants Stichwort für unsere Aufgabe: Disziplinieren, Kultivieren, Zivilisieren, Moralisieren”, in *AKTEN DES VIERTEN INTERNATIONALEN KANT-KONGRESSES, MAINZ, 6 - 10 April 1974*, 1-25 (Gerhard Funke ed., 1974).

⁸ See SIGMUND FREUD, *ABRISS DER PSYCHOANALYSE*, 9-11 (paperback edition 1953/1972).

enculturation – expand or delimit the basic needs “from below” and turn the human eye “forward” toward the future. They point toward ways, objects, and goals that satisfy our basic needs. Sometimes these basic needs are even transcended. Think, for example, of the perception of a reigning God, who lets the physical needs of an individual become less important or even unimportant, as in the case of a hermit. Such imaginativeness “from above” is partly object and body oriented, ranging from asceticism to gluttony; it is partly unto itself a set of standing creative products of the human soul, which at least fractionally distances itself from the structure of human needs, or creates new realms of experience like in love or in the religious realm of the holy.

If we are crossed with a difficult decision, the ego or self stands at the crux of operating impulses coming “from below” and “from above.” The horizontal and vertical axes of consideration cross one another with two energized poles each—thus equaling four decisional perspectives in total. We have not just “two,” but “four souls in our breast.” The four factors act as informational currents and a set of motives in every problematic situation. There, they exhibit two main variants: (1) They become apparent in the conscious reflection of the actor when considering and making decisions. (2) The conscious decision is strengthened or in the borderline case supplanted by emotional impulses impinging upon the deliberation process ranging from “green lights” (Go!), and “yellow lights” (Go?) to “red lights” (Stop!).

To sum up the argument so far: The anthropological cross of decision-making allows for a first-order differentiation between behavior and action, animal and human. Aside from this classificatory or definitional level, the cross of decision-making possesses an analytical or comparative and a normative or prescriptive dimension. Analytically and comparatively, it allows for deciphering and assessing the relative weight of the input of the four perspectives in problematic human decisions; and this can be done either from the objective view of an outside observer (depending on the level of information) or from the internal perspective of the actor. The upward, downward, backward, and forward-looking views (reflections) of one’s ideals, basic needs, biographical self-conceptions and future plans taken together with comprehensive considerations of means and ends provide a roadmap to the underlying structure of human decision-making. Human decision-making does not constitute a “black box,” even if, admittedly, nowhere near enough information exists precisely elucidating the interaction between cognition, evaluation, emotion and decision, or between neurobiological processes and human decision-making. The normative or prescriptive potential of the cross of decision-making, although less rigorously developed, is nonetheless nontrivial. A “good,” “successful” or “fulfilling action” is one based at least in the long run on consideration of all four perspectives before the actor decides on a specific course of action. Bad, or at least laden with danger are the decisions that not only once or

once in a while, but more and more, structurally, phase out one or more of the perspectives and thus make themselves a slave to the tyranny of a single anchor of human existence, that is: their biographical past, their natural instincts, the maxim "the ends justifies the means," or the social standards as defined by the "*Zeitgeist*." In contrast, the four anchoring points of the decisional cross give a deeper mooring, even if it cannot lend safety in every situation.

The insight provided so far by the use of the decisional cross as a map and magnifying glass to analyze hard cases has been illustrated on the level of individual actors. But its analogical use reaches collective actors and organizations as well, be it companies, legal systems, nation states or supranational entities. These are not natural persons with identities, personalities with minds and bodies, or hearts and souls of their own. Rather, they are artificial bodies, organizational entities, and legal persons established by humans for the execution of specific purposes that are usually laid down in a specified organizational text called an "enabling act" or an "organic act." On a closer look, it is not surprising that most, if not all of these organizations deal with the task of taking care of one or several of the four perspectives. Thus, on the first glance, one could say that museums "look back," think tanks "look ahead," religious organizations deal with the "vertical" interpretation of the spiritual needs of their believers, and social services deal with the "downward perspective"; they provide food and shelter for those who are sick or poor. Every organization with a longer history of existence probably serves primarily one important "basic need" of human existence and interaction, but does so "vertically" by integrating the need for, say, the production of goods (economy), security (law), love and respect (family, religions) in a broader interpretive and legitimitative context that is provided in the reflection "from above." At the same time, the "vertical axis" of every organization is grounded in the "horizontal" temporal reflection of the historical progression of its development, betterment or worsening. We "look back" at feudalism and industrialism; we live in modernity and look forward to -or are already enmeshed in - post-modernity.

The structural relevance of all four perspectives is apparent even in the illustration of a museum, which at first glance only "looks backwards." A museum is only planned and financed if it addresses a relevant aspect of the respective community, be it an especially outstanding or depressing aspect of its history. Thus, a Holocaust museum in Germany or elsewhere addresses the violations of the bodies and minds of the Jewish people (reflection downward). It reflects upon them in the light of the ideals from above (universalism and dignity of everyone against Aryan race theory), and it puts these violations in an historical context by looking backwards (how could this happen?) in order to educate every visitor about how to prevent something similar from happening in the future (never again!).

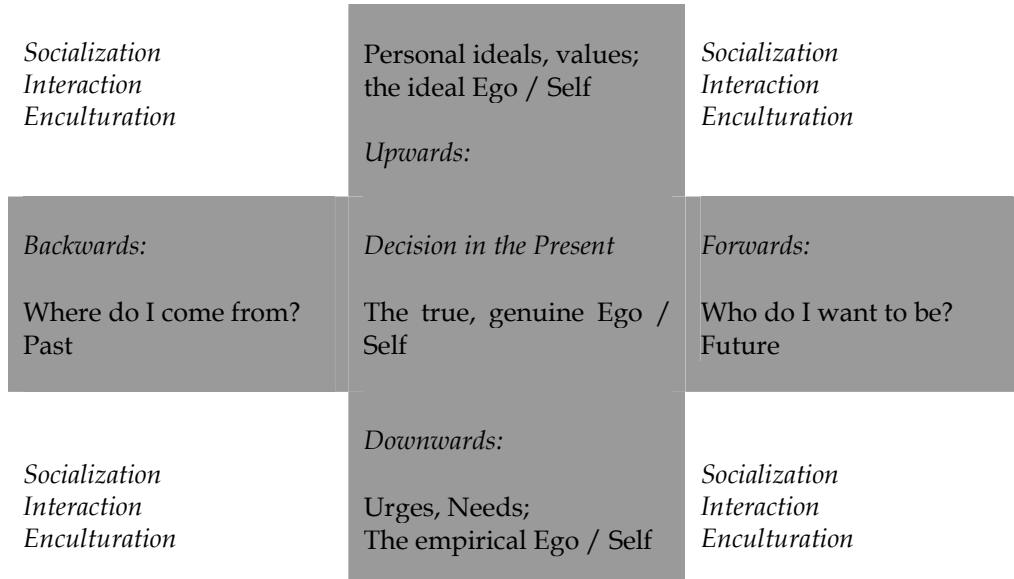
Put more abstractly, all collective actors, having been invented and established on purpose, or having developed more or less organically over time in order to serve human beings that define themselves in the “decisional cross,” act within the same cross. The differences mostly concern two aspects: Collective actors and organizations, such as legal systems and nation-states, usually “live longer” and have more or less “specific purposes,” while individuals lead shorter lives and are necessarily “all-purpose” beings who have to develop an identity that covers all kinds of needs, activities and interpretive horizons.⁹

As pointed out earlier, human action tends to be either habit-based or problem-based. The decisional cross deals with the latter category of human action. Hard cases to decide for humans are either caused by inner-tensions such as conflicting emotions or ideals, instances of becoming sick, or they occur because some envisioned course of action will lead to serious frictions with actors or organizations in the external world. In both cases, one could say that the actor either remains immobile and denies the problem,¹⁰ or attempts something that can be called ego growth through crisis resolution. Likewise, all these other persons and institutions act within their anthropological cross of decision-making. Thus, in shorthand, and as noted in the table, “action” turns to “interaction”- Max Weber would call it “social action”- which usually occurs within the framework of the “socialization” of the respective actors and the cultural ways of evaluating the envisioned courses of action on all sides - “enculturation.”

Figure 1. The actor under the Anthropological Cross of Decision-Making

⁹ Closer analysis would of course reveal that there exist more constricted types of organizations and institutions as well as multi-purpose institutions that in the extreme case, such as with a comprehensive religious body of rules for leading one’s life, can embrace all aspects of human existence.

¹⁰ Denial or suppression is a familiar example taken from psychology showing that human beings sometimes cannot act in the face of conflicting motives or options.



B. Human Dignity and Human Rights within the Anthropological Cross of Decision-Making

When one stands — with body and mind, instinct and reason — at the point where the horizontal axis, with its time and its means-and-ends reflection, and the vertical axis with its interpretive and prescriptive reflection, meet in a hard but inevitable case of decision-making, then one gains a non-exclusive yet important understanding of the concept of *human dignity*. Motives and arguments pull at us from all four directions. The four perspectives are poised against and contradict each other, but even within each perspective conflicts can arise, such as when the ideal of living up to the highest standards of a husband and father collides with the ideal of being the best professional possible who works day and night. Such situations let us feel the “cruX” of the decision and turn the decision-maker into a “subject,” because who is better suited than the actor himself to sense the weight of each choice when making a decision and interpreting possible actions? The agent carries responsibility for the decisions he makes; in most cases, those decisions are attributed to him by the social environment. The entire legal system ties into this concept of attributing responsibility to the actors that make those decisions, as long as extreme circumstances are not present where the difficulties of taking responsibility for what one does are so overwhelming (think of instances of coercion or mental illness) that the law characterizes such actions as being heteronomously caused instead of autonomously initiated or at the very least controllable by the individual.

The concept of the person is rooted deeply in the cross of decision-making, and it ties together with the human potential to reflect, select, and justify what one does. This is a potential for every human being. Under regular circumstances and as a result of socialization and enculturation, it will be present in every adult with varying degrees of conforming socially versus uniqueness and creativity. This leads to the necessary differentiation between person and personality. Whereas the characteristic of the "person" is species-oriented – as it can be applied to every human being and its potential for reflection in the horizontal and vertical axis of the decisional cross – , the characteristic of "personality" refers to the unique, varying ways in which specific actors form their identities (personalities) and present themselves in public. They do this either in more socially conforming or alternative ways. However they transform themselves from the generic human person into the particularistic individual, every one of them unconsciously or consciously will develop a personality that has the best possible fit for synthesizing basic needs, biographical inputs, ideal values and forward-looking goals for exactly this one and only human character. The dominant social and legal philosophy of "legitimatory individualism" in the West is based on this interwoven understanding of person and personality, whereas more traditionalist societies pay stronger attention to backward and upward-looking perspectives of "how one always has lead a good and productive life in our society."

If we understand human dignity's place within the four perspectives of the decisional cross, we can provide the link between dignity as the dominant social and legal value and the seminal legal concepts of person, personality, responsibility, and attribution. All of these four terms presuppose human agency in the sense explicated by the backwards, forwards, downwards and upwards oriented reflection, as centered on the decision-maker in a problematic situation giving him the impression that he has to bear a heavy cross. This insight reveals why constitutions and human rights agreements protect human freedom of action and the right to develop one's personality; it is because these rights are necessary for standards of good law – meaning a legal system that is in accordance with the basic facts of human existence. The personality is individualized, because it essentially perceives itself from the first-person perspective – even "John Doe" is unique from his own inner-perspective. Freedom of action does not suppose a causal non-determinacy of action; rather it presupposes various influences on our behavior from the inside (the four perspectives) and the outside (socialization, interaction, enculturation). With regard to the legal order, it presupposes the right

of every individual to “lead a life,” to have some leeway, flexibility or choice within his or her “quadricity” of feelings and perspectives.¹¹

The equality of mankind as expressed in the principle of and right to equality in constitutions and human rights treaties, results from the equal position of all human beings in hard cases of decision-making which challenge one’s status of person and seriously affect one’s development of personality. If this is what differentiates us from animals and the rest of the natural world rather than skin color, race, sex, or any other immutable traits, then indeed equality qualifies as a necessary component of good and just law. As already pointed out, coupled to the principle of equality or equal respect is the basic regard for dignity. With regard to both standards, one should distinguish between “basic standards” and “higher, more challenging standards of excellence.” Every human being as such, without regard to whether he acts rationally or irrationally, legally or illegally, setting a good or a bad example – should receive the basic equal respect due all human beings because of their potential for acting and reflecting and justifying their actions before themselves and others, even if this potential is not fulfilled, even violated, as in the case of a criminal act. Higher, unequal respect is paid legitimately to those members of our community that set standards of excellence, whom we can look up to and try to live up to, such as “statesmen” or “heroes” in whatever field of human action and interaction they may be positioned. The German penal law protecting one’s honor and dignity embodied in the tort of defamation in § 185 et seqq. of the Criminal Code (*Strafgesetzbuch*) encompasses both layers: One cannot be allowed to call into question a criminal’s status as a person or human-being; one may only call him a cruel person and his deeds bad or reprehensible. The good reputation of the respectable citizen may not be harmed by a third party without good cause, that is, if one utters or publishes harmful assertions about someone, they better be true!

With the exception of one’s withdrawal into the private sphere, action—that is to act—is usually interaction or, as Max Weber would put it, social action. It can be done routinely or creatively, in a smooth, problem-solving manner or in a way that is prone to conflict. In conflict-laden cases the law and the state usually come into play in order to cope with such crises in a productive manner that avoids the use of

¹¹ In other writings of mine, I have analyzed these aspects within the “Menschenbild der Menschenrechte,” the model of person as identified by modern human rights instruments. See Winfried Brugger, *Zum Verhältnis von Menschenbild und Menschenrechten*, in: “VOM RECHTE, DAS MIT UNS GEBOREN IST”. AKTUELLE PROBLEME DES NATURRECHTS, 216-246 (Wilfried Härle & Bernhard Vogel eds., 2007), and an earlier English version: Winfried Brugger, *The Image of the Person in the Human Rights Concept*, 18 HUMAN RIGHTS QUARTERLY 594 (1996).

coercion for as long as possible. In all interactions it should be presumed that every agent counts as an independent source of analysis, assessment, and action, and is thereby free, equal, and disposed to reciprocity. Therein lies the right to have one's dignity respected. Respect for dignity is tied up with respect for the four perspectives in which every human being finds the anchor for his status and person and molds his unique personality: in terms of basic needs, such as the corporeal need for food, water, sleep, propagation, and sexuality. However, this holds true also in relation to biographical self-conception in the form of a family narrative as son or daughter of parents and in relation to wanting to develop a life plan for the future, based on one's version of the ideals and values that one's family and culture have ingrained in them.

In this sort of interaction one sometimes develops common solutions; in other cases, disputed questions remain. The consensus lends itself to a basic recognition of the importance of the aspects of being a person, which present themselves in the four perspectives, and consequently the general right to develop one's personality for all human beings in action. The dividing line between consensus and dissention often lies where the action of the isolated individual meets or challenges, through interaction, the expectations and rights of other actors. Legally formulated, in view of the lone actor with his cross of decision-making, the relevant "rights to" respect and protection can be argued for persuasively. The "right to" specifies, however, not the addressee of the respective duty to provide a service or good, so much as the "right against." It also does not specify the breadth of the bilateral or multilateral duties, and says nothing about the absolute or relative character of the entitlement in question.¹² This is where the dissent and the competition of giving and taking begin (to say nothing about the contested question of what should be the reaction in cases of injuries to pertinent legal rights and duties). Neither the "decisional cross" with its four perspectives nor the principles of human dignity are specific enough to resolve such disputes in detail. Additional considerations are necessary, which positive law must provide. Nevertheless, three requirements for solving such conflicts can be formulated that should guide the establishment of legal concretization procedures:

¹² To put it in more concrete terms: Should the respective right be "absolute," inalienable, or be relativized by "limitation clauses?" In the U.S., such a discussion was led in the 1960s on the first amendment by the "absolutist" Justices Black and Douglas against the other "relativist" balancing Justices. In the German Constitution, some constitutional rights (freedom of religion, the arts, and the right of dignity) are without limitation clauses, which transforms them, at least on first glance, into absolute rights.

1. In such balancing decisions all humans that are basically affected persons and personalities should have a right to voice themselves and be heard. Politically speaking, this leads to democracy as a human right, from upfront rights of communication like the freedom of opinion, assembly, and association as well as to subsequent rights of court hearings.
2. Aside from this procedural argument, a core or essential content argument should be made¹³: In any case, a base element of each of the four perspectives of the cross should be respected and furthered by other actors to be particularly specified. Here are a few examples in the cross of decision-making that come to mind and are typically guaranteed by modern constitutions and declarations of human rights: looking downward, we see the organization safeguarding the minimal existence of every human being,¹⁴ whereas looking upward we see the safeguarding of freedom of religion and world view (*Weltanschauung*).¹⁵ Looking backwards into the past we see the respect for and facilitation of marriage and family in which we develop our biographies.¹⁶ Looking forward, we recognize the need for options around which we can plan our futures and secure purposeful choices – choices regarding activities which are dear to us, which define our personality, for example in the personal or professional area.¹⁷ One can summarize these four levels of reflection and link them to human dignity by using the concept of integrity: Respecting human dignity requires that in core areas its integrity is secured, both in regards to its physical vulnerability and neediness and the integrity of its psyche or identity, which shape humans throughout their entire life story.
3. Eventually the resolution of conflicts with regards to demanding versus delivering and taking versus giving requires a specification of “rights and responsibilities” based on the huge variety of communal spheres of

¹³ As an example, take Art. 19 II of the German Constitution: “In no case may the essence of a basic right be affected.”

¹⁴ See, for example, HENRY SHUE, *BASIC RIGHTS* (2nd ed. 1996), with regard to “subsistence.”

¹⁵ See, for example, Art. 4 I of the German Constitution: “Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable.”

¹⁶ See, for example, Art. 6 I of the German Constitution: “Marriage and the family shall enjoy the special protection of the state.”

¹⁷ See Art. 2 and 12 of the German Constitution, respectively.

interaction.¹⁸ Human associations that give specificity to what we owe each other range from small to large, from face-to-face to anonymous communities, from emotion to calculation, from sectoral and specific to universal aspects of belonging, and from societal to legal organization. Some thinkers or countries advocate the primacy of the local, regional or national community. Unlike such particularists or conservative communitarians, as we can call them, universalists or egalitarian communitarians campaign for their preference of humans as being part of a universal community comprised of all human beings; then most reciprocal obligations embrace every member of mankind, and equal concern applies to all human beings. Liberal communitarianism intercedes in a meditative manner: It argues for the gradation of mutual responsibility ranging from the familial to the universal community in both their inner and outer relations, with regard for every human's autonomy which is a result of his position in the cross of decision-making. It is in concordance with the cross of decision-making (although not a direct result of it) that in modern constitutions and human rights treaties we separate spheres of spiritual and worldly power in order to avoid totalitarianism, and that we have to divide governmental authority using some method of checks and balances in order to avoid being overpowered by too much governmental regulation, while at the same time accomplishing the legitimate businesses of the government in the most effective way possible.

If we summarize the merits of the cross of decision-making by elucidating the concepts of human dignity and human rights, one notices a difference between positive and negative aspects: Concerning the positive aspect, the cross of decision-making exhibits an ensemble theory of human dignity; but it is not a haphazard, chaotic ensemble, rather, it is a systematized, architectural theory fully extrapolated in the four perspectives of analysis, valuation, and decision. Thus it becomes clear that several competing conceptions of "humanity" or "dignity" can be integrated, find their anchor or a home in the decisional cross: This is true of approaches that look "actionistically", self-regarding, downward to the necessary needs of every human being; it is true of identity-oriented approaches of dignity that primarily look backwards and upwards; it is true with regard to Kantian reason-oriented approaches that look upwards to a specific version of morality which focuses on reciprocity of liberty; and it is true concerning religious-oriented approaches that look upwards as well but with an emphasis on ways of transcending, while not

¹⁸ See the articles on "communitarianism" in WINFRIED BRUGGER, *LIBERALISMUS, PLURALISMUS, KOMMUNITARISMUS* (1999); Winfried Brugger, *Communitarianism as the social and legal theory behind the German Constitution*, 2 *INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW* 431 (2004).

necessarily forgetting, the mundane needs of humans; and this is finally true of creative-oriented approaches of dignity that are positioned at the productive crossroads between the four perspectives. A glance at the cross bespeaks the dimensions important to all humans relating to all aspects of dignity. The same holds true “interactionistically”, other-regarding, in shaping relations of respect, recognition and care between humans in communities small and large, of a private, societal or legal character. All such interactions take place within the rich realm of “enculturation” that provides a well of interpreting and evaluating specific ways of organizing a social life.

The cross of decision-making also illustrates that it is possible and sensible to make progressive steps from the dignity of the human species (the general potential of agency) to the dignity of the person (the individual potential of agency) to the dignity of the irreplaceable individual (who acts from the “I” perspective). The cross of decision-making is relevant for all these aspects: It points to a generic characteristic of the species and the individual as well as to the difficulty of particular individuals to present themselves more or less creatively and uniquely as an “I” or “self.” Nonetheless, one should not expect too much from this formula. It excludes some answers to the question of which policies and laws conform to human nature (agency), but leaves many others open. The exclusionary function of the decisional cross is directed against all theories of human nature and dignity that are reductive. The term, reductive, here is understood as singling out one of the four perspectives as the defining element while at the same time marginalizing or totally suppressing the other ones. If, for example, a theory such as Marxism, denies the relevance of the vertical dimension in humans by disqualifying the upward reflection towards religion as mere “opium for the masses,” and it then combines this axiom with brutal repression of believers in religion, then we are faced with a reductive view of mankind that cannot come up with a legal regime that is in concordance with the nature of humankind. The cross of decision-making also excludes theories that do not accommodate for the equality in status of all human beings with their “four souls” in their breast. For this reason theories of racial superiority are rejected. It also excludes theories, which within the scope of the four perspectives, would want to omit an entire perspective, for example the physical and mental vulnerability of all humans. This vulnerability, which affects all human beings, leads to the postulate of respect for physical and mental integrity, thus excluding dire humiliation or torture.

Nonetheless, many questions remain unanswered. This does not mean to say that relevant arguments cannot be anchored to the cross of decision-making. The difficulty arises because the cross does not have just four perspectives, but allows within each perspective varying interpretations of past, future, ideality, and basic needs. What necessarily remains unsettled is the specific emphasis on individual

aspects within the four perspectives, because the task to find the right balance of and interpretation within each of the four perspectives is up to the particular human being. This is not only his “right”; it is a challenge that no human in hard cases can avoid. Every individual, apart from following well-functioning routines, is at least latently occupied with evaluating and arranging tension-filled preferences. Through this process, the individual attains his personality. This applies even more so to collisions of interpretations, valuations, and decisions between individual and collective actors, for example in cases of life against life or dignity versus dignity. Such specific disputes are not ended by reference to the cross of decision-making or by a single theory of dignity, since they are relative abstractions and initially stand for themselves, thus comprising uncontextualized valuations.

At this point the aforementioned steps toward contextualization and proceduralization have to be taken within the legal system. In every such procedure all those affected by the problem at hand should be heard and the basic elements of all rights potentially affected should be respected. The cross of decision-making cannot determine detailed results in this respect, but it can instead be viewed as helpful in searching topically for relevant aspects to troubleshoot. Here are some illustrations based on German law and decisions of the Federal Constitutional Court:

1. Should an adopted child have the basic right to know its ancestry? Within the four poles of the decisional cross it is clear that this knowledge is relevant when looking downward toward the natural basis of this child and its identity, which is formed along the horizontal axis. However, one must understand the situation of the adopting family as well. The adopting family satisfies the basic needs of the child, opens it up to the world of values, and offers it its own social instead of genetic line of identity. Thus, from its perspective, depending on the circumstances, it may have a legitimate interest in the anonymity of the genetic parents. The cross of decision-making cannot as such determine what exactly should take priority, given the fact that in such a case of complex interaction, contextualization needs to be added to the bare outline of the case. According to the *Bundesverfassungsgericht* (German Federal Constitutional Court), in volume 79 p. 256 et seqq. of its compilation of judicial decisions, as long as the appropriate pieces of information are present, an adoptive child has the fundamental right to know his genetic lineage.¹⁹ This is one

¹⁹ BVerfGE (Reports of the Federal Constitutional Court) 79, p. 256.

possible answer, although not necessarily the only correct answer that can be argued from the viewpoint of dignity as pertaining to the cross of decision-making.

2. The cross of decision-making is not specific enough to be able to say something about the consequences of a violation of rights, for example the form and length of a punishment. That would require additional theories concerning punishment and a look at the circumstances of the case. Nonetheless, the following is clear: Whoever commits a murder, who under § 211 of the German penal code²⁰ destroys the life of another human being for especially abject reasons and thereby removes the vital basis of dignity of the victim, has to expect serious sanctions for his actions. Whether such a sanction should take the form of the death penalty or compulsory life imprisonment, or just a basic life sentence that as a rule may only amount to 15 years in prison, is something the cross of decision-making cannot determine on its own merits. It can, however, on the level of the isolated mindset of the felon, call attention to the four decisional perspectives, and point out what kinds of biographical data, urges, rationalizations and goals were guiding his actions. This leads to an assessment of the perpetrator's motives, intent, and guilt. Moving from the analysis of the felon's actions to the interaction, to the victim's side, the level of injury to as well as the impact on the victim, his family, and even the public in general – its expectation of being safe in their daily activities – come into the fore. Ultimately this will bring our attention to questions of enculturation: One relevant point of discussion is the balancing of the fact that capital punishment is an effective way to prevent future criminal acts of the felon, with the fact that allowing capital punishment can or actually will lead to a brutalization of the legal system.²¹ The *Bundesverfassungsgericht* decided in BVerfGE 45 p. 187 that the compulsory life sentence for murder, provided for under § 211 of the penal code, was constitutional, however, as a general rule, a review would be required after 15 years, which often ends with an early parole.²² The cross of decision-making explains why this constitutional decision is at least one appropriate answer to the question of how to deal with murderers. Being human incorporates the choice of

²⁰ Strafgesetzbuch, 211.

²¹ As is well known, the U.S. balances this differently from Germany and Europe. While there the death penalty is constitutionally acceptable (with exceptions), here the death penalty is mostly outlawed.

²² BVerfGE (Reports of the Federal Constitutional Court) 45 p. 187.

choosing between good and evil, legal and illegal. Those who commit a serious criminal offense fail in their choices; despite this, they do not absolve themselves of the potentiality and duty to, in the future—after serving their deserved and adequate penalty for their crime—behave lawfully and to respect the lives of others. Moreover, the future-oriented dimension is one of the remarkable qualities of human life. A perpetrator, whose future is completely obstructed by a life sentence, who is consequently confined to a part of his past, ends up losing a part of his humanity and his dignity. Preventing this from happening is certainly one relevant consideration even though this argument does not always yield the deciding answer – to the extent that the perpetrator may commit more criminal offenses after his release from prison, one can expect other competing viewpoints to come into play.

3. In looking downwards in the cross of decision-making we understand that the structure of needs and desires, especially those needs that our corporeal life brings with it, falls within the territory of being human; this is especially true in cases of threats to life and limb. Yet this is a characteristic that humans share with animals, and is thus not distinguishing. Neither human nor animal should be tantalized; their physical integrity should be respected. Despite this, we eat animals but not other human-beings. This can only be explained and may be justified if one does not exclusively define dignity with regard to the physical “ability to sense suffering” and “pain.” Rather, one must add to the definition reflexivity, individuality, and identity – or in other words, one has to include a comprehensive conception of dignity or humanity in the other three dimensions of the definitional cross. In this sense, § 90a of the German Civil Code is correct in saying: “Animals are not objects. They are protected by special laws.”²³ These special laws are tied in together with the physical ability to sense suffering and pain as well as a few other approximations of “human behavior,” but they do not extend into all four dimensions of the cross of decision-making. For this reason animals share a world with humans as well as a few human characteristics, but in the end they are only “close” to us, not the “same” as us.
4. Here we can locate and to some extent assess the controversy concerning the “highest” or “most pressing” aspects of *human dignity* and the rights needed for their protection. In this conflict, one can look upwards towards

²³ Bürgerliches Gesetzbuch, 90.

transcendence, reason or “*Geist*” as being the most important part of a human being; or one can look downwards towards the integrity and protection of life and limb, upon which all living things depend. To formulate this somewhat differently: Depending on where one puts his emphasis, the human can seem “cogital” or “animal”-like²⁴; he can seem like a “creation of God” or an “accomplished ape.”²⁵ Within the analytical framework of the decisional cross, such hierarchies are not really convincing, because both aspects necessarily come with the territory of being human, including the aspects of biography and future planning, which are still missing in the vertical axis of this reflection. Depending on the circumstances, one of the dimensions may be especially endangered so that in this situation, one might tend to protect this particular human interest through a provision in the constitution.²⁶

C. Dimensions of Fundamental Rights in the Cross of Decision-Making

Now we can add another facet to the question of how rights in constitutions and human rights treaties are connected. Fundamental rights respond to past infringements of important basic needs and important values in order to guard against similar dangers in the future.²⁷ In this sense, the entire fundamental rights portion of the German constitution (just as in every international human rights agreement that was enacted after the Second World War) stands by the motto: Never again! Never again should the barbarism of the national socialist terror apparatus be allowed to prevail in our community. Due to the function of legitimation, fundamental rights cannot easily be restricted by a simple voting majority of the parliament; tightened standards for the existence and proof of heavy

²⁴ See Friedrich Nietzsche, *Vom Nutzen und Nachteil der Historie für das Leben*, in: DEUTSCHE GESCHICHTSPHILOSOPHIE VON LESSING BIS JASPERS, 360 (Kurt Rossmann ed., 1959).

²⁵ GEHLEN, *supra* note 6, 9.

²⁶ Think of the history of the U.S. Constitution. The freedom of religion in combination with (religious) censorship were especially endangered under the old English regime and even in some of the newly founded colonies. That is why we find the freedom of religion and the freedom of speech clauses in the First Amendment of the Constitution.

²⁷ Some of these infringements are extraordinary, bound to a special situation that will not repeat itself easily – one example would be the quartering of soldiers in citizens’ houses without their consent; see the Third Amendment of the U.S. Constitution. Some infringements constitute “standard threats” that in a politically organized community can easily repeat themselves and thus require constitutional prevention. As for the term “standard threat,” see the discussion in SHUE, *supra* note 11.

public interests are needed. The final check is therefore, in most countries, incumbent upon a constitutional as opposed to a non-constitutional court.

However, fundamental rights have a second dimension that fits precisely in with the four perspectives of the cross of decision-making. Do fundamental rights guard only against acts of governmental authority in the past – illustrated by infringement of a fundamental right that leads to some sort of compensation – , or do they also guard against future acts? The textual phrasing of “fundamental rights” alone does not answer this question for us: Fundamental rights are either formulated as liberties to protect oneself against the actions of public authority, which also indicate an area of life (i.e. the family sphere) or a form of action (i.e. congregating) that should be protected; or fundamental rights indicate the criterion for equal and unequal treatment within the scope of a guarantee of equality, which is either granted or forbidden by the constitution (for example the equality of all human beings under the law, the prohibition of unequal treatment based on origin or sex). If fundamental rights are so meaningful for the legitimacy of a political body, then they should operate backwards as well as forwards. This is also how it is under German law. Fundamental rights should generally guarantee the integrity of an outlined area under the scope of protection of the law, or they should protect the integrity of respective variants of action against unjustified governmental intrusion. If an inappropriate restriction has already occurred in the past in the form of an “infringement on a fundamental right,” then the bearer of fundamental rights is accorded – depending on the situation and according to the specifics of the parliamentary law – the right to a remedy, reinstatement of the law, just compensation or a claim for damages. If there does not appear to be any final harm done to a fundamental right, and instead the harm lurks on the horizon in the future, the notion of integrity turns around “from behind” to face “forward” and transforms itself into injunctive relief, which is inspired by fundamental rights and detailed mostly by law to protect against the impending injury. The notion of integrity in fundamental rights reveals a dimension of protection that is directed backwards as well as forwards; when looking downwards it diagnoses important basic needs such as property and honor, and when looking upwards it normatively ennobles them as fundamental rights to respect. Thus, by transforming the four perspectives of the cross into constitutional and parliamentary law, a good and just legal system can develop.

D. Legal Philosophies and Methods of Interpretation in the Cross of Decision-Making

Let us now shift our attention to the link between the decisional cross and the philosophy of law. As said at the outset, rivalry and diversity dominate the schools of legal philosophy. Yet only a limited number of ideal types in legal philosophy can really be found amongst the diversity of thought. Four of these are consistent with the perspectives of the anthropological cross of decision-making. Here is an example of each:

If we stand along the horizontal axis in the present and look “backwards” into the past, and if we understand the law primarily in the sense of the leading line of tradition at the present time, then we are at the core of the German “*Historische Rechtsschule*,” the historical school of law. One famous representative from the 19th century is Friedrich Carl von Savigny. His basic question is: “In what relation does the past stand with regard to the present, or becoming in regard to being?” The answer is: “Every single human-being is essential ... to think as a part of a family, a nation, a state, and every nation’s era as the continuation and development of all previous times ...” “History is ... not just a collection of examples, rather it is the only way to truly be aware of our own condition.” Thus, the main focus is on evolution and continuation of the “*Volksgeist*” (the national character).

This is different in legal doctrines that look “upwards” and thus fall under “idealism.” They understand the law to be comprised primarily of values and ideals. The “value” of a legal and political system can be determined in varying ways, like in the sense of protecting human dignity and human rights, but also in the sense of protecting the ways of acquiring power, or protecting the advancement of a certain culture, religion, class or race – to name but just a few. In the broadest sense possible, legal idealism includes every type of theory that compliments a fact (particularly a basic need) with an interpretation and a justification in the form of the argumentative “because.” If one refers to present-day criteria for legitimation that are able to draw a consensus, then one must think especially about justice or fairness being the highest virtue of a legal system. Natural law and the law of reason are two classic strands of justice theories. Modern variants of these theories distinguish themselves insofar as they assume equal rights of all citizens and/or human beings in determining their social and political organization. All of these theories represent a version of legal idealism that distinguishes itself from the Savigny-like legal historicism and evolution by emphasizing the independent character of judgments of right and wrong. Thus Kant—the most important legal philosopher in our tradition of conceptualizing justice—admits and emphasizes that man is influenced (“*affiziert*”) by his drives from below; but at the same time he points to the possibility, indeed duty, of letting the principle of the categorical imperative or the legal principles of reciprocity restrict the natural inclinations of “*Willkür*” (arbitrariness). The prevalence of will (*Wille*” over *Willkür* makes him into an idealist who primarily pays attention to the upward-oriented view.

Now let us move our legal philosopher's gaze "from above to below" to the collective Id, the anthropological constant in human drives and basic needs. In the cross of decision-making, these include not only "life and limb," "appetite" and "libido," but all specific needs that can be found spanning all personalities and cultures in most human beings and their communities, including for instance the need for respect, love, fellowship, activity, development, repose, etc. This is where legal philosophies typically make a choice. We encounter some legal philosophies that tend to conceive of human reason as the executor of the empirical drives present in human beings – thus, reason mutates into the prudential optimization between means and ends. Sometimes these drives are characterized in a less good-natured way as threatening or dangerous, which results in a relatively pessimistic view of the human being. Consequentially, this corresponds with a strong role for the coercive role of the state. The function of the state is mainly directed at ensuring the most elemental needs of human-beings: securing survival and ensuring security and order. One could call this type of theory a narrow legal anthropologism. The best example for this is Thomas Hobbes, who in the 17th century witnessed the English civil wars and in his book, "Leviathan," opined that every man is a wolf to every other man. Thus, if a strong authority does not intervene, the state of nature persists, "which is the worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short."²⁸ It is no wonder that in such a situation Hobbes advises creating a social contract in which a stronger, even overpowering ruler is charged with providing life and security for all.

Now we have to look "forwards" at legal philosophies that define the role of the law primarily from the perspective of creating a successful future. Most variants of this kind of thought fall under the category of legal instrumentalism. One famous example is the school of Critical Rationalism, which was developed by Karl Popper and championed by Hans Albert in Germany. His catchphrase is: law as social technology.²⁹ Science has to enlighten the political and legal actors as to the correlations between personal, institutional and technical aspects of existing or envisioned organizations and find the best ways to achieve the desired state of social order.

²⁸ THOMAS HOBBS, *LEVIATHAN*, 84 (1998).

²⁹ See HANS ALBERT, *KRITISCHER RATIONALISMUS*, 64-76 (2000).

Those were examples of reflections of legal philosophy in all four dimensions of the anthropological cross of decision-making.³⁰ An attractive and convincing legal philosophy differentiates itself in that it articulates all four perspectives structurally and relates them to each other – with different emphases, of course. But it should not exclude one or more of the perspectives from the outset.³¹ That would be misguided, even foolish, because the four perspectives are themselves always present in us. They belong constitutively to the lifeworld (*Lebenswelt*), or in law to the legal world. They should be related to each other in practical concordance or *praktische Konkordanz*. All of the schools of philosophy of law mentioned above articulate implicitly or explicitly all four perspectives and even integrate them to a certain degree, however, with differing emphases on evolution, idealism, anthropologism, and instrumentalism.

Likewise, the cross of decision-making features an instrument for analyzing methods of interpretation. Laws do not have a natural “texture of personality” around which an individual’s identity must form and remodel itself; instead, laws possess a democratically agreed-upon “textual structure.” In place of the task of “leading one’s life” incumbent on individuals, we see the “execution of tasks” incumbent on laws according to the main purpose of the organic act or *ratio legis*. In connection and continuation with maxims espoused by Friedrich Carl von Savigny, the modern canon of interpretation is comprised of textual, systematic, historical, and teleological interpretation.³² Looking “backwards,” the interpreter sees a date lying in the past, a problematic case and the enactment of a law designed to solve it, which during the period of enactment was itself a collective decision in the purview

³⁰ For examples of these four strands of philosophy of law (and methods of interpretation) from the U.S., see Winfried Brugger, *Legal Interpretation, Schools of Jurisprudence, and Anthropology: Some Remarks from a German Point of View*, 42 AMERICAN JOURNAL OF COMPARATIVE LAW 395, 415-421 (1994).

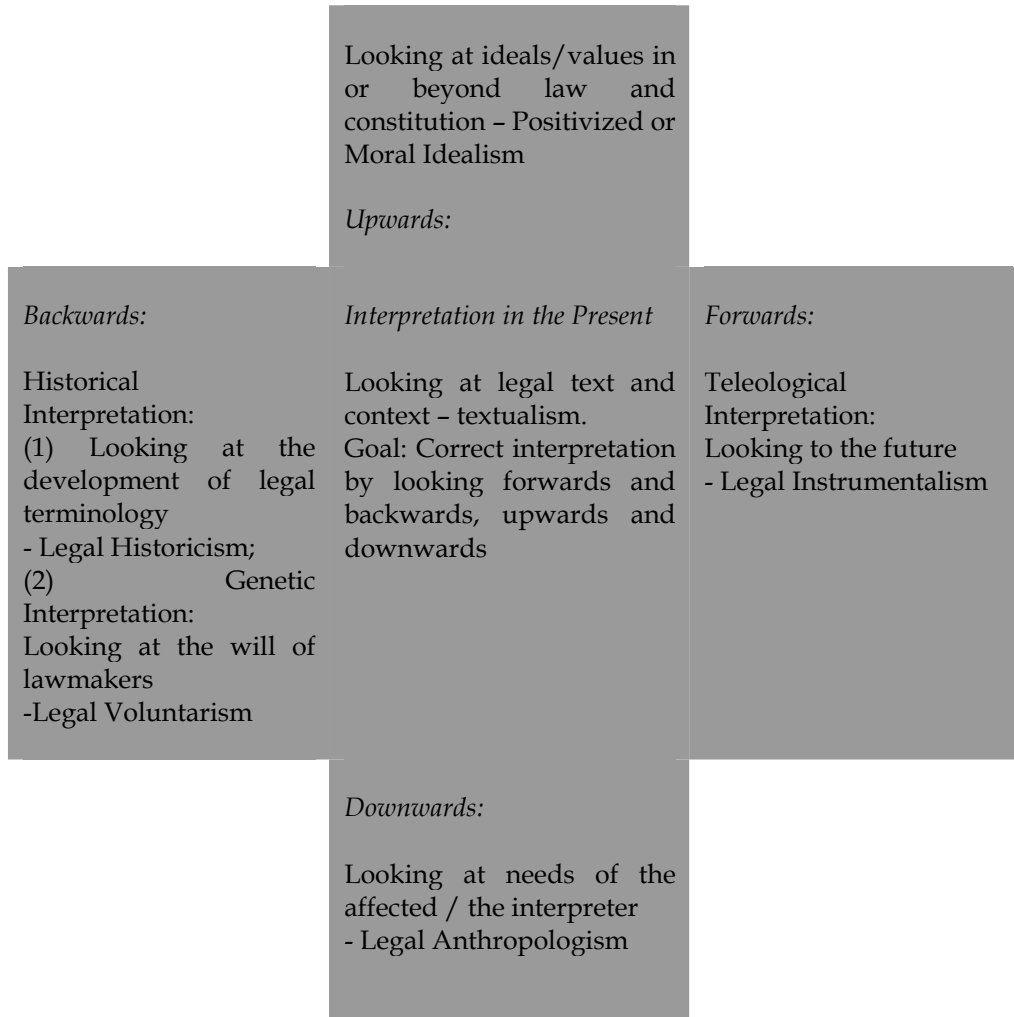
³¹ See, for example, Karl Lewellyn, cited in BRUGGER, *supra* note 19, 416: “In a going life-situation, fairness, rightness, minimum decency, injustice look not only back but forward as well, and so infuse themselves not only with past practice but with good practice, right practice, right guidance of practice, i.e., with felt net values in and for the type of situation, and with policy for legal rules.” Harold Berman formulates as follows: “The essence of historical jurisprudence is not historicism but historicity, not a return to the past but a recognition that law is an ongoing historical process, developing from the past into the future ... Indeed, history without political and moral philosophy is meaningless. Yet those philosophies without history are empty. In American jurisprudence the time is ripe to restore the historicity of law to its proper role alongside political principles of legal order and moral principles of legal justice.” This citation, in BRUGGER, *supra* note 18, 416, is taken from an article of Berman on “Integrative Jurisprudence”. The decisional cross provides such a framework.

³² For a comparison between German and American methods of legal interpretation, see BRUGGER, *supra* note 19, and WINFRIED BRUGGER, EINFÜHRUNG IN DAS ÖFFENTLICHE RECHT DER USA, § 2 II and § 16 (2nd ed., 2001).

of the cross of decision-making. Looking further into the past, historical continuity and clarity of legal terminology helps the interpreter as far as it is relevant for solving the case.³³ Voluntative genesis and continuous development both belong to “historical interpretation” in the all encompassing sense. The interpreter, however, does not define legal rationale only as past-oriented, since the law should be “reasonable” and “appropriate” not only for yesterday, but also for today and tomorrow, and should be able to hope for the greatest possible acceptance. These measures of value reside in the cross of decision-making along the vertical axis: Laws are oriented to the satisfaction of sectoral basic needs: social welfare law is primarily oriented towards upholding standards of subsistence; criminal and criminal procedure are supposed to protect “life and limb” of the population, but, after the crime, also of the perpetrator; marital and family law are oriented to “companionship, stability, sexuality, procreation,” etc. In looking upwards, we expound the meaning and worth of these basic needs, either by reference to values explicitly mentioned in the statute or constitution, or by reference to a-legal, religious or moral ideals. At the intersection of the four perspectives, initially the lawmaker, and then later the citizen, jurist, and judge in the act of interpreting the law, all must take responsibility for the specific valuation or rather the detailed weighting and fitting of legal rules. In both stages of concretization, subjective elements of assessment cannot be avoided. An appropriate decision in a contested case cannot usually be “objectively” detected in the mere text of the pertinent provision; the specifics of the “situation” and the mindset of the “interpreter” also play a role. This stands parallel to an individual’s decision concerning personality formation or identity, which is likewise not predetermined or in any case not only predetermined but a matter for active and creative determination—at least in instances that put a heavy burden on our shoulders. If in this respect, it is said individuals are both creature and creator of their personality and culture, then this parallel also holds true for the interpretation of legal norms: For the interpreter, they are authoritative “creatures” created by constitution and lawmaker to be discovered. At the same time, the interpreter is the “creator” of the specific and situational meaning of the corresponding rule.

Figure 2. The Anthropological Cross of Decision-Making in Legal Philosophy and Methods of Interpretation

³³ Put differently, there are, in German jurisprudence, two different variants of “historical interpretation”: (1) the will of the legislature at the particular time; here voluntarism prevails, and (2) the (hopefully organic) development of a legal term or doctrine in time, such as “contract” or “constitution”; here tradition and evolution prevail.



V. Conclusion

The cross of decision-making does not offer a “model of subsumption” to deduce correct decisions either for individual or collective actors. It does not provide detailed rules of decision-making, and it is not about the maximization of the four perspectives as separate principles. Rather, in disputable actions and interactions, it is about structuring a field of interpretation, valuation, and decision, in which the

human being has always stood. The decisional cross provides a map of decision-making in hard cases; it provides binoculars with built-in crosshairs, displaying the vertical and horizontal lines within the horizon of socialization, interaction and enculturation. A “good shot” or a worthwhile decision has to find the crossing point of the four modes of reflection – only there we expect the “right fit” of the decision to be made by this person in this situation.

Having to carry the burden of the crux of decision-making is an inevitable part of the human destiny that God, nature, or evolution has chosen for us. The decisional burden affects every human being as a physical and mental, emotional and deliberative actor – it is a privilege and a curse. It is not for nothing that we sing our praises to the routine, in which, for purposes of the cross of decision-making, all four perspectives point in the same direction, and the end decision is self-evident. However, if the four perspectives cross each other at the core of the personality, and if acting in the emphatic sense is demanded, then the “cross” has to show some backbone.³⁴ In balancing competing aspects, we should not try to act as the average person does; we should not exclusively base our judgment on the input of “the skilled, the prudential or the wise,” but on our own sense of what is right for us and our fellow men. Thus, the decisional cross helps us to switch off simple-minded notions of just having to follow our “preferences” in order to live a good life. It points to the diversity of motives within ourselves and others. Every human being is a subject, a person and at least in some instances a unique personality. This is what we learn from the decisional cross, and this is what the legal order should recognize and organize as well. In the words of an old German saying: “In the cross, man comes to know himself more than ever.”

³⁴ In the German language, the back of a person is called *Kreuz*, meaning “cross.” In hard, existentialist cases, one has to show backbone, one has to act within the decisional cross.