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## Human dignity from a legal perspective

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### Introduction

As the contributions to this handbook make clear, human dignity is a fundamental value in many legal systems. In both the northern and the southern hemispheres, in common law and civilian legal systems, we find that human dignity plays a prominent role. It is also a cornerstone concept of many regional and international conventions and declarations. However, the jurisprudence of human dignity betrays a familiar tension. Whereas, in some cases, human dignity is articulated and applied in a ‘liberal’ spirit (underpinned by an ‘empowerment’ conception), in others the guiding spirit is ‘conservative’ (underpinned by a conception of ‘human dignity as constraint’) (Beyleveld and Brownsword 2001). Broadly speaking, while liberals appeal to human dignity in order to protect and to extend the sphere of individual choice, conservatives appeal to human dignity in order to impose limits on what they see as the legitimate sphere of individual choice.

Introducing the legal section of the handbook, three general issues are addressed. First, there is the question of how we should view the burgeoning references to human dignity (often in conjunction with human rights) in international and regional instruments. Second, there is the question of how we should understand the role of human dignity in national legal systems. Finally, there is the question of whether positive law is enhanced by references to human dignity or whether it would be an improvement to eliminate all such legal allusions.

### Human dignity and human rights as universal values: from one declaration to another

The notion of human dignity is intimately connected to the cornerstones of modern human rights thinking – that is, to the United Nations’ Universal Declaration of Human Rights (UDHR) of 1948, together with its two partner Covenants, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, both of 1966. In the Preamble to each of these instruments, we read that ‘recognition of the

inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'; and Article 1 of the UDHR famously proclaims that 'All human beings are born free and equal in dignity and rights.'

In the early years of the present century, in the particular context of 'medicine, [the] life sciences and associated technologies', UNESCO has made a comparable attempt to underline the centrality of respect for human rights and human dignity. Notably, the Universal Declaration on Bioethics and Human Rights, 2005, is peppered with references to human dignity. For example, Article 2(d) states that one of the aims of the Declaration is to recognize 'the importance of freedom of scientific research and the benefits derived from scientific and technological developments, while stressing the need for such research and development to . . . respect human dignity, human rights and fundamental freedoms.'

We find a similar story in Europe, where the Council of Europe copied across the spirit, if not quite the letter, of the UDHR in the European Convention on Human Rights, 1950 (ECHR). Even the European Community, with its constitutive *economic* objectives, has recognized the binding nature of the Convention rights. Indeed, after the Treaty of Lisbon, Article 2 of the (amended) Treaty on the European Union provides that the EU 'is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights'. Moreover, Article 6(1) of the Treaty now accords to the Charter of Fundamental Rights of the European Union – a Charter that is founded on the indivisible and universal values of human dignity, freedom, equality and solidarity – the same legally binding status as the Treaties.

On the face of it, these affirmations and reaffirmations of respect for human rights and human dignity testify to a consolidation of the project started by the United Nations – in particular, they testify to human rights and human dignity being universally supported as fundamental values for the conduct of public life as well as for the governance of science, medicine and technological development. However, although the rhetoric of human rights and human dignity commands widespread support, the liberal thinking that underlies the UDHR and the ECHR is rather different to the conservative ethic that underlies both the UNESCO Declaration and the Council of Europe's Convention on Human Rights and Biomedicine, 1996.

### The Universal Declaration of Human Rights

According to the distinguished judge and jurist, Michael Kirby, the purpose of the UN Charter (1945) in conjunction with the UDHR was 'to design a new world order for the safety of humanity, the more equitable sharing of its wealth and the defence of fundamental rights' (Kirby 2010: 789). Specifically, the UDHR reflected the efforts that had been made in some countries to 'express universal values that attach to being a member of the community' (Kirby *ibid.*).

In other words, the principal purpose of the UDHR was to put down a non-negotiable marker against the denial of human dignity. From the Declaration onwards, governments should not be permitted to say to any human being, ‘you do not count, you have no value as an individual’. This did not require a deep philosophical justification; and it was a cosmopolitan principle that applied to all humans in their dealings with governments. Quite simply, humans have a dignity – a dignity that governments should always respect.

Having placed their preambular markers in support of ‘the inherent dignity . . . of all members of the human family’, it was not necessary for the Declaration or its partner Covenants to make repeated references to human dignity. Indeed, in the UDHR, after the proclamation in Article 1, there are only two further explicit references to human dignity – first, in Article 22 (concerning the right to social security and the economic, social and cultural rights indispensable for dignity and the free development of personality), and then in Article 23(3) (concerning the right to just and favourable remuneration such as to ensure an existence worthy of human dignity). Similarly, in the Covenants, the only further references to human dignity are in Article 13 of the International Covenant on Economic, Social and Cultural Rights (where it is agreed that ‘education shall be directed to the full development of the human personality and the sense of its dignity’), and in Article 10 of the International Covenant on Civil and Political Rights (to the effect that ‘All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person’).

These provisions are firmly tied to an important cluster of ideas: namely, that each and every human being has inherent *dignity*; that it is this *inherent* dignity that grounds (or accounts for) the possession of human rights; that these are *inalienable* rights; and that, because all humans have dignity, they hold these rights *equally*. So understood, human dignity is the foundation on which the superstructure of human rights is built. Given this relationship between human dignity and human rights, the primary *practical* and *political* discourse becomes that of human rights; and, while those who seek a deeper justification for human rights might need to revisit the idea of human dignity, the practical business of pressing one’s interests against others (particularly against powerful states) will be conducted in terms of claimed human rights (see, for example, Kolnai 1976: 257–9; and Goodin 1981).

Accepting the preambular axioms – human dignity signifying that each human has inherent value and is worthy of respect – which particular rights are presupposed by human dignity? According to Joseph Raz (1979: 221), ‘[r]especting human dignity entails treating humans as persons capable of planning and plotting their future. Thus, respecting people’s dignity includes respecting their autonomy, their right to control their future.’ It follows that, if the capacity to control one’s actions by reference to the choices one has made is the distinctive source of human worth, then to deny a human the opportunity to choose and control, whether by insult, enslavement or manipulation, is to

offend against his or her dignity – it is, in fact, a double offence, a denial of rights as well as a denial of responsibility.

However, the International Bill of Rights is not limited to such offences against dignity. Rather, it is designed to specify a constellation of particular negative and positive rights that create the right kind of environment for humans to flourish. In this light, Andrew Clapham (1993: 148–9) maintains that the protection of human dignity involves (1) respect for everyone’s humanity, and (2) the creation and protection of ‘the conditions for everyone’s self-fulfilment (or autonomy or self-realization)’. While the former is said to relate to *direct* attacks on dignity (such as killing, torture, slavery, trafficking in persons, coercion, verbal abuse, discrimination and maltreatment), the latter can be understood as relating to *indirect* attacks (such as a denial of the right to associate, to make love, to take part in social life, to express one’s intellectual, artistic or cultural ideas, or to enjoy a decent standard of living and healthcare). This latter approach, Clapham points out, is picked up in Article 22 of the UDHR – and the same point could be made in respect of Article 23(3).

### The UNESCO Universal Declaration on Bioethics and Human Rights

UNESCO has been in the vanguard of attempts to forge a worldwide bioethical consensus, publishing three major instruments, namely, the Universal Declaration on the Human Genome and Human Rights in 1997, the International Declaration on Human Genetic Data in 2003, and most significantly – or, at any rate, certainly most ambitiously – the Universal Declaration on Bioethics and Human Rights in 2005 (see, ten Have and Jean 2009). This five-part Declaration opens by speaking to its scope (namely, medicine and the life sciences) and then to its aims (particularly to ensure that developments in science and technology are compatible with respect for human dignity, human rights and fundamental freedoms).

Starting in Article 3(1) with the principle that ‘[h]uman dignity, human rights and fundamental freedoms are to be fully respected’, the second and longest part of the Declaration articulates familiar principles relating to the maximization of benefit and the minimization of harm (Article 4), the importance of individual autonomy (Article 5) and consent (Article 6), and requiring respect for privacy and confidentiality (Article 9). However, not all persons are robust individualists able to look after their own interests, and the Declaration emphasizes the importance of respecting human vulnerability and integrity (Article 8), as well as setting out principles of equality (Article 10) and non-discrimination or stigmatization (qua ‘violation of human dignity, human rights and fundamental freedoms’) (Article 11). The Declaration, too, conveys the sense of our essential connectedness (and, concomitantly, our mutual responsibilities) in a series of articles that relate to solidarity and cooperation (Article 13), social responsibility and health (Article 14), benefit-sharing (Article 15) and the protection of future generations (Article 16) and the environment (Article 17). Last but not least, in the middle of this list, we find Article 12, which underlines the ‘importance of

cultural diversity and pluralism' but only so long as difference is not 'invoked to infringe upon human dignity, human rights and fundamental freedoms' (compare Appiah 2006).

For present purposes, we can skip over the remaining three parts of the Declaration because, to the extent that it is an ethical milestone, it is in its first two parts that its significance lies. On one reading, the different facets of human dignity are brought together in a complementary way: hence, despite its general nature, 'the idea of human dignity provides the necessary conceptual background for responding to the new concerns about respect for persons in clinical and research settings, and for humanity as a whole' (Andorno 2009: 96). However, the counter-reading is that the insistent demand that human dignity must not be compromised not only sets limits on pushing ahead with the science, it is also in tension with respect for human rights (Brownsword 2008).

### Europe

Although the ECHR does not explicitly refer to or rely on the notion of human dignity, there is no doubt that, by implication, the European Convention on Human Rights asserts the value of respect for human dignity. Moreover, in the Strasbourg jurisprudence, it is clear that human dignity is implicated in the Convention's protective regime. For example, in the *Pretty* case, the Grand Chamber of the European Court of Human Rights affirmed that 'the very essence of the [Convention] is respect for human dignity and human freedom'.<sup>1</sup> By and large, the terms of the Convention together with the jurisprudence of the Court stick closely to the idea of human dignity as the supportive underpinning for (autonomy-driven) human rights. Yet, in the Convention on Human Rights and Biomedicine, Article 1 of which declares that the parties 'shall protect the dignity and identity of all human beings', the Council switches to a more conservative European bioethics.

The contrast in the thinking that underlies the two Conventions is not immediately obvious. So, in the Explanatory Report accompanying the later Convention, we read that 'human dignity . . . constitutes the essential value to be upheld [. . . and] is at the basis of most of the values emphasized in the Convention' (paragraph 9); that all articles must be interpreted in light of the aim of the Convention – 'which is to protect human rights and dignity' (paragraph 22); and that the principle of respect for human dignity is central to Articles 15 (the general rule with regard to scientific research) (paragraph 96), 17 (protection of persons not able to consent to research) (paragraphs 106 and 111) and 21 (which provides that '[t]he human body and its parts shall not, as such, give rise to financial gain' (paragraph 131)). Additionally, the Preamble to the Protocol to the Convention dealing with the cloning of human beings tells us

<sup>1</sup> *Pretty v. United Kingdom* 2002-III; 35 EHRR 1, para. 65. See also *SW v. United Kingdom* and *CR v. United Kingdom* (1996) 21 EHRR 363, 402, para. 44/42.

that the Protocol is guided by the consideration that ‘the instrumentalization of human beings through the deliberate creation of genetically identical human beings is contrary to human dignity and thus constitutes a misuse of biology and medicine’.

While these explanatory comments suggest a greater readiness to identify human dignity with a number of specific offences (particularly relating to the commercialization and commodification of the human body, the sanctity of human life, and so on) (see Caulfield and Brownsword 2006), this kind of tagging does not of itself indicate that a rival conception is incorporated in the Convention. Nevertheless, there are grounds for thinking that the Convention reflects more than a new fashion for drafting. In particular, human dignity is deployed not only to give protection to human life from the point of conception (including human embryos) but also to constrain actions which, although *prima facie* merely self-regarding, are judged to compromise human dignity (whether located in the actor’s own person or humanity or, so to speak, in the community’s collective conscience).

### The UN declaration on human cloning

All 191 members of the United Nations agree that human reproductive cloning is incompatible with respect for human dignity; and, accordingly, they support its prohibition. However, members disagree about the ethics of so-called therapeutic cloning. In 2005, the General Assembly accepted a recommendation that members should be called on ‘to prohibit all forms of human cloning inasmuch as they are incompatible with human dignity and the protection of human life.’<sup>2</sup> This non-binding Declaration purports to cover all forms of human cloning, but its drafting allows members to persist with their different views about whether therapeutic cloning is compatible with human dignity. First, the use of the phrase ‘inasmuch as’ allows for both a narrow (‘to the extent that’) and a broad (‘for the reason that’) interpretation of the prohibition on human cloning. Second, and for present purposes more significantly, this ambiguity reaches through to invite reading the prohibition in line with one’s favoured conception of human dignity. And, third, as pointed out by several of the members who voted against adopting the Declaration, the reference to the protection of human life begs all the difficult questions about the status of the human embryo (see, further, Brownsword 2007).

### Taking stock

In one Declaration after another, the importance of human dignity has been affirmed. In the political arena, human dignity finds a regime of human

<sup>2</sup> Eighty-four members voted in favour of the (non-binding) UN Declaration on Human Cloning, with thirty-four against and thirty-seven abstentions (UN press release GA/10333, [www.un.org/News/Press/docs/2005/ga10333.doc.htm](http://www.un.org/News/Press/docs/2005/ga10333.doc.htm)).

rights that acknowledges that each human has a view, a voice and a value. In the modern biomedical Declarations, human dignity again underpins the idea that each human counts and should not be used merely as a research resource. However, in the more recent Declarations, human dignity also signals some limits to individual autonomy as well as the responsibilities that we have to human life in its developmental stages.

As foreshadowed in our introductory remarks, there is a fault line in the international jurisprudence of human dignity. Whereas, on the one side, we find a liberal ethic that treats human dignity as the underpinning of human rights, on the other, we have a conservative ethic holding that the fundamental duty is not to compromise human dignity (Brownsword 2003). Until this tension is resolved, we can expect international legal instruments to engage with human dignity in more than one way and to be articulated in one of three forms: first, they might follow the UDHR in adopting a particular conception of human dignity (and, concomitantly, a particular underlying ethic); or, second, they might try to conceal the tension by drafting either at a very high level of generality or in suitably vague terms; or, third, they might follow the UNESCO Universal Declaration by taking a more pluralist approach which invites different interpretations depending upon one's ethical approach.

### **Human dignity in modern legal systems**

Turning from the international to the national scene, we find that human dignity is a key concept in many legal systems. However, the contributions to this handbook paint a picture that suggests some unevenness and unpredictability in the various appeals that are made to it and in its application. Not surprisingly, we find that the tensions already detected at the international level are replicated nationally.

There are many different ways of classifying the elements of legal systems. For present purposes, a three-level model of the ordering (or governance) of human societies will be employed. For convenience, we can term these levels: the 'constitutive', the 'public' and the 'private'. Following some clarifying remarks about this organizing scheme, we can consider how human dignity shapes features of both the public and the private order, before broaching the important question of why it is that, in some cases, human dignity underlines the importance of consent and yet, in others, repudiates it (Fletcher 1996; Beylveland and Brownsword 2007).

#### **The organizing scheme**

Assuming a three-level legal ordering, the first task for a society is to declare its constitutive values. These values indicate the mission of that society, its direction and the values that set the limits to what it regards as acceptable conduct. All

legal operations within a society need to be compatible with this constitutive order. When we say that human dignity is treated as a fundamental legal value, this ordinarily means that it is either itself one of the explicit constitutive values or that it is an implicit value that is the basis of, or ground for, the expressed values. Second, there is public order, giving the public life of each society its distinctive features. Broadly conceived, the public order includes the criminal justice system but also the regulation of health, education, the economy, transport, the information society and a myriad other matters. Third, there is private ordering, at which level individuals have the opportunity for self-governance. In the case of contract law, for example, it is not simply that parties may make their own trades; more significantly, it is that they may (within public policy limits which, of course, will be sensitive to the order's constitutive and public values) set their own terms of trade (Brownsword 2006).

Against this backcloth, the law operates in ways that reflect the influence of a host of credos and beliefs, or so to speak 'ideologies' (Adams and Brownsword 2006). As political institutions take greater responsibility for making the law, leaving courts to settle particular disputes and to hold government to the constitutive values of the legal order, it is surely unsurprising that particular legislative enactments reflect the political ideologies of their promoters. Nevertheless, we might expect that the constitutive values themselves are above politics and, for this reason, immune to the influence of political ideology – and, indeed, to some extent, this might be so. The fact is, however, that, in one instance after another, we see that human dignity cannot escape the influence of ideology (McCrudden 2008).

In a seminal paper, David Feldman cautioned that we should not 'assume that the idea of dignity is inextricably linked to a liberal-individualist view of human beings as people whose life-choices deserve respect' (Feldman 1999: 685). To the contrary, 'human dignity may subvert rather than enhance choice . . . Once it becomes a tool in the hands of lawmakers and judges, the concept of human dignity is a two-edged sword' (*ibid.*). Applying this insight, we can chart the application of human dignity relative to both liberal and conservative readings, the former pushing (other things being equal) for the protection and extension of the sphere of individual choice, the latter emphasizing the limits to this sphere of legitimate choice. Of course, this is a very broad-brush contrast. On the liberal side, there are important differences between, for example, consequentialist (usually utilitarian) and rights-based approaches, and between approaches that recognize only negative rights and those that recognize also positive rights; similarly, on the conservative side, there are important differences between communitarian and other duty-based approaches (Brownsword 2003); and we should not forget that there are approaches that treat human dignity as the ground not only for permitting individuals to make their own choices but also for setting limits to the sphere of free choice. However, for present purposes, the double-edged sword (albeit a relatively blunt instrument) suffices.

**Public order**

Where a legal system orients itself towards a liberal reading of human dignity, this will impact on matters of institutional design and process as well as on the substantive law. According to Green:

Principles . . . which directly or indirectly recognize and protect human dignity include: like cases must be treated alike; any curtailment of the freedom of an individual is prima facie unlawful unless justified by a positive law; a private person may do anything which is not prohibited or which does not infringe the rights of others; when it is making a decision affecting the interests of individuals a public authority is required to observe procedural fairness or natural justice and various presumptions of statutory interpretation designed to protect individual rights and freedoms. (Green 2007: 153)

Arguably, then, many of the features of the due process model of criminal justice (Packer 1969) – for example, the presumption of innocence, the right to know the reason for one’s arrest, the right to legal representation, the right to remain silent, the requirement that guilt be established beyond any reasonable doubt, and so on – flow from (or, at the very least, are in line with) the liberal conception of human dignity. Similarly, for example, section 35 of the Constitution of the Republic of South Africa provides that the conditions of detention (of arrested, detained and accused persons) must be consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment. In the German *Life Imprisonment* case,<sup>3</sup> too, the Federal Constitutional Court emphasized that, even where offenders are deprived of their liberty following the commission of a crime, they do not lose their inherent dignity and, by implication, their membership of a community of rights. Elaborating on this, the Court held that cruel, inhuman and degrading punishments are strictly prohibited by the ‘commandment of human dignity’;<sup>4</sup> and, in the *Honecker* decision,<sup>5</sup> the Court suggested that human dignity is violated where an individual is ‘degraded to a mere object of state action’ by being kept in custody when he is seriously ill and close to death.<sup>6</sup> Although this latter suggestion was controversial, the idea that human dignity is violated where persons are subjected to conditions that are demeaning or degrading is commonly relied on – not merely in the context of deprivation of liberty, but also in relation to housing and employment conditions.

While much of the liberal-inspired design of criminal justice is opposed to the ideology of ‘crime control’ (Packer 1969), rather than to the conservative reading of human dignity, the latter famously opposes liberal thinking in relation to the limits to be set on individual choice. For liberals, the way in which human dignity is respected is by recognizing that individuals should be free to make their own

<sup>3</sup> BVerfGE 45 (1977) 187.    <sup>4</sup> *Ibid.*: 228.

<sup>5</sup> BerlVerfGH NJW 1993, 515.    <sup>6</sup> *Ibid.*: 517.

choices, and act on them, unless such actions trench on the rights or freedoms of others. Against this, conservative communitarians see human dignity as a value that binds the group together by setting community-defining limits to individual freedom. So, for example, in the US case of *State v. Braxton*,<sup>7</sup> the appellate court withdrew the option of surgical castration that the trial court had offered to the convicted defendant (this being instead of a thirty-year custodial sentence). Why limit the defendant's options, and, if surgical castration is permissible in a medical context, why not in a juridical context? According to Meir Dan-Cohen (2002), the answer is that, in the latter case but not in the former, the procedure is seen as expressing an affront to human dignity. As Dan-Cohen puts it, the 'negative connotations with regard to human dignity of physical mutilation extend to even such unusual punitive circumstances as those presented by *Braxton*, but they do not extend to the very different practices of medical treatment' (Dan-Cohen 2002: 163).

The conservative dignitarian manifesto pushes for the criminalization of conduct that it regards as off limits – for example, acts that involve the commercialization or the commodification of the human body (compare the earlier analysis of the Convention on Human Rights and Biomedicine). However, its opposition to the liberal pro-choice view is nowhere sharper than in relation to end-of-life decisions. Here, as many have remarked, we witness an initially puzzling exchange between those would-be reformers who appeal to 'death with dignity' to argue for a permissive legal position and those who insist that the prohibitions against assisted suicide and euthanasia must be retained lest human dignity should be compromised.

Where activities need to be licensed, and where appeals to human dignity are made, it is easy to find further examples of conflict – for example, the conservative ideology failed to prevail in recent English cases concerning the licensing of research using human embryos and the tissue typing of an embryo for 'saviour sibling' purposes;<sup>8</sup> but it was successful in the well-known (German) *Peep-Show* decision,<sup>9</sup> where the Federal Administrative Tribunal denied a licence for a mechanical peep-show on the ground that the performance would violate human dignity. Anticipating a later point in this discussion, the Tribunal said:

The consent of the women concerned can only exclude a violation of human dignity if such a violation is based only on the lack of consent to the relevant actions or omissions of the women concerned. However, this is not the situation here because in the case at issue . . . the human dignity of the women concerned

<sup>7</sup> 326 SE 2d 410 (SC 1985).

<sup>8</sup> *R (Quintavalle on behalf of Comment on Reproductive Ethics) v. Human Fertilization and Embryology Authority* [2002] EWHC 2785 (Admin); [2003] EWCA 667; [2005] UKHL 28; and *R v. Secretary of State for Health ex parte Quintavalle (on behalf of Pro-Life Alliance)* [2001] EWHC 918 (Admin) (Crane J); [2002] EWCA Civ 29; [2003] UKHL 13.

<sup>9</sup> BVerwGE 64 (1981) 274.