Introduction to the Special Issue on Dignity

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Human dignity is too often described as a malleable concept that cannot have concrete legal meaning. For a concept so apparently ‘useless’ it has inspired hundreds of books and articles all describing its virtues and fallacies. For a concept so inept at helping those who make decisions in cases, be it judges, advocate generals and barristers, it has been utilized hundreds of times in aid of judicial interpretation in a vast array of legal jurisdictions. For a concept so vacuous of content, it is enshrined in half the world’s constitutions (or close to it) and in most human rights instruments adopted since 1948 regardless of geographical location and cultural and religious background. Strange that so much time has been given over to a concept by politicians, lawyers and jurists if that concept is not worthwhile.

But of course it is. Human dignity is the heart and soul of our human race. Dignity is the concept that all of us, in our every day lives, can imagine: we can certainly recognize a lack of dignity in the way we or others are treated. Indeed, we are surrounded by stories of care homes not caring, nurses and doctors neglecting patients, and so-called friends posting inappropriate pictures on line. In other words, there is a host of instances that all of us recognize as involving dignity. Human rights documents also recognise human dignity as an overarching principle and the foundation of human rights since the United Nation Universal Declaration of Human Rights, providing a minimum common basis for its interpretation and protection. While human dignity’s legal definition is not a closed one, it is generally understood as having deep roots in history and philosophy, with the work of Immanuel Kant having a particular far reaching legacy, both in doctrinal and case law definitions of human dignity. This concept is therefore generally associated with

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individual autonomy, the capacity (and freedom) to self-determine and to take control over one's destiny and life style. Human dignity is, however, not just about reason and rational decision-making, it is also, as discussed in this issue, about emotions, feelings and vulnerability... In particular feelings of hurt are a bountiful area of law in which dignity has been deployed as a significant argument, especially perhaps in relation to dignity at work (bullying and harassment). The papers brought together in this special issue propose a thick definition of human dignity and bring to light dimensions of dignity which are too often ignored. While each paper focuses on a specific angle, the special issue as a whole explores what can be called the big questions of human dignity. These include the connections between dignity/autonomy/vulnerability, dignity/rationality/emotions, the indivisibility of human dignity and human rights, with in particular the connection between dignity and socio-economic rights, as well as the role of dignity in the emergence of a new (constitutional) order as a tool used to shape a particular image of human beings and to bound state powers.

As with most legal or other concepts, dignity can be used in positive or negatives ways. There is nothing unusual about this. Yet critics of dignity call its usefulness into question because of this fact. Certainly, judges and lawmakers have used concepts to mean what they desire or believe the outcome should be. So we have for hundreds of years had lawmakers and judges contort the meaning of ordinary words in order to progress certain agendas. Not that this is necessarily a virtue. For instance, not to be subject to torture is an absolute right under the European Convention on Human Rights. Yet in the era of 'war on terror', we have seen that countries that seek to use information from prisoners have contorted the definition of torture. There is little doubt that there is no dignity for humanity in torturing fellow human beings. Clearly, dignity is, a useful concept, if only to remember that human beings may never be degraded by those in power as a means to an end, but should always be treated as an as end in themselves.

Introducing this Collection

The articles in this short edited collection have one thing in common: they use cross-cutting themes to examine human dignity from a legal perspective in different legal jurisdictions and different areas of law. The collection is unique as it includes both practical as well as theoretical pieces. It provides new insights into a variety of important legal dimensions as well as examining dignity within democracy.

The collection begins with a piece by Dr Mary Neal. Her article first looks at some historical aspects before moving on to more recent conceptions of dignity. As with nearly all writers on dignity, Neal problematizes autonomy-based accounts of dignity, especially from a feminist perspective. In particular, she argues that the liberal subject of law and how this articulation of being embodied so fashionable at the moment is not a one-size-fits-all solution. Rather, the theoretical underpinning of vulnerability offers a richer analysis. Authors like Nussbaum, Harris and Fineman are discussed in detail, but Neal equally engages with the difficulties attached to separating dignity out as a stand-alone theory or part of what we value as a society,

as humans—about dignity. She argues that there is not one unifying theory of dignity, rather the meaning and content of dignity changes with the circumstances of a given scenario. Indeed, vulnerability has some of these same traits (it is universal and constant, yet ever changing). She argues strongly that ‘dignity positively values our fragility, our finitude—our human vulnerability.’ This would distinguish dignity from other ethical concepts. Put this together with vulnerability then ‘what we value when we invoke dignity is a kind of balancing, or equilibrium, which is only valuable, or admirable, because we are vulnerable.’ This insight is an exciting new way of looking at dignity and improves on the liberal subject paradigm, which still too often guides and restricts protection of (vulnerable) human beings.

Neal’s article is followed by two pieces looking at the development of human dignity in two legal jurisdictions well known for its use: Germany and South Africa. Professor Eberle’s piece takes a mainly historic view of the development of human dignity under German constitutional law, which has been a model for so many other constitutions in and outside Europe. Eberle first outlines the German constitutional order and its connection with the philosophy of Kant, before moving on to analyzing the development of personality rights through the jurisprudence of the German Constitutional Court. He examines both the inner and outer aspects of personality development, in particular focusing in detail on the *Elfes* and *Microsensus* cases, thus explaining the personality and dignity as understood in the context of the German legal order. Throughout the article, Eberle draws parallels between the German and US approaches to dignity, bringing in sharp relief the particular national and cultural characteristics of the concept’s definitions.

The second piece is written by Evadne Grant and looks at the post-apartheid South African constitution, where human dignity has played a key role as a foundational value and as a commitment to respond to the systematic unfairness inherited from the previous regime. In particular, South African constitutional jurisprudence on dignity has been at the vanguard of a progressive interpretation of dignity and has become a point of international reference for scholars and judges alike. Grant examines the jurisprudence of the South African Constitutional Court with regard to dignity, and socio-economic rights, a dimension of human dignity that is attracting growing attention in scholarship and in practice. Her insightful article takes such broad and pressing themes as poverty and human dignity, the right to water, social security, equality more generally as well as health care among others. Perhaps it is not necessary to divide human rights into categories, thus safeguarding the basic needs of humans to live a dignified life, especially after having been cruelly denied basic needs for so long. When should a government be accountable to its people for these basic needs, especially in difficult economic times? When is it reasonable to deny the right to water under the South African transformative constitution? Grant’s article addresses all of these issues and offers a stark analysis using dignity as a foundational value.

The final two pieces of the collection take a look at future conceptions of dignity and how they intersect with democracy. Catherine Dupré’s piece argues that human dignity, understood as the ability to set one’s own ends and to self-determine, implies the ability and the right to take part in the democratic decision-making process; democracy therefore becomes the ‘organisational consequence of human

dignity'. As a result, a new type of democracy, with respect for human dignity at its heart, is arguably beginning to emerge. Dupré insightfully argues that it is essential to sustaining democracy that law has the ability to make space for the unexpected and respond to the unknown, allowing change to take place within the normal constitutional framework. Focusing on recent UK and ECHR case law on human dignity, her paper brings to light a crucial temporal dimension of this concept's dynamic definition. In particular, reference to dignity in a legal context brings to the fore the strong aspiration that 'the future constructed through human dignity ought to be better than the past and than the present, so that people can keep looking forward to their life. Uses of human dignity have gradually constructed a specific civilization characterised by a particular construction of constitutional time that both is defined by dignity and frames the concept's legal uses. Arguably this is the most important aspect of any legal concept, especially one that occupies such a prominent place under the Lisbon Treaty and to which the EU Charter dedicates its entire first title.

This latter aspect makes up the final piece of the collection by Jackie Jones, which proposes one of the very first analysis of human dignity in the EU available in English. Jones' piece explores the potential the concept of human dignity as outlined in the EU Charter of Rights has if the CJEU were to take an expansive, progressive and substantive approach to its interpretation under EU law. Human dignity is the basis of many legislative provisions in the EU now and as such, the EU institutions and the member states must protect and respect it in *full*. That position has been derived at over a number of years stretching from the early conception of fundamental values and rights right up to the present manifestations in asylum and criminal law legislation, both pre and post ratification of the Lisbon Treaty. Human dignity offers the CJEU an opportunity of upholding such fundamental rights as equality and dignity as substantive rights, even in the face of cases involving the fundamental freedoms—in other words, the very heart of the European project. With the jurisprudence of the European Court of Human Rights part of European law, the symbiotic relationship is one that can be celebrated when it comes to dignity. It can also be strengthened under the EU Charter and this is hopefully the future for human rights protection in the EU.

This special issue brings together a unique collection of original papers, engaging very constructively and critically with the concept of dignity, which, as shown here, is definitely not vacuous or useless. Each paper shows the difference that dignity can make, and indeed has made, when used in legal thinking and adjudication of human rights, contributing to the construction of a more complex and richer picture of human beings, their needs and their interactions in a given legal order. Despite the very positive transformation that dignity brings to the law, the concept must not be reified and certainly not deified. It will not bring an easy answer to all the complicated questions that its uses have raised, and awareness of this is an invitation to keep reflecting on this powerful concept.