Critically discuss whether it can be said that, despite numerous critiques, human dignity remains the ultimate legal tool for the effective protection of humanity in the twenty-first century.

Alice Straight

INTRODUCTION

Human dignity is a significant and complex legal concept that has featured in historic accounts of philosophy and throughout the twentieth-century has found its way into national constitutions and human rights instruments.¹ This essay seeks to argue that, despite the critiques of the concept, it is human dignity’s dynamic and fascinating ability to be uniquely effective in protecting humanity that nurtures it as being the ultimate legal tool, thus supporting the question statement. That is, “despite numerous critiques, human dignity remains the ultimate legal tool for the effective protection of humanity in the twenty-first century.”

Whilst there are many meanings of the terms “ultimate”, “effective” and “humanity”, this essay refers to human dignity as being “ultimate” in the sense that it is the absolute, inviolable mother right in which other meaningful human rights protection flows.² In terms of “effective” protection, it is argued that effectiveness can be defined as the complete and complex function of human dignity that goes far beyond a static Kantian autonomous understanding of a human being.³ “Humanity” is used in this essay as a term that reflects the equality of all human life including the diverse, emotive and vulnerable aspects of human beings.⁴ It also refers to humanity in a wider sense including the future visions of humanity and the environment in which it exists. This paper firstly begins with

² See Basic Law for the Federal Republic of Germany Article 1 and Hungarian Constitution Article II.
⁴ C. Dupré, The Age of Dignity (Hart Publishing 2015) 44.
identifying the critiques of human dignity and argues that these are in fact the characteristics that maintain human dignity’s effectiveness. Secondly, the paper goes on to argue that the progressive and extensive qualities of human dignity underpin its effectiveness in protecting humanity. Human dignity is subsequently argued as ultimate as it takes the protection of humanity further in effectiveness by extending other legal principles to include those most vulnerable in humanity. Lastly, the paper takes its awareness wider and uses reflections on human dignity in the twenty-first century. It looks at dignity’s ability as a legal tool to facilitate more radical change beyond human rights to bolster further the argument that dignity’s effectiveness for protecting humanity is based on its very nature as an ultimate “core” for human beings and their environment.5

I. THE CRITIQUES

A. Repetition

Human dignity has been criticised primarily for its vacuous nature. It is questionable whether such criticisms should be described as “numerous” as they often relate to the same characteristic of open-endedness.6 It is argued that in acknowledging the potential critique of human dignity, we can reveal that “the unfinished nature of human dignity is a crucial sign of its dynamism, usefulness,” and therein its effectiveness as an ultimate legal tool.7 Bagaric and Allan criticise human dignity for being boundless in its nature, having a definition without consensus and working on both sides of the argument.8 Similarly, Macklin contends that dignity is a “vague… restatement of other more precise notions”.9 Foster identifies others that have criticised dignity for being a vacuous concept or as being “the legal tool used when philosophers run out of arguments”.10 Even supporters of dignity like McCrudden suggest that dignity has the ability to constrain rights and protect them simultaneously.11 Grover rejects this and suggests that this coalesce into one overarching critique of vagueness that can be applied easily to both sides of a dignity breach.12 In turning such indeterminacy on its head, it can be argued that it is the subjective meaning of dignity which

8 Bagaric and Allan (n 6) 264, 265 and 266.
11 McCrudden (n 5) 702.
enables it to be so effective for vulnerable victims of dignity breaches and their beliefs of what “they would find distressing”. Human dignity can be applied subjectively to those that are not ordinarily accounted for in the status quo of the law. Furthermore, in response to Macklin’s critique, it is contended that the other principles on which she relies, i.e. autonomy, are in reality no more clear in deciphering the answers to moral issues. Double standards are set in the recognition that bioethics often relies on the doctrine of rights to decipher answers to ethical issues. Rights are historically an extensively open and complex legal doctrine that becomes subject to the same critique in which Macklin strikes against dignity. This demonstrates a pitfall within the critique and enhances the argument that the ability for dignity to be subjective and fluid does not render it ineffective; just the same as other legal principles like justice and autonomy. In fact, it is the ability for dignity to be subjective that allows it to be uniquely effective and thus the ultimate legal tool for the effective protection of humanity.

B. Political Reservation

Further to this, recognition of potentially political reservations possessed by the critics may account for their disregard for it as an effective and coherent legal tool. Rao, an American legal scholar, argues that human dignity “undermines individual rights and liberty” that are important in American legal culture. Rao claims that within European constitutions, individual liberties are conceived through broader values such as human dignity and that this collapses the value of rights. Yet this is contradictory. In recognition of the atrocities that human dignity seeks to prevent from occurring again, it can be argued that without dignity as an ultimate legal tool for protection of humanity the value of individual liberty becomes ineffective. It is only when rights such as liberty are seen through the lens of dignity that they remain meaningful and do not run the risk of developing dangerously. Rao forgets that human dignity works as a “minimum core” where

19 ibid [222].
20 German Basic Law (n 2) and Constitution of the Republic of South Africa, Chapter 1 Founding Provisions s.1.
21 McCrudden (n 5) 663 and 673.
if you “dig deep enough, through other principles, you eventually hit dignity”. This enables rights like liberty to exist to begin with supporting the argument for it being ultimate. The basis for Rao’s argument against dignity as impacting on the protection of liberty seems to be founded on a political reservation to a European style protection of rights, rather than a genuine concern for it as a concept. This demonstrates that whilst dignity may be different to traditional American legal thought, it remains as the ultimate legal tool for the effective protection of humanity. This underlying principle maintains stability amongst competing rights.

II. EFFECTIVENESS OF HUMAN DIGNITY

A. The Deeper Meaning of Dignity; Why is it Ultimate?

After having established that the critiques of dignity relate to the very thing that contributes to its effectiveness, it will now be argued that the qualities human dignity possesses enhances the protection of humanity by progressing human rights protection further in its ability to facilitate change across constitutional law and develop beneficial interplay with other principles. It is thus contended, in support of the argument, that it is this unique effectiveness that nurtures dignity as being ultimate. In terms of dignity’s deeper meaning, legal scholars have conceptualised dignity as the “moral source from which all basic rights derive their meaning”. This understanding of dignity places it at the core of rights protection and demonstrates its ability to be understood as the ultimate legal tool in which all other rights naturally evolve from, thus supporting the thesis argument.

In dignity’s definition as a minimum core, McCrudden has noted that beyond this understanding dignity becomes complex in its universalism. However, it is posited that this universality allows dignity to be uniquely effective for protecting humanity and therefore ultimate above other human rights instruments. As McCrudden himself discusses, it is “one of the attractions of dignity in the human rights context is the idea that different jurisdictions share a sense of what dignity requires”. In order for a legal tool to be ultimate and facilitate the effective protection of humanity, it requires the ability to be applied internationally and amongst a variety of jurisdiction’s judiciaries. There is hence “a common recognition of the worth of the human person as a fundamental principle to which

---

22 Foster (n 15) 61.
24 McCrudden (n 5) 697.
25 McCrudden (n 5) 694.
the positive law is accountable”. It demonstrates effectiveness in the sense it is universal and is used in the development of constitutional law and human rights protection in the way it is understood philosophically: “an indivisible and universal value”. The domesticating and contextualising nature of human dignity does not lessen its effectiveness. Moreover, it is dignity’s ability to adapt to the cultural context of other legal systems, as it has done in post-Communist states, that makes it effective in legal systems internationally for protecting everyone in humanity. It is therefore ultimate in its unique effectiveness beyond other static human rights instruments.

B. Dignity’s Place Amongst Other Legal Tools

After having established the importance of cultural universalism in preserving dignity as effective for protecting humanity, another striking attribute of dignity is its ability to be effective in its relationship with other legal tools. It is argued that by enabling other principles like equality and autonomy to be understood in a more inclusive way the protection of humanity is extended to all, including the most vulnerable in humanity. Dignity is thus ultimate as it is the legal factor that proactively directs other principles into an inclusive direction.

Although Baer identifies a triangular relationship between dignity, liberty and equality postulating that human dignity cannot be ultimate as it must be understood in line with other principles, it is however argued that human dignity can be understood as separate from notions like equality and liberty yet still maintain a close relationship with them. Baer suggests that dignity, if understood alone, is not effective as it has the ability to create specific “paternalistic fillings” in the law. She identifies that viewing fundamental rights in a triangular relationship is more useful than in isolation. Indeed a relationship does exist between Baer’s three principles. Yet, the reason why the effective nature of human dignity is the ultimate legal tool for the protection of humanity is that it theoretically disables such isolated abuse of rights from occurring in the future through its creation of a time wall where we can think of such liberty and equality abuses like the Holocaust and Communist atrocities as being firmly in the past. It is the ultimate-ness of human dignity that influences the use of other rights for

28 Universal Declaration of Human Rights Preamble.
29 McCrudden (n 5) 719.
30 Dupré (n 26).
33 ibid [456].
34 ibid [468].
protecting humanity, not vice versa. Like Rao, political reservations may cast doubt on the equal footing dignity has within the triangular relationship in light of Baer’s openly lesbian status as a female German constitutional judge with relation to her reliance on equality and liberty.\(^{36}\) It is worth recalling that human dignity under Art. 1 is inviolable.\(^{37}\) Liberty, in circumstances of lawful arrest, is not.\(^{38}\) It is thus argued that the value of understanding human dignity’s two-way relationship with other rights is inevitably significant. Nevertheless, dignity remains ultimate in its superior and inviolable ability to encourage the effective functioning and understanding of liberty and equality to protect all of humanity.

Human dignity’s ability to allow legal scholars and national legal systems to understand autonomy in a thicker sense to encourage the protection of the most vulnerable “others” in society demonstrates its ability to be the ultimate legal tool and effective for safeguarding the inevitably un-autonomous members of humanity in support of the thesis argument.\(^ {39}\) Dupré discusses the capacity for dignity to go where autonomy cannot go and demonstrates how dignity can open up a holistic view of autonomy to include both outward and inward understandings of human beings.\(^ {40}\) This highlights dignity’s capacity to positively influence protection of humanity where the current “autonomy-based” human rights protection cannot reach.\(^ {41}\) Human dignity’s unique effectiveness is shown in its way of being relied upon for those who can sometimes be seen to be outside the remit of able-bodied corporeality and thus humanity, i.e. Pretty, Bland and MacDonald, by engaging with their inward psychological experience rather than merely their outward physicality.\(^ {42}\) Despite the dignity argument being dissenting in these cases it remains the ultimate legal tool as it sheds light on the significance of relational autonomy that works towards the “law better accomplishing its objectives of securing values such as dignity” and in recognising human dependence and inter-relationships as being central to humanity’s ability to “fully thrive”.\(^ {43}\) This facilitates its effectiveness and bolsters the argument that dignity remains the ultimate as a legal tool in protecting those who are un-autonomously dependent within humankind.

It is this ability to facilitate balance and bridge gaps with the relationship between the right to life, personality and vulnerability that strengthens the thesis


\(^{38}\) European Convention on Human Rights, Article 5.

\(^{39}\) Dupré (n 35) 270.


\(^{41}\) ibid [194].

\(^{42}\) Dupre (n 40) 194. Also see J. Herring Vulnerable Adults and the Law (OUP 2016), Chapter 5, E. Grosz, Volatile Bodies: Towards a Corporeal Feminism (Allen & Unwin 1994) and R (on the application of McDonald) v Royal Borough of Kensington and Chelsea [2011] UKSC 33.

that it is human dignity that is the ultimate legal tool for the effective protection of the entirety of humanity. Dignity is ultimate as it considers the right to life in a way that is a more “useful complement to providing a fuller protection for those who are particularly vulnerable” which is inherent to the human condition and thus be more effective for the protection of all within humanity. In the Burke High Court ruling, it was dignity that “enhanced the degree of protection under Arts. 3 and 8 in the case of the vulnerable”, bolstering it as effective in expanding an understanding of human rights to be meaningful to terminally ill claimants. Justice Munby’s reasoning that human dignity can work as a balancing tool so that “freedom of choice” is not sacrificed in the face of “respect for life” is what demonstrates human dignity’s importance to enhance the effective protection to vulnerable claimants that respects their choice. Baroness Hale also refers to dignity in facilitating a balance between the principles of equality and democracy. It is the unique effectiveness of dignity being able to find a balance between competing rights and “drawing rights together[,] reminding us that there is no divisibility between rights” that demonstrates why human dignity is ultimate in having the power to expand a more meaningful and effective definition of other human rights.

III. HUMAN DIGNITY IN THE TWENTY-FIRST CENTURY

A. The Protection of Humanity: The Temporal Dimension

After having recognised dignity’s ability to be uniquely effective and thus ultimate as a legal tool in protecting humanity, this final section will argue that dignity’s capacity as a legal tool has successfully developed an expansive definition of humanity since the turn of the century. This again demonstrates the doctrine’s unique effectiveness and thus supports the argument for dignity as the ultimate legal tool for the protection of future generations of humanity as well as the present ones.

The adoption of the EU Charter is just one of the examples demonstrating the important temporal dimension of dignity. The use of human dignity has recognised the status of workers and the elderly as making up a large part of humanity and thus has enhanced the effectiveness of protection of humanity by

---

44 Dupré (n 40) 202.
47 Burke (n 13) Munby J at 80.
48 ibid [79].
50 Dupré (n 40) 202 and Burke (n 13) at 73 – 76.
51 Dupré (n 4) 79.
expanding the definition of it.\textsuperscript{52} It is the very flexible characteristic that academics have so readily criticised dignity for that allows dignity to be engaged in issues relating to the complex ethical dilemmas of bio-ethics.\textsuperscript{53} Foster recognises that dignity enlightens the debate on cloning and that “all the arguments for and against cloning are, at their root, dignity claims”.\textsuperscript{54} In such analysis the argument that dignity’s absolute and ultimate importance in effectively protecting the development of humanity in the future is bolstered as it is dignity which is the legal tool that leads the way in deciphering these moral dilemmas in a communicative and balanced way.\textsuperscript{55} For dignity to lead the way in protecting types of humanity for which “we cannot even imagine” yet, supports the argument as being ultimate in its capacity as an effective legal tool for effectively protecting a much deeper definition of humanity.

\textit{B. Dignity, The Environment and Globalisation}

Human dignity is arguably the ultimate legal tool for effectively protecting the key part of humanity that is often forgotten: the environment. Dignity importantly focuses attention on the significance of the protection of the environment for the flourishing of humanity. It is recognised in the Earth Charter that “all human beings have a right to an environment adequate for their health, well-being and dignity”.\textsuperscript{56} Environmental dignity is also recognised as an “intergenerational interest”, particularly in South African courts.\textsuperscript{57} Dignity has the ability to be used as a legal instrument to effectively govern the relationship between man and the environment on the grounds it is essentially fundamental for the sustainability of humanity to protect the environment in which we live to preserve a meaningful right to life for future generations.\textsuperscript{58} It is thus argued that it is dignity’s unique ability to legally enforce the protection of the environment that makes it so effective and places it as the ultimate legal tool for protecting the very core of humanity. Likewise, human dignity has been used as a legal tool to critically rethink the globalised and capitalist world in which we live where “dignity is [viewed as] the upright walk of humanity… against the struggle of capitalism” that has

\begin{itemize}
  \item \textsuperscript{52} ibid.
  \item \textsuperscript{54} Foster (n 15) 135 and 142.
  \item \textsuperscript{55} Dresser (n 16).
  \item \textsuperscript{57} J. R May and E. Daly, ‘New Directions in Earth Rights, Environmental Rights and Human Rights: Six Facets of Constitutionally Embedded Environmental Rights Worldwide” Widener Law School Legal Studies Research Paper Series no 11-09 (2011) (1) 121.
  \item \textsuperscript{58} ibid.
\end{itemize}
historically exploited the poorest of our society.\textsuperscript{59} It is thus argued that human dignity’s effectiveness remains ultimate in its capacity to protect humanity from itself. Dignity is a legal tool that enables resistance to the destruction of the environment vis-à-vis globalisation which may lead towards negative consequences for humanity. It is through dignity that protection of the environment is importantly directly related to the quality of our Art. 2 right to life.\textsuperscript{60}

CONCLUSION

In conclusion, this essay has argued that despite the critiques, human dignity remains as the ultimate legal tool for the effective protection of humanity. Human dignity’s main trait as a unique legal concept having the subjective ability to assist the most vulnerable in humanity is the trait that promotes it as the ultimate legal tool for effectively safeguarding the “otherness” of humanity.\textsuperscript{61} It is dignity’s universality as a minimum core that allows it to be called upon in a comprehensive variety of legal concepts. In a wider sense by recognizing that human dignity plays a significant and forerunning role in the developments of twenty-first century issues including globalisation, medical ethics, an ageing population and the growth of national workforces, it has been argued that dignity has the capacity to accommodate real and important changes to the dynamics of humanity as it evolves. These points all underpin the argument that human dignity is more than a last resort safeguard for humanity. Moreover, it is a forward-thinking core and thereafter effective as the ultimate legal tool for the protection of humanity and the environment in which human beings require to exist.

\textsuperscript{60} Daly (n 57) 23.
\textsuperscript{61} Dupré (n 35) 270.