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## **‘Dignity’ in interpretation of rights and as a threshold for minimum core obligations**

### **Response to the consultation on a Human Rights Bill for Scotland**

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# What are your views on our proposal to allow for dignity to be considered by courts in interpreting the rights in the Bill? (Consultation question 1)

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The consultation document states that: “Our intention is therefore [...] for human dignity to be integrated into the framework as a fundamental value which can be used in reading and interpreting the framework as a whole. This closely reflects the formulation of international human rights treaties, and is intended to ensure we all have the opportunity to live a life with dignity.” **This is positive and welcome.**

The principle of respect for dignity is a core value underpinning all human rights. It is fundamental to the character of *human* rights as a category of legal rights. ‘Human rights’ is a broad category of civil, cultural, economic, environmental, political and social legal rights but not all of the legal rights that we have, set out in domestic law, are human rights. Thereby, highlighting the language of dignity in legislation and practice on human rights is useful because it emphasises the unique character of *human* rights as a category of legal rights.

In ‘The Underpinning Concept of Human Dignity’,<sup>1</sup> prepared for the Academic Advisory Panel to the National Taskforce for Human Rights Leadership, Webster highlights that “[t]he idea of ‘human dignity’ has remained at the forefront of the modern international human rights regime since it began in the 1940s. It features in core UN treaties as well as other key instruments. It has an important presence in regional human rights regimes, in the text of treaties and/or in the decisions of monitoring bodies and courts. [...] In recent international developments, with the adoption of the 2030 Agenda for Sustainable Development, the prominence of the idea of ‘human dignity’ has been reinforced.” (p1)

The paper also highlights a link to textual interpretation: “The internationally recognised role of ‘human dignity’ is to express an aspect of the purpose behind a legal text, and as such, to guide interpretation of that text (by the judiciary but also much more broadly) as it develops over time.” (p1) In other words, respect for dignity captures a key aspect of the purpose, or point, of human rights protections in law. When we look at the words that make up the text of a right, and we ask, what does this right mean, we should ask, what is this text trying to achieve?

Webster’s paper notes that “[...] there are legislative examples of ‘dignity’ being referred to in several recent Acts of the Scottish Parliament.” (p2 and p13-14)

The paper concludes that “inclusion of ‘human dignity’ as a value in the Bill will be a clear and symbolic demonstration of Scotland’s support for the UN’s international human rights law framework (and the EU’s Charter of Fundamental Rights), as well as the Sustainable Development Goals.” (p18)

To support the intention of integrating human dignity into the framework, Consultation Question 1 is broken down into further queries, each of which are addressed in turn. This response highlights elements of, and also builds upon, the research undertaken for the Academic Advisory Panel to the Taskforce.

- What might it mean ‘to allow’ for dignity to be considered by courts and tribunals?
- How should human dignity be integrated in an interpretive clause and what are key considerations?
- Should the Bill imply that the principle of respect for human dignity as an interpretive aid is only available to courts and tribunals and not duty-bearers more broadly?

## What might it mean ‘to allow’ for dignity to be considered by courts and tribunals?

Webster’s paper notes that ‘dignity’ is a term that is already widely used in legal judgments in the UK. A database search in 2020 returned more than 4000 results across various areas of law, including in the equality and human rights field (p13).

Courts and tribunals have had to take into account the judgments of the European Court of Human Rights the introduction of the Human Rights Act 1998. These judgments include references to dignity as a value so it would not be new for courts and tribunals to be able to take respect for dignity into account. The paper also highlighted “the familiarity of the idea of ‘dignity’ within Scots private law, as a result of a connection which has been maintained to Roman law.” (p2, p14-15) In this sense, courts and tribunals already consider dignity of their own volition.

Further, integrating dignity specifically would not exclude additional interpretive aids. These would be drawn naturally by a court or tribunal from the context, content and structure of the statute as a whole.

‘Allowing’ courts and tribunals to consider dignity should not mean an obligation to engage with this value. This would be overly directive, including because respect for dignity can play out very differently in relation to different rights.

Instead, making explicit reference to the principle of respect for human dignity should give it a clear intended role as an interpretive aid; it should make clear that this principle can legitimately be relied upon to inform decisions about what a preferred meaning of a right is in a particular context. This is a key benefit of explicitly integrating dignity into the framework.

In international and European human rights law, treaties should be ‘interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose’ (Vienna Convention on

the Law of Treaties, Article 31). 'Object and purpose' refer to the range of general and specific aims of a treaty. Respect for human dignity has been recognised as a fundamental value that reflects general and specific aims of human rights treaties. As such, it plays a role in interpretation guided by purpose, which is the main approach to interpretation used for applying human rights law.<sup>2</sup> Integrating reference to dignity in the Bill would support dignity being used in this way in interpretation, mirroring international and European human rights law.

## How should human dignity be integrated in an interpretive clause and what are key considerations?

The approach in international law treaties is to have a preamble, which is used by interpreters as an interpretive aid. UK statutes do have introductory texts (some fairly extensive, such as in the Equality Act 2010) but they are only descriptive of the content of the statute.

Constitutional bills of rights also tend to have preambles, but they may be supplemented by other provisions. For example, the South African Bill of Rights section 39 addresses interpretation:

"Interpretation of Bill of Rights

39.

(1) When interpreting the Bill of Rights, a court, tribunal or forum—

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

A relevant example of a human rights-related interpretive clause in a UK statute is in the Human Rights Act 1998 s2, 'Interpretation of Convention Rights'. This only refers to sources which should be taken into account by a relevant court or tribunal, rather than guiding interpretation more broadly.

An alternative example is found in the Social Security (Scotland) Act 2018, which has as its Part 1, 'Tenets and oversight'. The first two sections are under the heading of 'Principles'. This section also includes reference to respect for dignity (s1(d)).

A dignity reference could also be integrated in an original way in a new form of interpretive clause. However, consideration should be given to the relationship between dignity as a value and other principles that may be included in the Bill.

The consultation document states that: “We are also considering the most appropriate mechanism by which to recognise other key international human rights principles – such as the universality, indivisibility, interdependence and interrelatedness of all rights – within the framework. We need to consider carefully how we do this whilst meeting our objective of providing a clear and accessible framework.” Dignity sits comfortably alongside universality but is on a different plane to indivisibility and interdependence of human rights, which were articulated later in the process of international human rights law’s development. Nevertheless, respect for dignity, the aspiration of universality, and indivisibility and interdependence can all play a role in interpretation. As such, it would not be unreasonable to include them in the same provision. If there were several principles included the distinction between principles of different status could be acknowledged in the structure of the provision.

However dignity is included in an interpretive clause, the Bill should make clear that the rights to which the Bill gives effect are expressions of, or vehicles for, respect for human dignity to be manifested. Confusion which could lead to claims based on dignity violations directly, as is found in some countries on the basis of dignity-based provisions in written constitutional bills of rights, risks weakening protection of the rights set out in the incorporated treaties/treaty provisions.

## Should the Bill imply that the principle of respect for human dignity as an interpretive aid is only available to courts and tribunals and not duty-bearers more broadly?

The Bill could imply or specify that the purpose of the legislation should be considered by courts and tribunals (only) or by courts, tribunals and duty bearers. Either approach is workable.

It makes sense for the Bill to enable courts and tribunals specifically to consider the principle of respect for human dignity. If disputes arise that come before a court or tribunal, these bodies will have the authority to settle any questions of interpretation (subject to any available appeal avenues).

At the same time, all duty bearers will have to make decisions about how relevant rights apply in particular contexts and should also be striving to realise the intent of the Bill. They could also be directed to consider the principle of respect for dignity. On the one hand, the more effective their practice is the more likely it will be that there is improved enjoyment of rights in people’s everyday lives. From this point of view, the Bill’s interpretive clause, including its reference to human dignity within that, need not be restricted to courts and tribunals. Duty bearers would require training and capacity to make informed decisions taking the purpose of the

legislation into account.

On the other hand, non-judicial interpreters would likely take account of the interpretive clause by virtue of knowing that courts and tribunals, as final authoritative interpreters, will be guided by it in their own interpretations. This means it may not be necessary to explicitly make duty bearers subject to the interpretive clause.

## What are your views on our proposal to allow for dignity to be a key threshold for defining the content of MCOs? (Consultation question 2)

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This proposal is exciting and presents **significant positive opportunities**.

It is helpful to think of dignity as a powerful value that has enough of a shared meaning for people to agree upon and enough of an indeterminate meaning for people to inject their own ways of seeing the world. It is a complex idea, which expresses fundamental things about what we think it means to be a human person in the society that we live in, and about the nature of social relationships. Webster has described a key distinction that helps people to navigate the idea of dignity: human rights protect against a person's dignity being undermined and human rights promote the flourishing of a person's dignity; some human rights aim to do both of these things while some focus more on one or other aspect.<sup>3</sup>

Research suggests that dignity in a 'minimal' sense has a widely shared intuitive meaning, even for people who have not thought about it before (there is a large body of academic literature on this as well as recent pilot research undertaken in Scotland).<sup>4</sup> This is relevant because the participatory process would be interested in this 'minimal' sense.

Nevertheless, there is likely to be some disagreement when engaging with the idea of dignity. This need not be a barrier in the participatory process if there is transparency and a final authority decision-making structure rather than a consensus based structure. Provided that the meaning of dignity is anchored in international human rights law there is flexibility; there may be more and less coherent approaches to defining minimum essential levels of rights with reference to a dignity threshold, but not a right or wrong approach.

If minimum essential levels of the rights are to be defined in a participatory process (which is itself highly positive), a dignity based threshold seems to be the only convincing option for an approach that is connected to international human rights law and that can provide coherence in discussion across the diverse range of rights.

There has to be some threshold for defining minimum essential levels of the rights that makes sense and building the threshold around respect for dignity is a prime candidate because the idea of dignity has been used in this way in international

human rights law and also in constitutional law in some countries. Amongst all the key human rights principles - equality, universality, indivisibility and interdependence - it is the only one that is feasible since it speaks to the substance of the rights.

The aim of helping to “ensure that no one in Scotland falls below such a level that their inherent dignity is violated” is appropriate and in line with international human rights law (and the Sustainable Development Goals).

Since minimum essential levels are normally defined by courts and monitoring bodies, this approach is also world leading. The combination of participation and a dignity threshold will have implications for the design and resourcing of the process.

There will be a need for research to supplement existing international law guidance. Broadly speaking, we can say that all human rights aim to secure respect for dignity, but ‘human rights’ is a diverse category and different rights aim to secure respect for different facets of dignity. Some facets of dignity’s meaning are more useful in some contexts than others.

There will be a need for guidance (e.g. a working definition) for participants and ideally the use of creative forms of participation that can bring to life the relationship between human dignity and relevant spheres of life (food, housing, culture, and so on), and in ways that are accessible as well as feasible within realistic timeframes.

The key advantage is that this approach presents real opportunities for participants to learn deeply about how human rights can be interpreted. In this sense, defining minimum essential levels of the rights in a participatory process with reference to a dignity threshold can form a core element of capacity building for the wide range of participants who will presumably be engaged in the process. This is a significant opportunity.

## Contacts

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<sup>1</sup> E. Webster, ‘[The Underpinning Concept of Human Dignity](#)’, June 2020, 19pp.

<sup>2</sup> See further discussion in E. Webster (2018), *Dignity, Degrading Treatment, and Torture: The Ends of Article 3 of the European Convention on Human Rights*, Routledge, p49-54.

<sup>3</sup> Webster (2016) p371-390.

<sup>4</sup> E. Webster, ‘[Can Talking about ‘dignity’ support the growth of a human rights culture?](#)’, March 2022.