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Brigitte Feuillet-Liger · Kristina Orfali
Editors

The Reality of Human Dignity in Law and Bioethics

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Editors
Brigitte Feuillet-Liger
University of Rennes
Rennes, France

Kristina Orfali
Columbia University
New York, USA

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In memory of our colleague Ruwen Ogien

Foreword

Human dignity is a key concept invoked in the ethical and political discourse of national and international bodies, treaties, declarations of human rights, religious teachings, and all manners of ethical writings. However, what the concept means and on what grounds it is invoked in political, policy, or moral debate is not so clear. The U.S. Supreme Court and constitutional courts around the world regularly use the term human dignity when deciding cases about freedom of speech, reproductive rights, racial equality, war crimes, immigration, marriage, and organ trafficking. Dignity is presented as an important legal value, but courts almost never explain what it means.

So, what realities do this amorphous concept cover? This superb and comprehensive book, edited by Brigitte Feuillet-Liger and Kristina Orfali, seeks to explore and compare the current application of the principle of human dignity in different legal and cultural systems throughout the world. Many countries and legal systems have adopted human dignity as a core principle (sometimes enshrined in their constitution), while others have not. Does the principle remain just a distant rhetorical reference or is it really enacted in case law, in courts or in biomedical norms?

Dignity often appears in admonitions about how doctors should treat patients. "Each individual has the right to be treated with dignity […]. To repeat, individuals have a right to be treated with dignity not as an instrument of someone else's policy" avers Sir Michael Marmot in a World Medical Association statement.[1] The WMA's Code of Ethics enjoins doctors to provide care "[…] with compassion and respect for human dignity".[2] The American Nurses Association believes that

[1] Marmot, Michael. "Treating People With Dignity Not As Instruments". The World Medical Association, World Medical Association, 16 Mar. 2016, https://www.wma.net/blog-post/treating-people-with-dignity-not-as-instruments/.

[2] "WMA International Code of Medical Ethics". The World Medical Association, World Medical Association, Sept. 30, 2006, https://www.wma.net/policies-post/wma-international-code-of-medical-ethics/.

"respect for the inherent dignity, worth, unique attributes, and human rights of all individuals is a fundamental principle".[3]

This all sounds wonderful in the abstract. But can the concept really bear the weight that it is asked to hold in so many ethical settings, especially in health care?

The noted bioethicist Ruth Macklin is one of the many who thinks not. In 2003, she declared in the British Medical Journal (BMJ) that "dignity is a useless concept in bioethics." She went on to argue that outside of being used as a placeholder when asking for respect for persons or individual autonomy, dignity was mere window dressing in ethical argumentation.

Many disagree. They find dignity present in human beings from their embryonic state through their ending as cadavers. Others urge the bestowal of dignity on any and every patient, no matter how ornery, blameworthy, odd, obstreperous, or non-compliant they may be. And others maintain that dignity is a "natural" human state around which a package of human rights can be built.

So, do those called to philosophical arms in defense of dignity succeed in blunting Macklin-like challenges? Not to any great degree.

Many of the defenders of dignity are so eager to retreat back to their conclusions that human embryos have inherent dignity or that reproductive cloning is an affront to human dignity, that they do not get far in either explicating the idea or finding persuasive grounds for positing it. Others want to cite natural law or religious tradition to support claims of human dignity. However, the invocation of a long intellectual or spiritual tradition is not an argument but only a sociological case study. And the invocation of "natural" dignity is an assertion, not an argument. What is needed are arguments that make sense of dignity and make it palatable as a key idea on persuasive and pragmatic grounds. That can be done if we recognize that dignity is intended to sometimes capture biological requirements for human flourishing, other times virtues that are valued by human beings that permit autonomy, and finally, it is often used to denote the capacities that allow such autonomy to exist.

Most of us feel revulsion at what happens to people who are tortured, raped, or trafficked. Part of the reason is that we know that torture often involves humiliation or degradation of the victim. Respect for persons hardly seems sufficient for capturing the evil involved. Torture plays on cultural and social views of propriety that go beyond simply respecting the individual as a person, to the broader social realms of what makes that person feel safe, whole, and a part of larger groups. One sense of dignity, which those who invoke "natural" human dignity search for, is that in which it encapsulates a core of requirements rooted firmly in biology that permit any individual to flourish—some privacy, bodily security, adequate nutrition, housing, mobility, and the freedom to speak, think, and reproduce. Those who torture, sadly, know full well what these biologically based requirements are.

[3] "Code of Ethics for Nurses with Interpretative Statements". American Nurses Association, 2015, p. 1.

Similarly, human dignity can refer, and has since Cicero and the Stoics, to the virtues that are esteemed by a society. So, when we ask a doctor to practice medicine with dignity or speak about death with dignity we are seeking consensus on the virtues of professionalism or what constitutes a "good" death.

What about finding dignity in autonomy? Making a claim of dignity about a person or even a group is more than simply acknowledging the right of individuals to act autonomously. It is to see inherent value in their ability to reflect, deliberate, value, and choose—the core elements of autonomy. There is moral pull or gravity exhibited by those who can do these things and thus are autonomous agents, have the capacity to become so, or are in the care of an autonomous agent—a disabled infant, a cadaver, or someone in a permanent coma.

Even the Christian notion of dignity that invokes both humanity's likeness to God in the grand scheme of things to ground dignity can be secularized a bit so that dignity becomes simply acknowledging the value of a conscious, socially cooperative and reflective creature and its products which are infused with acquired dignity due to their creation by autonomous beings and their concern for them.

There is no single conceptual coherence to the concept of human dignity, as is vividly demonstrated by this collection of essays from 16 countries (Germany, Belgium, France, Spain, Greece, Italy, UK, Hungary, Switzerland, Turkey, Egypt, Tunisia, Canada, USA, Brazil, and China), representing different cultures and religious areas (Christian, Muslim, and Buddhist countries), carefully assembled by its two scholarly editors. It can refer to the attributes that create value when autonomy occurs, relationships between those who try to create the conditions for autonomy in beings—teachers, police, healthcare workers, governments, etc. Or, it may describe what is most admirable about the kind of choices that autonomous beings make—be they courageous, altruistic, sacrificial, persevering, stoic, humble, etc. There is plenty to argue about concerning human dignity. But that the concept captures things of moral import, seems beyond dispute.

By exploring the ambivalence of human dignity in relation to a wide range of cultures and contexts and through the evolving reality of court cases, this comprehensive international book will be a valuable resource for students, scholars, and even professionals working in bioethics, medicine, social sciences, and law.

New York, USA

Arthur Caplan
Drs. William F. and Virginia Connolly
Mitty Professor of Bioethics
Head, Division of Medical Ethics,
New York University School of
Medicine

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Contents

Contributors

Hassan Abdelhamid Faculty of Law, University of Ain Shams, Cairo, Egypt

Penelope Agallopoulou University of Piraeus, Piraeus, Greece

Amel Aouij-Mrad Faculty of Law and Political Science of Tunis, Tunis, Tunisia

David Le Breton University of Strasbourg, Strasbourg, France

Thérèse Callus University of Reading, Reading, UK

Anderson Orestes Cavalcante Lobato Federal University of Rio Grande, Rio Grande, Brazil

Maria-Claudia Crespo-Brauner Federal University of Rio Grande, Rio Grande, Brazil

Brigitte Feuillet-Liger Faculty of Law, University of Rennes, Rennes, France

Francoise Furkel Franco-German Legal Center, Saarland University, Saarbrucken, Germany

Dominique Goubau Faculty of Law, Laval University, Québec, Canada

Gilbert Hottois Université Libre de Bruxelles, Brussels, Belgium

Francis Kernaleguen University of Rennes 1, Rennes, France

Dominique Manaï Faculty of Law, University of Geneva, Geneva, Switzerland

Jean-Pierre Marguénaud The Faculty of Law and Economics, University of Limoges, Limoges, France; The Institute of European Human Rights Law, University of Montpellier, Montpellier, France

Ruwen Ogien Centre National de la Recherche Scientifique (CNRS), Paris, France

Saïbe Oktay-Özdemir Faculty of Law, Civil Law and Obligations Law Department, Istanbul University, Istanbul, Turkey

Kristina Orfali Columbia University, New York, USA

Verónica San Julián Puig Faculty of Law, University of Navarre, Pamplona, Spain

Judit Sándor Center for Ethics and Law in Biomedicine (CELAB), Central European University, Budapest, Hungary

Geneviève Schamps Centre of Medical and Biomedical Law, Université Catholique de Louvain, Louvain-la-Neuve, Belgium

Gülen Sinem Tek Faculty of Law, Bahçeşehir University, Istanbul, Turkey

Carlo Sotis Tuscia University, Viterbe, Italy

Li Zhang China University of Political Science and Law (Zhongguo Zhengfa Daxue), Beijing, China

Part I
The Realitie(s) of Human Dignity in Europe

The Concept of Human Dignity in Belgian Law: A Variety of Approaches

Geneviève Schamps

Abstract In Belgian law, the concept of human dignity has no legal definition. In addition to the international instruments and decisions of the European Court of Human rights that refer to it, the Belgian legislature has, in a number of fields, adopted normative provisions that are underpinned by this concept. In the instruments, decisions and opinions concerning a particular theme of biomedicine, it takes on a range of applications, which may even contribute to the concept's general ambiguity within the legal system, or even with regard to a single issue. The discussions often oscillate between the dignity of each human being as the common good of the human community, and another form of dignity which prioritizes the autonomy of the individual, involving accountability and self-respect.

1 Human Dignity: An Undefined Concept

The concept of human dignity appears in Belgian law, but has no legal definition or precise parameters that could be used in a specific piece of legislation. Doctrine analyses the development of philosophical insights with regard to human dignity since Greek and Roman times, the development of Christianity, the conceptions in the Middle Ages , the Renaissance and onwards. In addition to the thinking of Pascal,

G. Schamps (✉)
Centre for Medical and Biomedical Law, Université catholique de Louvain, Louvain-la-Neuve, Belgium
e-mail: genevieve.schamps@uclouvain.be

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the emphasis is placed in particular on that of Emmanuel Kant and the advances that this inspired in establishing a legal concept.[1]

After the atrocities committed during World War II, it became apparent that, in the words of Ph. Coppens, there was a "pressing need to reawaken and re-energize the concept of human dignity". Since that time "the duty to respect [the concept of human dignity]" has been included in the constitutional instruments of a number of countries and in those international instruments "that wish to recognize in it the expression of the humanity common to all men and women".[2] As this author states, it is prescribed to "protect it everywhere, at all times and for each person *worthy* of this name. As to what it is, however, there is not a word".

The author raises the question of the meaning or meanings of the notion of personal dignity within a modern sovereign State.[3] In the first part of this author's description, he distinguishes the legal recognition of the dignity of the human being from other rights, especially from the fundamental human rights: the recognition of the dignity of every human being serves the common good, which prevents it from having a relationship of proportionality with another fundamental right that may limit it. In the second part, dignity expresses the agent's autonomy and accountability, leading to the development of self-esteem, self-respect[4] and possibly even the idea of justice.

Among the foreign instruments it sometimes refers to, Belgian doctrine references Article 1, para. 1 of the German Constitution of May 08, 1949, concerning the ambiguity of the principle of dignity, the rights of the human being and the applicable fundamental rights.[5] It is sometimes thought that dignity is less a right than an underlying condition which mandates all other rights. In other words, the respect and protection of dignity justifies the respect and protection of the fundamental rights.[6]

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[1] Fierens, J. (2002). La dignité humaine comme concept juridique. *J.T.*, 578; Id. (2015). Existe-t-il un principe général du droit du respect de la dignité humaine? note under Cass., November 18, 2013. *R.C.J.B.*, 363–367, with highlights that the reference to human dignity is primarily of a philosophical and ethical nature, before forming part of the legal sphere. See also on this subject, Coppens, Ph. (2011). La dignité humaine: droit constitutionnel ou principe matriciel? In *Les droits constitutionnels en Belgique*, vol. II, ed. M. Verdussen and N. Bonbled, 1510 and following. Brussels: Bruylant, 2011; Dijon, X. (2012). *La raison du corps*. Brussels: Bruylant, 43 and following; see also in this work the contribution of Hottois, G. p. 259.

[2] Coppens, Ph. (2011). La dignité humaine: droit constitutionnel ou principe matriciel?, *op. cit.*, 1516.

[3] *Ibid*., 1516, 1529 and 1530.

[4] See also in particular Langlois, A. (2001). Dignité humaine. In *Nouvelle encyclopédie de bioéthique*, G. Hottois and J.-N. Missa, 281–284. Brussels: De Boeck & Larcier.

[5] Coppens, Ph. (2011). La dignité humaine: droit constitutionnel ou principe matriciel?, *op. cit.*, 1517; Dijon, X. *La raison du corps*, *op. cit*., 44. Doctrine also refers to Article 151 of the German Constitution of August 11, 1919, mentioning a dignified life for everyone in the context of economic, social and cultural rights (Fierens, J. 2002. La dignité humaine comme concept juridique, *op. cit*., 578).

[6] Coppens, Ph. (2011). La dignité humaine: droit constitutionnel ou principe matriciel?, *op. cit.*, 1517.

Human dignity is often brought up in relation to the question of a person's control over their body. In this regard, X. Dijon[7] states that a subject's freedom to make decisions about one's body differs from that of an external item of property. To the question of whether an individual has a right over their own body, he responds that it is "in accordance with the dual theory of the subjective right (both power and interest) that, with regard to the human body, traditional doctrine accorded a right of protection to the subject *in* his body, without according him the power to have full control *over* his body". However, he points out that some theories were developed calling into question the non-commercialization of the body or the principle of the unavailability of the body. At the same time, he believes that the imperative of dignity, specific to the human race, sometimes infringes upon the right to autonomy.[8] According to Dijon, the question of personal development, which is central to ethics, must not be confused with the fulfilment of all desires.

In accordance with the opinion that self-determination contributes to personal development, Y.-H. Leleu and G. Genicot believe that the human body must be distinguished from the person, and that the right to control of the body should be seen as a personality right derived from the right to life and the right to respect for physical integrity.[9] They place the emphasis on the autonomy of the person and on the protection it is entitled to, stating that a number of pieces of legislation[10] have expanded the scope and limits of a right to control of the body, which goes beyond the "traditional debate between the 'patrimonialist' and 'personalistic' theories" and is "broadly placed under the banner of the dignity of the human person". In their opinion, it is up to the person to consider the implications of the idea that the integrity of his body is based on the terms of his control and the limits imposed on them.[11] The ability to dispose freely of one's body, via free and informed consent, would be limited by standards drawn from the law and ethics: public order, human dignity and the protection of the species.[12]

At the present time, the case can be made that, in Belgian law, there are different levels of availability—determined by the extent of the legal constraints governing the

[7]Dijon, X. (2006). Vers un commerce du corps humain. *J.T.*, 501–504; see also Dijon, X. *La raison du corps*, *op. cit.*, 29 and 30; Dijon, X. 1982. *Le sujet de droit en son corps, une mise à l'épreuve du droit subjectif*. Brussels: Larcier, 60–142.

[8]On this subject, see also Verdussen, M., Depré, S. and Bombois, Th. (2005). Les devoirs fondamentaux en droit constitutionnel comparé. In *La responsabilité, face cachée des droits de l'homme*, ed. H. Dumont, F. Ost and S. van Drooghenbroeck, 282–283. Brussels: Bruylant.

[9]However, see Rigaux, F. (1992). *La vie privée. Une liberté parmi les autres?* Brussels: Larcier, 137.

[10]See the legislations relating to abortion, assisted reproductive technologies, patient rights, in vitro research on embryos, experiments on humans, the removal or transplantation of organs, activities related to human bodily material, transsexualism, etc.

[11]Leleu, Y.-H. and Genicot, G. (2012). Le statut juridique du corps humain en Belgique. In *Le droit de la santé: aspects nouveaux, Journées suisses 2009*, Travaux de l'Association Henri Capitant, t. LIX, 68–71. Brussels: Bruylant, LB2 V; see also Leleu, Y.-H. and Genicot, G. (1999). La maîtrise de son corps par la personne. *J.T.*, 589–600.

[12]Leleu, Y.-H. (2010). *Droit des personnes et des familles.* Brussels: Larcier, coll. de la Faculté de droit de l'Université de Liège, 131–132.

exercise of autonomy or its translation into a written agreement[13]—rather than a clear limit between unavailability and availability.[14] As well as the ethical considerations, the law marks out the autonomy of the individual, particularly with regard to the legislature's view of the concept of dignity or public order. It negates the effectiveness of, and even introduces sanctions for, the arrangements or commitments made by the individual beyond certain limits placed on his freedom, all in the interests of protecting the general interest or competing individual interests. It also seeks a balance between the general interest, individual interest and the protection of legitimate competing interests, particularly with regard to the fundamental rights included in numerous instruments of internal or international law.

Not only have international instruments,[15] the decisions of the European Court of Human Rights[16] and the Court of Justice of the European Union[17] considered the concept of dignity, but the Belgian legislature has also adopted the normative provisions that this concept underpins. Some situational case law refers to it, as do the local ethics committees and the Belgian Advisory Committee on Bioethics in the opinions it issues.

2 Human Dignity as Included in the Instruments

Since the constitutional revision of 1994, it clearly refers to human dignity by stating in Article 23, para. 1 that "Everyone has the right to lead a life in keeping with human dignity". To this end, this provision indicates that the law, the decree or the rule referred to in Article 134 of the Constitution "guarantee economic, social and

[13] With regard to assisted reproductive technologies.

[14] Schamps, G. and Willems, G. (2013). La convention de gestation pour autrui entre autonomie, ordre public et droits fondamentaux: quelles garanties formelles et substantielles? In *La gestation pour autrui: vers un encadrement?*, ed. G. Schamps and J. Sosson, 329. Brussels: Bruylant.

[15] See in particular the United Nations Charter of June 26, 1945, the Universal Declaration of Human Rights of December 10, 1948, the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on November 04, 1950, the International Covenant on Civil and Political Rights of December 16, 1966, the Convention on the Rights of the Child of November 20, 1989, the Charter of Fundamental Rights of the European Union, the Treaty on the European Union, the Universal Declaration on Bioethics and Human Rights of October 19, 2005, the Convention on the Rights of Persons with Disabilities of December 13, 2006, etc.

[16] For judgements concerning Belgium, see in particular ECHR, Grand Chamber, *Case Bouyid v. Belgium*, September 08, 2015, *JLMB*, 2015/35, 1640, obs. M. Nève, "Quelles limites à une intervention policière d'apparence anodine?"; where the Court pointed out that, although the European Convention on Human Rights does not refer to human dignity, respect for it can be found at the very heart of the Convention; ECHR, Grand Chamber, January 21, 2011, *Case M. S. S. v. Belgium and Greece*; on this decision, see Carlier, J.-Y., Saroléa, S. (2011). Le droit d'asile dans l'Union européenne contrôlé par la Cour européenne des droits de l'homme. À propos de l'arrêt M. S. S. c. Belgique et Grèce. *J.T.*, 353–358; ECHR, *Case K. A. and A. D. v. Belgium*, February 17, 2005 (sadomasochistic practices).

[17] Court of Justice of the European Union, *A., B. and C. v. Staatssecretaris van Veiligheid en Justitie*, December 02, 2014, joint cases C-148/13 to C-150/13, *JLMB*, 2015/6, 245.

cultural rights, taking into account corresponding obligations, and determine the conditions for exercising them".

According to Article 23, these rights include the right to employment and the right to the free choice of an occupation within the context of a general employment policy, aimed among other things at ensuring a level of employment that is as stable and high as possible, the right to fair terms of employment and to fair remuneration, as well as the right to information, consultation and collective negotiation. They also include the right to social security, health care and social, medical and legal aid; the right to decent accommodation; the right to the protection of a healthy environment; the right to cultural and social fulfilment; and the right to family allowances.[18]

Article 23 of the Belgian Constitution is considered as providing a "standstill" clause—also called "ratchet effect" or "no-return effect"—and a "hope of implementing through legislation the ideal of dignity by creating subjective, economic, social and cultural rights".[19] The legislature can therefore modify a legal instrument, but the constitutional provision prevents the establishment of legislative norms that decrease the level of protection acquired.[20] The scope of para. 1 of this provision is a subject of debate. Some believe it expresses a constitutional principle.[21]

The scope of Article 23 of the Constitution is essentially developed by the Constitutional Court and the Council of State.[22] According to some authors, the Constitutional Court believes that the right of each individual to lead a life in keeping with human dignity can be achieved by all of the combinations of economic, social and cultural rights alone. They do, however, state that the vagueness of the concept of human dignity makes it difficult to have direct control of legislation intended to "achieve the goal of increasing human dignity".[23] Even though Article 23 of the Constitution includes a standstill clausule, these authors condemn the decline

[18] On these rights, see in particular the contributions of Verdussen, M. and Bonbled, N. (ed.). (2011). *Les droits constitutionnels en Belgique*, vol. I and II. Brussels: Bruylant.

[19] Coppens, Ph. (2011). La dignité humaine: droit constitutionnel ou principe matriciel?, *op. cit.*, 1517.

[20] As regards the standstill obligation and the right to the protection of a healthy environment (Article 23, 4° of the Constitution), see Council of State, April 29, 2014, no. 227.231, ASBL Royal League for the protection of animals.

[21] Fierens, J., (2002) Existe-t-il un principe général du droit du respect de la dignité humaine?, *op. cit.*, 371–372 and 381, which considers that, while some specific direct effects (detached from paras. 2 and 3 of Article 23 of the Constitution) should in future be accorded to para. 1 of this provision by the Court of Cassation, the Council of State or the Constitutional Court, it would not then be necessary to make a "detour" by the general principle of law. The author also believes that the right to respect for human dignity constitutes a general principle of law of supranational ranking (p. 381).

[22] See in particular the developments of Neven, J.-F., Dermine, E. and Palate, S. Les droits à la sécurité sociale et à l'aide sociale, médicale et juridique. In *Les droits constitutionnels en Belgique*, vol. II, ed. M. Verdussen and N. Bonbled, *op. cit.*, 1355 and following; Born, Ch.-H. and Haumont, F. Le droit à la protection d'un environnement sain. In *Les droits constitutionnels en Belgique*, vol. II, ed. M. Verdussen and N. Bonbled, *op. cit.*, 1446 and following and the authors quoted. On the subject and notion of significant decline, see also Hachez, I. (2008). *Le principe du standstill dans le droit des droits fondamentaux*: *une irréversibilité relative*. Brussels: Bruylant, 694.

[23] Neven, J.-F., Dermine, E. and Palate, S. Les droits à la sécurité sociale et à l'aide sociale, médicale et juridique, *op. cit.*, 1327.

in social benefits provided to foreigners who legally reside in Belgium. Many also claim that the improvement of foreign benefits results more from decisions made by the European Court of Human Rights than from the provisions of Article 23 of the Constitution.[24]

In addition, several criminal law provisions sanction behaviour deemed to violate human dignity; for example, war crimes,[25] human trafficking,[26] sexual offences, abusing the vulnerability of others, particularly by slum landlords,[27] inhumane and degrading treatment, discrimination, offences against labour law, social law, violations of laws concerning experiments on human beings, the removal and transplantation of organs or activities relating to human bodily material.

In civil law, a complete reform of the Incapacity Regime came into force on September 01, 2014, with the law of March 17, 2013, whose terms refer specifically to human dignity, as it pronounces a "new status of protection in keeping with human dignity".[28] These regulations establish a new figure—the administrator of the person—in addition to the administrator of property, when an adult is for health reasons totally or partially incapable of assuming alone, "as would normally be the case, without assistance or other protective measures", the management of their own non-patrimonial interests.

3 Human Dignity as Recognized by Case Law

Case law also interprets instruments that refer to human dignity, often when it is only alluded to and not mentioned explicitly.[29]

The interpretations in judicial decisions are quite diverse. Case law can play a unifying and authoritative role in establishing the legal application of this concept at a national level or even at the level of the European Court of Human Rights.

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[24] *Ibid.*, 1382.

[25] Article 136 *quater*, § 1, 5°, Crim. C.: "The other violations, in particular inhumane and degrading treatment".

[26] Clesse, Ch.-E. (2013). La notion de dignité humaine et son application pratique en matière de traite économique des êtres humains. *RDPC*, 854–877.

[27] On slum landlord offences by abusing the position of vulnerable foreigners on account of their illegal or uncertain administrative status, by renting a property or room in conditions that are incompatible with human dignity, see in particular Mons, June 29, 2007, *RDPC*, 2008, 86, note Ch.-E. Clesse, "Les marchands de sommeil: *summum jus, summa injuria*"; Corr. Liège, September 02, 2015, *JLMB*, 2015/37, 1761.

[28] Law of March 17, 2013, reforming the disability regimes and introducing a new status of protection in keeping with human dignity; see Recommendation no. R (99) 4 of the Committee of Ministers to the Member States on the principles concerning the legal protection of incapable adults, adopted on February 23, 1999.

[29] Fierens, J. (2002). La dignité humaine comme concept juridique, *op. cit*., 579; Id. (2015) Existe-t-il un principe général du droit du respect de la dignité humaine?, *op. cit.*, 358–382. The author points out that while the domestic courts have not up to now explicitly recognized the respect for human dignity as a general principle of the law, that does not prevent it from existing as such (379).

Some believe that the usefulness of this concept is precisely in the fact that it has no specific definition and is flexible, like other concepts such as public order, morality, wrongdoing, human trafficking.[30]

The concept of human dignity has, for example, been the subject of interpretations by the Council of State and the labour courts within the framework of the right to social benefits,[31] within the meaning of the law of July 08, 1976,[32] including access to health care.[33] These use different conceptions of dignity when deciding if the *Centre public d'action sociale* (Public Social Services Centre—CPAS) should be responsible for costs of surgery related to sex changing or assisted reproductive technologies.[34]

Concerning human trafficking,[35] the Court of Cassation pointed out that such acts are only punishable if the person prosecuted acted with the intention of forcing the

[30]Fierens, J. (2002). La dignité humaine comme concept juridique, *op. cit*., 579–581; Id. (2015) Existe-t-il un principe général du droit du respect de la dignité humaine?, *op. cit*., 376; see also on this subject Martens, P. (2000). Encore la dignité humaine: réflexions d'un juge sur la promotion par les juges d'une norme suspecte. In *Les droits de l'homme au seuil du troisième millénaire. Mélanges en hommage à Pierre Lambert*, 574–575. Brussels: Bruylant.

[31]See in particular Mormont, H. (2011). La condition d'octroi de l'aide sociale: le critère de la dignité humaine. In ed. H. Mormont and K. Stangherlin, 51–65. Brussels: La Charte. In a judgement dated March 05, 2008 (*JLMB*, 2008, note by M. Ellouze, "Vers une notion évolutive de la dignité humaine"), the Mons Labour Court stated that "in a supposedly civilized, and more particularly post-industrial society, the concept of human dignity covers, as well as everything related to satisfying basic needs (access to housing, food, heating, etc.), other needs or aspirations, of a material nature for some, but of an intangible nature for others". In this case, the Court considered that in regard to his situation, the petitioner had the right to obtain half of the benefit applied for from the CPAS, i.e. payment of half of the costs of subscription to a sports club, for a registration after the pronouncement of the decision; comp. Lab. Court. Nivelles, October 11, 2013 (comments by Trusgnach, Z. 2014. L'octroi de l'aide sociale doit s'apprécier à l'aune de la dignité humaine. *Bulletin Juridique & Social*, 1), who believed that the community should not be responsible for the cost of the petitioner's children's membership of a sports club, as this does not constitute a vital need. With regard to the amount awarded to the detainee by the CPAS for his expenses relating to personal hygiene, access to a telephone, email and the provision of a television, the Liege Labor Court considered that the sum of 50 Euros was sufficient to enable this individual to lead a life in keeping with human dignity in detention conditions (Labour Ct. Liege, July 31, 2013 [comments by Trusgnach, Z. 2014. *Bulletin Juridique & Social*, 2]).

[32]Organic law relating to Public Social Assistance Centres. According to Article 1 of this legislation, "Every individual has the right to social assistance. Its aim is to enable everyone to live a life in keeping with human dignity".

[33]As regards emergency medical assistance, see in particular Cass., October 14, 2013, C.13.0117.F, when the patient is not in a position to assume the cost of emergency care in respect for human dignity; on the refusal by the CPAS to cover the cost of medication intended to treat erectile dysfunction, see Lab. Ct. Liege, June 07, 2011 (comments by Gilson, S. 2011. *Bulletin Juridique & Social*, 1), which rejected the insured's claim, considering that although it is important to have sexual relations, the fact of being unable to have them does not mean that the individual's life is not in keeping with human dignity.

[34]See the decisions referred to by Dermine, E. and Palate, S. Les droits à la sécurité sociale et à l'aide sociale, médicale et juridique, *op. cit.*, 1326.

[35]In accordance with Article 433 *quinquies*, § 1, 3° of the Criminal Code: "The following acts constitute the offence of human trafficking: recruiting, transporting, transferring, accommodating

victim to work in conditions contrary to human dignity.[36] In terms of human dignity, case law also considers the employment conditions of a worker,[37] taking account of a number of factors such as remuneration, the standard of pay in the country where the work is carried out, the working hours, the working conditions, the lack of safety equipment, the non-declaration of the work and even the worker's accommodation and meals.[38]

In a case relating to a professional sport employment contract,[39] the Antwerp Labor Court referred to Article 23, para. 1 of the Constitution, according to which each person has the right to lead a life in keeping with human dignity, in order to mandate the free choice of occupation. The Court initially pointed out that the legislature treated paid sportsmen and women differently from employees under an employment contract in order to avoid creating an imbalance in the element of competition and to maintain a certain stability between sports teams. It justified these special measures by the need to ensure an adequate degree of legal security in professional sporting relationships. However, it later ruled that the measure[40] allowing for a termination of payment corresponding to thirty-six months' salary disproportionately threatened the freedom of labour of the sports professional, and that it was exaggerated by comparison with the intended goal, especially in relation to the relatively short career of a paid athlete.

In other fields, judicial decisions or judgements by the Constitutional Court have referred to the concept of human dignity[41] and, in general, Article 23 of the Consti-

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or receiving a person, taking or transferring control of said person: […] 3° for the purpose of work or services in conditions contrary to human dignity […]".

[36]Cass., October 08, 2014, *RDPC*, 2015, 692, note Ch.-E. Clesse, "Le recrutement: une action active ou passive?".

[37]See the decisions referred to by Clesse, Ch.-E. (2013). La notion de dignité humaine et son application pratique en matière de traite économique des êtres humains, *op. cit*., 870 and following, according to which case law deemed not to be in keeping with human dignity an almost total lack of remuneration, an unconfirmed salary left to the discretion of the employer, pay of 4 or 5 Euros per hour, an undeclared wage below the minimum wage, the fact of working in places in breach of the standards prescribed by the law of August 04, 1996 (concerning the well-being of workers in the performance of their work), of having to stay in a caravan or other unsuitable accommodation, etc.

[38]Cass., June 05, 2012, *Pas.*, 2012, 1307.

[39]Labor Court of Antwerp, May 06, 2014, *Chron. D.S*., 2014, 6:302, note T. Arts, S. Fiorelli, V. Loenders, "Een tweede juridische bom onder de voetbalclubs".

[40]See the Royal Decree of July 13, 2004, setting the amount of compensation referred to in Article 5, para. 2 of the law of February 24, 1978, concerning employment contracts for sports professionals, according to which the sportsperson should pay a termination payment much higher than that required from an employee within the context of the termination an employment contract agreed for an indefinite period.

[41]See also P. Verviers, September 10, 2012, *J.T*., 2012, 732, concerning a communal regulation prohibiting the wearing of clothing concealing the face: "The refusal to reveal one's face to other citizens, similar to refusing to have a surname, is a matter of human dignity. The rule of proportionality must be interpreted as a balance between the freedom to express one's beliefs, on the one hand, the principle of non-discrimination and equality between citizens, and on the other, the expression of the general concept of human dignity, two other fundamental freedoms". The Court considered

tution. For example, they have done so with regard to access to water and electricity, even in the case of non-payment of bills,[42] collective debt settlement,[43] begging,[44] the temporary provision of transit accommodation,[45] the right to decent housing,[46]

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that "communal interference based on the absolute need for security respects the principle of necessity demanded by those standards which are above communal regulations"; on the law of June 01, 2011, prohibiting the wearing of clothing that totally or mostly conceals the face, see Const. Ct., December 06, 2012, *J.T*., 2013, 234.

[42]See in particular Ref. Court of 1st Instance Charleroi, January 19, 2000, *TBBR/TGDC*, 2000/9, 590 (electricity); J. P. Mouscron-Comines, Warneton, *TBBR/RGDC*, 2008, 274, note A. Vandeburie, "Coupures d'eau, de gaz et d'électricité: ça suffit! L'article 23 de la Constitution à la rescousse des besoins énergétiques fondamentaux". According to this decision, the application for authorization to cut off the water supply in case of unpaid bills cannot be granted, and the distributor would have to develop a system making it possible to reduce the water supply to the absolute minimum required to conform to the basic needs related to human dignity; see also J. P. Fontaine-l'Evêque, October 15, 2009, *J.J.P*., 2012, 306, note J. Fierens, "Vers un droit à l'eau effectif?" which declares the application for the water supply to be completely cut off to be unfounded and also refers to Article 23, para. 1 of the Constitution, stating that human dignity is inconceivable without a minimal supply of drinking and non-drinking water. Civ. Charleroi, February 22, 2013, *JLMB*, 2014/5, 231, which does not consider that Article 23 of the Constitution would have a direct effect.

[43]Any natural person who is not a trader may, if he is unable to pay his debts, payable now or in the future, submit an application to the judge for a collective settlement of debts, provided he has not deliberately arranged his insolvency (Article 1675/2, C. Jud.). A settlement plan is then drawn up for the purpose of re-establishing the debtor's financial situation "enabling him in particular, as far as is possible, to pay his debts and at the same time guaranteeing him and his family the possibility of living a life in keeping with human dignity" (Article 1675/3 C., Jud.). See Labor Court of Liège, January 12, 2010, *JLMB*, 2010/11, 504. In this case, it was a matter of the dignity of a person freely and voluntarily deciding to be a prostitute. In addition, in a judgement date November 18, 2013 (*R.C.J.B*., 2015, 355, aforementioned note of J. Fierens), the Court of Cassation considered that neither Article 110 of the Constitution (granting the King the right to increase or reduce the sentences imposed by the courts) nor the general principle of law concerning the separation of powers prohibit the collective settlement judge from granting the person being mediated, within the terms set by the law, a write-off of debts resulting from sentences to fines when this measure is necessary to enable the interested party and his family to live a life in keeping with human dignity. However, the legislature has not followed up this idea: see Article 464/1, § 8, para. 5 CIC, inserted by the law of February 11, 2014, concerning various measures intended to improve the recovery of fines and legal costs in criminal cases (I).

[44]See Const. Ct., December 06, 2012 (*J.T*., 2013, 234), which considered "that the right to lead a life in keeping with human dignity involves being able to have a livelihood, which may include begging in the absence of a better practical and effective solution; that this right does not, however, mean begging without any restriction being imposed on this practice by the administrative authority […]".

[45]J. P. Grâce-Hollogne, May 30, 2002, *JLMB*, 2002/41, 1815: "The time to find decent housing in accordance with the objective of Article 23 of the Constitution".

[46]Corr. Liège, September 02, 2015, *op. cit.*, 1761, concerning slum landlord offences (Article 433 *decies* of the Criminal Code): "The aim of the law is to protect the general principle of human dignity which, not being confined to combating substandard housing, is autonomous with regard to regional housing legislation. […] The 'undignified' nature of an accommodation is determined, in particular, by the absence, insufficiency or the manifestly dangerous condition of electrical or sanitary equipment or by the small size of the premises compared to the number of renters accommodated".

the right to social integration,[47] social assistance for foreigners,[48] the situation of the elderly accommodated in rest homes and care homes,[49] access to the territory, and the stay, settlement and removal of foreigners.[50]

4 Present in the Field of Biomedicine

In addition to its inclusion in the Constitution and usage in case law, the concept of human dignity also appears in law relating to health care. Parliamentary proceedings or opinions of the Belgian Advisory Committee on Bioethics refer to it, as described below. However, concerning situations likely to arise from the start to the end of life, most specific legislation does not define it explicitly.

4.1 Health Care

Reference is made to human dignity in the law of August 22, 2002, relating to patient rights. This legislation constitutes a *lex generalis* for health care provided by a professional practitioner and states that "the patient has the right to receive a high-quality service from the professional practitioner that meet his needs, with due respect for his human dignity and independence and without any form of distinction being made".[51] This legislation applies to all health care, whether provided at the start, during or at the end of the patient's life.

Without defining it, the Medical Ethics Code also refers to this principle when it states that the organization of a doctor's office must respect patient dignity and privacy.[52] It also requires that the method of collecting doctor's fees must respect the dignity required in the doctor–patient relationship.[53] In addition, when patients are led by the media to give the public some information, the doctor can only be a participant in such information if the confidentiality and dignity of the patients are

[47] Const. Ct., September 26, 2013, no. 122/2013 (preliminary ruling).

[48] Const. Ct., October 04, 2012, no. 114/12, concerning a preliminary ruling relating to Article 4 of the law of February 27, 1987, concerning grants to the disabled; on this subject, see in particular Trusgnach, Z. 2014. L'aide sociale aux étrangers: rappel des principes (1re partie). *Bulletin Juridique & Social*, 2.

[49] Const. Ct., December 09, 2010, no. 135 10.

[50] Const. Ct., December 19, 2013, no. 166 2013: "Detaining minors in a suitable place does not constitute inhumane or degrading treatment. Detaining minors pending their deportation does not violate their right to lead a life in keeping with human dignity". On migrant rights, see in particular Saroléa, S. 2006. *Droits de l'homme et migrations. De la protection du migrant aux droits de la personne migrante*. Brussels: Bruylant.

[51] Article 5 of the law of August 22, 2002.

[52] Article 21 of the Medical Ethics Code.

[53] *Ibid.*, Article 75.

still protected. The doctor must ensure that the patients have been fully informed and that they freely consented to participate.[54] It is also stipulated that medical ethics prohibits all research that could harm the psyche or moral conscience of the research subject or violate his dignity.[55] The Code also states that the doctor referred to in Article 119[56] must respect the patient's philosophical beliefs and his human dignity.[57] Finally, concerning the profession, it emphasizes that the "doctor must refrain, even outside of the practice of his profession, from any act likely to tarnish the honor or dignity of his profession".[58]

4.2 The Beginning of Life

4.2.1 Abortion

Article 350, para. 2 of the Criminal Code, allowing abortion under certain conditions, does not refer to the concept of dignity. Dignity was, however, cited before the Constitutional Court in the context of an action for the annulment of several provisions of the law of April 01, 1990, on abortion, which introduced the aforementioned article.

To justify an interest to take legal action against these provisions, some claimants, including some who were disabled, claimed that they felt their dignity was affected, as the law, in their opinion, established a distinction between disabled and non-disabled citizens. They argued that the latter received better protection of their right to life by the law. However, the Court of Arbitration considered that the fact that the claimants disapproved a legislation with ethical implications did not constitue a sufficient interest to take legal action agains this legislation.[59] In a later judgement, the Court also rejected actions for annulment based on the affirmation of a violation of human dignity.[60]

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[54] *Ibid.*, Article 17.

[55] *Ibid.*, Article 94.

[56] This refers to the "doctor responsible for assessing the physical or mental capacity or qualification of a person, or for carrying out any physical examination, checking a diagnosis, monitoring a treatment or making enquiries about medical services on behalf of an insurance body".

[57] Article 125, § 1 of the Medical Ethics Code.

[58] *Ibid.*, Article 9.

[59] See Arb. Ct., October 24, 1990, no. 32 90.

[60] Arb. Ct., December 19, 1991, no. 39/9, *J.T.*, 1992, 362, note J. Coenraets, "De nouvelles frontières aux compétences de la Cour d'arbitrage. Quelques conséquences de l'arrêt n° 39/91 du 19 décembre 1991".

4.2.2 Research on Embryos

The term "dignity" does not appear either in the law of May 11, 2003, relating to research on embryos in vitro. This law prohibits reproductive cloning[61] in particular, although it authorizes research on embryos under strict conditions and subject to review by an ethics committee.[62]

The creation of embryos in vitro for research purposes is prohibited, unless the objective of the research cannot be achieved by research on surplus embryos and provided that the other conditions imposed by law are fulfilled. Belgium has not signed the Oviedo Convention (Convention on Human Rights and Biomedicine of April 04, 1997), which prohibits the creation of embryos for research purposes.

The concept of dignity was nevertheless raised in the discussions prior to the aforementioned law of the Belgian Advisory Committee on Bioethics relating to reproductive human cloning. In its opinion of June 14, 1999, the Committee stated that due to the scientific, technical and ethical uncertainties surrounding the technique for such a type of cloning, it recommended prohibiting any attempt, in the more or less short term, to achieve a reproductive human cloning.[63] It added that if a human clone were born—as a result of unlawful acts—it would be a fully fledged human being and its dignity could not be challenged.

Concerning the provisional or definitive nature of the prohibition, or even of a possible authorization, of reproductive human cloning, several viewpoints were put forward within the Committee's opinion. Some said that the concept of human dignity should not be linked to uniqueness or singularity: the fact that two human beings would be identical would not take away their human dignity, and they would have the right to the same respect for their self-determination. The point was also raised that dignity had to be seen from a relational perspective, as the result of an interactive process of recognition by others and self-affirmation.[64]

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[61] See Article 5 of the law of May 11, 2003, introducing a ban on implanting human embryos in animals, creating chimeras or hybrids, implanting embryos subject to research on humans (unless authorized by law), the use of embryos, gametes and embryonic stem cells for commercial purposes, conducting eugenic research, research on gender selection unless it is based on avoiding embryos with gender-based diseases.

[62] Articles 3 to 7 of the law of May 11, 2003. Research may be carried out on an embryo during the first fourteen days of development, not including the freezing period, and it must have a therapeutic goal or be related to advancing knowledge with regard to fertility, sterility, organ or tissue transplants, or the prevention or treatment of diseases. There can be no alternative method of research of comparable effectiveness.

[63] Opinion no. 10 of June 14, 1999, of the Belgian Advisory Committee on Bioethics concerning reproductive human cloning, 35.

[64] *Ibid*., 21, 26 and 27; see also in particular Opinion no. 24 of October 13, 2003, of the Belgian Advisory Committee on Bioethics concerning human stem cells and therapeutic cloning.

4.2.3 Activities Related to Assisted Reproductive Technologies

The law of July 06, 2007, concerning activities related to assisted reproductive technologies and the use of surplus embryos and gametes does not include a reference to dignity in its provisions.[65]

The autonomy of the person with regard to the body—whether this relates to plans to have children or to donate gametes or surpernumerary embryos—is broad when it comes to activities concerning assisted reproductive technologies. The fertility clinic also has an important decision-making power.[66]

There is a significant element of autonomy with regard to the use of pre-implantation genetic diagnosis (PGD), though it requires a written agreement with the fertility clinic.[67] A pre-implantation genetic diagnosis may exceptionally be authorized for the purpose of treating an existing child of the candidates.[68]

Those seeking the use of an assisted reproductive technology procedure can themselves decide, in the agreement concluded with the fertility clinic, the intended use of the surplus embryos and gametes,[69] but they may not decide the parentage of the future child.[70]

With regard to prenatal examinations or genetic tests carried out during the person's lifetime, they are not subject to any specific piece of legislation and are covered by the law of August 22, 2002, on patients' rights. Article 5 of this law, however, states the right of the patient to obtain quality services, in respect of his human dignity and autonomy.[71]

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[65] The law of July 06, 2007, on activities related to assisted reproductive technologies and the use of surplus embryos and gametes.

[66] It can use a conscience clause to refuse to accept an application, even when the legal requirements have been satisfied.

[67] Article 67 of the law of July 06, 2007. It is, however, prohibited to carry out a eugenic PGD (based on the selection or amplification of non-pathological genetic characteristics of the human species, within the meaning of Articles 5, 4°, of the law of May 11, 2003, concerning research on embryos in vitro) or to base it on gender selection, unless this is intended to avoid embryos with gender-related diseases; see also Article 5, 5°, of the law of May 11, 2003.

[68] Article 68 of the law of July 06, 2007.

[69] Either their cryopreservation for a pregnancy, their destruction, their inclusion in a research protocol or their allocation for donation (Articles 10, 13, 20, 30, 37, 40, 42, 49 and 59 of the law of July 06, 2007).

[70] It is regrettable that the legislature did not adopt a specific system to establish parentage when the child is the result of an assisted reproductive technology; see Schamps, G. (2014). Les incidences de la biomédecine sur la parenté: le hiatus entre les actes liés à la procréation médicalement assistée et l'établissement de la filiation en droit belge. In *Les incidences de la biomédecine sur la parenté. Approche international*, ed. M.-C. Crespo-Brauner and B. Feuillet-Liger, 55–82. Brussels: Bruylant: see the law of May 05, 2014, on establishing parentage in shared parenting cases, which in particular establishes the presumption of joint motherhood for the female spouse of the woman who gives birth (Article 325/2 of the Civil Code civil); Beernaert, J.-E. and Massager, N. (2015). La loi du 5 mai 2014 instaurant le régime de la co-maternité: Trois femmes, un homme et un couffin. *Act. dr. fam.*, 4:74–84.

[71] See above.

This provision was also referred to by the Belgian Advisory Committee on Bioethics in 2013 with regard to the ethical aspects of freezing eggs in anticipation of age-related infertility, with a view to a different autologous use.[72] None of the Committee members considered that this plan would be unacceptable in ethical terms. Some members emphasized the fact that this was a matter of the woman's right to make a choice in complete autonomy and without pressure. Others believed that it is an example of the excessive medicalization of a natural process or of the use of medicine to resolve a social problem that could be addressed by other measures encouraging women to have children at a younger age.

In a previous Opinion,[73] the Committee considered the question of whether or not it is acceptable for some body parts removed from a living person to be traded. It rejected the full-scale liberalization of the market of the human body, where only the laws of supply and demand regulate prices and transactions.

The Opinion includes a number of other positions. Some members of the Committee believed that trading in certain elements of the body—in particular the gametes, cells, tissues and even the organs[74]—could be considered in order to put an end to shortages, and they recommended lifting the prohibition which previously restricted such commercialization based on the unavailability of the human body.[75] Other members were opposed to any commercialization of human body parts, on the grounds that it is a violation of the dignity of the person or could lead to the exploitation of the most vulnerable. In their opinion, the freedom to control parts of the body can only be seen in the spirit of a donation, and in a context of social cohesion.

4.2.4 Surrogacy

Practiced in Belgium, gestational surrogacy is not subject to any specific regulation.[76] Activities related to assisted reproductive technologies must comply with the aforementioned law of July 06, 2007.

A surrogacy agreement is generally considered null and void on the grounds of the unavailability of the human body and civil status.[77] The reason or subject of

[72] Opinion no. 57 of December 16, 2013, concerning the ethical aspects of freezing eggs in anticipation of age-related infertility, p. 32–34.

[73] Opinion no. 43 of December 10, 2007, concerning the problem of the commercialization of human body parts, p. 43 and 44.

[74] Concerning the removal of organs from incapable persons, see in particular Opinion no. 50 of May 09, 2011, concerning certain ethical aspects of modifications introduced by the law of February 25, 2007, to the law of June 13, 1986, relating to the removal and transplantation of organs; Opinion no. 60 of January 27, 2014, relating to the ethical aspects of liver transplants for patients suffering from acute alcoholic hepatitis (AAH) and who are not responding to traditional medical treatments.

[75] For a critique of this conception and the arguments put forward, see Dijon, X. 2006. Vers un commerce du corps humain, *op. cit.*, 501–504.

[76] See the contributions in the work Schamps, G. and Sosson, J. (ed.). 2013. *La gestation pour autrui*: *vers un encadrement*? Brussels: Bruylant.

[77] See in particular Gallus, N. La validité de la convention de gestation pour autrui en droit belge actuel. In *La gestation pour autrui*: *vers un encadrement*?, *op. cit.*, 182; for a different view, see