

Children's Right to Respect for Their Human Dignity

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1 Introduction and Main Question

The starting point in section 104 of the Norwegian Constitution, which is devoted to children's human rights, is the statement that 'Children have the right to respect for their human dignity.'¹ The position of the concept of human dignity in the Norwegian Constitution indicates that it is a central idea for children's rights. Although the concept of human dignity is well known and often used in human-rights discussion, it is heavily debated.² Some of the questions are linked to the uncertainty about the content of the concept, and others about the connection between human dignity and human rights. These questions cannot be overlooked in the discussion of section 104, especially since discussions of human dignity have almost, without exception, had their origin in the adult world. One of the significant differences between minors and grown-ups is autonomy. Normally adults have full autonomy, while children lack this right, a right that is regarded so highly, and often brought into the discussion about the content of human dignity. This is among the factors influencing a diverging approach to human dignity in a children's rights context.

In this article, I will give a presentation of the reason for including human dignity into this specific section of the Norwegian Constitution. In order to discuss the legal effect of such a provision in the Constitution, it is necessary to explore the content of the concept. None of the other Nordic countries has a similar statement in their Constitutions, and there is no similar provision on

1 The Norwegian Supreme Court has not by December 2018 given any interpretation of section 104, first sentence.

2 In Norwegian legal literature the concept of human dignity is especially discussed by Bjørn Henning Østenstad, *Heimelsspørsmål i behandling og omsorg overfor psykisk utviklingshemma og aldersdemente* (Fagbokforlaget 2011) 94–151. The conference held in 2012 where a multidisciplinary group discussed the concept of human dignity from their various disciplinary perspectives is an example of the international debate. The book edited by Christopher McCrudden, *Understanding Human Dignity* (Oxford University Press 2013) is to an extent outcome of the conference.

human dignity elsewhere in the Norwegian Constitution.³ A question to be asked is whether children are a vulnerable group, and more vulnerable than the rest of the population, and if a statement in the Constitution on human dignity is of special benefit for children.

It is beyond my scope to discuss human dignity in an international context, even limited to human dignity from a child-law perspective. Still, human dignity is an international concept. National legislation on human rights has strong links to international conventions, international courts and official human rights organisations, which apply and interpret human rights. Therefore, it is not possible to overlook the international discussion and the conflicting understandings of human dignity.

2 Human Dignity in the Founding Documents of the Norwegian Constitution

A search into the founding documents gives no explicit answer to why children's right to respect of their human dignity became a part of s. 104, and subsequently not an answer to why the concept of human dignity follows from the first sentence. To answer these basic questions, in this context, it is necessary to start by looking into the discussion in the appointed Human Right's Commission (Commission) and their reason to include a specific section on children's human rights in the Constitution. The Commission stressed that although human rights are universal and there is no age limitation, children have certain special needs, and this fact must be reflected in the Constitution to secure their human rights.⁴ Their distinctive needs follow from their dependence on adults, in particular, their parents or persons with similar responsibility. Children's vulnerability is another reason pointed out in the founding documents for children's need for special protection of their human rights.⁵ I will return to the concept of vulnerability later in this paper.

3 But the Finnish Constitution makes multiple references to dignity as an important principle vis-à-vis constitutional rights.

4 Dokument 16 (2011–2012) *Rapport til Stortingets presidentskap fra Menneskerettighetsutvalget om menneskerettigheter i Grunnloven*, 19. desember 2011 (Report from the Human Rights Commission to the Presidium of the Parliament on Human Rights in the Constitution, 19 December 2011) (Dok 16) 189. The report is available only in Norwegian <<https://www.stortinget.no/Global/pdf/Dokumentserien/2011-2012/dok16-20112.pdf>> accessed 20 February 2019.

5 Dok 16 (n 4) para 32.5.1.

The Commission also emphasised that a section in the Constitution designed with the purpose of highlighting special aspects of children's human rights will have symbolic, political and legal effect.⁶ Children are the future of every nation. As the Commission stressed, childhood is of special importance, and the nation has a responsibility to provide adequate conditions so that children, in time, can evolve into responsible grown-ups. This is the symbolic side of the provision. The political effect is connected to obligations for the legislature and courts. Lawmakers, as well as judges and other decision makers, are obliged to pay attention to the concept of children's human rights. This will cause a legal effect, in addition to the effect that follows when other provisions in the Constitution or provisions in other parts of the Norwegian legal system are interpreted. These interpretations cannot be contradictory to the Constitution. To fortify children's human rights, the content of s. 104 had to differ from the other provisions in the Constitution's Bill of Rights. The intention was to formulate Section 104 as a supplement to the other provisions in the Bill of Rights.⁷

With this as a backdrop to the reason why human dignity became a part of s. 104, the Commission starts their reasoning for enshrining human dignity in the Constitution with a reference to the necessity to underline children as equal human beings. They have no less value than adults.⁸ Children cannot be treated unfairly just because they are children. The Commission explicitly said that they preferred the principle of equality to the principle of non-discrimination.⁹ In addition they emphasised that s. 104 should be read in conjunction with the principle of equal treatment as follows from s. 98, which states: 'All people are equal under the law. No human being must be subject to unfair or disproportionate different treatment.' Furthermore, the Commission stated that a provision declaring children as equal human beings will underline children as holders of all the other human rights, unless otherwise is decided.¹⁰ The Commission stressed that the aim to declare children as equal to adults through the reference to human dignity would be a 'signal' provision (*fanebestemmelse*).¹¹ The signal would extend to imply equality between children and adults, and among children, but not as far as to treat children as adults or give children similar rights as adults.

6 Dok 16 (n 4) para 32.5.1.

7 Dok 16 (n 4) para 32.5.1.

8 Dok 16 (n 4) para 32.5.2.

9 Dok 16 (n 4) para 32.5.2.

10 Dok 16 (n 4) para 32.5.2.

11 Dok 16 (n 4) para 32.5.2.

The debate in the Norwegian Parliament (*Stortinget*) followed the same line of argumentation as the Commission in this regard, and stressed that children are equal human beings and that the Bill of Rights apply to children as well.¹²

Human dignity as a legal concept was brought into the Constitution without any interpretation of the content or any reference to the ongoing international debate about the role of human dignity in relation to human rights. The Commission did not, *inter alia*, give any reason why children need the special protection human dignity might give. But as part of the process of the comprehensive Constitutional reform, an obvious aim was to strengthen children's legal position.

To clarify whether human dignity is a suitable concept to strengthen children's legal position, the theoretical foundation for human dignity has to be explored. This includes the historical background of the concept of human dignity and the essence of the concept. Thereafter, some current questions on human dignity of special interest from a child prospective will be discussed, *inter alia*, the relation between human dignity and autonomy and whether human dignity is a right or a principle.

3 The Concept of Human Dignity—a Short Presentation

3.1 *A Historical and Ideological Basis for Human Dignity*

Human dignity, as well as other international legal concepts, cannot be understood in the same way worldwide. The concept has to be interpreted and understood in a national context, due to differing societies, economic resources, cultures and legal systems. A division between a national and an international understanding of human rights terms is well known, for instance, in legal practice, the European Court of Human Rights (ECtHR) leaves a margin of appreciation to each member state. However, the concept needs a core to have influence as an international guide. If not, human dignity will serve as a rhetorical flourish, a loose term, and a term that does not convey state obligations. The challenge is to establish the core of international human rights provisions, to emphasise the importance as international legal instruments.

The first question to ask is whether it is possible to identify this core. Here, several points of confusion occur. Is human dignity a social, religious or philosophical concept, or is it a concept that depicts values from these enterprises? Do these values establish the core of the concept, if such a core exists? These

¹² Innst. 186 S (2013–2014).

are questions discussed by several academics.¹³ I will, therefore, give a short summarisation of what, in my view, are the central elements in, and points of, these discussions.

First of all, it is useful to look back at the history. The idea of human dignity has deep historical roots, but it is hard to identify when the concept entered the legal scene.¹⁴ The claims of liberty and equality in the revolutions in both the United States (1776) and France (1789) might be a starting point.¹⁵ Even though human dignity is not included in the Declarations of the Rights of Man, conditions for dignity to emerge as a legal concept later on, were created. Earlier on, the word *dignity* was reserved to the 'dignities', those with privileges.¹⁶ The Constitution that was implemented in Norway some decades later (1814) was based on the same ideas, although neither the words human rights nor dignity can be recognised in the text. Human dignity can hardly be discussed without reference to the philosopher Immanuel Kant and the categorical imperative: individuals should not be treated simply as a means to an end.¹⁷ In the nineteenth and twentieth centuries, social and political movements brought new elements to the ideas of human dignity. The abolition of slavery and child labour in Western Europe in the nineteenth century has to be viewed in light of a growing respect for human dignity. The idea of human dignity played a significant role in religious debates about what constituted human well-being.¹⁸ The wars in these centuries, culminating in the horrors of the Second World War, strengthened the debate of human dignity. These historical examples reflect a philosophical, religious and social approach to the concept of human dignity. Each of them bring, to some extent, different values into the human dignity debate.

13 In June 2012, a multidisciplinary group were brought together in a conference held in Oxford, United Kingdom to discuss the concept of human dignity. The outcome of the conference is to be found in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013). Questions related to children and human dignity were not a subject in the conference.

14 Catherine Dupré, 'Constructing the Meaning of Human Dignity: Four Questions', in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) 113–121 (117).

15 Catherine Dupré, 'Constructing the Meaning of Human Dignity: Four Questions' (n 14) 118.

16 Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 *The European Journal of International Law* 655–724 (656).

17 Immanuel Kant, 'Metaphysics of Morals' Section 38 of the Doctrine of Virtue.

18 Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 16) 660–662.

Kant's philosophy has played a significant role in establishing a non-religious based concept of dignity. In my opinion, his ideas have established a bridge to the legal concept of dignity – all human beings are of the same equal value. This essence in the legal concept of dignity is clearly rooted in United Nations documents of human rights. Through these texts, human dignity indubitably entered the legal scene. The reference to human dignity as inherent in every person follows from the preamble of the Universal Declaration of Human Rights (1948) and further enshrined under article 1. Since then, the concept is regularly enshrined in UN declarations and conventions, for instance, the Declaration of the Rights of the Child (1959) and in the preamble of Committee on the Rights of the Child (CRC) (1989).

The architects behind United Nations Charter and the Universal Declaration of Human Rights, amongst them Jacques Maritain and René Cassin, emphasised that dignity has a practical meaning in establishing human rights to promote the common good. Human dignity is the basis on which human rights could be said to exist.¹⁹ Beyond an agreement of dignity as a central starting point in the theory of human rights, it is rather unclear why and how the concept gained this position, despite the prominent position the concept has come up with in international human rights instruments.²⁰ However, the concept of human dignity provides a theoretical basis for the idea of human rights in absence of any other common consensus. With human dignity as a foundation for human rights, it signals that every human being has worth and is worthy of respect, and this grants them their rights. And at the core is, as Aharon Barak has put it, humanity.²¹

The discussion of the concept of human dignity contains elements and values from several disciplines, and these are interwoven into a multi-layered concept. For the purpose of this article, it is not necessary to delve deeper into the long-term controversy of the concept of human dignity. Nevertheless, although it is difficult to land a universally accepted legal definition of human dignity, the term has its substance. The history of the term is rather long, but it is, as Christopher McCrudden emphasises, a relatively new scholarly

19 Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 16) 662–663 and 676–677; Catherine Dupré, 'Constructing the Meaning of Human Dignity: Four Questions' (n 14).

20 Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 16) 678.

21 Aharon Barak, 'The Constitutional Value and the Constitutional Right' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) 361–380 (363).

phenomenon.²² This is a reason why it is hard to unveil the substantive elements that establish the core.

3.2 *The Core of the Concept of Dignity—from the Perspective of the Child*

In the search for the core of human dignity, an option is to take a positive or negative approach. The positive approach can be described as an attempt to identify core components of human dignity. One example where the legal concept of dignity is visible is in the European Union Charter of Fundamental Rights (EU Charter) article 1, which reads: 'Human dignity is inviolable. It must be respected and protected.' This is a statement of inviolability and a corresponding duty to respect and protect human dignity. Further, the EU Charter lists several provisions that can be regarded as components of human dignity; the right to life (article 2), the right to respect for physical and mental integrity (article 3), the prohibition of torture, inhuman and degrading treatment and punishment (article 4), and the prohibition of slavery, forced labour, and human trafficking (article 5).

The negative approach suggests that dignity may best be understood in the light of factors that encroach upon personal integrity, in particular, humiliating and degrading treatment. Jürgen Habermas points out different types of humiliation that is in conflict with the idea of human dignity.²³ The features of the concept of human dignity appear as an effect of the violations. Whether the positive or the negative approach is the best way to approach the vagueness of dignity might be discussed. Still, the negative approach appears to hold an advantage, as vagueness implies a need for dynamic interpretation. A positive definition could be considered as comprehensive, which is a disadvantage.

For instance, the list of provisions in the EU Charter mentioned above can hardly be more than examples of what dignity can be. The provisions in articles 25 and 31, where reference to dignity appears in relation to 'the right of the elderly to lead a life of dignity ...' and 'the right to working conditions which respect ... dignity', are rather confusing. Do elderly people require more respect for their dignity than the rest of the population? What about children, young or old with disabilities, refugees. Do they not need to lead a life of dignity? And what about the conditions of life for those who are not part of the workforce, among them children?

22 Christopher McCrudden, 'In Pursuit of Human Dignity: An Introduction to Current Debates' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) 1–58 (4).

23 Jürgen Habermas, 'Human Dignity and the realistic utopia of human rights' (2010) 41 *Metaphilosophy* 465–480 (467–468).

Defining human dignity broadly is more confusing than enlightening. When the concept is diluted thus, it loses its power. The EU Charter is an example of this. The provisions in articles 2 through 5 are uncontroversial, at least in Western, democratic societies, and they will be secured through the provision in article 1. The measure of these articles is to protect everyone. However, when human dignity is parcelled in relation to limited groups, the question of interest is whether this group of people is more likely to have its dignity infringed upon. If so, the group may be characterised as more vulnerable than the average population.

The equality principle is as already said, apparently designated as a core of human dignity by the Norwegian Human Rights Commission. This point of view is coinciding with the Universal Declaration on Human Rights, which states: – ‘All human beings are born free and equal in dignity and rights’.²⁴ Every human being is equal to respect for human dignity as every human being is worthy of respect and every person has rights from the moment they are born. Human dignity requires reciprocity – I must respect your human dignity as you must respect mine. Also, in international literature, equality is said to be a part of the core of human dignity.²⁵ So, when a group of the population has special needs, it is important to highlight their human dignity to secure a basis of equal treatment. The principle of equality does not, however, refer to equal treatment in every respect. Equality as a part of human dignity underline that some rights apply to everyone. Respect for human dignity cannot be fulfilled without safeguarding these rights. Therefore, some rights have to be a part of the core of human dignity. Identification of these rights is too complicated to be an aim of this article. It could, in principle, be argued that the violation of any right violates dignity. But dignity argumentation cannot be taken this far. If it were, the distinctive contribution of the normative justification of the principle would be lost.

Still, there are some rights that, in my opinion, are crucial to the respect of children’s human dignity. The question is which types of humiliation are in conflict with the idea of children’s right to respect for their human dignity. This represents the negative approach to human dignity.

Violation of a child’s physical or psychological integrity is a violation of the child’s human dignity. The UN committee of the CRC has underpinned the

24 Universal Declaration on Human Rights, article 1.

25 Christopher McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (n 16) 690 with further references and 681; Bernhard Schlink, ‘The Concept of Human Dignity: Current Usages, Future Discourses’ in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) 631–636.

connection between human dignity and physical and psychological integrity of children.²⁶ The concept of integrity and human dignity are linked together.²⁷ The right to life can be looked upon as a part of the right to the protection of personal integrity. Prohibition of torture and inhuman or degrading treatment and prohibition of slavery are also parts of the protection of personal integrity.

Disrespect for family and private life will infringe human dignity. Also, the lack of opportunity to have one's voice heard, to be an object and not a subject in public or legal processes, are other elements contrary to the respect for human dignity.

The purpose of identifying basic values underlying the concept of human dignity is to give it strength in a legal debate. From a child's perspective, it is important to identify rights that are likely to be violated due to their inferiority and dependency. The vaguer the concept is, the more likely it will be devalued, will lose an evolving function and will be regarded as a rhetorical nullity that does not strengthen children's legal position. The strength follows from the basic values, which are not subject to change, and are timeless. However, these basic values are, as Christopher McCrudden writes, adaptable to changing ideas of what being human constitutes.²⁸ In this regard, the concept has a high level of generality, and is open to dynamic interpretation.

4 Dignity without Autonomy?

Freedom is a term connected to both dignity and equality. These terms are closely connected in the preamble and in article 1 of the Universal Declaration of Human Rights, as well as in other human right conventions.²⁹ Freedom is a foundation for autonomy. However, this leads necessarily neither to the conclusion that freedom is part of the concept of human dignity, nor that freedom and autonomy may be used as synonyms in a discussion on human dignity. The

26 UN Committee on the Rights of the Child, *General Comment No. 13: The right of the child to freedom from all forms of violence* (18 April 2011) CRC/C/GC/13 para 2 and 7.

27 The concept of integrity is discussed in a child law perspective of eg Michael Freeman, 'The Value and Values of Children's Rights' in Antonella Invernizzi and Jane Williams (eds), *The Human Rights of Children* (Ashgate 2011) 21–36 (31); Ursulla Kilkelly, *The Child and the European Convention on Human Rights* (Ashgate 1999) 149; *General Comment no. 13* (2011) (n 26) para 3(b) and 7(c).

28 Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 16) 677.

29 See eg The European Convention on Human Rights and UN Convention on the Rights of the Child.

possible link between dignity and freedom will not be discussed here, nor will whether freedom fits under the panoply of dignity. I will focus on the interconnection between dignity and autonomy, a theme discussed by several legal philosophers and authors.³⁰

Autonomy is linked to the concept of rationality. The ability of rational thought is what separates humans from other animals. Human beings are able to adapt information, use the information in the actual situation, be aware of alternative solutions, and make a choice and stand by it. Without the power of reason, this process would be impossible. Normally, an adult person does not need to prove him or her to hold all the elements that are required to have the full status of autonomy. Children pose a problem in this regard, but so do adults with cognitive disabilities, for instance, dementia. Firstly, children do not possess the same level of freedom as adults. Children are not in the same position as adults to make free choices. This fact is a central part of the concept of childhood. Secondly, children at least young children, do not have the same extent of intellectual skills as most adults, therefore, they are considered immature. Despite the lack of intellectual skills and limited experience, even very small children have views in personal matters. As stressed by the UN Committee on Children's Rights, the right to be heard, without meeting any personal demands in personal matters, is fundamental.³¹ The starting point is the assumption that everyone is capable of having views. It is not up to the child to prove her or his capacity.³² So, even if a person is not able to express reason for his or her standpoint, the person might still have an opinion, perhaps based on earlier experiences. Preventing individuals – young or old – from stating their views freely in matters affecting them is contrary to respecting their dignity. Therefore, the right to be heard is more fundamental than the right to act autonomously. As Conor O'Mahony observed, personal autonomy is subject to restrictions and limitations.³³ So, it has to be, to protect the human dignity of every individual. If not, people may make autonomous choices to a type of conduct that violates human dignity of other people. The many restrictions in the law, such as exists in criminal law, are examples of legitimate and necessary restrictions on personal autonomy and self-determination. This is the

30 Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 16) 656–663; Conor O'Mahony, 'There is no such thing as a right to dignity' (2012) 10 *International Journal of Constitutional Law* 551–574 (565).

31 UN Committee on the Rights of the Child, *General Comment No. 12: The Right to be Heard* (1 July 2009) CRC/C/GC/12 para 2.

32 General Comment no. 12 (n 31) para 20.

33 Conor O'Mahony, 'There is no such thing as a right to dignity' (n 30) 566.

reason why the connection between respect for human dignity and autonomy has to be weaker than between dignity and the possibility that persons can express their views in personal matters. Human dignity and autonomy cannot be mixed together. Instead, these two concepts have to be seen in light of each other.

Until children reach a level of cognitive maturity, there is a general perception that they must be protected. Children's need for protection is one of the central values that the CRC is built upon, and so is the right to be heard. The latter right shall not easily be put aside in order to protect children. Instead, opportunities for the child to be heard shall be promoted, to stimulate the development of the personality and the child's evolving capacities.³⁴ In contrast with the rights of most other groups, the rights of the child might be understood as conflicting, for example, with protections dealing with the right to be heard. Instead, these rights have to be interpreted in the light of each other in order to promote the human dignity of the child.

Protection of those who are not able to secure their own interests and rights has to be a part of the concept of human dignity. If someone is excluded from the concept due to their lack of autonomy, there is no equality for human beings. Individuals belonging to vulnerable groups have a particular need for respect of their human dignity, and because children are marginalised and disadvantaged, they need the protection that human dignity gives.³⁵

5 Is Respect for Human Dignity a Right or a Principle?

The concept of human dignity is unquestionably powerful. The uncertainty is how this power should be conveyed. There appears to be two different approaches in the legal understanding of human dignity and thus how the concept might have a pivotal role in a legal debate. The concept may be regarded as the founding *principle* that human rights derive from, or as a human *right* in itself. If human dignity is to be considered as a right, it invokes a rule. A right differs from a principle. In Robert Alexy's words: 'Principles require that something be realized to the greatest extent legally and factually possible. They are thus not definitive but only *prima facie* requirements.'³⁶ The character of rules he describes as follows: '... rules insist that one does exactly as required, they

34 General Comment no. 12 (n 31) para 79.

35 Conor O'Mahony, 'There is no such thing as a right to dignity' (n 30) 565–566.

36 Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press reprinted 2010) 57.

contain a decision about what is to happen within the realm of the legally and factually possible.³⁷ Which of these conflicting understandings of human dignity is the 'correct' one has to be discussed in both an international and national context. The power of the concept may be strengthened or weakened according to the approach. Another issue is whether dignity embodies a negative or positive obligation of the State. These discussions are extensive. Thus, I will only refer to the main arguments.

Human dignity is inherent to all humans and is an individual concept, in the way that everyone shall be treated with respect for their human dignity. This gives an assumption of a right – a right to dignity – a right in the meaning of being treated with dignity or to lead a dignified life.³⁸ In some Constitutions, human dignity is expressed as a right. Two examples are the South African and the German Constitutions, whose wording has been origin to the subject of debate by legal scholars.³⁹ Article 1 of German Basic Law states as follows:

- (1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.
- (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
- (3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

Read in conjunction with article 79(3), the constitutional right to human dignity is not subject to change through a constitutional amendment, even if the German Constitution does not actually use the phrase 'right to dignity'. The concept has, however, generally been treated as a right in interpretations of the Constitution.⁴⁰ It is an absolute right. Section 10 of the Constitution of the Republic of South Africa reads as follows: 'Everyone has inherent dignity and the right to have their dignity respected and protected.' Although the word 'right' is used directly in the text or the wording is interpreted as a 'right', it has

37 Robert Alexy, *A Theory of Constitutional Rights* (n 36) 57.

38 Conor O'Mahony, 'There is no such thing as a right to dignity' (n 30) 559.

39 Robert Alexy, *A Theory of Constitutional Rights* (n 36); Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press 2012); Jürgen Habermas, 'The Concept of Human Dignity and the realistic Utopia of Human Rights' (n 23).

40 See eg Jürgen Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights' (n 23); Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 16) 681.

been discussed whether the character of a principle is more significant.⁴¹ If human dignity is understood as a right, a consequence is that the 'right' might be understood as a right of free disposal. As dignity is a characteristic of man, it cannot be at the disposal of the individual. Nobody can waive their human dignity. This fact is a reason why it is problematic to use the term 'right' in relation to human dignity.⁴² In this might be a reason why alleged violations of human dignity brought before the Constitutional Court in Germany are coupled with alleged violations of other individual rights.⁴³

Because the concept of dignity has a link to equality, it expresses an underlying value of human rights. Violation of human rights is often a violation of human dignity. The assumption that every human right has a dignity core,⁴⁴ substantiates the understanding of human dignity as a principle and, as a principle, it has to contain a degree of vagueness. Human dignity is more than the human rights derived from it, because the obligation to respect human dignity exists even though the concept is not used in legislation or court practice. It is crucial that respect for human dignity is understood as a strong obligation on the state authorities. This gives human dignity clearly the character of a principle, which requires it to be realised to the greatest extent possible.⁴⁵

When human dignity is expressed in a Constitution, it clearly signals a foundational value and principle. Rules that follows from a Constitution have to be interpreted in the light of the principles. The concept of human dignity expands the interpretation horizon the constitutional rights. Furthermore, the concept influences interpretation of all others rules as well. This gives the concept of dignity a legally significant influence in the interpretation of the constitution as a document. The specific rights enshrined in the Constitution bind the lawmaker.

The founding documents of the Bill of Rights in the Norwegian Constitution indicate, albeit not explicitly, that human dignity is the foundational principle for the s. 104, and a foundation for other child specific rights.

41 See eg Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 16) 680–681.

42 In the unofficial translation of s 104 into English the word 'right' is used: 'Children have the right to respect for their human dignity.' There is, however, no signs in the preparatory works of an intention to establish a right to dignity.

43 Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 16) 681.

44 Dieter Grimm, 'Dignity in a legal context and as an absolute right' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) 381–391 (390).

45 Robert Alexy, *The theory of constitutional rights* (n 36) 47–48.

6 Children as a Vulnerable Group

As already addressed, the concept of human dignity belongs to a category of constitutional norms that constrain public power.⁴⁶ From a child-law perspective this is of importance, because children are vulnerable and dependent on adults, but as already said, children are of no less value than adults are. These factors have influence on the meaning of human dignity of children and, consequently, which rights are of specific importance for children.

The assertion that children are vulnerable, however, has to be challenged. Vulnerability is not a specific characteristic of children, it is a fundamental part of being human.⁴⁷ We are all more or less vulnerable throughout life. In some stages, we are less, and in some stages, we are more vulnerable, typically in the beginning and end of life. No one can decide not to be vulnerable. We can try to avoid becoming vulnerable, for example, by having a healthy lifestyle, but we cannot eliminate all risks. One moment we are healthy and strong, the next we are weak and vulnerable, at the mercy of other people's good intentions. So, why is it so important to underline children's vulnerability in relation to human dignity as the Norwegian Human Rights Commission does? Many people face similar or the same challenges as children do, in a part or even, most of their lives. But children are in a special position, as they are both vulnerable and dependent, and they cannot free themselves from the bonds to the parents or other adults who have a responsibility towards them. Children need a safe environment to develop to grown-ups who are able to exercise their rights and duties that serves themselves and the society.⁴⁸

In my opinion, a characteristic of a vulnerable person is inability to secure his or her interests and rights.⁴⁹ Two factors are particularly central to children's vulnerability – their age, a biological factor, and their dependence, a social factor. Everybody is a child from birth until their eighteenth birthday. This period of life contains the most fundamental changes, from lacking capacity to survive on one's own, to become an independent, self-sufficient person. The period of childhood embraces individuals who are well equipped to take care

46 Robert Alexy, 'Constitutional Rights, Balancing, and Rationality' (2003) 16 *Ratio Juris* 131–140 (131).

47 Martha Albertson Fineman, eg 'The Vulnerable Subject and the Responsive State' (2010) 60 *Emory Law Journal* 251–275 (especially 266–269).

48 *Innst.* 186 (n 12) para 2.1.10.

49 See also Jonathan Herring, 'Vulnerability, Children and the Law' in Michael Freeman (ed), *Law and Childhood Studies* (Oxford University Press 2012) 243–263 (244).

of their own affairs, to others who are obviously not. This must be borne in mind in the discussion of vulnerability.

Law endows parents the right to secure the rights and interests of children. When the parents fulfil their obligations children are not particularly vulnerable, at least compared to other groups who are potential victims of dignity breaches, but lack someone who has a responsibility to claim their rights. Problems especially arise when parents do not fulfil their parental duties. In such cases, children are vulnerable, and even more vulnerable than other comparable groups, because of their legal bond to the parents, and their dependence on them, for instance, practically and economically. The barrier to oppose the individuals you are dependent on is one negative effect of dependence. Our legal system is based on the assumption that parents' decisions are in the best interests of the child. Whether the decisions infringe upon children's interests and rights may be difficult to decide. Children are supposed to obey their parents' decisions, and according to respect for family and private life, public services can only in some, strictly limited cases, supervise decisions made by the parents. Until children are of age to form their own opinions, and are more independent, they will have the status of being vulnerable, because of an uncertainty whether parents fulfil their legal duties. The combination of age and dependency places children in a twofold vulnerable situation. Proportional to increasing age and decreasing level of dependence, children will be little-by-little less vulnerable. Until then, the concept of vulnerability could be considered a litmus test – a test of how we deal with the most vulnerable in society. Section 104 of the Norwegian Constitution may be viewed in this perspective, where the reference to human dignity is of importance to neutralise vulnerability. However, children are not the only group to be potential victims of dignity breaches. Whether it is more important to protect children than others, is an extensive discussion.

Even though the concept of vulnerability has a positive resonance when the aim is to strengthen children's rights, there are also negative effects. The focus on vulnerability causes a gap between the vulnerable, the weak and the not vulnerable, in other words, the independent, strong person. Considering children to be vulnerable may result in a paternalistic attitude towards them. The effect may be 'us and them' and undermining of the idea of equality. To avoid a paternalistic approach to human dignity, the core of the concept has to be highlighted. An essential part is the right of freedom. Article 1 of the Universal Declaration of Human Rights states: 'All human beings are born free and equal in dignity and rights.' Even if the term freedom is not the same concept for children as for adults, children are not without rights of freedom. The right to be heard in all matters affecting the child is one of them.

The link between human dignity and the right to be heard is rooted in the Norwegian Constitution in s. 104 ss. 1. The first sentence declares the need to respect human dignity, while the second sentence discusses the right to be heard. The placement in the same subsection may be interpreted as a signal that an aim of the reference to the right to be heard is to avoid violation of human dignity.⁵⁰ The child is given a tool – the right to be heard. One purpose is to implement the meaning of the child when deciding the child's best interests (ss. 2). In this way, the intention is to avoid a vulnerable situation for the child. Also, the concept of equal worth is reinforced. As adults are afforded the opportunity to express their views on matters affecting them, so should children.

7 The Significance of the Concept Of Human Dignity in a Child-Right's Perspective

The debate concerning dignity can be described on two levels: the theoretical foundation and the more practical one as a guide to action – to seek the arguments rooted in human dignity as tools to address and amend the legal and social status of children. How these arguments shall be identified has no obvious answer – as there are conflicting understandings of what children's interests are, for example, for more protection or more influence in their own lives. And as we often see, dignity arguments are present on both sides in the debate.

The concept of human dignity is necessarily abstract to allow it a role in the human rights debate. In a constitutional context, human dignity is a foundation on which human rights are built. Constitutional rights have the purpose of realising the principle of human dignity. As these rights are established within the same source of law, they often partly overlap each other. For example, the best interests of the child and the right to be heard are a tandem. However, the abstract nature of human dignity means that the interpretation has to be contextual, be it a national, regional or global context. The interpretation shall bridge the gap between the abstract norm and the more practical norm.

Even if the concept of dignity is abstract, it has a pivotal role in bringing children's rights and their legal position to centre stage. It has both a political and symbolic effect. The political effect is that it underlines the position of children as rights holders, and the duty for the government, courts and officials

⁵⁰ Dok 16 (n 4) para 35.5.3. For a more detailed discussion of children's right to participate, see Anna Nylund, 'Children's Right to Participate in Decision-Making in Norway: Paternalism and Autonomy' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

to respect those rights. All of them are obliged to take constitutional provision into account in their activities. This, in turn, gives the provision a practical and legal effect, just as the Commission's intention was.

In the history of human rights, human dignity has been a turning point. The history unveils that the question about human rights has started in the world of able-bodied adult males, persons who are aware of the benefit of rights, especially freedom rights. As the debate grows more mature, the question about rights is turned to groups that differ from the outset. Often the last groups brought into the human rights sphere are children and those with cognitive disabilities. In this perspective human dignity, with all its disadvantages, explicitly set down that at the core of human dignity is humanity, and as human beings we are equal, young and old. In this respect, human dignity serves as a cornerstone, or as the Norwegian Human Rights Commission put it, a signal provision in human rights' discussions. But, as a principle, human dignity also has a pivotal role even if it is not expressed in the Constitution or in other legal texts.

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