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Bartha-Maria Knoppers

HUMAN DIGNITY: IN DANGER OF BANALITY? (THE CASE OF CLONING)*

Bartha-Maria Knoppers†

On December 26, 2002, came the news about the supposed birth of "Eve the first baby "clone."" Two weeks later, a letter from Ian Wilmut and other scientists was sent to *Science*, entitled: "Cloning Claim Is Science Fiction, Not Science." I would like to draw your attention to a particular paragraph:

This appalling episode diverts our attention from weighty deliberations regarding human eggs, ex utero. The current media circus might be entertaining were it not for the potentially destructive consequences for nascent research in human reproduction and developmental bio-medicine. Debates over the ethics of such approaches, as well as their potential scientific and clinical merit, should be separated from the fantasy currently occupying news reports.[1]

As you know, Quebec is cited often in the news as the home of the Raelians. I think it is very appropriate for me to be speaking to you today. The case of cloning exemplifies a worst-case scenario in terms of how international policymaking can go wrong when faced with new technologies. What I would like to do is briefly describe current approaches to policymaking and then reproductive cloning – an example of policymaking gone awry. This will be followed by an examination of the concept of human dignity, per se. Finally, I will return to models of policymaking in my conclusion.

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† Prof. Knoppers, Canada Research Chair in Law and Medicine, is a Professor at the Faculté de droit, Université de Montréal and Senior Researcher at the Centre for Public Law. She is a graduate of McMaster University, (B.A.), University of Alberta (M.A.), McGill University (LL.B., B.C.L.), Cambridge University, U.K., (D.L.S.), Sorbonne (Paris I) (Phd.) and was admitted to the Bar of Quebec in 1985. Prof. Knoppers is currently the Chair of the International Ethics Committee of the Human Genome Organization (HUGO), and was a member of the UNESCO International Bioethics Committee, which drafted the 1997 *Universal Declaration on the Human Genome and Human Rights.*

[1] G. Schatten, R. Prather, & Ian Wilmut, Letter, *Cloning Claim is Science Fiction, Not Science,* 299 SCIENCE 344 (2003).

According to the scientific literature, newspaper articles, interviews on CNN and so on, reproductive cloning – the intention to create a genetically identical individual – is justified in certain situations. The examples most often cited are: to replace a dead child, selecting characteristics, treating infertility, and, the possibility of a suitable organ donor. None of these are therapeutically compelling, and all of them, other than replacing a dead child, can be met by other biomedical means.

Why is there then such widespread belief and fear surrounding cloning? To understand this, you have to situate cloning within the context of scientific developments. Already in 1994, consistent with the hype and the hope that surrounds human genetic research, the cover of *Time Magazine* read: "Genetics, The Future is Now."[2] And, as you know, in June 2000, the first iteration of the human genome sequence map was offered to humanity by President Clinton of the United States and President Tony Blair of the United Kingdom.

The sequence map, however, like the anatomy of Vesalius in the 16th century, is simply that: It's just basic anatomy, a beginning. We will not know what the map means, what the sequences do or how different genes will express themselves in the absence of understanding their co-evolution and co-adaptation with other species within specific social, economic, cultural, and geographic environments. So, we are only at the beginning. We have not yet arrived, and the future is not yet here. Nevertheless, policymakers seem to think that the future is now.

"Can we really clone Man?" Whatever is presented in the media is taken as a reality. And, in the political arena, when you are presented with what is in reality hypothetical, but perceived as a reality in the public eye, then as a politician and as a policymaker, you are expected to react and come forward with laws, statements, prohibitions, and the like.

So, what are the current approaches to new technologies? There is a traditional approach, what I call a "retrospective" approach or "private ordering" approach – whether it was organ transplantation with Christian Bernard, the birth of Louise Brown in 1978, Dolly in 1997 and so on. The first step of this approach implies research, by which scientists gain some clinical experience, and begin to worry about the ramifications, such as whether the technology in question really should be offered to the general public. This private ordering approach usually leads to professional guidelines which provide a framework for what we are doing in controversial areas, such as human reproduction, contraception, and so on.

If the professional guidelines developed from this process are seen as inadequate, or as not sufficiently framing clinical practice, or are not adhered to by professionals, then you tend to get reports, committees of inquiry, or a professional, national body specific to the topic. However, if

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[2] Philip Elmer-Dewitt, *The Genetic Revolution*, TIME, Jan. 17, 1994, at 46 (Caption to picture of article is entitled "Genetics, The Future is Now").

the public does not trust this self-regulatory, procedural approach, there will usually be a call for legislation. Usually ten years later, there will be strong appeals for international guidelines, laws, conventions, or declarations, because of the problem of forum shopping.

So, this is a logical, rational, linear process. It makes sense, sequentially, in terms of acquiring enough experience to know what you are talking about. But it has a fundamental failing in that when you get to the international level, you find that some countries have already adopted positions, usually enshrined in legislation that prevent them from achieving consensus or moving towards an international agreement. Therefore, even in the case of guidelines, you will find caveats and exceptions, or you will find the international guidelines to be so general that they end up being more politically oriented than human rights oriented.

So what about the prospects of adopting not the private ordering approach that I just described, but a public ordering approach? Why not start with international principles, and then allow individual countries to interpret them, according to their own cultural norms or legal systems? The advantage of this is that much like with the 1997 *Universal Declaration on the Human Genome and Human Rights*,[3] you can guide and harmonize (not standardize) the future rather than react to the past. You do not have what we call "ad hocery" or "incrementalism." The problem, however, is that sometimes when you are trying to frame an issue internationally, without understanding the science properly or all the ramifications of the social, ethical, and legal issues involved, you can end up either endorsing or prohibiting a technique prematurely. So today, I would argue that you need both approaches to occur simultaneously.

Irrespective of the approach adopted, there are four models currently in use in industrialized countries. One model is not to intervene, or the "laissez-faire" model. The market will eventually clean out those who do not offer quality products or techniques, or who behave in an antisocial or unethical way. The advantage of this, of course, is that in the meantime you can acquire certain technologies, and "progress" is not halted. The disadvantage of the laissez-faire approach, however, is that by the time consumers clean up the market, you have already had a person, a community, or a value of humanity, harmed due to the lack of protections. This approach involves litigation, which is an after-the-fact and expensive way of fixing something that has already gone terribly wrong due to a particular new technology.

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[3] UNESCO, Universal Declaration on the Human Genome and Human Rights, 29th Sess., 29 C/Res.16 (1997), *endorsed by* the U.N. General Assembly in G.A. Res. 152, U.N.GAOR, 53rd Sess., U.N. Doc. A/53/625/Add.2 (1998).]

The second model in traditional policy making is self-regulation, which is akin to the private order approach I mentioned previously. There are doctors, lawyers, and bioethicists saying: "Look, we will regulate ourselves, trust where we are going with consent, confidentiality, etc." This is the traditional route and probably the most flexible. But the weakness is that the public looks at this and says: "Look, you are professionals controlling yourselves on issues that concern us all as human beings. Where is the public representation? Isn't this system self serving?"

The third one is what I call the "genetic specific" approach. Stop someone on the street and say, "What do you think about Dolly?," or "What do you think about the raelien baby 'Eve'?," and he or she will say, "We need a law against it."

Laws are politically assuaging. But, most of the laws to date are an immediate reaction to new scientific discoveries. They are short-sighted and fail to address the issue. I will give you an example. The United Kingdom adopted a law on infertility treatment over a decade ago.[4] When Dolly was born in February 1997, they essentially said: "We already have a prohibition against human cloning in our law, so we did think ahead. For once we are ahead of scientific development." The problem, though, is they made the mistake of clearly defining what they meant by cloning. In their legislation, they focused on the technique called embryo splitting, which was not the technique actually used in the creation of Dolly.[5] And so, by specifying a particular cloning technique, they missed the technique actually used in Dolly. This has since been rectified.

Finally, there is the human rights model. Why not take constitutions, charters, human rights codes, international conventions and treaties that we have in place already, and take concepts that are rich, not only in the historical sense, but also potentially in the prospective sense, such as liberty, privacy, integrity, equality and so on, and interpret them to frame prospectively these new technologies? This is the best model and is based on the public ordering approach, but usually requires the intervention of the highest courts and so is expensive and slow.

So, which if any model should be used for human cloning? To answer this question, we need to first determine what is at stake. The literature on human cloning, says that cloning undermines the individuality and the uniqueness of the human person.[6] The answer given by Dan Brock in: "Human Cloning and Our Sense of Self," says, well, wait a minute, identical twins are copies – genetic copies – of each other, yet, aren't they

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[4] Human Fertilisation and Embryology Act, c.37 (1990) (Eng.)

[5] *See Id.*; *see also Dolly Cloning Method Patented,* BBC NEWS, Jan. 20, 2000 *available at* http://news.bbc.co.uk/1/hi/sci/tech/611253.stm (last visited May 2, 2004).

[6] *See* John F. Morris, *Cloning and Human Dignity,* 29 ETHICS & MEDICS 2 (2004) *available at* http://www.lifeissues.net/writers/mor/mor_01cloningdignity.html (last visited May 2, 2004).

unique?[7] Aren't they individuals? Aren't they distinct persons? However, he asks, what about the value or worth of human beings? Is it true that clones, if they ever were to be successfully created, would probably be less respected because they would be seen simply as a copy of someone? He responds, let us not confuse the intrinsic value of the person with the degree of respect that [s]he is accorded in an individualistic society.[8]

But, what about the right to an open future? What if you are born simply as some sort of genetic, pre-planned program and a copy of someone else: your father, a lost child, or whatever? Does that person have an open future? What about the genetic lottery that makes us think that because we are a unique event, a unique genetic combination, that we are therefore human? Brock would respond, let us not limit human beings or define them by their genetic code. His arguments are very compelling.

Moving then to human dignity and reproductive cloning, I would like to show you that human dignity is often used as a political tool. This is clear from the rhetoric and the ideology that you will find in specific legal prohibitions and laws around the world. I argue that human dignity has been cheapened and is in danger of banality when used for political purposes. I would like to go back to human dignity, as originally conceived in the human rights context at least, as the foundation of all human rights, not as a specific human right. This is the basis of the *Universal Declaration of Human Rights* of 1948.[9] I will finally conclude with a question: Does human dignity nevertheless constitute the one and only limit on scientific freedom?

What do I mean about human dignity as political ideology or rhetoric? Well, it's interesting because the same term is used differently by different camps or groups, whether in Europe or in North America. You find it in essentialist arguments – a bit reductionist, if you like – that the gene *is* the person. So, the clone, once again, is in danger of harm to its personhood. You also find it in the ecological, anti-tech left, where it is argued that technology is putting humanity in danger and therefore, the State must intervene to protect the welfare, if you like, of humanity, as though the gene "pool" is static. So, while you have an unholy alliance in these calls for wholesale prohibitions between the religious right and the ecological left, you also have the concept of human dignity exploited in their political discourse. Furthermore, proclamations that say at this time that we must prohibit human cloning because it puts into danger safety, life, dignity, health and so on, trivialize human dignity by treating it as an ordinary human right in a litany of lists.

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[7] Dan Brock, *Human Cloning and Our Sense of Self*, 296 SCIENCE 314 (2002) *available at* http://www.sciencemag.org/cgi/content/full/296/5566/314 (last visited May 2, 2004).

[8] *Id.*

[9] Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3rd Sess., U.N. Doc. A/810 (1948).

Let's have a look at examples of this: One of the first, obviously, was the Vatican in 1997. The Vatican equates human dignity with human life.[10] It accords human dignity to every phase or stage of life from the fusion of the gametes. It also uses human dignity against the "instrumentalization," as the Europeans call it, of the person, from the very beginning of any human cell.

In Canada, in the preamble of a law that has taken ten years to develop and was just adopted, we find dignity in the middle of a list of human rights that are at stake.[11] It is situated in the middle between a list of preambular "values" such as health, safety, and the environment.

Japan, in their law concerning regulation of human cloning techniques, prohibits human reproductive cloning (though not therapeutic or what they call research cloning), drawing attention to its effect on the preservation of dignity, safety and, interestingly enough, the maintenance of social order.[12] Human dignity and the idea of human clones is thus seen in a communal, social context. Human dignity here is related to the social order.

Then there's the Nordic Committee, which comprises the different Scandinavian countries. Their opinion on ethical issues in human stem cell research,[13] links dignity to instrumentalization, or the exploitation of the person. The Committee raises concerns that allowing research on embryos created by nuclear cell transfer would be a step on the slippery slope.[14] As such, they see human reproductive cloning as the end point of an infringement on human dignity. The purpose of the four examples is simply to show you how dignity now fits into the religious, political, and legislative discourse.

What about human dignity as the foundation or source of human rights? An article by Malby in the *Health and Human Rights Journal* entitled "Human Dignity and Reproductive Cloning" describes a working model for human dignity, irrespective of the technologies being

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[10] THE VATICAN, OBSERVATIONS ON THE UNIVERSAL DECLARATION ON THE HUMAN GENOME AND HUMAN RIGHTS (Nov. 11, 1997), *at* http://www.vatican.va/roman_curia/secretariat_state/documents/rc_seg-st_25091998_genoma_en.html (last visited May 3, 2004).

[11] An Act Respecting Assisted Human Reproduction and Related Research, Bill C-6, 37th Parl., 3rd Sess. (Can. 2004).

[12] The Law Concerning Regulation Relating to Human Cloning Techniques and Other Similar Techniques, (provisional translation) (Nov. 30, 2000) (Jp.), *available at* http://www.mext.go.jp/a_menu/shinkou/seimei/eclone.pdf (last visited May 3, 2004).

[13] *Legislation on Biotechnology in the Nordic Countries—An Overview,* NORDIC COMMITTEE ON BIOETHICS (2003) *available at* http://www.ncbio.org/BIO.pdf (last visited May 3, 2004).

[14] *Id.*

questioned.[15] It discusses medical technologies in the broader human rights context. This model postulates three bases for human dignity.[16] First, is the capacity for moral, autonomous thought. Second, is the inherent worth of being human. Third, – this is an interesting addition – is the capacity of individuals to create relations with society. According to this model, dignity cannot be abstract. It is not limited to the individual, but actually has a relational sense as well. I will come back to this in my conclusion, because I think this best captures why human dignity is important to us, and why we raise it in the particular context of human reproductive cloning.

Turning now to the *Universal Declaration of Human Rights* of 1948. When working on the 1997 UNESCO *Declaration on the Human Genome and Human Rights*, people said to me that a mere Declaration, without legal force or sanctions, was useless, and just there to fool people into thinking something is being done about a particular area of science. But look at the 1948 Declaration and the power that this Declaration of principles has had over time! Article 1 states: "All human beings are born free and equal in dignity and in rights."[17] Notice the distinction – you are born free and equal, *and* with dignity and rights. Dignity and rights are not the same, the latter derive from the former and yet also actualize it. Article 22 states that as a member of society, everyone has the right to social security, etc., and to the economic, social, and cultural rights that are indispensable for dignity.[18] The realization of one's dignity does not occur apart from the social, economic, or cultural context. Finally, in the *Universal Declaration*, article 23(3) mandates the right to just and favorable human relations in the work environment, ensuring for individuals and their families an existence worthy of dignity.[19] Again, in a contextual sense, which includes social protection. Thus, there are a panoply of rights to realize human dignity.

In the *International Covenant on Economic, Social and Cultural Rights* of 1976, the participating States recognized that education shall be directed to the full development of the human personality, and the "sense" of its dignity.[20] Here you get an appeal to what is called the "intuitive notion" of human dignity. We know that human beings – we understand somehow, intuitively, that they have dignity. Then it is strengthened

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[15] Steven Malby, *Human Dignity and Human Reproductive Cloning*, 6 HEALTH & HUM. RTS. J. 103 (2002).

[16] *Id.*

[17] Universal Declaration of Human Rights, *supra* note 9.

[18] *Id.*

[19] *Id.*

[20] International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.

through human rights and fundamental freedoms. The Covenant also reiterates that all persons deprived of their liberty shall be treated with humanity, and with respect for the inherent dignity of the human person. These are just a few examples of the international sources.

How then do we fit human dignity in the year 2003, into the context of genetics and cloning? UNESCO's 1997 *Declaration on Human Genome and Human Rights* states that certain practices are contrary to human dignity, *such as reproductive cloning of human beings, "shall not be permitted."*[21] Why? The International Bioethics Committee's (IBC) original proposal instead stated the following: "Practices, which are contrary to human dignity, shall not be permitted." The Committee deliberately chose not to name any particular present or imaginable technique. One reason is that it thought that dignity had the force and the power in and of itself to work, when translated in the national context into different prohibitions or guidelines over time.

Furthermore, it did not want to prohibit any particular technique because we thought that the concept of dignity in and of itself could not be limited or in anyway described in this sense. The Committee realized that any listing or mentioning of cloning or other techniques would create the impression that only those techniches named were contrary to human dignity. If this were the case, the *Declaration* would be limited in time and effect. Dignity would be circumscribed, undervalued and undermined. It would seem as though it had not prohibited other techniques, thus indirectly approving them.

The restrictive phrase, "such as reproductive cloning" was put into the final draft because the different States' members met in July 1997, just five months after Dolly was born. State representatives (in the absence of the IBC) were politically advised – to include cloning in the Declaration. This is shortsighted. As this example demonstrates, the strength of the *Universal Declaration of Human Rights of 1948* comes from the fact that it is not situation or time specific. That is why it is universal.

The WHO's interpretation of the notion of human dignity is that reproductive cloning is contrary to dignity and integrity.[22] This is a school of thought that is quite popular. The idea is that you are manipulating the human person in a way that is not "natural." Nature is seen as static as if we have not changed over time, have not evolved, or are not in constant mutation. It is a concept of the dignity of the human being that is limited to a physiological or "naturaliste" perspective – a physical notion of integrity.

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[21] Universal Declaration on the Human Genome and Human Rights, *supra* note 3, art. 11.

[22] Press Release, W.H.O., World Health Assembly, *World Health Assembly States its Position on Cloning Human Reproduction* (May 14, 1997) *available at* http://www.who.int/archives/inf-pr-1997/en/97wha9.html (last visited May 3, 2004) (stating "cloning for replication of human being is ethically unacceptable and contrary to human dignity and integrity").

The additional protocol to the 1997 *European Convention on Human Rights and Biomedicine* does not see cloning as an infringement of integrity, but rather, as you will note, comes back more to the deterministic model of the person as being their genetic code.[23] So any intervention seeking to create a human being genetically identical to another human being, whether living or dead, is prohibited. The advantage of this wording, however, is that it is the intent that is captured and not a specific technique. In this way, it can "survive" the series of cloning techniques that the future may hold.

So, this brings me then to the third part of my talk. Can human dignity, however described, destroyed, undervalued, and used, still serve as a limit on scientific freedom? I would argue, yes.

Taking then the UNESCO 1997 *Declaration on the Human Genome and Human Rights*, article 1 states: "The human genome, at the level of the species, underlies the fundamental unity of all members of the human family."[24] This recognizes the inherent dignity and diversity at the level of the species. In a symbolic sense, the human genome is the heritage of humanity. This first article was also changed in the July meeting of the different member states, due to the fact that the concept of the common heritage of humanity was not well understood and so reduced to a "symbolic" level.

The international heritage concept, like the space or the sea, was meant to protect the human genome at the level of the species. The Committee was not addressing persons or their own individual genomes. Individual genomes are treated under Article 2.[25] But several countries were uncomfortable with the notion of the "common" heritage of humanity. They did not understand that the four criteria for the common heritage of humanity approach are: peaceful uses, protection for future generations, equitable access, and non-appropriation by nations. This is exactly what you want at the level of the human genome. Once again, however, the political and everyday interpretation of a "common" undermined the process, so it has become purely "symbolic." "Common" was taken out and "heritage" was left.

The 1997 *Declaration* also reiterated something we often forget – freedom to do human research is a fundamental right. It is in the 1948 *Declaration* as well. Freedom of research is necessary for the progress of knowledge and part of the freedom of thought. You find this in freedom of

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[23] Council of Europe, Additional Protocol to the Convention on Human Rights and Biomedicine on the Prohibition of Cloning Human Beings, 36 I.L.M. 1415, 1417 (1997), *available at* http://conventions.coe.int/treaty/en/treaties/html/164.htm (last visited May 3, 2004).

[24] Universal Declaration on the Human Genome and Human Rights, *supra* note 3, art. 1.

[25] Universal Declaration on the Human Genome and Human Rights, *supra* note 3, art. 2

expression, and so on. Freedom to do research is a fundamental right and encourages intellectual curiosity. Having said this, the applications concerning the human genome should according to the *Declaration* seek to offer relief from suffering, and improve the health of individuals and humankind as a whole. So, it fosters a humanistic understanding of research, of freedom of expression, of freedom of thought. It is not the economic innovation – centered notion of research. The freedom to do research, then, is linked to the beneficial and peaceful uses thereof.

Can we use human dignity to limit scientific freedom, which is a fundamental right? I would argue that law characterizes as dignity the quality of membership of each individual in the human community. Dignity comes from the quality of membership: the social conditions, the education, the recognition of the individuality of each person in the human community. Thus, an infringement of dignity occurs when this technology results in the exclusion of the individual, or group of individuals from the human family. What do I mean by that? Dignity does not create the limits of freedom or research per se, but rather, is a point where the freedom given to Man, accorded to Man in the human rights context, is no longer legitimate because the very act of creating human clones or hybrids, animal-human hybrids, and so on, destroys the link between the individual as person and as member of humanity at the level of the species. (*See Below*)

So, how is this all unfolding? If we are going to negotiate an international treaty and ban internationally human reproductive cloning, extreme care should be taken in drafting the definition of the proscribed activity. Why? Well, too broad a definition may result in a limitation of therapeutic techniques that may be beneficial to humankind, and are supportive of individual health and life. If you get it too broad, you are already cutting off future therapeutic avenues. In contrast, a definition that is in someway narrowly linked to current scientific techniques, risks being inapplicable to future unknown techniques.

So, what is happening at the level of the United Nations? Three years ago, France and Germany began an initiative asking the United Nations to prepare, work on, elaborate, and adopt an international convention against the reproductive cloning of human beings. They wanted this enshrined in an international convention. As you know, following signature and before ratification, domestic law must be in conformity with the proposed Convention.

However, some countries, including the United States, want the proposed international convention, to go further and ban all forms of cloning, including therapeutic cloning that involves the creation of embryonic stem cells for therapeutic purposes. The movement for a rapid adoption has been halted. The Vatican, the U.S., Costa Rica, and others want this convention to immediately cover other things and not simply limit itself to human reproductive cloning.

So, where are we then? What then in conclusion should be the approach? Human dignity is at the source of human rights and yet human rights express human dignity in a given context and within relationships. Ethics and the life sciences are moving forward with benefits for mankind, but at the same time creating dangers that may jeopardize liberty and privacy interests.

The body politic best describes the expression of humanity and the transparency of its political institutions. Beneficial goals are how we as humans, at this point in time, envision the relationship between science and humanity. The notions of co-evolution, co-adaptation – genomics and ecology – would be where the responsibility for the future of mankind comes in.

What I want to say here is that we need to take a complex systems approach. Not a linear approach, not just a prospective (public) or retrospective (private) approach, not any one model of the four models that I have described. Instead, we need to seek the elaboration of all human rights as stemming from dignity. They are not equivalent to dignity but part of a complex, dynamic, epigenetic and non-hierarchal system.

So, do we have to go where no one has gone before? Do we really need to go with the Raelians? I do not think so for the following reasons. We have begun to understand that there are certain values at stake. There is, or will be, an erosion of the established sense of dignity and worth and of our communal human genetic heritage and our membership in the human family, in the human species. There has been an undermining of the value we accord to the human species. Our approach should not be a hierarchal one, the biblical sense of Man above the animals, which are over the plants, etc. We know now that we need an ecosystem approach, both in terms of our humanity and of our species. Membership in humanity thwarts the instrumentalization of the person. We have to continue to accord and respect the individuality of the person as a member of the human family and so the dignity of each person.

So, what is it then? I would argue that dignity is an explanation of why human beings have rights. Why they have rights rather than being a right in itself. I would argue that dignity is inherent in the person – intrinsic in each human person. That it is individual and communal and both empowerment and restraint. Thank you.