The Underpinning Concept of 'Human Dignity'

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June 2020

Explanatory Note

This briefing paper is one of a series written by the Academic Advisory Panel to the National Taskforce for Human Rights Leadership, which was established in 2019 in response to the recommendations made in December 2018 by the First Minister's Advisory Group on Human Rights. The aim of the briefing papers is to consider some of the legal complexities involved in translating international human rights treaties into domestic legislation.

For further information, please go to: https://www.gov.scot/groups/national-taskforce-for-human-rights-leadership/

1. Executive Summary

'Human dignity' is referred to in the Terms of Reference of the First Minister's Advisory Group on Human Rights Leadership (FMAG), and in its final recommendations (recommendation that the proposed Bill should be explicitly rooted in the core value of 'human dignity').

This briefing addresses the "internationally recognised meaning" of 'human dignity'. It makes the following key points:

- The idea of 'human dignity' has remained at the forefront of the modern international human rights regime since it began in the 1940s. It features in core UN treaties as well as other key instruments. It has an important presence in regional human rights regimes in the text of treaties and/or in the decisisons of monitoring bodies and courts. It has a particularly prominent role in the European Union, for which 'dignity' is one of the founding values of the Union, and is reflected in the EU Charter of Fundamental Rights.
- In recent international developments, with the adoption of the 2030 Agenda for Sustainable Development, the prominence of the idea of 'human dignity' has been reinforced.
- It it possible to distinguish between the internationally recognised *meaning* and the internationally recognised *role* of 'human dignity' in human rights texts. This distinction can promote clarity and help to assuage potential concerns about ambiguity in the dignity idea's meaning.
- The internationally recognised meaning of the idea of 'human dignity' has limited depth and detail. This is due to the nature of the idea itself, and the way in which it was

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Special thanks are due to colleagues at the University of Strathclyde: Dr Chris McCorkindale for engaging in discussion of UK constitutional dimensions of this paper, Dr Jonathan Brown for contributing the section on 'dignity' from a Scots private law perspective, and LLB Honours student Lucy Visocchi for research assistance to identify sources in UK legislation and case-law.

introduced into the foundations of the international human rights legal regime. 'Human dignity' is related to recognition of the 'worth' of human persons. It is understood to be equal amongst human persons, and is associated with the full spectrum of human rights. The meaning of 'human dignity' continues to be developed through interpretation by human rights courts and monitoring bodies.

- The internationally recognised role of 'human dignity' is to express an aspect of the purpose behind a legal text, and as such, to guide interpretation of that text (by the judiciary but also much more broadly) as it develops over time.
- The internationally recognised meaning and role of the idea of 'human dignity' provide a framework for future development of the idea's meaning and role in the Scottish context.
- In other national contexts, 'human dignity' is referred to in written constitutions of most countries. Comparative constitutional approaches to understanding the meaning and role of 'human dignity' could be useful in future. Their value depends to some extent on whether there is a desire to envisage the Bill as 'constitutional'. One valuable insight at the moment concerns the idea of a right to human dignity. If the Bill's primary function is to bring core international human rights into domestic law, it will be consistent to mirror the international human rights law approach to 'human dignity' – as a value rather than as a right. It will be helpful for the Task Force to be clear about the distinction between 'human dignity' as a value and as a right in the interest of promoting clarity in future public discourse.
- 'Dignity' is a familiar term in a many spheres of UK law, including in human rights law. There are no apparent reserved/devolved competence considerations in respect of using the language of 'human dignity' in the Bill (and especially if the intention is to mirror international human rights documents ratified by the UK). In Scotland specifically, there are legislative examples of 'dignity' being referred to in several recent Acts of the Scottish Parliament. A broader common law perspective is also interesting, which highlights the familiarity of the idea of 'dignity' within Scots private law, as a result of a connection which has been maintained to Roman law.
- Human dignity' is an important idea in terms of public participation because it can open a door to understanding what human rights legislation is aiming to achieve. The idea can provide a vehicle for a public engagement, potentially also drawing upon Scottish cultural heritage. This is potentially a way for people, including those who might never have engaged with human rights law before, to connect with the legislation.
- As 'dignity' is a common language term, it will continue to be used in different ways in different contexts. It is always helpful to promote clarity in the use of the language of 'dignity'/'human dignity'. To this end, it may be useful for the Task Force to consciously consider its choice of terminology. However, nothing of significance hangs on that choice and, regardless of the precise formulation, the link to international human rights law would anchor the idea's scope to its internationally recognised meaning and role.
- The FMAG recommended that 'human dignity' should feature in a preamble preceeding the provisions of the Bill. This is the most obvious place to make reference to it as an underpinning value, and also the most obvious place to include other principles, such as universality, indivisibility and interdependence. While domestic statutes do not routinely have 'preambles', many do. A relevant example is the Equality Act 2010. A reference to 'human dignity' at the start of the Bill in this way would symbolically mirror the approach

in international human rights law, and signal the status of the principle of respect for 'human dignity' as underpinning the range of rights in the Bill.

2. Introduction and Background

The Terms of Reference of the FMAG refer to the value of human dignity. These Terms of Reference observe that the Scottish Government is "pursuing a programme of activity which places human rights, equality and human dignity at the heart of public policy in Scotland" (Annex C to the Recommendations, p. 60).

This aligns with the explicit reference to 'dignity' in Scotland's National Performance Framework (NPF). One of the indicators within the NPF's Human Rights Outcomes, is that 'public services treat people with dignity and respect.' The idea of treating people with 'dignity' is also part of the value-base of the NPF.[1]

The NPF is itself aligned with the UN 2030 Agenda for Sustainable Development, which also refers to 'human dignity'. The Agenda states in its introduction:

> *As we embark on this great collective journey, we pledge that no one will be left behind. Recognizing that the dignity of the human person is fundamental, we wish to see the Goals and targets met for all nations and peoples and for all segments of society. And we will endeavour to reach the furthest behind first', and 'We envisage a world of universal respect for human rights and human dignity […].*[2]

The FMAG recommended that the Bill should be rooted in the core value of 'human dignity'. The FMAG suggested that the Bill must 'affirm that the human dignity of everyone underpins all our rights and our society' (p. 8 and p. 32).

This is concretised in Recommendation 1, for the creation of the new legal framework: "The Preamble of the Act should make clear that its purpose is to give further effect to human rights and that human dignity underpins all rights." (p. 33 and Annex B).

The recommendations also refer to the rights to be included in the Act as "based upon the recognition of human dignity" (p. 38 and p. 50).

This briefing paper outlines relevant considerations for the Task Force: it outlines possible approaches to understanding and integrating 'human dignity' in the Bill. It does so by considering international and regional perspectives, a comparative constitutional law perspective, and four key discussion points: whether 'human dignity' fits within the domestic legal culture, whether including 'human dignity' could contribute to public engagement with the Bill, whether there is a preferable form of expression for referring to 'human dignity' in the Bill, and where in the Bill the reference to 'human dignity' could be included.

This paper focuses on the 'internationally recognised' meaning of 'human dignity'. It does not discuss different academic understandings of the meaning of 'human dignity' because there is significant

[1] Scotland's National Performance Framework: Our Purpose, Values and National Outcomes, available at https://nationalperformance.gov.scot/sites/default/files/documents/NPF_A4_Booklet.pdf.
[2] United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1, paras. 4 and 8.

variation in the *details* of such accounts. Further, it is appropriate that the detailed meaning of 'human dignity' should develop through its use in Scotland. Therefore this paper focuses on the 'internationally recognised' meaning that can provide a framework for developing a context-specific meaning in future.

In this paper, the term 'human dignity' is generally used instead of 'dignity', as this mirrors the FMAG recommendations. Little significnance lies in the distinction, but for clarity, it is addressed in the discussion below (section 4).

This paper concludes that the inclusion of 'human dignity' as a value in the Bill will be a clear and symbolic reflection of, and demonstration of Scotland's support for, the UN's international human rights law framework and the Sustainable Development Goals. Its internationally recognised meaning (related to recognition of the 'worth' of human persons, perceived as something equal amongst human persons, and associated with the full spectrum of rights) and role (an expression of an aspect of the purpose underpinning the text) provide a framework for future development of the idea's meaning and role in the Scottish context. There are some options for how 'human dignity' is included in the Bill but no apparent barriers to doing so, and there is a potential added value of providing a route for promoting a sense of ownership of the legislation within Scotland's public culture.

3. Legal framework

3.1. International law

'Human dignity', as a baseline, has an important symbolic place in international human rights law. Beyond this, the substantive *meaning* that can be identified will not be detailed. This is not problematic. It is due to the nature of the concept of 'human dignity' itself, and the way that it was introduced into the foundations of the international human rights law system.

The concept of 'human dignity' does not, of course, originate in legal texts. It is a value, which has deep roots in theological and philosophical thought about human life and relationships in society.[3] Archival documents, which give insight into the drafting and development of international human rights laws, suggest that 'human dignity' was introduced as an underpinning value *because* of these deep roots. At the same time, the fact that 'human dignity' is such a deeply rooted idea, including across cultures, brings it within a family of concepts (including others like 'justice') that are not easily definable.

Therefore, the internationally recognised meaning of 'human dignity' *can only be* expressed in a relatively minimal way.

It is also useful to distinguish between the internationally recognised *meaning* and the internationally recognised *role* of the concept of 'human dignity'.

In international human rights law, 'human dignity' can be described as a 'fundamental value'. As such, 'human dignity' can guide interpretation because it is understood to expresses one aspect of the purpose behind the treaty, declaration, etc. 'Human dignity' then can be understood as a value that should guide interpretation of provisions within a text. Purpose is

[3] Yechiel Michael Barilan (2012) *Human Dignity, Human Rights, and Responsibility: The New Language of Global Bioethics and Biolaw* (Cambridge: MIT Press), in particular at 5, 28-52.

important because, in international human rights law, interpetation with prominent recourse to the purpose of the text is the accepted approach to interpretation.[4] Purpose can be described as the "context in whose light the text should be given meaning".[5] For example, the European Court of Human Rights describes "respect for human dignity and human freedom" as "the very essence" of the ECHR[6] and aproaches interpretation of specific rights in light of the Convention as a whole.[7]

In playing a role in interpretation, the meaning of 'human dignity' inevitably must develop beyond what is visible in the primary sources that will be outlined below; otherwise the idea would be ineffective in guiding decisions about the scope of particular provisions.

If 'human dignity' becomes routinely referred to in interpretations of particular rights, as opposed to having a primarily symbolic and abstract function (which is extremely important in itself), there are associated risks – of critisicsm, by legal and policy communities (including duty-bearers) as well as rights-holders and advocates – if expectations of how 'human dignity' should support particular instances of interpretation of a right do not align. This is a risk, but need not be overstated; it is part of the nature of human rights negotiaton and implementation. The best 'remedy' for this is to address expectations on the part of all stakeholders through engagement in the development of the Bill and in on-going capacity building programmes.

For the purposes of the Task Force and ensuing process, the important point is that a more developed meaning need not be pinpointed in the Bill (it would be unusal to do so); it could be left open to interpretation (the most common approach in international human rights law and constitutional law); or it could feature in later guidance (also unusual but potentially innovative and useful for developing shared understandings within but crucially also beyond the legal community).

3.1.1. United Nations-level primary sources

There are a number of UN documents that refer to 'human dignity'[8] but this section focuses on providing an overview of where this idea arises in core human rights treaties.

The Preambles of the United Nations Charter and the UDHR refer to the 'dignity and worth of the human person'. The UDHR Preamble refers also to 'inherent dignity', as do the preambles of ICESCR and the ICCPR.[9]

[4] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, Treaty Series, vol. 1155, p. 331, Article 31.
[5] Aharon Barak (2005) *Purposive Interpretation* (Princeton: Princeton University Press), 93.
[6] *S.W. v UK*, App. No. 20166/92, judgment of 22 November 1995, Series A, no. 335-B, para. 44.
[7] *Soering v UK*, judgment of 7 July 1989, Series A, no. 161, para. 103.
[8] One example is the Stockholm Declaration of the UN's 1972 Conference on the Human Environment, which refers to 'freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being […]'. United Nations General Assembly, *United Nations Conference on the Human Environment*, 15 December 1972, A/RES/2994, Principle 1.
[9] UN, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Preamble; UN General Assembly, *Universal Declaration of Human Rights* (10 December 1948) 217 A (III), Preamble; UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171,

The UDHR's first substantive Article declares that: 'All human beings are born free and equal in dignity and rights.' The UDHR also refers to 'dignity' in two other articles: in Articles 22 (right to social security: "Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality") and 23 (b) (employment remuneration: "Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity […]").

The preamble of the Vienna Declaration adopted at the 1993 World Conference on Human Rights states that 'all human rights derive from the dignity and worth inherent in the human person…' and reaffirms the earlier documents' reference to the 'dignity and worth of the human person'.[10]

Both the ICCPR and ICESCR contain reference to 'inherent human dignity' in substantive Articles (Article 10(1) ICCPR on treatment of persons deprived of liberty, and Article 13(1) ICESCR on the right to education).

At the international level other human rights treaties that contain reference to 'dignity' include the Convention on the Elimination of All Forms of Racial Discrimination[11], the Convention on the Elimination of All Forms of Discrimination against Women[12], the Convention on the Rights of the Child[13], and the Convention on the Rights of Persons with Disabilities.[14] These include reference to 'dignity' at least in their Preambles, and in doing so refer back explicitly to the UN Charter and the UDHR.

In summary, the idea of 'human dignity' is a common feature of international human rights law treaties. The inclusion of 'human dignity' as a value in the Bill will be a clear reflection of the UN's international human rights law framework.

3.1.2. Regional-level primary sources

This section provides an overview of where the idea of 'dignity' arises in key regional agreements.

Preamble; UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, Preamble.

[10] UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23, Preamble.

[11] UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, Preamble.

[12] UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, Preamble.

[13] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, Preamble, Article 37 (treatment of children deprived of liberty), Article 39 (promotion of recovery of child victims), Article 40 (treatment of children charged with a criminal offence).

[14] UN General Assembly, *Convention on the Rights of Persons with Disabilities*, 13 December 2006, A/RES/61/106, Annex I, Preamble (3 mentions), Article 1 (purpose of the Convention), Article 3 (general principles underpinning the Convention), Article 8 (on awareness-raising and promoting respect within society), Article 16 (freedom from exploitation, violence and abuse), Article 24 (education), Article 25 (health).

The American Declaration and Convention on Human Rights refer to 'dignity' in the preamble to the Declaration ("dignity of the individual") and in substantive articles of both (relating to property, treatment in detention, freedom from slavery, and privacy).[15] Also at the regional level, the African Charter on Human and Peoples' Rights refers to 'dignity' in the preamble, and in a substantive article (including reference to legal status and inhuman and degrading treatment).[16] These sources are relevant because they are closely linked to the international human rights law regime, but of more immediate relevance are European regional sources, which are themselves interconnected.

3.1.2.1. The Council of Europe

The Council of Europe's European Convention on Human Rights (ECHR) is unsual amongst treaties in that it does not have a preamble, and does not refer to 'dignity' in the treaty text.

Case-law of the European Court of Human Rights, however, states explicitly that 'human dignity' is central to understanding the scope of the treaty (see case of *S.W.* v *UK* cited above; in another example, the Court has stated that: "Any interference with human dignity strikes at the very essence of the Convention […]").[17] The way in which this Court has drawn upon the idea in its judgments has contributed to the prominence of 'dignity' in international human rights interpretation.

The Council of Europe's European Social Charter does have a preamble, but does not refer to 'dignity' therein. It does, however, inlcude a provision on 'dignity at work': "All workers have the right to dignity at work."[18]

The idea of 'dignity' is thereby most prominent at the Council of Europe level through the European Court of Human Rights' case-law on the ECHR, rather than in the core treaties.

3.1.2.2. The European Union

Conversely, 'dignity' occupies a prominent place in the founding documents of the EU. The European Union's European Charter of Fundamental Rights refers in its preamble to 'dignity', which is the first among the European Union's founding values: "[…] the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity […]"[19]; values which are then reflected in the Charter.

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[15] *American Declaration of the Rights and Duties of Man* (1948) Preamble and Article XXIII (right to property); *American Convention on Human Rights* (1969) Articles 5 (right to humane treatment), 6 (freedom from slavery) and 11 (right to privacy).

[16] (1981) Preamble and Article 5 (respect for dignity, recognition of legal status, prohibition of slavery, torture, inhuman or degrading punishment and treatment).

[17] *Bouyid v Belgium*, App. No. 23380/09, 28 September 2015, para. 101; see also para. 89.

[18] Council of Europe, *European Social Charter (Revised)*, 3 May 1996, ETS 163, Article 26. N.b. The Charter (1961; revised in 1996) was signed by the UK in 1997 but not ratified.

[19] This mirrors Article 2 of the Treaty of European Union. European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 26 October 2012, OJ L. 326/47-326/390; 26.10.2012, Article 2; Article 27 also refers to 'respect for human dignity' as a guiding value of the EU's external relations.

Title I of the European Charter of Fundamental Rights is entitled 'Dignity' and encompasses five provisions. The first provision, Article 1, states: "Human dignity is inviolable. It must be respected and protected."

The other provisons under Title I relate to life, bodily integrity, freedom from torture, inhuman or degrading treatment or punishment, and freedom from slavery.[20]

Beyond Title I, the Charter refers twice more to 'dignity': in relation to older persons ("The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life")[21] and working conditions ("Every worker has the right to working conditions which respect his or her health, safety and dignity").[22]

The European Pillar of Social Rights (a non-binding text)[23] refers explicitly to 'dignity' in relation to pensions ("Everyone in old age has the right to resources that ensure living in dignity"); minimum income ("Everyone lacking sufficient resources has the right to adequate minimum income benefits ensuring a life in dignity at all stages of life, and effective access to enabling goods and services […]"); and inclusion and disability ("People with disabilities have the right to income support that ensures living in dignity, services that enable them to participate in the labour market and in society, and a work environment adapted to their needs)".[24]

In key EU primary sources, 'human dignity' is thereby given a very prominent symbolic and substantive role.

In summary, 'human dignity' is a common feature of regional rights treaties and non-binding texts. The inclusion of 'human dignity' as the Bill's underpinning value will be a clear and symbolic reflection of, and demonstration of Scotland's support for, the regional human rights frameworks, which are themselves part of the international human rights law landscape.

Due to the presence of the idea of 'human dignity' in ECHR case-law, a link to 'dignity' is already present in the UK's legal culture through the mechanism of the Human Rights Act 1998, which directs courts and tribunals to take into account the jurisprudence of the ECHR institutions when determining a Convention-related claim.[25] This link exists despite the fact that 'human dignity' does not feature explicitly in the ECHR itself. However, withdrawal from the EU has weakened a link to 'dignity' represented by Article 1 of the Charter (and the specific provisions of the Charter outlined above, as well the European Pillar of Social Rights). The embeddedness of the idea of 'dignity' within this regional context may be a relevant

[20] European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, Preamble and Title I.
[21] European Union, *Charter of Fundamental Rights of the European Union*, Article 25.
[22] European Union, *Charter of Fundamental Rights of the European Union*, Article 31.
[23] See briefing paper by Professor Tobias Locke, *Scotland's future relationship with the EU and the development of human rights under EU law*, April 2020.
[24] European Pillar of Social Rights 2017, Chapter III, 14, 15(b), and 17, available at https://ec.europa.eu/commission/sites/beta-political/files/social-summit-european-pillar-social-rights-booklet_en.pdf
[25] Human Rights Act 1998, s. 2.

consideration for the Task Force in light of the FMAG's guiding principle of keeping pace with future rights developments within the EU.

It is also of note that the idea at the regional level, as at the international level, expresses an underpinning value and tends to also feature in relation to particular provisions. This combination shows that 'human dignity' acts as a value underpinning a whole text and can also act as an objective of specific provisions perceived to have a particularly close relationship with 'human dignity'. There is no contradiction between the two approaches.

3.1.3. The internationally recognised meaning of 'human dignity'

These sources do not indicate what 'human dignity' is, why human beings have 'human dignity', or what exactly respect for 'human dignity' requires. It would be unreasonable to expect international treaties (or any legal text) to do so.

What they do indicate is that 'human dignity' is understood as equal amongst human persons, that its existence is not dependent on recognition by the state (it is inherent), and that it has something to do with the 'worth' of human persons.

'Human dignity' is associated with the full spectrum of rights (from freedom from slavery, to education, to working and living conditions). The UN also stipulates that any new international human rights agreements should "[b]e of fundamental character and derive from the inherent dignity and worth of the human person".[26] This reinforces a link between all human rights and 'human dignity' as an underpinning value.

One approach to viewing this link to the spectrum of human rights is to understand 'human dignity' as demanding responses (from those acting on behalf of the state) which project in two different directions: some provisions are concerned that 'human dignity' should not be *undermined*, and some are concerned that 'human dignity' should be *promoted*.

This is the extent of the meaning of 'human dignity' that is visible in international primary sources. As noted above, this is due to the nature of the idea itself and its function as a foundational, consensus-generating value in the UDHR initially. The limited depth of the meaning is part and parcel of the way that 'human dignity' works in international law.

To gain a *richer* understading of the internationally recognised meaning of 'human dignity' it would be necessary to look at how this meaning has developed in secondary international human rights sources. This would require close *and* comprehensive reading of bodies of case-law, decisions and comments. The extent to which 'human dignity' is referred to at all in secondary sources differs depending on various factors, including the right in question, and the meaning that is deduced will partly depend on who is reading the sources. Nevertheless, the meaning of 'human dignity' is understood most fully by looking at the way the idea has influenced interpretation in relation to particular sets of circumstances (because of the role that the principle of respect for 'human dignity' plays in interpretation).

[26] United Nations, General Assembly, *Setting International Standards in the Field of Human Rights*, 4 December 1986, UN Doc A/RES/41/120, para. 4.

This richer meaning would have to be built up by looking across a range of decisions/comments; isolated examples (such as a judgment of the European Court of Human Rights referring to 'human dignity' and degrading treatment [27], a decision of the UN Committee on Economic, Social and Cultural Rights referring to 'human dignity' and social security[28], or one General Comment of the Committee on Economic, Social and Cultural Rights referring to 'human dignity' and adequate food[29]) by themselves do not provide much more insight than the references in the primary UN and regional soures.

In due course, in working towards the implementation stage of the future legislation, a suite of further guidance could be developed to explore in detail the impact of courts and monitoring bodies drawing upon 'human dignity' in discussions about particular rights. For some rights, there would be many instances of 'human dignity' being explicity used in decision-making (e.g the right not to be subjected to inhuman or degrading treatment or punishment; for other rights there may be no international or regional examples (e.g. the right to take part in cultural life). This would be an opportunity for Scotland to lead the way on collaboratively exploring exisiting impacts of 'human dignity' in interpretation of rights, and supplementing these insights with new thinking.

The key point for the Task Force presently is that the meaning of 'human dignity' is linked in primary sources to recognition of the equal worth of human persons, and this has implications across the spectrum of human rights.

In summary, this provides us with an understanding of the contours of the internationally recognised meaning of 'human dignity'. Beyond this, what 'human dignity' means in more detail, and when applied to particular sets of facts/contexts, is not fixed. Human rights courts and monitoring bodies have developed the meaning of 'human dignity' over time through judgments and comments, and they will continue to develop this meaning as they address new circumstances and societal challenges. This would be the case in Scotland also.

3.2. Comparative constitutional law

Academic research has shown that the idea of 'human dignity' is now found in most of the world's constituions, in all regions.[30] Further, it has been said that "hardly a new constitution is adopted without its explicit recognition."[31] This raises the question as to whether an analysis of comparative constitutional approaches to 'human dignity' could usefully inform the Scottish process. The guiding questions here are, is a *constitutional* perspective perceived by the Task Force as helpful or unhelpful, and does a comparative constitutional perspective provide, in any case, additional insights?

[27] European Court of Human Rights, *Stanev v. Bulgaria*, App. No. 36760/06, 17 January 2012, para. 204.
[28] UN Committee on Economic, Social and Cultural Rights, Communication No. 1/2013, *López Rodríguez v Spai*n, 20 April 2019, UN Doc. No. E/C.12/57/D/1/2013, paras. 10-1 – 10.2.
[29] UN Committee on Economic, Social and Cultural Rights, *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999, para. 4.
[30] Daly, E (2012) *Dignity Rights: Courts, Constitutions, and the Worth of the Human Person* (University of Pennsylvania Press: Philadelphia) 1.
[31] Daly (2012), 2.

3.2.1. The value of a constitutional perspective

In relation to the first question, the value of a *constitutional* perspective might depend on the extent to which there is a desire to (politically) conceive of the Bill as constitutional in nature (like the Human Rights Act 1998). If so, this would increase the relevance of looking at constitutional comparators in more detail. Relevant national constitutional comparators would need to be identified.

Having said that, due to the nature of the UK's constitutional framework, no legal texts are formally considered as 'constitutional'. The idea of 'constitutional statutes' has emerged in case-law but this has been a post-enactment response to particular questions of implied repeal of statutory provisions in light of the principle of parliamentary sovereignty within the the UK's constitutional framework.[32] Futher, it is not clear whether an Act of the Scottish Parliament (or any of the devolved legislatures) is capable of being framed as a 'constitutional statute' in this sense.

3.2.2. Insights for the meaning and role of 'human dignity'

The second question is whether a comparative constitutional perspective would provide, in any case, additional insights to those gleaned from international sources. This seems not to be the case in respect of understanding the meaning of 'human dignity'.

This meaning is not more visible in constitutional texts than it is in international human rights texts. To look at different meanings of 'human dignity' would require discussion of comparative *jurisprudence*, since 'meaning' cannot be deduced from the primary texts themselves. Therefore any added value of looking at these sources would be in learning from interpretation in relation to specific rights across bodies of case-law in comparators with strong similarities to Scotland's legal system.

In terms of where references are found in texts, a comparative constitutional perspective reinforces the approach in international human rights sources: there is sometimes reference to the value of 'human dignity' in provisions general to the constitution or in sections on fundamental rights, and sometimes in relation to specific rights. For example, the constitutions of Sweden and Switzerland respectively state: "Public power shall be exercised with respect for the equal worth of all and the liberty and dignity of the individual […]"[33], and "Human dignity must be respected and protected."[34] The constitutions of Belgium and Finland include a reference in specific provisions: 'Everyone has the right to lead a life in conformity with human dignity', to which end, economic, social and cultural rights are guaranteed[35]; 'Those who cannot obtain the means necessary for a life of dignity have the right to receive indispensable subsistence and care'.[36] This thereby mirrors the positioning of references to 'human dignity' in international human rights documents.

[32] See Lord Hope's *obiter dictum* in *H v Lord Advocate* 2012 UKSC 24, para. 30.
[33] Constitution of Sweden, 28 February 1974, Chapter 1, Article 2.
[34] Constituiton of Switzerland, 18 April 1999, Title 2, Article 7.
[35] Constitution of Belgium, 17 February 1994, Article 23.
[36] Constitution of Finland, 1 June 1999, Section 19(1).

However, comparative constitutional perspectives do highlight an additional perspective more related to the *role* rather than the meaning of 'human dignity'. 'Human dignity' tends to play two different functions within different constitutons: as a value and/or as a right.

'Human dignity' as a value in some national constitutions can primarily play a symbolic role and can act as a guide to interpretation. Comparative examples include Canada (as an implicit value) and Spain (as an explicit value).[37] 'Human dignity' is also framed as a right in itself in some national constitutions. Comparative examples include South Africa, Germany, and Switzerland.[38] In most constitutions where there is a 'right to (human) dignity', it is on the same 'level' as the other rights within the constitution; i.e. can be limited, subject to the proportionality of the interference with the right (the constitutional right to human dignity in the German constitution is a unique example in that 'human dignity' is an absolute right, which permits no justifiable interferences).[39] 'Human dignity' as a value and as a right can co-exist within a national constitution.

To express a right to 'human dignity' in Scotland would be a more radical approach vis-à-vis the UK's current constitutional framework and the international human rights law framework, where it is generally perceived as an underpinning value and as having special relevance to specific rights. If the Bill's primary function is to bring core international human rights into domestic law, it will be more consistent to mirror the international human rights law approach to 'human dignity'. The FMAG recommendations indeed indicate a vision of 'human dignity' as a value underpinning the rights rather than a right itself. However, this distinction drawn from comparative constitutional perspectives is perhaps useful to bear in mind. If the Bill were to be envisaged as a form of 'constitutional' Bill of Rights (within the parameters of devolved competence and the UK's constitutional framework) this distinction could become a subject of discussion and would also need to be borne in mind when identifying relevant national constitutional comparators.

This distinction may also be useful for the Task Force to bear in mind in order to be clear about its perception of the role of the reference to 'human dignity'. This would help to promote clarity around use of the language in future (in particular if 'human dignity' comes to be a useful feature of public engagement processes; see section 4.2 below).

In summary, 'human dignity' is a common feature of constitutions. The extent to which this is relevant for the Task Force depends on whether a constitutional perspective is seen to be valuable. Considering primary constitutional sources from other jurisdictions can provide examples, but does not offer more detail on the meaning of 'human dignity', or its place within general and substantive provisions, than international sources. However, this perspective does highlight a question about the role of 'human dignity' as a value or a right. The FMAG recommendations conceive of 'human dignity' as a value, but clarity about this value/right distinction could nevertheless prove important in public discourse.

[37] See classification in Aharon Barak (2015) *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge: Cambridge University Press), Chapter 4.
[38] Barak (2015) Chapter 4.
[39] Barak (2015) Chapter 13 ('Human dignity in German constitutional law').

4. Discussion

This section discusses four points that arise from the above overview: whether 'human dignity' fits within the domestic legal culture, whether including 'human dignity' could contribute to public engagement with the Bill, whether there is a preferable form of expression for referring to 'human dignity' in the Bill, and where in the Bill the reference to 'human dignity' could be included.

4.1. Does 'human dignity' fit within the domestic legal culture?

There are no apparent reserved/devolved competence considerations in respect of using the language of 'human dignity' in the Bill (and especially if the intention is to mirror international human rights documents ratified by the UK). Further, drawing upon particularites of Scots private law arguably provides a further indication that 'dignity' is at home within Scotland's legal culture.

An overview of UK legal judgments shows that 'dignity' is a familiar term. 'Dignity' is used in several different senses, including to describe the status of an institution[40]; in the context of peerages and titles[41]; and to describe the nature of a person's conduct.[42] This reflects different ways that the term is also used in everyday language. 'Dignity' appears in thousands of cases relating to many legal subject areas.[43] There are examples in criminal law, commercial law, personal injury law, local government law, and others.[44]

In the context of cases based on (ECHR-related) human rights law claims, 'dignity' is commonly referred to.[45] Examples of very recent contexts include payment for work undertaken in Immigration Removal Centres[46], to residence within a care home.[47] A recent Scottish example concerned detention arrangements for a disabled person.[48]

In terms of devolved legislation, there are several examples of the term 'dignity' being used. These include the Children's Hearings (Scotland) Act 2011[49], Patient Rights (Scotland) Act

[40] *Ewart v Chancellor, Master and Scholars of the University of Oxford* [2019] WLUK 656 at para 186: **"**[…] this was evidently a body conducted with a considerable degree of formality and dignity […]."
[41] *Hamilton of Rockhall v Lord Lyon King of Arms* [2019] CSOH 85 at paras 2, 6(2), 6(3), 6(4), 6(5), 7, 8, 9, 27, 30, 39(2), 75, 78, 81. Paragraph 2 example: "The dignity of a barony title […]."
[42] *Copeland v Bank of Scotland Plc* [2020] EWHC 1441 (QB) at para 98: "I conclude this judgment by saying that the appellant […] conducted herself throughout with dignity […]."
[43] Based on a search using legal database Westlaw. This search (Law Reports and Judgments-cases only-no date limit-freetext: dignity, allowing also for variations such as 'dignitas' or older spelling such as 'dignities') returns more than 4000 cases from institutions across the UK.
[44] The Westlaw search results are tagged by legal subject area.
[45] A Westlaw search of post-Human Rights Act 1998 UK cases containing the term dignity within topic area 'equality and human rights' returns more than 1000 results and within the topic area of 'human rights' returns almost 700 results.
[46] *R (on the application of: Shola Badmus, GW, Okwudili Chinze, Granville Millington) v The Secretary of State for the Home Department* [2020] EWCA Civ 657, paras. 4, 44, 47, 90, 96-100.
[47] *BP v Surrey County Council* [2020] EWCOP 17, paras. 22, 28, 36.
[48] *RC v HMA* [2019] HCJAC 62, paras. 13, 33, 35.
[49] Section 175 5(a).

2014[50], Public Bodies (Joint Working) (Scotland) Act 2014[51] , Social Security (Scotland) Act 2018[52], and Health and Care (Staffing) (Scotland) Act 2019.[53]

These reflections can also be viewed alongside a broader, historical perspective on Scots law. An additional dimension, which supports a sense that the idea of 'human dignity' fits well within Scotland's legal culture, derives in part from the historic reception of the Roman law *actio iniuriarum* into Scots law.

The Continental European *ius commune* developed means of protecting individual dignitary interests through adaptation of the Roman *actio iniuriarum*. This *actio* obliged a delinquent who effected *iniuria* ('injury', in the sense of 'affront' rather than in the sense of 'loss') to make reparation. 'Dignity' (Latinised as *dignitas*), as an interest protected by the the *actio iniuriarum*, has been described as follows: "a collective term for all personality interests […] which in Roman law had not yet been clearly distinguished and independently delimited".[54]

The Roman *actio iniuriarum* was received into Scots law and Institutional writers including Mackenzie, Bankton and Erskine discuss it at length in their institutional works. Each of these institutional works are heavily influenced by the Continental European legal tradition and the discussion of the delict of 'injury' (*iniuria*) is built on the works of European jurists.[55]

Recent scholarship suggests that there are two conceptions of 'dignity' at play when the *actio iniuriarum* is concerned[56]; one more particular[57] and one at a higher, more general level (here the Latin term used is *existimatio*) where 'dignity' can also be conceived of as the umbrella term under which all 'rights of personality' (i.e., rights to bodily integrity, reputation, etc.) are to be found.

Scotland has retained a connection to the *actio iniuriarum*. Conversely, the action was not received into English Common law. In Scotland, however, the *actio iniuriarum* has remained available; it has never been abrogated and was effectively employed in the (comparatively recent) case of *Stevens v Yorkhill NHS Trust* 2006 SLT 889.[58]

[50] Section 2 and 14.
[51] Section 31(1)(b)(vi).
[52] Section 1 and 14.
[53] Section 1(1)(b)(iii).
[54] Johann Neethling *et al* (2015) *The Law of Delict* (7th Edn.) (Durban: LexisNexis South Africa), 14.
[55] Bankton's *Institutes* in particular demonstrate a close alignment with Continental jurists including Johannes Voet and Hugo Donellus and the Roman jurist Ulpian: See *Institute*, I, 10, 21-39.
[56] Jacob Giltaij (2016), '*Existimatio* as 'Human Dignity' in Late-Classical Roman Law', *Fundamina: A Journal of Legal History*, 22(2), 232-249.
[57] Eric Descheemaeker and Helen Scott (2013), *Iniuria and the Common Law*, (Oxford: Hart Publishing), 13.
[58] Within the law of defamation, see, for instance, *Winter News Scotland Ltd.* 1991 SLT 828, in which 'dignity' must properly be understood with reference to the law developed from the *actio iniuriarum*. The law of assault (in criminal and civil law alike) similarly has a strong connection with the *actio iniuriarum*; see Brian Pillans (2014) *Delict: Law and Policy* (Edinburgh: W. Green), paras. 6-13; Jonathan Brown (forthcoming 2020) 'When the Exception is the Rule: Rationalising the 'Medical Exception' in Scots Law', *Fundamina: A Journal of Legal History*; and Jonathan Brown (forthcoming 2020), 'The Defamation and Malicious Publications (Scotland) Bill: An Undignified Appraoch to Law Reform?', *Scots Law Times*.

(It is interesting to note that South African law has maintained a clear connection to the *actio iniuriarum* and has also developed its law in this area considerably since the enactment of the Constitution:[59] the concept of 'human dignity' which is protected in that document is synonymous with the more general, higher level concept of *existimatio* as outlined above. Arguably, the inclusion of 'human dignity' in the Bill could potentially have the added benefit of informing its development in Scots common law [60] by increasing its visibility and encouraging Scots practitioners to make active use of native and comparative jurisprudence which seeks to protect 'dignity' as a meaningful interest.)

The language of 'dignity' is thereby familiar within UK and Scottish case-law, and 'human dignity' linked to human rights law is a familiar feature of post-Human Rights Act 1998 case-law. In Scotland specifically, there are contemporary legislative examples of 'dignity' being referred to in several Acts of the Scottish Parliament but a broader common law perspective is also interesting: the familiarity of the idea of 'dignity' within Scots private law, as a result of a connection which has been maintained to Roman law, makes these considerations relevant for the Task Force.

4.2. Would the inclusion of 'human dignity' as an underpinning value contribute to public engagement with the Bill?

There is existing academic research which suggests that values can help people to engage with legal norms.[61] There is not yet extensive evidence for this finding, but applied to the idea of 'dignity' in particular it is convincing. It accords with a common intuition that 'dignity' is something that people immediately know and recognise. It is this intutition that has underpinned the stability of 'dignity' as a foundational idea in moral, political, legal and professional practice over time.

'Human dignity' is an important idea in terms of public participation because it can open a door to understanding what human rights legislation is aiming to achieve at a basic level (the abstract purpose of the legislation). This is a way for people, including those who might never have engaged with human rights law before, to grasp the importance of the legislation.

In relation to the HRA 98, there is academic opinion which suggests that the Act has been vulnerable because of a lack of public engagement and sense of ownership when the Bill was being developed.[62] Giving 'dignity' a prominent place in the legislation could support public engagement.

[59] See, e.g., the discussion in Jonathan Burchell (2009), 'Personality Rights in South Africa: Re-affirming Dignity', in Niall Whitty and Reinhard Zimmermann (eds), *Rights of Personality in Scots Law: A Comparative Perspective*, (Edinburgh: Edinburgh University Press).

[60] For more on the development of 'human dignity' in Scots law, see Niall Whitty (2009), 'Overview of Rights of Personality', in Niall Whitty and Reinhard Zimmermann, *Rights of Personality in Scots Law: A Comparative Perspective*, (Edinburgh: Edinburgh University Press), in particular at 161.

[61] Sally Engle Merry *et al*. (2010) 'Law from Below: Women's Human Rights and Social Movements in New York City', *Law & Society* Review, 44 (1), 101-28.

[62] Francesca Klug (2007), 'A Bill of Rights: Do we need one or do we already have one?', *Public* Law, Win 701-719, 713-714.

An interesting backdrop to this, which might suggest a unique resonance in Scotland's public culture, is that international leaders and scholars have associated the idea of universal dignity with the poetry of Robert Burns. Former UN Secretary General Kofi Annan has stated: 'So let us allow hope to be renewed. Let us admire the enduring resonance of the work of Robert Burns. And let us dream, as he did, of a true brotherhood – and sisterhood – that embraces and encompasses all humankind, and allows all people a chance to enjoy their inalienable rights, dignity and freedom.'[63] Burns has been described as the 'master' of a change in use and understanding of the idea of 'dignity', from something that was formerly associated with societal elites to something associated with ordinary people.[64] This cultural heritage perspective is a tangential point, but it reinforces the potential value of 'dignity' having a prominent role in the Bill.

The Bill's underpinning value can be a route for promoting a sense of ownership of the legislation within Scotland's public culture if it forms part of the participatory and capacity building process around the Bill.

4.3. Is there a preferable form of expression for referring to 'human dignity' in the Bill?

It is helpful to promote clarity in the use of the language of 'dignity'/'human dignity'. As 'dignity' is a common language term, it will clearly continue to be used in different ways in different contexts. To this end, it may be useful for the Task Force to consciously consider whether it recommends that the Bill, at the drafting/consultation stage, refer to 'dignity' or 'human dignity', and or 'respect for' 'dignity'/'human dignity'.

In international human rights sources, when 'dignity' is referred to in preambular text the language used mirrors the UDHR: 'dignity and worth of the human person', and 'inherent dignity'. The SDGs refer to 'the dignity of the human person' and 'human dignity'. Regional sources vary: for example, the African Charter on Human and Peoples' Rights refers to 'dignity' and 'dignity inherent in the human being'; the EU Charter of Fundamental Rights refers to 'human dignity' (as something 'inviolable' that 'must be respected and protected'); the EU Pillar of Social Rights refers to 'dignity'. In Acts of the Scottish Parliament, like the Social Security (Scotland) Act 2018, and Health and Care (Staffing) (Scotland) Act 2019, the term used is 'dignity' rather than 'human dignity'. No major significance lies in the choice, and there is no particular reason to depart from the choice of words in the Task Force recommendations, but some relevant further considerations are outlined here.

It may be helpful to settle on a form of words that might incur the least disagreement or confusion. For example, there has been academic debate, in the past two decades, about whether the UDHR's insistence on 'inherent dignity' has helped or hindered the use of

[63] Kofi Annan, Burns Memorial Lecture, January 2004, available at: https://www.un.org/press/en/2004/sgsm9112.doc.htm

[64] Jeremy Waldron, *Dignity, Rank and Rights, The Tanner Lectures on Human Values,* University of California, Berkeley, 21-23 April 2009, available at: https://tannerlectures.utah.edu/_documents/a-to-z/w/Waldron_09.pdf, 228-229.

'human dignity' in human rights debates and claims.[65] For example, one question has been about the sense of describing 'dignity' as inherent and unable to be taken away, and at the same time it is often talked about as something that can be lost. This is a fairly abstract, philosophical debate but the choice of words is likely to have implications for how the Scottish public and civil society respond to the idea, and in this sense would be useful to consider.

A further consideration is whether it would be useful to express through the choice of language a distinction between 'dignity' in the context of human rights, and 'dignity' in other contexts in which it is, and will continue to be used (such as in the sense of the dignity of institutions, and so on). From these perspectives, referring to 'human dignity' rather than 'inherent dignity' or only 'dignity' might be attractive.

These are only future proofing considerations and not crucial at the stage of the Task Force recommendations. Whichever formulation might be recommended, the context of 'human dignity' within legislation which aims to give further effect to international human rights treaties would tie 'human dignity' to the way that it is used in international human rights law. Therefore, regardless of the precise formulation, the link to international human rights law would helpfully act as an anchor.

4.4. Where in the Bill should 'human dignity' be referred to?

A preamble preceeding the provisions of the Bill is the most obvious place to make reference to 'human dignity' as an underpinning value. This was the recommendation of the FMAG. Domestic statutes do not habitually have preambles but there many examples of statutes with preambular 'Introductory Text'.[66] By way of recent example, there is the Digital Economy Act 2017, and the Renting Homes (Wales) Act 2016. In Scotland, an example is the International Criminal Court (Scotland) Act 2001.

The most pertinent example is perhaps the Equality Act 2010, which has the following 'Introductory Text'[67]:

> *An Act to make provision to require Ministers of the Crown and others when making strategic decisions about the exercise of their functions to have regard to the desirability of reducing socio-economic inequalities; to reform and harmonise equality law and restate the greater part of the enactments relating to discrimination and harassment related to certain personal characteristics; to enable certain employers to be required to publish information about the differences in pay between male and female employees; to prohibit victimisation in certain circumstances; to require the exercise of certain functions to be with regard to the need to eliminate discrimination and other prohibited conduct; to enable duties to be imposed in relation to the exercise of public procurement functions;*

[65] Jeremy Waldron (2015) 'Is Dignity the Foundation of Human Rights?' in R Cruft, SM Liao and M Renzo (eds), *Philosophical foundations of human rights* (Oxford: Oxford University Press).
[66] A Legislation.gov website search for statutes with an 'Introductory Text' returns more than 200 results.
[67] Equality Act 2010, Table of Contents.

> *to increase equality of opportunity; to amend the law relating to rights and responsibilities in family relationships; and for connected purposes*.[68]

'Human dignity' could be referenced in the Bill in a similar 'introductory text'.

The FMAG also recommended that the following might be included in the Bill: "A statement of principles applicable to all human rights. This would include the principles of universality, indivisibility and interdependence as well as non-discrimination and could assist in interpretation of the rights."[69] Such a statement could also be housed within an 'introductory text'.

If 'human dignity' is referenced in this preambular sense, as underpinning all of the rights, it does not preclude it from being referenced in provisions enumerating particular rights (mirroring international and comparative constitutional approaches). When 'human dignity' is used in particular provisions it can be presumed that it is in relation to rights that have a particulary close connection to, or are particularly high stakes in terms of protecting 'human dignity'. But equally the preambular reference alone would indicate that the purpose of all of the rights enumerated is to protect 'human dignity'.

5. Conclusions and Recommendations

The FMAG report notes, discussing international leadership, that the new framework would signal Scotland's "support for an international rules-based order" (p. 19). This paper concludes that inclusion of 'human dignity' as a value in the Bill will be a clear and symbolic demonstration of Scotland's support for the UN's international human rights law framework (and the EU's Charter of Fundamental Rights), as well as the Sustainable Development Goals.

The paper has distinguished between the meaning and role of 'human dignity' in international (UN and regional) sources and in a comparative constitutional perspective. It has outlined the internationally recognised meaning of 'human dignity' and has also aimed to show that its limited-depth meaning gives the idea an 'openness', which can be seen as positive and enabling rather than problematic.

It is often observed that 'human dignity' will mean different things to different people. Sometimes this is raised as a concern, especially in light of a potential future role of the idea in interpretation of specific rights. (Whether or not there is explicit agreement at the time of the Bill's drafting that 'human dignity' should play a role in interpretation, this might happen regardless, in the short or long term, because of the dynamic nature of human rights interpretation). Intuitively held views (and indeed well-developed philoshopical views) about the meaning of 'human dignity' are the reason why it is important to include 'human dignity' in the first place, but these views will not all map onto the meaning that 'human dignity' would be given in interpretation of the rights in the statute.[70] Thinking ahead, there is a risk that there will be differing expectations of how the underpinning idea of 'human dignity' should support particular instances of interpretation of a right. At a stage of developing guidance on the interpretation of the Bill there could be a process

[68] Equality Act 2010, Introductory Text.
[69] FMAG recommendations, p. 37.
[70] Barak (2015) 4.

of unpacking how 'human dignity' should be understood in more detail. This futher process of deeper engagement in particular contexts is 'normal' and inevitable. In other words, a meaning should develop that is unique to the nature and aims of the statute, and it should develop in relation to context-specific examples.

A key conclusion is that if 'human dignity' is seen to signal a commitment to international human rights, its meaning and role in Scotland will *evolve within this framework*. This frame would simultaneously constrain the meaning in Scotland and leave room for Scotland-specific undertandings to develop – a combination which is ideal.

The paper further concludes that there are some options for how 'human dignity' is included in the Bill but no apparent barriers to doing so. It suggests that 'human dignity' is at home within Scotland's legal culture and that integrating 'human dignity', as the Bill's underpinning value, within participatory processes relating to its development is a potentially significant aspect of supporting public engagement.

This paper recommends that the Task Force promotes awareness of the different aspects of the meaning and role of 'human dignity' and models clarity in the use of the language, and that it maximises the potential of the compelling idea of 'human dignity' to promote a sense of ownership of the legislation within Scotland's public culture.