Human Dignity as Legal Instrument

The coherence of the concept of human dignity in the jurisprudence of the European Court of Human Rights

Thesis

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Content

Introduction

In this thesis I will examine if the European Court of Human Rights (hereafter 'the Court') has a coherent concept of human dignity. I will do this by exploring the jurisprudence of the Court, and comparing different judgments on different articles of the European Convention of Human Rights (hereafter 'the Convention'). As human dignity is generally considered to be the foundation of human rights, it is important to know if the Court uses it as a coherent legal instrument. I will find that human dignity can hardly be a coherent component of law, and that the European Court of Human Rights does not have a perfectly coherent concept of human dignity. However, this thesis shows that this does not mean that there is no coherence at all, or that human dignity cannot be a very useful instrument of law.

The Convention is the best working protection of basic human rights in history, due to its own full time-functioning court in Strasbourg. Although states have their independent sovereignty to write their own law, there is general consensus that some fundamental rights should be enforced on a supranational scale. In the aftermath of the Second World War, a group of European countries decided that it was time for a supranational court to decide whether national laws are in accordance with international acknowledged human rights. This was their way of giving all citizens a guarantee on these rights, protecting them even from their own government. Giving up this much sovereignty to a supranational institution is unique in history.

The Court has long proved its uses. Most people in Western-European countries consider their country as a civilized one, where one would expect basic human rights to be well protected by the government. Nonetheless, the Court is working full time on applications from all of the member states looking for a breach of the Convention, which they find on many occasions. Apparently, the Court is not just a symbolic statement; it actually is correcting governments on their actions. In 2014 the Court delivered 891 judgments concerning 2,399 applicants. In 85% of these cases the Court found at least one violation of the Convention by the respondent state.[1]

As the appointed institution to clarify and explain the Convention through its judgements, the Court has great influence on the practice of maintaining human rights. Consequently, the Court holds high moral authority on the subject of human rights. They mould the Convention, and have direct influence on the legal practice in Europe and the rest of the world. This makes the work it does very sensitive, which is why the Court always has to be very delicate in their judgments. Precision in formulation and coherence throughout their judgments is of vital importance to the proper functioning of the Convention. Human

[1] The ECHR in facts and figures 2014, p. 4 & 6

dignity, a concept recognised as the foundation of human rights, is used by the Court in its judgements on some occasions, but the concept does lack a clear definition.

Research question

In this thesis I will discuss the concept of human dignity, as used by the Court. Human dignity is often seen as the foundation of human rights[2], so in a way the building stone of the Convention. Surprisingly, though, the word 'dignity' is not named in the Convention once. However, the Court does often refer to the concept itself, but it seldom elaborates on the content. It appears to be used in different ways. We will see that the Court can use human dignity to set boundaries, especially in relation to Article 3, the right not to be subjected to torture or inhuman or degrading treatment or punishment, where human dignity is used to determine whether a treatment is inhuman or degrading. But we will also see that the Court uses human dignity to underpin the essence of the Convention, which is to protect human dignity.

In this paper I will be looking for the different kinds of references to the concept by the Court. On which subjects does it use the concept, and what does the Court appear to understand as the content of the concept? I will also look into the coherence of the different references by the Court. The concept of human dignity is mostly discussed when it comes to a possible violation of Article 3 of the Convention. But is the interpretation coherent with the concept of human dignity that underpins the foundation Convention? So altogether, does the Court use the concept of human dignity in their judgements in a coherent way?

Secondly, the Convention consists of articles that in principle are not expected to change. This doesn't exclude however, that the social customs and perceptions in Europe will change. Over time, people tend to think differently about certain subjects, such as juvenile corporal punishment, equal women's rights, same sex marriage or abortion.

Together with the change of standard social practices, the application of the Convention will have to change. This is why we say that the Convention is a 'living instrument'. The Court has to consider this in their judgements. This raises the question about the concept of human dignity. To what extent does human dignity, as a foundation of human rights, allow the Convention to be a dynamic institution, in a morally defensible and legally coherent way?

Automatically, this triggers a third question: if not, would that be a problem? Is human dignity ever a coherent component of law?

Together these questions form one research question:

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[2] E.g. the word dignity has a prominent place in the first sentence of the Preamble and the first sentence of Article 1 of the United Nations' Universal Declaration of Human Rights.

Does the European Court of Human Rights have a coherent concept of human dignity?

As described above, this research question can be interpreted in three ways, which I all intend to address.

- Are the different uses of human dignity in the jurisprudence of the Convention coherent?
- Does human dignity contribute to a coherent evolution of the Convention?
- Is human dignity ever a coherent component of law?

Methodology and structure

Because the research question is "does the Court use a coherent conception of human dignity?", it is necessary to look straight into the judgments of the Court. Through its judgments, the Court speaks to us about the Convention. If we want to know what the thoughts of the Court are about the concept of human dignity in relation to the Convention, and how they use it, the judgments are the place to look. The fact that the concept of dignity does not appear in the Convention, being a human rights treaty, seems unusual, because dignity is widely accepted as the foundation of human rights. In clarifying the Convention, which is done by the Court in their judgments, and the way they use the concept of human dignity, the Court undoubtedly teaches us something about how they think about human dignity in general, and in specific in relation to the Convention.

Answering the following three questions will lead us to an answer of the research question, by exploring the jurisprudence of the Convention:

- Does the Court consider human dignity as the foundation for the Convention as a whole, or (also) as foundation for each (or some) article(s) of the Convention individually? If the Court uses human dignity as foundation for one article, but neglects to do so for the other article, what does this mean for the status of the article as a human right? And could it say something about a hierarchy between the articles? Can a right, granted by the Convention, be more human right than the other? This will lead to an answer of the first interpretation of the research question: are the Court's different uses of human dignity in its judgments coherent?
- Does the Court use the concept in a way that adds value to the quality of the reasoning that leads to the judgment? In other words: was the judgment also possible without using the concept of human dignity, or would that go at the expense of sound reasoning and adequate argumentation? If not necessary,

then what is the added value of the concept of human dignity in relation to human rights? If necessary, does this mean we cannot think about human rights without thinking about human dignity? Ultimately, how does human dignity help the Court in its decision? This will help us answer the second interpretation of the research question: how does human dignity help the Court to have an evolutionary conception of the Convention?

- How does the Court put the concept to use? Is it merely named as the foundation of the Convention? Or could it grant a practical bottom line for a specific right, such as with the right not to be tortured, and help with the qualification of the right? But if it is used as means to qualify a right, what does this tell us about human dignity as foundation for human rights in general? And again, what does this mean for the different articles when it is used to qualify one article, but not to qualify the other. Answering these questions will help to understand human dignity as an instrument of law, which may help to provide an answer to the first interpretation of the research question, but also to the second and third: can human dignity ever be a coherent component of law?

With the information from the jurisprudence, we should be provided with the information we need to answer the research question in three ways. First, we should be able to judge if the Court uses human dignity as a coherent concept in its judgments. With this I mean coherent in a philosophical way. Does the Court ascribe a single meaning to the concept? Or is it used indiscriminately? Is it clear what the Court refers to, when referring to human dignity? This will be the subject of the second chapter.
Secondly, the judgments should show us how the Court uses human dignity as an instrument to apply the Convention to cases. Is it necessary to provide foundation for the law? How does it help us understand the Convention, and is it a morally defensible and legally coherent instrument? If not, how can it ever provide clear guidance? When it doesn't provide clear guidance, how can it be a useful instrument of law? In the end, with all the different notions of human dignity, and with different ways to put it to use as an instrument, the question must be asked: can it ever be a coherent component of law? This will all be discussed in the third chapter.

To begin with, we need to provide a clear framework for answering the questions raised above: is it important to have a good perception of the notion of human dignity. We must know what we are talking about. In the first place, we must know something about the history of the concept, and how it became leading in the use of the concept as a foundation of human rights. This will be the subject of the first chapter. We have to understand why the concept of human dignity and the concept of human rights are so intertwined. On the other hand, I will not discuss what a possible definition of human dignity is, or can be, or what it is about humans that we deserve this special kind of

dignity. There is no universal truth about human dignity, and a lot of people have their own, completely different thoughts about it. This is not a problem I wish to discuss in this thesis, because it will only lead to more problems, more questions, and more complexity. The focus will be on the Court, and its perception of the concept.

Aim and relevance

The aim of this thesis is to see how a moral concept can be used in practice, and how constraints can be placed upon it by a practical institution such as the European Court of Human Rights. How can a concept of human dignity serve as an instrument of law? Although a very old concept, discussion of the content of the notion is still relevant today. Without a clear definition, can it still be a useful, morally defensible and legally coherent instrument? The conclusion will be that the Court indeed does not use it as a coherent concept. This shouldn't necessarily mean that human dignity should be dropped as instrument in the Court's judgments. The conclusion will even be that it is rather impossible to use it in a coherent way, but this doesn't necessarily mean that this is a bad thing. Human dignity could still be useful.

1. History of the concept and the concept as a foundation of human rights

In this chapter I will describe the history of the concept of dignity, and how it led to a foundation of human rights in general, and to the Convention in particular.
The notion of dignity can be found in several international documents, treaties, charters and declarations, and it is commonly understood as a value that applies to the intrinsic worth of the human being on a universal scale.

Though the concept of human rights is not very old, the concept of dignity can take us back to ancient times, leading back to the Stoic tradition.[3] The word dignity is derived from the Latin word *dignitas*, but the Romans did not use the word in exact the same way we do now. *Dignitas* pointed out a certain honour, or worthiness and gravity that came with a certain position in society. Now we ascribe dignity to every human being because of their status as a human being, whereas back in time you were awarded with a certain dignity by being in an important position, such as some public offices, but also just because you were a member of the nobility. Thus, belonging to the common people did not entitle you with any *dignitas*. Due to this needed status to deserve the dignity that came along with it, it was not so much the person, but rather the office, rank, institution or even the state itself that wore this dignity. It didn't have anything to do with equality of men, but rather the opposite: with the difference in social status.[4] The legacy hereof is still noticeable today. It is the reason we rise for a judge in the courtroom, and we are expected to offer special respect to other high public officials. A recent decision of the public prosecution office in the Netherlands to prosecute a man who had exclaimed "fuck the king" during a parade led to a public debate, but proves the old meaning of *dignitas* still lingers in our modern society.[5]
But already in Roman times there was another meaning ascribed to *dignitas*, a broader concept than the one described above, for example by Cicero.[6] He referred to the dignity of a human being, which a human being had merely because he had the status of a human being. With this, the contrast between humans and animals was construed, and it raised important questions about our status as human beings, and what this dignity that comes along with it means.[7] These questions are still difficult to answer, which points out the core of the problem of the concept of human dignity.
In the Middle Ages, when philosophy was dominated by the Church, the concept of dignity stayed in the spheres of pointing out the difference between humans and other

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[3] Barbara Misztal. "The idea of dignity: Its modern significance", *The European Journal of Social Theory, vol. 16(1) (2012)*. P. 102

[4] Jürgen Habermas. "The concept of human dignity and the realistic utopia of human rights", *Metaphilosophy, vol. 41(4) (2010)*. P. 471

[5] Freek Schavesand. "'Fuck de koning!' Mag dat?", *NRC Next, 7 May 2015*

[6] E.g. in Cicero's work *De Officiis*.

[7] Christopher McCrudden. "Human Dignity and Judicial Interpretation of Human Rights", *The European Journal of International Law, Vol. 19(4) (2008).* P. 657

species. It was because of the view that humans were created by God in the image of God himself, that humans had a special kind of status, different from other species: a status with dignity.[8] In the Renaissance period, the idea that what differentiated men from animals more than anything was the possession of reason. By claiming reason as the greatest gift from God, this was an important bridge between the classical Roman thinking and the doctrine of the church. The idea that God gave us the capacity to reason on our own also opened the door to the idea of man as an autonomous species. From then on, the concept developed more and more in the direction of the human being as the master of his own faith. Gradually, the religious based thinking (men created in God's image, reason as the greatest gift of God) about the concept became more philosophical. Not surprisingly, this coincided more or less with what we call the period of Enlightenment.[9] The idea of autonomy as a foundation for dignity was used by Immanuel Kant, whose philosophy required to use people as ends in themselves, and not merely as means to an end. Dignity is an inner value from this perspective, which all human beings possess.[10]

At the end of the 18th century, in the time of the French Revolution, dignity came closely related to Republicanism. The Declaration of the Rights of Men and of the Citizen, a fundamental document of the French Revolution, proclaimed by the French revolutionary government in August 1789, extended dignity to every citizen, using it as a way to create equality, instead of the dignities or privileges ascribed to the aristocracy, which pointed out the difference in social status.[11] In reaction to this Declaration, Jeremy Bentham wrote his critical essay *Anarchical Fallacies*, in which he famously wrote:

> *"From* real *law, come* real *rights; but from* imaginary *laws come* imaginary *rights."*[12]

His criticism addressed the phenomenon of human rights in general. In a realist light we can see his point: there has to be real enforceable law, with real practical applicability to protect any right. With the European Court of Human Rights, there now is an institution that enforces the human rights from the Convention, so that part of the critique is no longer valid. But still, we could imagine Bentham to have critique on the usage of the concept of human dignity as an instrument of law. He would probably have his doubts about how it could work in practice, when there is no clear notion of human dignity.

The modern concept of dignity calls for respect for other people's autonomy and rejects humiliating constraints on freedom. But despite these widely accepted fundamental

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8 McCrudden, "Human Dignity and Judicial Interpretation of Human Rights", p. 658

9 McCrudden, "Human Dignity and Judicial Interpretation of Human Rights", p. 657-659

10 Misztal, "The idea of dignity: Its modern significance", p. 102

11 McCrudden, "Human Dignity and Judicial Interpretation of Human Rights", p. 660

12 Marie-Bénédicte Dembour. *Who believes in Human Rights?* (Cambridge: Cambridge University Press, 2006). P. 30

ideas of the concept, it is still not very precisely defined. This leads to difficulties and criticism on the utility of the concept in legal practices and other. Without clear and specific content, it could easily be seen as 'rhetorical dressing', or 'a mere decoration which dresses up a tautological reasoning'[13].
It was only since the beginning of the 20th century that the concept of human dignity was used in any legal discourse. It entered the constitutions of Mexico (in 1917), Weimar Germany (in 1919) and Cuba (in 1940) for example.[14] But it wasn't until after the Second World War, where the vision of tremendous horrors shocked the world, creating a renewed boost to the popularity of the notion of (respect for) human dignity, that the concept entered international legal texts, used as a justification for universal human rights. In the Universal Declaration of Human Rights, adopted by the United Nations in 1948, the notion of human dignity is used in the preamble and in article 1 ("*All human beings are born free and equal in dignity and rights*"). This declaration set the example for other international documents of human rights. But, the most effective international legal treaty on human rights, the European Convention on Human Rights, though similar to the Universal Declaration of Human rights in many ways, does not include any mentioning of dignity.

The development of the concept through the ages, does not add up to one specific concept of human dignity, an we can safely say that it is difficult to with a concept like this. There are different ideas about the genesis of the concept, different ideas about the notion of the concept, different ideas about the practical applicability of the concept. Christopher McCrudden says there are in essence three different perceptions of human dignity, which we can also recognise in the short history above. The first perception is rooted in religion, and based on worth of the human being. This perception strongly links human dignity to God, where humans are a special species appointed by God, and endowed with dignity. The second one is rooted in (especially Kant's) philosophy and based on respect. It stresses the importance of personal autonomy. The third perception is based on the limitation of the state. This perception looks at history to decide which particular type of action in the past (like different examples from the Second World War) should be considered graceless due to its consequences, and should be prevented to appear in the future. [15] These three different perceptions of Brownsword will come back in discussing the coherence of the Court in Chapter 2.

Even in modern times all three different strategies could be adopted. There are still many people who will link human dignity to religion, due to their personal beliefs. Also the philosophical strategy, with a call for respect for autonomy and equal rights will

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13 Jeremy Waldron. "Dignity and Rank", *48 Archive Européenne de Sociologie (European Journal of Sociology, 2007)*. P. 203

14 McCrudden, "Human Dignity and Judicial Interpretation of Human Rights", p. 664

15 McCrudden, "Human Dignity and Judicial Interpretation of Human Rights", p. 658

appeal to many people. The historical view can be seen directly in the drafting of the Universal Declaration of Human Rights and subsequent human rights documents. Without the horrors of the Second World War, this probably would not have happened the same way. All three strategies are still relevant. What conclusion does this provide us with? That we will probably have a difficulty finding coherence in the usage of human dignity. In the following chapters I will explore the jurisprudence of the Courts, looking for coherence. But consider all the different judges that have or ever had a seat in the Court: would they all think about human dignity the same way? Sticking to the perceptions of McCrudden, will all the judges, in the past and in the future, adopt the same perception? Judges use dignity for various reasons depending on the case. The question is, are these different appearances coherent in any way? And if so, are they also coherent with reference to any underlying philosophical conception of dignity?

Robert Brownsword also recognizes that human dignity is difficult to apply in a coherent way in legal judgments. According to him, the tension lies in the difference between a liberal philosophy and a conservative philosophy in applying human dignity.

> *"Broadly speaking, while liberals appeal to human dignity in order to protect and to extend the sphere of individual choice, conservatives appeal to human dignity in order to impose limits on what they see as the legitimate sphere of individual choice."*[16]

In practice this means that applying human dignity in a liberal spirit comes down to using the concept as the underpinning of human rights, while the conservative spirit holds that the fundamental duty is not to compromise human dignity.[17] With these two different approaches in mind, we can imagine human dignity as a tool of empowering and as a tool of constraining. In the latter approach, human dignity creates certain boundaries, per example how *not* to treat someone in order not to compromise his human dignity. For example, a government is not allowed to keep someone in detention for too long, without a charge. This is generally considered in contradiction with human dignity. In other words, the government is allowed to keep people in detention without charge, but not for a longer amount of time than is allowed by human dignity. On the other hand, human dignity as a tool of empowerment can entail positive obligations. Considering it in line with human dignity to be able to change sex, human dignity can require governments to create the possibility to change one's sex status in his passport.
I will come back to this tension between a conservative spirit and liberal spirit in Chapter 3.

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16 Brownsword, "Human dignity from a legal perspective", p. 1

17 Brownsword, "Human dignity from a legal perspective", p. 7

We can conclude that there is little chance of finding a perfectly coherent version of human dignity throughout the judgments of the Court. However, this doesn't mean there can be no coherence at all. In some way, the concept is put to use in similar situations or with similar meaning. This can still tell us a lot about human dignity as an instrument of law. Maybe this flexibility of the concept can even be of use to the Court.

2. Internal coherency in the judgments of the Court

Where human dignity is widely seen as the foundation of human rights, one of the most famous and important human rights documents, the European Convention on Human Rights, does not mention human dignity anywhere. Why would this be? And what does this mean? Doesn't the Convention recognize human dignity as the foundation of its human rights? To understand what our perception regarding human dignity in the light of the Convention must be, we have to look into the statements of the institution with the task of clarifying the means of the Convention: the European Court of Human Rights.

Although the Convention doesn't mention human dignity, the Court does. It is often found as a foundation of the legal reasoning of the Court, and it is engaged in many different kinds of human rights violations. According to Costa, human dignity could be left out of the Convention in order to improve pragmatism.[18] We can assume that the drafters had in mind a similar idea as a foundation for human rights as the drafters of the Universal Declaration of Human Rights had. The drafters of the Convention, the Council of Europe, founded in 1949, not only gave birth to the Convention in 1950, but also to the European Social Charter in 1961, in which the concept of human dignity does appear.[19] It is possible that Costa is right, and that the drafters of the Convention did not see human dignity as a very practical instrument. The big difference between the Convention and for example the Universal Declaration of Human Rights is after all the fact that the Convention is actually enforceable, namely by the Court. To be enforceable, the Convention needs to be pragmatic.

There are different rights to which the Court delivered a judgment with a reference to human dignity. The merit of the search should be the ability to find out if the way in which the Court uses the concept is in any way coherent. I hope to find this out while asking at least the following two questions: does the Court consider human dignity as the foundation of the Convention as a whole, or (also) as foundation for each (or some) article(s) individually; and how does the Court put the concept to use (solely as a foundation of the rights, or also to qualify a right)?

Tyrer v. United Kingdom

The very first judgment in which the Court made reference to human dignity came in 1978, in the case of *Tyrer v. United Kingdom*.[20] This case comprised of a fifteen year old from the Isle of Man, a Crown Dependency of the United Kingdom, who was prosecuted for an incident at school, for which he was convicted of unlawful assault occasioning

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[18] Jean-Paul Costa. "Human Dignity in the Jurisprudence of the European Court of Human Rights", *in: Understanding Human Dignity,* ed. Christopher McCrudden (Oxford University Press, 2013). P. 393

[19] In article 26, the European Social Charter states the 'right to dignity' at work.

[20] *Tyrer v. United Kingdom*, 25 April 1978, Application no. 5856/72

bodily harm. He was sentenced to three strokes of the birch. The punishment was executed by a police officer, in the police station, in the presence of his father and a doctor. The boy's buttocks were sore for about a week and a half afterwards. This was the first case in which the Court had to decide on corporal punishment for disciplining youngsters.[21] The treatment could not be considered torture, nor could it considered an inhuman treatment. The question that remained was if it was to be considered a degrading punishment.[22] The Attorney-General of the Isle of Man argued that the judicial corporal punishment didn't outrage public opinion on the Island: it was a longstanding law, considered very normal by the people on the island. The Court refuted this argument: first of all, the fact that it didn't outrage public opinion doesn't mean that the punishment couldn't be experienced as degrading by the convicted. Secondly, the Court stated that:

> *"…the Convention is a living instrument which (…) must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field."*[23]

As regards the manner of execution of the punishment, the Attorney-General stated that the punishment was carried out in private and without publication of the name of the offender. On the publicity matter the Court mentioned that this may be a factor in answering the questioning if the facts of the case fell within the meaning of Article 3, but that the absence of publicity did not necessarily mean that it doesn't fall within the meaning of Article 3. In fact, the Court considered that it may well be sufficient when the convicted was degraded in his own eyes, even if not in the eyes of others.[24]
The final judgment of the Court said:

> *"…although the applicant did not suffer any severe or long-lasting physical effects, his punishment – whereby he was treated as an object in the power of the authorities – constituted an assault on precisely that which is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity. Neither can it be excluded that the punishment may have adverse psychological effects."*[25]

Later on, the Court added to that:

> *"The indignity of having the punishment administered over the bare posterior*

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21 Dembour, "Who Believes in Human Rights?", p. 171

22 *Tyrer v. United Kingdom*, 25 April 1978, Application no. 5856/72, par. 29

23 *Tyrer v. United Kingdom*, 25 April 1978, Application no. 5856/72, par. 31

24 *Tyrer v. United Kingdom*, 25 April 1978, Application no. 5856/72, par. 32

25 *Tyrer v. United Kingdom*, 25 April 1978, Application no. 5856/72, par. 33

aggravated to some extent the degrading character of the applicant's punishment but it was not the only or determining factor."

The Court couldn't be more clear on the role of human dignity in this judgment: one of the main purposes of Article 3 is to protect a person's dignity and physical integrity. Apparently, the Court considers the punishment in the case at hand in particular, and a degrading treatment in general a violation of a person's dignity. It is a bit surprising that the first time the Court decides to use dignity in its judgment, it is said to be a foundation for Article 3 in particular. If the concept plays a fundamental role for the rest of the Convention is left unanswered. It is emphasized that Article 3 is one of the more important rights that is protected by the Convention, which also shows by the fact that there is no possible provision for exceptions. But 'to protect human dignity', considered as a foundation for the Convention as a whole, named as the specific aim of Article 3, shows that the Court sees Article 3 as a core Article, which cannot be said about all articles. This means there could very well be a kind of hierarchy amongst the different rights.

It is not only human dignity that is used as a foundation for the Article though. There is also a sense of qualification of Article 3. The Court mentioned the fact that the punishment was administered over the bare posterior, and admitted that this aggravated the degrading character of the punishment. Dignity itself is apparently a part of drawing the line between a non degrading punishment and a degrading one. Although not the only or determining factor, the fact that it was on the applicant's bare posterior helped aggravate the character to an extent that it eventually crossed that line.

The Court decides to use dignity as something that can be violated by punishing someone in a degrading way, even it is merely degrading in the eyes of the victim. This hints at dignity as a status, which has to be respected. This makes sense, considering that the Court named protecting dignity together with protecting someone's physical integrity. Considering dignity as a status relates it, together with physical integrity, to autonomy.

Selmouni v. France

The case of *Selmouni v. France*[26] was also an Article 3 case. It was about a man, Selmouni, who was taken into custody by the French police on the suspect of drugs trafficking. During his detention, the applicant claims to be physically mistreated on many occasions. He claims to have been beaten, urinated on, and sexually assaulted with a truncheon. Multiple medical examinations support most of his claims.

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26 *Selmouni v. France*, 28 July 1999, Application no. 25803/94

Again, the Court stresses the importance of Article 3, calling it one of the most fundamental values of democratic societies.[27] The Court finds a violation of Article 3:

> *"The acts complained of were such as to arouse in the applicant feelings of fear, anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical and moral resistance. The Court therefore finds elements which are sufficiently serious to render such treatment inhuman and degrading. In any event, the Court reiterates that, in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3."*[28]

The Court mentions similar things about the relation between human dignity and Article 3 as in *Tyrer v. United Kingdom*, not only about the importance of Article 3 within the Convention but also human dignity as a way of qualifying Article 3: a diminishment of human dignity can cause an infringement of Article 3. By using it as a tool of qualification, the Court again seems to see dignity as a foundation for Article 3 in particular, rather than as a foundation for the Convention as a whole.

Again, the Court seems to consider human dignity to be strongly connected to physical integrity, relating the concept to physical and mental autonomy, which has to be respected. But this is not the only way you could look at it. There is also a strong incentive of the Court in this case to correct the Government, in order to put a limitation on the power of the state. Mistreatment by the police is a grave abuse of power. The Government should be there to prevent mistreatments in general, and they should never punish someone before their guilt is proven. It is a phenomenon of the imminent danger that power corrupts, and one of the reasons that a supranational court of justice can prove to be very useful.

Pretty v. United Kingdom[29]

In this case the applicant is a 43-year old woman. She suffers from a disease which will certainly cause her death within a short time. Death usually occurs unpleasantly as a weakness from the breathing muscles. There is no cure. Because of the distressing and undignified final stage, she strongly wishes to commit suicide, but due to the already occurring symptoms of the disease, she is unable to do so without any help. Her husband is willing to assist her, so she writes a letter to the Director of Public Prosecutions with a request not to prosecute her husband after her death, because

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27 *Selmouni v. France*, 28 July 1999, Application no. 25803/94, par. 95

28 *Selmouni v. France*, 28 July 1999, Application no. 25803/94, par. 99

29 *Pretty v. United Kingdom*, 29 April 2002, Application no. 2346/02

assisting with suicide is a criminal offence in the United Kingdom. The request was rejected. She asks the Court to declare the rejection in violation of the Convention. The Court found no violation of Article 2, the right to life, which the applicant considered as a right to determine one's own life, in short because:

> *"It may be described in general terms as imposing a primarily negative obligation on States to refrain from inflicting serious harm on persons within their jurisdiction."*[30]

As to Article 8, the right to privacy and family life, the Court considered:

> *"The very essence of the Convention is respect for human dignity and human freedom. Without in any way negating the principle of sanctity of life protected under the Convention, the Court considers that it is under Article 8 that notions of the quality of life take on significance. In an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity."*[31]

> *"The applicant in this case is prevented by law from exercising her choice to avoid what she considers will be an undignified and distressing end to her life. The Court is not prepared to exclude that this constitutes an interference with her right to respect for private life as guaranteed under Article 8 §1 of the Convention."*[32]

But the Court found no violation of Article 8 either, because the rejection of the request was in accordance with Article 8 §2, in which interference with the right to privacy and family life is allowed when it is in accordance with the law and is necessary in a democratic society. Whether it is necessary in a democratic society was considered to fall within the margin of appreciation.[33]

In this case, the Court says that respect for human dignity is, together with human freedom, the essence of the Convention. Unlike the previous two discussed cases, dignity is not named a foundation of Article 2 or 8 in specific, but for the Convention as a whole. It seems like the Court is not putting up to discussion whether the way the applicant is going to die is with or without dignity. This is in accordance with what the Court said in *Tyrer v. United Kingdom*, where it was enough that the punishment was

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30 *Pretty v. United Kingdom*, 29 April 2002, Application no. 2346/02, par. 50

31 *Pretty v. United Kingdom*, 29 April 2002, Application no. 2346/02, par. 65

32 *Pretty v. United Kingdom*, 29 April 2002, Application no. 2346/02, par. 67

33 *Pretty v. United Kingdom*, 29 April 2002, Application no. 2346/02, par. 70

degrading in the eyes of the applicant.[34] The fact that the applicant herself considered her way of dying not in accordance with human dignity could be enough.

In the previous cases the Court used human dignity not only as a foundation of the right or of the Convention, but also to qualify the content of the right. Apparently, the Court felt no need to do so in the case at hand. Whether or not there was a violation of the right was put off to the margin of appreciation, instead of judging it on the facts and the violation of the foundation of the Convention. There was a possibility here to take the opportunity to restrict the power of the State again, by declaring it an intervention of the applicant's autonomy, with the consequence of a direct violation of the foundation of the Convention. The difference between *Pretty v. United Kingdom* and *Tyrer v. United Kingdom* or *Selmouni v. France* probably lies in the fact that Article 3 is an absolute right, without the possibility for exemption.[35] With the existence of §2, Article 8 does. However, it does seem odd that a direct violation of the very foundation of the Convention can be set aside with a reference to the margin of appreciation. It also makes clear that there certainly is a hierarchy between the different rights of the Convention.

Christine Goodwin v. United Kingdom

In the case of Christine Goodwin[36], the applicant is a transsexual, helped by surgery to turn from a man into a women. Despite her complete sex change, the applicant still experienced difficulties on a daily basis with her past. According to the applicant, the Government failed their positive obligation to ensure her right to respect for her private life, and thus violated Article 8 of the Convention. The most prominent complaint is the lack of legal recognition given to her gender re-assignment. The Government said that the lack of recognition fell within the margin of appreciation that was attributed by the Convention to the States. In their defence they also claimed that there was no generally accepted approach within the Signatory States in respect of transsexuality.
The Court decided:

> *"…the very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings. In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-*

34 *Tyrer v. United Kingdom*, 25 April 1978, Application no. 5856/72, par. 32

35 *Selmouni v. France*, 28 July 1999, Application no. 25803/94, par. 95

36 *Christine Goodwin v. United Kingdom*, 11 July 2002, Application no. 28957/95

operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable."[37]

The Court balances out the facts of the case, considering that there may be difficulties with changing the system to open up the lost possibilities for transsexuals, but also that:

"[no] concrete or substantial hardship or detriment to the public interest has indeed been demonstrated as likely to flow from any change to the status of transsexuals and, as regards other possible consequences, the Court considers that society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost."[38]

Therefore, the Court judges that there has been a violation of Article 8 of the Convention:

"Having regard to the above considerations, the Court finds that the respondent Government can no longer claim that the matter falls within their margin of appreciation, save as regards the appropriate means of achieving recognition of the right protected under the Convention. (…) There has, accordingly, been a failure to respect her right to private life in breach of Article 8 of the Convention."[39]

Again, as in *Pretty v. United Kingdom*, the Court claims human dignity and human freedom to be the very essence of the Convention. It seems that the Court ascribes the notion of personal autonomy, as a vital part of that which Article 8 is presumed to protect, to this general foundation, being human dignity and human freedom. Unlike in the previous Article 3 cases, the Court doesn't ascribe the protection of human dignity in itself as one of the aims of Article 8, but apparently a part of human dignity and human freedom, or one interpretation of the concept, is.
Evidently, in this judgment human dignity expresses the respect for autonomy, and in a way physical integrity. The personal body is one's own to determine, including the consequences this has for formal gender. On the other hand, the protection that is given to the personal sphere of each individual also relates to the status as a human being. A right to determine one's own identity, ascribed to him by his status as a human being.

It is an interesting question whether the Court uses the concept of human dignity to qualify the right. On the one hand, the Court does use the fact that there is an interference with one's private life, and thus with human dignity, which causes a violation of Article 8. On the other hand, it all comes down to the question whether the

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37 *Christine Goodwin v. United Kingdom*, 11 July 2002, Application no. 28957/95, par. 90

38 *Christine Goodwin v. United Kingdom*, 11 July 2002, Application no. 28957/95, par. 91

39 *Christine Goodwin v. United Kingdom*, 11 July 2002, Application no. 28957/95, par. 93

interference is allowed by the possibility to exempt the situation from violating Article 8. This was a balancing between the interference and the pressing social need the Government had to refuse to alter the situation. In *Pretty v. United Kingdom* the final decision was considered by the Court to fall inside the margin of appreciation, leaving the actual qualifying of the right to the State. Here, the Court did no real qualification. But in this case the Court did the balancing on its own, so in a way qualified the right. The fact that human dignity is seen as the essence for the Convention as a whole, and that a part of human dignity is integrated in the right to privacy, seemed to weigh heavily in the balancing and was not outweighed by problems of mere practicality.

Siliadin v. France

The applicant in this case[40] arrived in France at the age of 15, under the supervision of a woman, Mrs D. It was agreed that the applicant would work at Mrs D.'s home until the airplane ticket to France was paid. Mrs D. would see to the applicant's immigration status and send her to school. In fact, the applicant became an unpaid housemaid. The applicant was also 'lent' to another couple, Mr B. and Mrs B., where she also worked as a maid and looked after the couple's children. The applicant worked seven days a week from 7 a.m. to 10 p.m., never went to school, did not have her own room to live in and never got paid.

In first instance, the French court sentenced Mr B. and Mrs B. to imprisonment and ordered them to pay a fine. In appeal, however, the judgment was quashed. Finally, the Court de Cassation held up the findings of the court in first instance, but only for the civil aspects. Mr B. and Mrs B. were not sentenced for any criminal offence. According to the French Criminal Code, there would have to be 'exploitation through labour and subjection to working and living conditions that are incompatible with human dignity'. According to the applicant, the refusal to sentence Mr and Mrs B. for a criminal offence was a violation of Article 4, the right not to be subjected to slavery or servitude. According to the French court of Appeal:

> *"…the additional investigations and hearing had shown that, while it did appear that the applicant had not been paid or that the payment was clearly disproportionate to the amount of work carried out (…), in contrast, the existence of working or living conditions that were incompatible with human dignity had not been established."*[41]

The Court states that the afore mentioned provision of the French Criminal Code does not deal with the specific rights guaranteed by Article 4 of the Convention. As it was established that the applicant was held in servitude, the French judicial system failed to punish the wrongdoers according to Article 4 of the Convention.

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40 *Siliadin v. France*, 26 October 2005, Application no. 73316/01

41 *Siliadin v. France*, 26 October 2005, Application no. 73316/01, par. 40

Surprisingly, the Court omits the word dignity when speaking for its own. The judgment only contains the concept when referring to the words of the French courts or the French Criminal Code. Although the French Criminal Code was fixated on protecting human dignity, it failed to live up to the standards of the Convention. It would not be strange to think that any code of law that aims to protect human dignity would be compliant to the Convention.

The Court had the ability here to state that conditions in which we speak of servitude, forced labour or slavery are *always* conditions of working and living that are incompatible with human dignity. Instead, the Court judged that the aims of the French Criminal Code did not perfectly comply with Article 4 of the Convention. This leaves human dignity remarkably absent in the conditions the Court sets for Article 4.

The following quotes refer to previously discussed cases:

> *"…the very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings."*[42]

> *"...precisely that which is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity..."*[43]

Now compare these to the following quote from *Siliadin v. France*:

> *"The Court reiterates that Article 4 enshrines one of the fundamental values of democratic societies."*[44]

It seems as if the Court deliberately avoids using the word dignity, as it might infringe the constitution of the judgment. Not that every right granted by the Convention doesn't enshrine one of the fundamental values of democratic societies, of course it does, that is why we have this Convention, but what is the *purpose* of protecting anyone from slavery or servitude? The Court does not elaborate on the fact that we do not want people to be subjected to slavery because it is a violation of a person's dignity. Just like torture, slavery is a perfect example of a phenomenon that is so disgracing to human dignity

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42 *Christine Goodwin v. United Kingdom*, 11 July 2002, Application no. 28957/95, par. 90

43 *Tyrer v. United Kingdom*, 25 April 1978, Application no. 5856/72, par. 33

44 *Siliadin v. France*, 26 October 2005, Application no. 73316/01, par. 112

under any circumstances that we want to ban it under any circumstances. I will come back to the question why the Court might have left dignity out, in Chapter 3.

Conclusion

In the different cases, different remarks have been made by the Court about human dignity. As far as it wasn't clear already, the Court does actually admit that human dignity forms, together with human freedom, the essence of the Convention. But, human dignity has a special role within the appliance for Article 3. Not only does it have a stronger qualifying notion compared to the use in other articles, but it is also explicitly named as a main purpose of the Article to protect human dignity. When considering that human dignity is the essence of the entire Convention, it does seem odd to make a difference within the different rights whether its aim is to protect dignity or not. Shouldn't they all?

Despite the fact that human dignity is named as the essence of the Convention, it is not always an overriding argument. In the case of *Pretty v. United Kingdom*, the Court decided that although the circumstances of the applicant were not according to human dignity, the State could use their margin of appreciation whether they took action or not.

We have seen all three perceptions of John McCrudden pass: the perception based on worth, based on respect and based on limitations of the State. In most cases we have seen that two of these perceptions could be applied to the way the Court uses the concept. For a large part, the perceptions overlap and aim to protect the same thing. The places were these perceptions overlap may be the closest we can come to the essence of human dignity.

Is the way in which the Court uses human dignity coherent? In the Article 3 cases we have seen multiple similarities and we could say that there the concept is coherently used. When looking at cases across different articles, it becomes more difficut to see similarities in the outcome or the aim of human dignity as a legal instrument. But in my opinion, the Court doesn't put the concept to use in a vague way. The Court is careful in using the word and doesn't throw it in when they can. When it is used, they provide context which doesn't give reason for the reader to question what the Court means exactly with dignity.

However, the way the Court seemed to evade the concept in *Siliadin v. France*, whilst there was sufficient reason to refer to the context does beg the question if the Court is consistent.

3. Human dignity as instrument of law

In the previous chapter we have seen that the Court is not very generous with using the word dignity. This doesn't make it easier to answer the question at hand, but we may assume that the vagueness of the notion of human dignity is for a large part the reason for the Court's reluctance to use it. Why would the Court burn its fingers in an effort to define the concept of human dignity? Due to the lack of consensus on the content of the concept, it could only weaken the Court's argumentation. When used as an empty shell, it is not a very impressive argument. Besides that, as mentioned in the conclusion of previous chapter, the context of the case should provide enough to evade any question on dignity. An arrested person beat up by the police while under interrogation, a person who is dying in pain without a better future, are all cases without a doubt that are in contradiction with human dignity. The more surprising is the absence of the concept in the case of *Siliadin v. France*, because slavery is also something that is regarded as contrary to human dignity without any discussion. This brings us to the two questions as promised in the introduction. Can the concept of human dignity contribute to a coherent evolution of the Convention? This question will be answered with another look at *Tyrer v. United Kingdom*. The second question asks if human dignity can ever be a coherent component of law. This question will be answered with another look at *Siliadin v. France.*

Does human dignity contribute to a coherent evolution of the Convention?
On the one hand, human dignity can be put to use as an important factor in the argumentation, making an argument hard to refute. But we do not want human dignity as an empty shell, with no clear definition and vague content, making it easy to use in any argumentation. Without a clear definition or further explanation of the concept, it is a factor of risk in the argumentation of the Court. When it becomes unclear what the Court means with human dignity, and it is unclear when human dignity does apply to an argumentation and when it doesn't, it rather weakens a judgment then strengthens it. This would call for more elaboration of the Court on its notion of human dignity. On the other hand, it is understandable that the Court needs a kind of discretion, by which they can measure all the circumstances of each individual case. The Court needs this space to be able to reach a fair decision in each case, which can prove to be hard when everything is set in stone. This way, the absence of a crystal clear notion of human dignity is actually helping the Court, as it leaves space for interpretation. As we can see, there are arguments for and against the desirability of a clear notion of human dignity.

In *Tyrer v. United Kingdom*, the Attorney-General of the Isle of Man referred in particular to the public opinion of the island, which was in favour of the chosen punishment, and

did not consider the punishment degrading.[45] Therefore the Court also answered the question whether there are such local requirements that in spite of its degrading character, the punishment does not entail a breach of Article 3 of the Convention. The Court made the following comments on the question:

> *"The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of the present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field."*[46]

> *"…even assuming that judicial corporal punishment did possess those advantages which are attributed to it by local public opinion, there is no evidence before the Court to show that law and order in the Isle of Man could not be maintained without recourse to that punishment. In this connection, it is noteworthy that, in the great majority of the member States of the Council of Europe, judicial punishment is not, it appears, used and, indeed, in some of them, has never existed in modern times; in the Isle of Man itself, as already mentioned, the relevant legislation has been under review for many years. If nothing else, this casts doubt on whether the availability of this penalty is a requirement for the maintenance of law and order in a European country."*[47]

Although the Court stresses that Article 3 is an absolute right, no provision is made for exceptions, and there can be no derogation from Article 3.[48] Here it seems to give away, that even an absolute right is under the influence of cultural relativism.[49] The Court says that it '*cannot but be influenced by the developments and commonly accepted standards'*, meaning that its perception of the punishment is determined by the perception of the punishment in other European countries. The question what would be compliant with human dignity is thus culturally entrenched.[50] What is and what isn't compliant with human dignity, is determined, in a way, by how the different populations and cultures of Europe feel about corporal punishment. Whether the punishment is to be considered degrading depends on what is commonly accepted in a culture as degrading. This can differ between different cultures: some people can feel degraded by something while others aren't. The Court says here, that in Europe corporal punishment is in general considered degrading. But this doesn't mean that in other cultures corporal punishment can be allowed as an appropriate punishment. It wouldn't be desirable if the interpretation of Article 3 would be set in stone, as this would prevent the Convention

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45 *Tyrer v. United Kingdom*, 25 April 1978, Application no. 5856/72, par. 37

46 *Tyrer v. United Kingdom*, 25 April 1978, Application no. 5856/72, par. 31

47 *Tyrer v. United Kingdom*, 25 April 1978, Application no. 5856/72, par. 38

48 *Tyrer v. United Kingdom*, 25 April 1978, Application no. 5856/72, par. 30

49 Dembour, "Who Believes in Human Rights?", p. 171

50 Dembour, "Who Believes in Human Rights?", p. 171

from being a living instrument. We see in these words of the Court that the line of human dignity, and with that the line of being a degrading punishment or not, is crossed because of the conditions and perceptions in other European countries. Because of the fact that the concept of human dignity is not entirely spelled out, it grants the Court space to judge on the facts of the case, and with that it enables the concept to contribute to the evolution of the Convention, making it a useful instrument.

As to the question of the added value of human dignity within the argumentation of the judgment, imagine the judgment without mentioning human dignity. What would remain was the Court saying: other countries do not participate in this kind of punishment, so neither can you. Obviously, this is not a very strong argument. With referring to human dignity the Court actually says *why* other countries do not participate in this kind of punishment: for the sake of respect for human dignity. And for exactly this reason the Isle of Man shouldn't use this kind of punishment either. This makes it morally defensible to intrude in the legislation of the Isle of Man, and contradict with what apparently is the public opinion of its citizens.

In this way the Court is able to use the same criterion that is applicable to all the different judicial systems in Europe. In all honesty, we cannot deny that in the future other opinions might be prevalent, on this subject or another. In this situation the Court would not be forced to change its opinion or its criterion on the matter, as the same reason used in *Tyrer v. United Kingdom* could be applied, perhaps with a different outcome. The criterion would stay the same: is the punishment degrading, which can be determined with the answer to the question if it is compliant with human dignity? This way it stays legally coherent. The Convention can stay the same, so can the criterion, but the circumstances and outcomes may change: this makes it a living instrument.

So far, it seems a very useful instrument, contributing to the Convention in a morally defensible and legally coherent way, but there are two critical remarks that have to be made.
First of all, the Court emphasizes the absolute character of Article 3. One can ask the question to what extent the story about evolution, explained above, is compatible with this absolute character. As Dembour puts it, the absolute character gives Article 3 the 'gloss of universalism', making it seemingly hard to imagine cultural arguments against this right.[51] However, as argued above, the Court's interpretation of Article 3 is, up to a certain point, influenced by cultural arguments. This does detract a little from the absolute character. We can say that human dignity is a hard line, that cannot be crossed, but then we may forget that the position of this hard line is liable to cultural interpretation. This makes it impossible to indicate the exact position of that line at all

[51] Dembour, "Who Believes in Human Rights?", p. 171

times, which brings us close to the second point of critique.

Not only does the notion of human dignity create an imperfect compatibility with the absolute character of article 3, due to its liability on cultural arguments, it can also create a tension with the rule of law. When one creates a rule, it must be perfectly understandable, for those who have to adhere to that rule, what the rule contains, and which actions are compatible and which aren't. It would be unfair to punish people that were not able to fully understand the fact that what they were doing was wrong. If the notion of human dignity has such a strong hint of vagueness, how can it provide the proper guidance? If it doesn't guide action, doesn't that defeat the purpose of law? Roger Bronsword presents us with a clear example, saying that if this were not a problem, we could all do with just one law: act in accordance with human dignity.[52] It doesn't need explanation why this would create problems and why it wouldn't work. To a certain extent, this showed in *Tyrer v. United Kingdom*. According to the Attorney-General of the Isle of Man the majority of the citizens of the Isle of Man didn't think of the punishment as degrading. They weren't aware of the fact that their judicial system was in contradiction with the Convention on this point. The more the Court allows its interpretation of the Convention to rely on human dignity, the bigger this problem becomes. On the other hand, this argument is valid only up to a certain point. The Convention itself doesn't provide a crystal clear notion on every right either. Article 3 doesn't contain the sentence *'thou shalt not molest an arrested person in order to interrogate him'*, nonetheless we do understand that Article 3 forbids us to beat up an arrested person in order to interrogate him.

Can human dignity ever be a coherent component of law?

As we have seen in the previous paragraph, using human dignity in a judgment is not without problems. An unclear notion of human dignity leads to an unclear argumentation of the judgment. Also, the rule of law demands a clear notion of every right protected in the Convention. It begs the question if it isn't possible to keep human dignity out of the judgments of the Court, as it is in the Convention itself. That human dignity is not a necessary tool for the Court is proven in the case *Siliadin v. France*.

Let's have another look at the curiosity of this case. The French law was about protecting human dignity, but in the considerations of the Court why this law wasn't sufficient, the Court didn't mention human dignity explicitly. The court noticed that there wasn't a French law that explicitly prohibited slavery or forced labour or servitude.[53] What the French law did prohibit was *exploitation through labour and subjection to*

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[52] Roger Brownsword. "Human dignity from a legal perspective," in *The Cambridge Handbook of Human Dignity*, ed. Marcus Düwell et al. (Cambridge: Cambridge University Press, 2014). P. 13

[53] *Siliadin v. France*, 26 October 2005, Application no. 73316/01, par. 142

working and living conditions that are incompatible with human dignity.[54] According to the Court, the protection that was offered by this law wasn't in accordance with the aim of Article 4 of the Convention.

This is where we return to the tension between a conservative and a liberal spirit of applying human dignity, as posed by Robert Brownsword. Remember that the spirits differ in the fact that the conservative spirit uses human dignity as a tool of constraining and the liberal spirit uses human dignity as a tool of empowerment.

Looking at the French law, we recognise that it is mostly aimed at preventing circumstances that compromise human dignity. But for the Court, this isn't sufficient. Clearly, they expect something more from Article 4.

> *"Having regard to its conclusions with regard to the positive obligations under Article 4, it now falls to the Court to examine whether the impugned legislation and its application in the case in issue had such significant laws as to amount to a breach of Article 4 by the respondent State."*[55]

> *"The Government pointed to Articles 225-13 and 225-14 of the Criminal Code. The Court notes, however, that those provisions do not deal specifically with the rights guaranteed under Article 4 of the Convention, but concern, in a much more restrictive way, exploitation through labour and subjection to working and living conditions that are incompatible with human dignity."*[56]

To be compliant with Article 4, the law needs not only to constrain the working and living conditions, but everything that falls in the category of 'modern slavery'[57], regardless of the specific circumstances and conditions. The rules should be making it impossible to keep someone in any form of forced labour, broadening the sphere of individual choice. We recognize a more liberal spirit in this reasoning. A law that prohibits conditions that compromise human dignity is not enough, the law should enforce the fundamental right not to be subjected to forced labour. It's not that the Court spoke without the spirit of human dignity, it just used it in another spirit, highlighting the tension meant by Brownsword. The fact that the Court didn't mention human dignity while explaining this difference between the French law and Article 4 of the Convention, now seems less strange: to explain the aim of Article 4 on the basis of human dignity would be complicated due to the explicit mentioning of human dignity by Article 4. There is no room in a judgment like this to explain possible different 'spirits' of human dignity, and it

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54 *Siliadin v. France*, 26 October 2005, Application no. 73316/01, par. 142

55 *Siliadin v. France*, 26 October 2005, Application no. 73316/01, par. 130

56 *Siliadin v. France*, 26 October 2005, Application no. 73316/01, par. 142

57 *Siliadin v. France*, 26 October 2005, Application no. 73316/01, par. 122

would only create a lot of noise on both the concept of human dignity and this judgment. This wouldn't benefit the comprehensibility of the judgment.

According to Brownsword, we can expect human dignity to appear in multiple ways, until this tension is solved.[58] As explained above, in *Siliadin v. France*, the Court approached human dignity in a more liberal spirit. But in other judgments, such as *Pretty v. United Kingdom*, we sense a more conservative spirit. Human dignity could be used as a tool of empowering, using the right to life to empower the sphere of one's choice over his own ending of life, but the Court did not. We can also sense a difference between the spirit of applying human dignity in *Siliadin v. France* and the discussed Article 3 cases. In the Article 3 cases, the Court focused on the question if the circumstances of punishment and interrogation compromised human dignity. The government was allowed to punish or interrogate the applicant, but not in way that compromised human dignity. This seems familiar: the French law prohibited working and living conditions that are incompatible with human dignity. But the Court didn't consider that sufficient. Apparently, the Court struggles with this tension as well: they do not specifically choose a side on how to apply the concept, and appears to use different forms for different articles.

Back to the question posed before: is it possible to leave human dignity out of a judgment? Although the Court does not specifically mention human dignity, it does judge in the spirit of human dignity. So the fact that human dignity isn't specifically mentioned doesn't mean it doesn't serve as a foundation of Article 4. The Court does specifically mention that the prohibition of slavery enshrines one of the fundamental values of modern societies.[59] Why this is so is not explained, but we can assume that one of the vital reasons for this is that we understand slavery to be in severe contradiction of human dignity. Is it a problem that the Court doesn't mention a specific foundation in its judgment? Does every law, every rule need a foundation? Most national laws do not have a fundamental value of a modern society as foundation. They just exist, and are accepted by the grace of the fact that we recognize and exercise these laws. Does international law need more foundation? As long as states recognize international law, and act accordingly to it, the same goes for international law. The only foundation it needs is that its subjects recognize it as legal. The member States recognise and exercise the rights of the Convention, and accept the authority of the Court as its interpretation. Does the Convention need more foundation because it concerns human rights? It does seem odd to create a higher threshold on the legal right of existence of human rights than for example for rules of trade. Just as any other law, human rights law exist and is legit when it is recognized by its subjects, in this case the member States. I think that we intuitively think more about the foundation of human rights law, because

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58 Brownsword, "Human dignity from a legal perspective", p. 7

59 *Siliadin v. France*, 26 October 2005, Application no. 73316/01, par. 112

human rights law happen to have a stronger natural foundation. This does not mean we must subject human rights law to a higher threshold to be legit than other laws.

Conclusion

We have seen that human dignity can be a useful instrument that can contribute to the evolution of the Convention. We have also seen that this can be done in a morally defensible and legally coherent way, but some comments on that can be made. Is the way of reasoning in *Tyrer v. United Kingdom* not detracting the absolute character of Article 3, and with that the credibility of its protection? In addition to this, the foreseeability of any contradiction with human dignity can be a problem, urging the Court not to be too generous with using the term human dignity. As we have noticed, the Court is indeed not, thus reassuring us that they are aware of this possible problem.

If the Court uses human dignity without a clear notion of the content, we need to think about whether it is desirable that the Court uses the concept at all. Is it only needed when no alternative argument is there to support the judgment adequately? This is at least a risk that the Court is exposed to: they can use it at their own discretion, whenever they see fit, and omit it the same way. But as explained above, the fact that human dignity wasn't explicitly mentioned in *Siliadin v. France* didn't mean that they didn't judge in the spirit of human dignity. We may assume that human dignity is, in a way, present in any judgment of the Court, as it has mentioned that human dignity serves as foundation for the Convention. But it doesn't always appear in the same way. Not surprisingly, as Brownsword mentions, because there exists a fundamental tension in the nature of human dignity. This tension is best exposed when comparing the empowering spirit of the Court in applying human dignity in *Siliadin v. France,* where a law that prohibited working conditions incompatible with human dignity was not enough, with the constraining spirit of the Court in applying human dignity in *Pretty v. United Kingdom*, where the Court refused to use human dignity to enable the applicant to choose her own ending of her life on the basis of the right to life. I agree with Brownsword that as long as this tension exists, we cannot expect human dignity as a coherent component of law. The tension between liberal and conservative philosophy is so fundamental that we cannot expect it to be resolved at short notice, urging the Court once again not to be too generous with using the concept. Elaborating more on its specific notion of human dignity, the Court will probably not help itself.

Concluding remarks

From the history and the development of the concept of human dignity, we could already know that we would have a difficult time in finding perfect coherence in the application of human dignity by the Court. One's perception of human dignity is influenced by different factors. McCrudden thought us that a perception could be centred on the status of a human being, on respect for autonomy and on limitation of the state. In addition to that, Brownsword thought us that in the application of human dignity in legal judgments, a tension exists between applying human dignity in a conservative spirit and in a liberal spirit. Despite these difficulties, have we found a coherent concept of human dignity in the words of the Court?

Are the different uses of human dignity in the jurisprudence of the Court coherent?
In multiple cases, the Court mentioned human dignity as the very essence of the Convention. But the Court also mentions human dignity a specific aim of Article 3, which it did not do for other Articles. This puts Article 3 on a different level than the other Articles, emphasizing it as a core article. I also noticed that human dignity has a special qualifying role in Article 3 cases, where in other cases it is merely named as foundation. The Court uses human dignity in all three perceptions named by McCrudden. But I noticed that the different perceptions never contradicted each other, and overlapped most of the time. Moreover, the context of the case always provided such facts that there was never any doubt whether something was or was not in line with human dignity. The different uses are definitely not perfectly coherent. But the important thing is that the Court doesn't use the concept in a vague way. It is always perfectly understandable what the Court means.

Does human dignity contribute to a coherent evolution of the Convention?
In the second chapter we saw that human dignity can serve as a useful instrument to support the argumentation of the Court, making the argumentation more morally defensible. It also serves as a good criterion to help with a coherent evolution of the Convention because of the fact that the content of the concept of human dignity is not set in stone. Because our notion of human dignity evolves, the Convention can serve as a living instrument.

Is human dignity ever a coherent component of law?
The application of human dignity can be done in different ways. Human dignity can put constraints on action, but it could also empower action. This is a fundamental tension, and the Court sometimes struggles with it. In *Siliadin v. France* the Court had a difficult time explaining why the French law, which aimed to protect human dignity, was not in

line with the Convention. As long as this tension exists, human dignity can hardly be a coherent component of law.

The Court does not have a perfectly coherent concept of human dignity. However, the Court is very careful in using the concept. People can differ on the exact meaning of human dignity, but the careful way the Court uses the concept makes sure that whether something is in line with human dignity can almost never be the question. When human dignity can hardly be a coherent component of law at all, it is not surprising we do not find it in the judgments of the Court. This does not mean that human dignity cannot be a very useful instrument, strengthening the argumentation of the Court and contributing to a coherent evolution of the Convention in a morally defensible and legally coherent way. The most important thing is that the Court can emphasize the essence of the Convention: to protect human dignity. I have put forward that the Convention does not need a special foundation to be legit. But we must not forget that the Convention is not just another magisterial level, it is something people can believe in. By emphasizing that the Convention is there to protect human dignity, we will remember why we founded the Convention in the first place.

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