

ETHEL BENJAMIN COMMEMORATIVE ADDRESS 2010

DIGNITY

**Rt Hon Baroness Hale of Richmond
Justice of the Supreme Court of the United Kingdom**

It is a great delight to be back in New Zealand. I have fond memories of our first trip here in 1993, the centenary of your pioneering decision to give women the vote. I picked up a facsimile copy of a small poster from 1893 headed “Notice to Epicene Women”. It advised electioneering women that they were not wanted at that address and should get back to looking after their homes and their husbands. When I joined the Court of Appeal in England I put it up on the door of my chambers – mainly as a joke, but also to catch people’s eyes, and make them wonder where and when such sentiments could have been uttered. Hopefully, although I was the only woman on the court then, my colleagues would recognise that such things could never be said today. But I miscalculated. One day the poster disappeared. A colleague had taken it down. He was not so sure who had put it there or whether it was a joke.

So it is even more of a delight to be back here celebrating the memory of Ethel Benjamin. If New Zealand deserves great credit for giving women the vote, long before anyone else in the English speaking world, it deserves at least as much credit for giving women the right to practise law, if not so far ahead of the rest of the English speaking world, then at least long before “the mother country” and with much less fuss and bother than anywhere else. Think what trouble our sisters in the United States had!

In 1872, Miss Myra Bradwell made the mistake of taking seriously the commitments to equality in the 14th amendment to the US Constitution. In the famous case of *Bradwell v Illinois*,¹ the US Supreme Court refused to hold that women had a constitutional right to pursue any lawful employment, including the practice of law. Justice Bradley famously declared:

‘The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organisation, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to women adopting a distinct and independent career from that of her husband.’

And to the objection that not all women got married, he declared that ‘these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother’. Civil law had to be adapted to the general constitution of things and could not be based upon exceptional cases.

It was not only that women had better things to do. The courts were also worried that the law was a nasty place for them to be. When Miss Lavinia Goodell applied to be admitted to the state Bar of Wisconsin in 1875,² the Chief Justice said:

¹ 83 US 130 (1872).

² *In matter of Motion to admit Goodell* 39 Wis 232 (1875), 245.

‘[Our profession] has essentially and habitually to do with all that is selfish and malicious, knavish and criminal, coarse and brutal, repulsive and obscene in human life. It would be revolting to all female sense of the innocence and sanctity of their sex, shocking to man's reverence for womanhood and faith in women, on which hinge all the better affections and humanities of life, that women should be permitted to mix professionally in all the nastiness of the world which finds its way into the courts of justice . . . This is bad enough for men. . . ’

The legislators were much more sympathetic to the women's cause than the judges. The Wisconsin legislature swiftly reversed the Chief Justice's rebuff to Miss Goodell. The Illinois legislature reacted to the Bradwell litigation by passing a law opening up all civil employment to women. Myra Bradwell was admitted to the Illinois bar in 1890 and licensed to practise before the US Supreme Court in 1892. In 1879, the indomitable Belva Lockwood had lobbied for and secured federal legislation requiring women to be allowed to practise in the US Supreme Court on the same terms as men.

Here in New Zealand, Ethel Benjamin did not have to go to court to pave the way for legislation. She decided to study and practise law before she realised that women were not allowed to do so. When she found out, she had, she said, “faith that a colony so liberal as our own would not long tolerate such purely artificial barriers”.³ But without her courage and foresight it must be doubtful whether the Female Law Practitioners' Act of 1896 would have been passed as early as it was. Here she was, a Law student at New Zealand's oldest University, achieving high marks, not only in the tutored subjects of Jurisprudence and Constitutional Law, but also in the self-taught subject of

³ Quoted in Janet November, *In the footsteps of Ethel Benjamin, New Zealand's first woman lawyer*, 2009, Victoria University Press, at p 54.

Roman and International Law. What possible justification could there be for denying her the right to practise her chosen profession? Women in New Zealand were being educated to degree level and allowed to enter all the other professions, so why not law? And of course, the desire to offer something to the new women voters also played its part.

Compare the so-called home country. The first woman to be allowed to study and sit the examinations for the Bachelor of Civil Laws degree at the University of Oxford was the remarkable Cornelia Sorabji, the daughter of a Parsee Christian missionary in India. Her academic success in India would have entitled her to a scholarship to study in England had she been a man, but a “substitute scholarship” raised by friends in England enabled her to come to study at Somerville Hall (as it then was) in Oxford in 1889. There she was, as she put it, “adopted” by the great Benjamin Jowett, Regius Professor of Greek and Master of Balliol. He was also an enthusiastic promoter of the first institution of higher education in England to admit women on equal terms with men, now the University of Bristol (of which I am proud to be Chancellor). It was his influence which enabled her to become, in 1892, the first woman ever to sit the examination for the BCL.

But although she could pass the examination, she was not allowed to take her degree or to be called to the English Bar for another 30 years. When she returned to India, she was granted a special dispensation to represent the interests of women in purdah who could not consult male lawyers to protect their property rights. Care was taken not to set a precedent which would open up the Bar to women practitioners generally. Ethel Benjamin was more fortunate. New Zealand women had already been allowed,

not only to take the examinations, but also to take their degrees. And in New Zealand, following the Law Practitioners' Act 1882, a law degree was all that was needed to be allowed to practise. So once the Female Law Practitioners Act was passed in 1896, this must have been a great help to Ethel Benjamin. She did not have to persuade a solicitor to offer her articles or a barrister to offer her pupillage. She could set up in independent practice straightaway. She was also able to disregard the constraints which the local Law Society wished to place upon her – in matters such as how she should dress in court and whether she could advertise. (As an aside, her story supplies me with the best answer I have ever heard to why women barristers adopted the male barristers' 18th century wig, thus denying their femininity as well as their modernity: in an age where women all wore hats, to be required to go bare-headed would have been much worse.)

In England, would-be practitioners had first to join the Law Society and be articulated to a solicitor. When Miss Bebb was refused entry to the Law Society in 1913, she took them to court. But the Court of Appeal held, in *Bebb v Law Society*,⁴ that a woman not only had no right to become a solicitor but was disqualified by the common law from doing so. Inveterate usage being the whole foundation of the common law, the fact that there had never been a woman solicitor was enough to disqualify her, even though, as Cozens-Hardy MR admitted

‘in point of intelligence and education and competency women – and in particular the applicant here, who is a distinguished Oxford student – are at least equal to a great

⁴ [1914] 1 Ch 286.

many and, probably, far better than many, of the candidates who will come up for examination’.

Another judge raised what was by then the purely technical objection that theoretically a married woman still did not have an ‘absolute liberty’ to enter into binding contracts, so that it would be a serious inconvenience if in the middle of a piece of litigation a woman was suddenly unable to make contracts because she had married. This was ridiculous, because by then women did have contractual capacity in relation to their separate property.

So women in the United Kingdom had to wait until after the First World War, when the Sex Disqualification (Removal) Act 1919 opened up, not only the professions, but also public and judicial office to women on the same terms as men. Even so, a woman who was a hereditary peer in her own right was not allowed to take part in the business of the House of Lords. In *Viscountess Rhondda’s claim*, Lord Chancellor Birkenhead held that, unlike a minor or a bankrupt, she was not merely disqualified but incapacitated. While a minor could grow up, or a bankrupt be discharged,

‘a person who is a female must remain a female till she dies. Apart from a change in the law she could not before 1919 both be a woman and participate in the legislative proceedings of the House of Lords. By her sex she is not – except in a wholly loose and colloquial sense – disqualified from the exercise of this right. . .’⁵

So it had to wait until the Life Peerages Act 1958 for women to be admitted to the House of Lords. Even then there was fierce opposition. One of the noble Lords

⁵ [1922] 2 AC 339, at p 362.

declared (3 December 1957) that ‘it would be an unmitigated disaster to have women in this House’. He explained why:

‘Frankly, I find women in politics highly distasteful. In general, they are organising, they are pushing and they are commanding. Some of them do not even know where loyalty to their country lies. . . . It is generally accepted that the man should bear the major responsibility in life. It is generally accepted, for better or worse, that a man’s judgment is generally more logical and less tempestuous than that of a woman. . . . Shall we in a few years’ time be referring to ‘the noble and learned Lady, the Lady Chancellor’? I find that a horrifying thought. . . . Will our judges, for whom we have so rich and well-deserved respect, be drawn from the serried ranks of the ladies?’

He suggested that ‘these examples may sound a little excessive’ and concluded that nine out of ten noble Lords would share his feelings: ‘we like women; we admire them; we may even grow fond of them; but we do not like them here’.

Even after the Act was passed, their lordships were not too happy having women about the place. The Law Lords’ judicial clerk tells the story⁶ of a file labelled “a dictionary for the Law Lords”. The woman who typed their speeches for them had asked for the long version of the Oxford English Dictionary because the Law Lords often used words in an old fashioned or obsolete sense which she could not find in the concise version which was all she had in the office. The House authorities cavilled at the expense. So the radical suggestion was made that she might be allowed to go and consult the dictionaries in the House of Lords’ library, then as now one of the finest

⁶ James Vallance White, ‘The Judicial Office’, in L Blom-Cooper and G Drury, *The Judicial House of Lords*, 2009, Oxford University Press.

law libraries in the country. Eventually it was decided that she could do so, but only on the days when the House was not sitting or before 1.00 pm, before their Lordships might start arriving for lunch in time for the sitting day to begin at 2.30 pm, such was the feeling about having women about the place. And this was in 1962.

Ethel Benjamin would have recognised this story. The Supreme Court library was the only good Law library in Dunedin when Ethel was a student and the male law students were allowed to use it (on certain conditions). But when Ethel applied to do so, she was told there was 'no rule applicable to your case' and only allowed to use the Judge's Chamber room and to take books out of the library, not to mix with the male practitioners who used it in the ordinary way. That battle may soon have been won, but the battle to be accepted at Bar and Law student dinners continued for many decades afterwards, as women students of the 1970s can well remember. Even today I have to live with the fact that five of my eleven colleagues belong to a gentleman's club which does not admit women members and one of them belongs to two. Yet when we women set up the United Kingdom Association of Women Judges we were accused of being divisive, even though we have from the start admitted men as members.

But what has all this to do with the subject of my talk – dignity? Every woman here who has suffered these and other indignities, some small and some large, will know what I mean. Many of us here have had to put up with small humiliations, such as being told by the men what we should wear in court or how we should be addressed. Some of us here will have had to put up with much larger humiliations, being relegated to work far below our capabilities or paid much less than the men for doing

exactly the same work, simply because we are women. These things are annoying and frustrating, but more than that: they are also morally wrong. Why do we think that they are morally wrong? Because they offend against our intrinsic dignity as human beings. Dignity has an internal and an external aspect. Internally, it is the sense of self-worth, of self-esteem, of being deserving of the respect of other people. Externally, it is actually being valued and respected by other people.

Increasingly, however, we are talking of dignity, not only as a moral value, but as a human right. This is more problematic than talking of it as a moral value. Where does this idea of dignity as a human right come from and what does it mean?

It was not in the early human rights instruments, such as the American Constitution. For the founding fathers, the enemy was a world without the rule of law. So freedom under the law was their organising principle. An express commitment to equal treatment by the law for all citizens did not come until the 14th amendment, after the civil war and the abolition of slavery. For the French Revolutionaries, the enemy was the old idea of dignity as status: that certain people were entitled to special respect and treatment simply by virtue of their birth and aristocratic status. Hence the Declaration of the Rights of Man and the Citizen proclaimed that: ‘All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents’. The idea of equality is there, but the idea of dignity is still linked to superiority, even if it was now open to all. It is in that sense that English statutes still refer to “dignities and titles of honour” (to which, for example, adopted

children cannot succeed⁷) and Lord Birkenhead referred to a ‘peerage dignity’ throughout Viscountess Rhondda’s case.

But the national constitution builders of the post World War II era knew that freedom under the law was not enough. The Nazis had gained power through the normal democratic process and conducted many of their atrocities under the authority of properly enacted laws. Something was needed to guard against this. Hence the Preamble to the French Constitution of 1946 required the protection of the dignity of the human person from all forms of degradation. Article 1(1) of the German Basic Law of 1949 goes further: ‘The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority’. This is why, in the famous *Omega* case, the German authorities banned that part of a laser gun game which is in general use in the United Kingdom but involves shooting at targets attached to real people – in other words, pretend killing. The UK exporters and German importers complained that the ban was a restriction on the free movement of goods within the European Community, as indeed it was. But the European Court of Justice in Luxembourg accepted that this was justified by the fundamental principles of the German constitution.⁸ Here is an example of dignity being used to determine the scope of legal rights, not just to explain them.

For similar reasons to those in Germany, Article 2 of Israel’s Basic Law on Human Dignity and Liberty, passed in 1992, states that ‘There shall be no violation of the life, body or dignity of any person as such’. Section 10 of the Constitution of the Republic

⁷ ‘An adoption does not affect the descent of any peerage or dignity or title of honour’: Adoption and Children Act 2002, s 71(1).

⁸ *Omega Spielhallen und Automatenaufstellung GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I – 9609, [2005] 1 CMLR 5.

and South Africa of 1996 states that ‘Everyone has inherent dignity and the right to have their dignity respected and protected’. It does not take much imagination to understand why those countries, recently emerged from regimes which did not respect the equal dignity of all human beings, should entrench such concepts in their laws. Dignity (as Stuart Woolman has said) is the flip-side of ‘never again’ for the Germans and the South Africans⁹ and (as Aharon Barak¹⁰ has said) of ‘never forget’ for the Israelis.

Dignity has also made an appearance in the international human rights instruments. There was a brief period after World War II when, not only individual nations, but the whole international community was also committed to the equal dignity of all human beings. The Charter of the United Nations in 1945 proclaimed that its main purpose was ‘to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small’. But the Charter itself is not concerned with human rights: that is why we in the United Kingdom are having so much trouble reconciling the demands of UN Security Council Resolutions with the fundamental human rights principles to which we have since become committed. The Universal Declaration of Human Rights, adopted by the United Nations in 1948, opens with the words, ‘Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . .’ Article 1 provides that ‘All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.’ But the Universal Declaration is not a binding instrument. It is aspiration only. There

⁹ S Woolman, ‘Dignity’, chap 36 in S Woolman and T Roux (eds), *Constitutional Law of South Africa*, 2nd edn, 2005.

¹⁰ Recently retired President of the Supreme Court of Israel.

is no machinery for enforcement. The world had to wait until the 1970s for its children, the International Covenants on Civil and Political Rights and on Economic and Social Rights of 1966 to come into force.

The cold war dampened enthusiasm for the intended international Bill of Rights. The Europeans decided to go it alone. They had been at the receiving end of the Nazi atrocities. They were also experiencing the descent of the iron curtain and were fearful of the growth of communism in western Europe. So they formed the Council of Europe and negotiated the European Convention on Human Rights and Fundamental Freedoms, among other things ‘to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration’. These did not include a right to dignity as such. They covered a list of more concrete rights which the framers could all agree required protection. The UK was anxious to achieve a list of quite precisely defined rights which they thought already existed in the common law, rather than the more open-ended rights which the continental lawyers would have left to be worked out by judicial decision.

However, the European Convention is a ‘living instrument’. By 2002, in the case of *Pretty v United Kingdom*,¹¹ the European Court of Human Rights in Strasbourg could say that ‘the very essence of the Convention is respect for human dignity and human freedom’. And in 2003, in *Gündüz v Turkey*, it could hold that ‘tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic pluralistic society’.¹² Thus the link between dignity and equality was made explicit.

¹¹ (2002) 35 EHRR 1, para 65.

¹² App no 35071/97, Judgment of 4 December 2003, para 40.

The Charter of Fundamental Rights of the European Union¹³ entitles a whole Chapter – Chapter 1 - ‘Dignity’. Article 1 follows the German Basic Law: ‘Human dignity is inviolable. It must be respected and protected’. The following articles in Chapter 1 cover the more familiar specific rights: the right to life (article 2); the right to respect for physical and mental integrity (article 3); the prohibition of torture and inhuman or degrading treatment or punishment (article 4); and the prohibition of slavery and forced labour (article 5). Other chapters deal with Freedom, Equality, Solidarity, Citizen’s Rights and Justice. But here for the first time in European law we see dignity spelled out as an independent right.

This is all very well. But what does dignity mean? It is not a lawyers’ concept. The Advocate General in the *Omega* case complained that ‘there is hardly any legal principle more difficult to fathom in law than that of human dignity’ (para 74). Lord Lester of Herne Hill, one of our foremost human rights lawyers, has said that it is not an independently justiciable rule of law.¹⁴ It is much easier to see it as a value which underlies other more concrete rights than it is to see it as a right in itself. But even as a value, it has several different meanings.

It is conventional to trace it back at least to the 18th century philosophy of Immanuel Kant: the imperative, ‘so act as to treat humanity, whether in thine own person or in that of any other, in every case as an end withal, never as means only’.¹⁵ Every human being is important for her own sake and not for the sake of what she can do for others. She is to be treated as a subject in her own right not an object of the rights of others.

¹³ Proclaimed at Nice in December 2000; under the Lisbon Treaty it becomes binding on Member States, apart from the UK and Poland, who have been granted derogations.

¹⁴ *Hansard*, HL, cols 828-831, 19 October 2005.

¹⁵ *Fundamental Principles of the Metaphysics of Ethics*, 1785, sect 2 (trs T K Abbott).

But the Kantian notion of dignity, important though it is, is intrinsically linked to the concept of autonomy, the capacity to make choices and to participate in making the laws which bind us. Autonomy is an exclusively human attribute, which distinguishes us from other beings.

Important though autonomy is in all thinking about rights, it is not the whole story. Every human life has an intrinsic value, irrespective of its usefulness to others, or even of its moral worthiness. The old, the sick and the disabled have value even though they can no longer be of much economic use to others, if indeed they ever have been. Even wicked people have human rights. As Helen Mountfield and Rabinder Singh have put it, ‘Dignity is not an earned characteristic, and it is equally ascribed to all human beings, irrespective of their external moral and physical attributes’.¹⁶ If this is so, even human beings who lack the legal or mental capacity to exercise autonomy have dignity. They too must be the holders of human rights, although not those rights which depend upon the ability to exercise choice: tellingly, these are above all the dignity rights listed in Chapter 1 of the European Charter.

Following on from that is the principle of equal concern and equal respect for all human beings. People should not be treated differently, by Government or by the law, on the basis of irrelevant characteristics such as race or sex or the colour of their hair. There has to be an objective and reasonable justification for treating someone less favourably than someone else. Otherwise one is treating her as somehow less worthwhile than other people, simply because of the group to which she belongs, undermining her essential humanity. This is as true of disabled and older people as a

¹⁶ ‘The Value of Dignity’, paper presented to British-Israeli Legal Exchange, London, January 2004. The preparation of this lecture has owed a great deal to this valuable paper.

group as it is of the black or the female. Sometimes the courts are able to make the link between dignity and equality explicit in their reasoning, for example in a case holding that there was no justification for treating the survivors of same sex partnerships any less favourably than the survivors of opposite sex partnerships in the laws governing succession to rented homes:¹⁷

‘Treating some as automatically having less value than others not only causes pain and distress to that person but also violates his or her dignity as a human being . . . Second, such treatment is damaging to society as a whole. Wrongly to assume that some people have talent and others do not is a huge waste of human resources. It also damages social cohesions, creating not only an under-class, but an under-class with a rational grievance. Third, it is the reverse of the rational behaviour we now expect of government and the state. . . . Finally, it is a purpose of all human rights instruments to secure the protection of the essential rights of members of minority groups, even when they are unpopular with the majority. Democracy values everyone equally even if the majority does not.’

Sometimes, however, it is necessary to treat a person differently in order to accord her equal respect. The most startling illustration of this is the case of *Price v United Kingdom*.¹⁸ Adele Price may have been a very difficult person. She got into debt and had a judgment debt against her. Creditors are entitled to enforce their debts in the county court. She was summoned to Lincoln County Court so that it could investigate her means to pay. She appeared at court but refused to answer questions about her means. The judge did the usual thing and sentenced her to prison for contempt of

¹⁷ *Ghaidan v Godin Mendoza* [2004] UKHL 22, [2004] 2 AC 557, at para 132.

¹⁸ [2002] 34 EHRR 53.

court. For some reason the judge made an order for immediate imprisonment, rather than the more common order suspended on condition that she obeyed him. History does not reveal why, but it is quite possible that she had already refused to comply with the conditions of a suspended sentence. She still refused to answer and so she was taken away.

A sad tale, but not on the face of it a breach of her human rights. Article 5(1)(b) of the European Convention on Human Rights allows people to be deprived of their liberty for failing to obey the lawful orders of a court. But Adele Price was a thalidomide victim without proper arms or legs. She also had defective kidneys and other health problems. She used an electric wheelchair but was told that she could not take its charger with her. It was too late to take her to prison that day so she was kept overnight in the cells at Lincoln Police Station. There she could not use the bed because it was too hard: she was used to sleeping sitting up in a chair to avoid bedsores. She could not use the toilet because it was higher than her wheel chair. She could not move around to keep herself warm but it was January 1995 and the cell was cold. Eventually a doctor was called who arranged for a space blanket and some pain relief.

Next day she was taken to New Hall prison in Wakefield where she was placed in the health care centre. But they too could not look after her properly. The female nurse was unable to lift her alone so male prison officers were required to help her on and off the toilet. She was released on the fourth day after serving half her sentence. By then she needed catheterising because her lack of fluid intake and problems with toileting had led to urine retention.

She sought legal advice but was told that the chances of success in an action against the Home Office were slim and in any event the damages would be no more than £3000 so legal aid was withdrawn. So she complained to the European Court of Human Rights in Strasbourg that she had been the victim of ‘inhuman or degrading treatment or punishment’ contrary to article 3 of the European Convention on Human Rights.¹⁹

This is an unqualified right. Such treatment cannot be justified no matter what the reason for it. So the Court sets a high threshold for a finding that someone has been subjected to it. But on this occasion the Court had very little difficulty in finding that Ms Price had been subjected to degrading treatment. As one of the judges, Judge Greve, said,

‘The applicant’s disabilities are not hidden or easily overlooked. It requires no special qualification, only a minimum of ordinary human empathy, to appreciate her situation and to understand that to avoid unnecessary hardship – that is hardship not implicit in the imprisonment of an able bodied person – she has to be treated differently from other people.’

The court awarded her £4500 damages.

The moral is plain. You should treat all prisoners alike. But to treat a woman with no arms and legs and defective kidneys in exactly the same way that you would treat an

¹⁹ *Price v United Kingdom* [2002] 34 EHRR 53.

able-bodied prisoner is to deny her equal respect as a human being. You have to treat her differently in order to make imprisonment for her the same experience as it is for the able-bodied.

But dignity is not only about how a person is treated by the outside world. It is also about allowing each human being to develop her own talents and personality as she chooses. Time and again, the Strasbourg court has said that the right to respect for private life in article 8 of the European Convention 'is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings'.²⁰ In fact, some philosophers would argue that this is not only a right inherent in each individual's humanity but also a duty. Ronald Dworkin argues that there are two dimensions of human dignity – one is the principle of the intrinsic value of each human life; but the other is that each person has a special responsibility for making the most of her own life. A person who does not care how her life is led lacks dignity.²¹

Dignity is also 'Janus-faced'.²² It attaches to the subject as well as the object, to the actor as well as the actee. As Dworkin²³ puts it,

'if . . . objective importance cannot be thought to belong to any human life without belonging equally to all, then it is impossible to separate self-respect from respect for the importance of the lives of others. You cannot act in a way that denies the intrinsic importance of any human life without an insult to your own dignity. . . . Kant insisted

²⁰ eg, *Botta v Italy* [1998] 26 EHRR 241, para 32.

²¹ R Dworkin, *Is Democracy Possible Here?*, 2007, chap 1.

²² H Mountfield and R Singh, *loc cit*.

²³ R Dworkin, *loc cit*.

that if you treat others as mere means whose lives have no intrinsic importance, then you are despising your own life as well’.

Or as Lord Hoffmann put it in the second *Belmarsh* case,²⁴ which held that evidence obtained by torture is never admissible in the courts of the United Kingdom: ‘The use of torture is dishonourable. It corrupts and degrades the state that uses it and the legal system which accepts it.’ Respect for the dignity of others is not only respect for the essential humanity of others; it is also respect for one’s own dignity and essential humanity. Not to respect the dignity of others is also not to respect one’s own dignity. Earl Ferrers please note.

Indeed, respect for one’s own dignity is a value in itself. Lord Hoffmann made this point in the Court of Appeal in the case of Tony Bland, a football supporter who was left in a persistent vegetative state after a disaster at Hillsborough football ground in which many supporters were herded into a small space and some were crushed to death:

‘The fact that the dignity of an individual is an intrinsic value is shown by the fact that we feel embarrassed and think it wrong when someone acts in a way which we think demeaning to himself, which does not show sufficient respect for himself as a person.’²⁵

²⁴ *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71, [2006] 2 AC 221, para 82.

²⁵ *Airedale NHS Trust v Bland* [1993] AC 689, 826.

This is all very well as a statement of the values underlying our fundamental human rights.²⁶ It is all very well as a tool for interpreting the content of those human rights. It can even lead us to recognise new rights. The Israelis have used the right to dignity to construct family and equality rights which are not expressed in their basic law.²⁷ The Hungarians have copied the Germans in using it to fashion new rights which were not expressed in their Constitution.²⁸ But can dignity really be a human right in itself? As a German judge of my acquaintance put it, can it keep this universal quality if we try to use it in a court to win cases? One problem is that dignity can so often be used on both sides of an argument. The *Pretty* case might be a good example.

Mrs Pretty had motor neurone disease and wished to be helped to die at the time and in the manner that she chose. She was frightened and distressed by the suffering she would have to bear if the disease were allowed to run its course. She asked the Director of Public Prosecutions to promise not to prosecute her husband if he helped her to commit suicide. He refused to do so. The English courts said that he was entitled to refuse, not least because of the blank cheque which he was being asked to sign.²⁹ Their decision was upheld in Strasbourg.³⁰ She was not being subjected to inhuman and degrading treatment contrary to article 3. The state was not inflicting any ill treatment upon her. She was being very well cared for by the medical authorities. Nor was this an unjustified interference with her right under article 8 to respect for her private and family life.

²⁶ See D Feldman. 'Human Dignity as a Legal Value' [1999] *Public Law* 682, and [2000] *Public Law* 61.

²⁷ As explained by President Barak in *Adalah Legal Centre for Arab Minority Rights in Israel v Minister of Interior*, HCJ 7052/03, Supreme Court of Israel, 14 May 2006.

²⁸ C Dupre, 'The right to human dignity in Hungarian constitutional case law', in *The principle of respect for human dignity* (1999), European Commission for Democracy through Law.

²⁹ *R (Pretty) v Director of Public Prosecutions* [2001] UKHL 61, [2002] 1 AC 800; I was a member of the Divisional Court which first heard the case: [2001] EWHC Admin 788, [2002] UKHRR 97.

³⁰ *Pretty v United Kingdom* (2002) 35 EHRR 1.

However, unlike the UK House of Lords, the Strasbourg court did think that article 8 was potentially engaged, because the notion of personal autonomy was an important principle underlying the interpretation of its guarantees (para 61). ‘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’ (para 65). But article 8 is a qualified right. Even a blanket ban on assisting suicide was justified in the interests of protecting the rights of other vulnerable people, who might be put under undue pressure to agree to be helped to die. Mrs Pretty, who was certainly able to make up her own mind about what she wanted, would have to suffer for their sake.

This touches on a further aspect of human dignity. This is the responsibility of others to respect and protect human dignity whether or not the individual wants her dignity respected. It may therefore be justifiable to prohibit extreme sado-masochistic practices even between consenting adults, because to consent to torture is to demean oneself as well as the torturer. Less controversially, discrimination is wrong even if the individual discriminated against takes it for granted and fails to recognise the affront to her essential humanity. Inhuman and degrading treatment is wrong whether or not the individual realises that she is being degraded. Some would argue that it was respecting Mrs Pretty’s essential human dignity, to forbid her husband to help her take the life which she no longer valued, even though she did not want it respected in that way. The same is true of arguments about abortion or stem cell research.

Another problem is that if dignity is made a right in itself it may have to be balanced against other rights, or against the interests of the community as a whole, and then again it begins to lose its universal quality. Under the European Convention, the right to respect for family and private life, and the right to enjoy the Convention rights without discrimination are all qualified rights. Interference with them may be justified if the aim is legitimate and the means are proportionate to the legitimate aim. If dignity is to be an absolute and inalienable right in itself, without any qualification, it may have to be limited to the right not be tortured or subjected to inhuman or degrading treatment or punishment. It might, perhaps, extend to the other rights contained in Chapter 1 of the European Charter, but the right to respect for physical and mental integrity (article 3), which is derived from article 8 of the European Convention, must be a qualified right.

Both article 3 and article 8 (in its integrity-protecting aspect) of the European Convention impose positive as well as negative obligations on the state. The state has not only to refrain from subjecting a person to the prohibited treatment: it must take reasonable steps to protect people from being subjected to that treatment by others. The state has not merely to refrain from interfering in a person's private and family life: it must on occasions take steps to protect that private and family life from interference by others or to allow the opportunities for it to develop.

This is a difficult area because it brings us into the realms of social responsibility. To what extent does respect for human dignity impose a duty upon society to save others from degradation? This used not to be a problem in the modern welfare state. But it has become a problem with the increasing efforts of Government to deny even the

bare necessities of life to people who have no right to be in the United Kingdom. Destitution has become an instrument of Government policy. The courts have resisted this, originally by trying to find other obligations which would fill the gap, but now through the Human Rights Act. Thus in *R (Limbuela) v Secretary of State for the Home Department*,³¹ the House of Lords held that it was unlawful for the Secretary of State to deny all means of subsistence to an asylum seeker so that he was reduced to living and begging on the streets. Theoretically this may have been a breach of the negative obligation – the state was reducing a person to destitution by a combination of refusing to allow him to make his own living and denying him any support from the state. But the consequence was a positive obligation to rescue him from utter destitution if there was nowhere else for him to go. Human dignity was the fundamental value which underlay that decision even if we did not say so. It was a tool for interpreting what article 3 required.

So what do we conclude? That human dignity is the universal foundation for the most fundamental rights. That human dignity can help us to decide what other human rights entail. That human dignity is a, perhaps the, underlying rationale for equality and non-discrimination rights. But in that sense it cannot be an absolute and universal right. Equality rights are by their nature relative and relational. Who do we compare with whom? Can the differences between their treatment be justified? As more and more protected characteristics arrive on the scene, how can we resolve the conflicts between them? How, for example, do we decide between the duty of service providers not to discriminate against would-be customers on the ground of their sexual orientation and the right of employees not to be discriminated against on the ground

³¹ [2006] 1 AC 396.

of their religion or belief? There are some who think that the impact on dignity may be a 'useful touchstone' for resolving these dilemmas.³²

Today, however, we can be grateful to Ethel Benjamin and all those other women pioneers who, by proving themselves equal to the men, brought dignity to our sex as never before.

³² G Moon and R Allen, 'Dignity Discourse in Discrimination Law: A Better Route to Equality?' [2006] EHRLR 611, at 647.