

Safeguarding Human Dignity in the European Audiovisual Sector

by *Tarlach McGonagle*

EDITORIAL

Audiovisual media services fall within the scope of many different international and national legal instruments, as well as of best practices and standards developed by case law. These rules often target a much wider spectrum of activities. Only some of them address specifically the media. Those, however, that don't are not necessarily of lesser importance for the audiovisual sector. The case in point might be human dignity, a "Human Right" with great bearing on the media. Reversing the logic, one might point out that the media may impact heavily on human dignity.

While the concept of another Human Right, namely the right to information and freedom of expression has been a topic for IRIS publications, we have hitherto published much less information on human dignity. One explanation might be that its essence is even harder to grasp than that of the right to information and freedom of expression. To remedy this situation, this IRIS *plus* looks into the legal roots and main elements of human dignity as an important standard for audiovisual media services.

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Introduction

The protection of human dignity is widely and uncontroversially regarded as one of the central animating objectives of international human rights law. However, references to human dignity are more frequently found among preambular assertions in international human rights treaties than among their more substantive provisions. This inevitably prompts questions about the normative consequences that flow from the concept of human dignity. This article sets out to explore the extent of those consequences, both in general terms and specifically in the context of the European audiovisual sector. It therefore provides an overview of the main instruments employed by both the Council of Europe and the European Union to operationalise the concept for the purposes of regulation in the media sector.

Human Dignity and International Human Rights Standards

Leading international human rights treaties, whether generalist or thematically-specific in nature, routinely invoke the protection of human dignity as one of their principal values or goals. This tendency is quite a recent innovation in international law and one which was ushered in by the Charter of the United Nations (UN Charter)¹ and the Universal Declaration of Human Rights.² By enshrining basic standards of protection for human dignity in positive international law, the drafters of the UN Charter and the Universal Declaration of Human Rights aimed to prevent the recurrence of the horrors of the Second World War which violated human dignity on a massive and unprecedented scale. As such, relevant provisions could be described as reactionary in character, but preventive in outlook. They were very much a product of the *Zeitgeist*.³

The Preamble to the UN Charter reaffirms “faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women [...]”. The Preamble to the Universal Declaration of Human Rights opens with the proclamation that “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”. It also refers explicitly to the UN Charter’s above-cited reaffirmation of faith.⁴

The pattern established by the UN Charter and the Universal Declaration of Human Rights has, by and large, consistently been followed in subsequent international human rights treaties. In its Preamble, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),⁵ refers back to relevant sections of the United Nations Charter and the Universal Declaration of Human Rights. So, too, does the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),⁶ in its Preamble. The sister-treaties, the International Covenant on Civil and Political Rights (ICCPR)⁷ and the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁸ both replicate the language of the Universal Declaration of Human Rights (i.e., the

excerpt cited *supra*) in their Preambles. They also recognise that “these rights derive from the inherent dignity of the human person”. As such, they clearly conceive of human dignity as a basis for other rights. For its part, the Convention on the Rights of the Child (CRC)⁹ adopts in its Preamble the formula used in the Universal Declaration of Human Rights, the ICCPR and the ICESCR about the recognition of the inherent dignity [...] of every individual being the foundation of freedom, justice and peace. It also makes repeated references to the underlying principles and values of the United Nations Charter and the Universal Declaration of Human Rights.

This routine, almost reflexive, recourse to the notion of human dignity, can be explained by the overarching importance of human dignity in the dominant conceptual framework for human rights; a framework which insists on the universality, indivisibility, interdependence and inter-relatedness of all human rights.¹⁰

The overarching importance of human dignity has generated much academic literature and is well-captured in the following reflection:

“[...] at its heart, the idea of human rights is two-dimensional. There is the absolute side – the moral wrongness of cruelty and humiliation, and there is also the – perhaps less clear but nevertheless essential – dedication to human flourishing. The two are linked in that each flows from a commitment to human dignity, which is in turn manifested in acts of compassion towards the other. In its prohibitory form, this demands that we do not degrade our fellow humans by de-personalising them. The positive side. [*sic*] stressing growth and personal success, sees human rights as radically pluralist in the hospitality towards others – rather than mere tolerance of them – that its underlying ethic demands. Viewed as a whole, therefore, human rights is an idea that both protects us as persons and enables us to grow at the same time.”¹¹

Styled in this way, human dignity is a conceptual lynchpin, providing crucial linkage between negative and positive dimensions to human rights and the preventive and promotional strategies required for their full realisation. The practical importance of this conceptual linkage becomes evident in the discussion of Council of Europe and European Union strategies for protecting human dignity in the audiovisual sector, as they comprise both preventive and promotional components (see further, *infra*).

Normative Potential of Human Dignity

As noted at the outset, invocations of human dignity are typically preambular rather than substantive. The provisions detailed in the preceding section all fall into the former category, but they are complemented, if somewhat sporadically, by substantive references to human dignity. Such substantive refer-

rences emphasise the particular importance of human dignity for the realisation of specific human rights, like various social, economic and cultural rights;¹² work-related rights and the right to a decent existence;¹³ educational rights;¹⁴ certain standards of treatment in cases of deprivation of liberty,¹⁵ and for children, the right to enjoy certain qualitative standards of life when suffering from mental or physical disability,¹⁶ or when recovering from having been victimised in any of a number of enumerated ways.¹⁷ This list of illustrative examples concerns substantive provisions of selected international human rights treaties which *explicitly* couple the concept of human dignity with specific human rights. It should equally be borne in mind, however, that human dignity has a high level of valency, and has obvious implications for the realisation of other rights, even in the absence of express textual linkage. The right to privacy is an obvious example of a right that has clear human dignity ramifications. This perspective is also consistent with the conception of human rights as an interrelated and interdependent whole, as described in the preceding section.

Article 1 of the Universal Declaration of Human Rights states, *inter alia*, that “All human beings are born free and equal in dignity and rights”. This assertion is quite unique in that it is not preambular, but is contained instead in the corpus of the text of the Declaration. Its position therefore vests it with extra significance. The formula employed suggests that “dignity is a quality or characteristic of human beings”, with the corollary that “an individual cannot have a right to it”.¹⁸ While this claim may be contested,¹⁹ it derives much of its cogency from two important premises (in particular).

First, when Article 1 of the Universal Declaration of Human Rights is read in conjunction with the preambular provisions discussed in the previous section, what emerges is the view that human dignity serves a foundational purpose *vis-à-vis* the canon of human rights guaranteed by international law. It grounds those rights and helps to shape the societal matrix in which they are to be realised. Thus conceived, human dignity belongs to the set of values described by Bhikhu Parekh as “operative public values”, i.e., those values “that a society cherishes as part of its collective identity and in terms of which it regulates the relations between its members”, and which “constitute the moral structure of its public life and give it coherence and stability”.²⁰ Other examples of operative public values could include “pluralism, tolerance and broadmindedness”,²¹ which are prerequisites of democratic society (as consistently held by the European Court of Human Rights). Parekh further explicates the concept of “operative public values” as follows:

“They are values because society cherishes, endeavours to live by, and judges its members’ behaviour in terms of them. They are public because they are embodied in its constitutional, legal and civic institutions and practices and regulate the public conduct of its citizens. And the values are operative because they are not abstract ideals but are generally observed and constitute a lived social and moral reality. The operative public values of a society constitute the primary moral structure of its public life.”²²

Second, the claim rests on a certain amount of conceptual unravelling of the term “human dignity”, especially given the absence of any authoritative definition of the term in international human rights law. It is useful to distinguish between the various roles that dignity can play: as already discussed, it can serve as a basis for defined rights or as a value (or, *a fortiori*,

an operative public value). In accordance with those roles, it can be invoked, respectively, in claiming violations of independent rights and for aspirational or exhortatory purposes, e.g. promoting values that ought to be shared at societal level. Another role that has been identified for “human dignity” is that of a principle, whereby it could be invoked “to stand alongside other fundamental principles”.²³

Yet some commentators who prefer the “human dignity as a ‘fundamental, shared quality of human beings’” thesis to the “human dignity as a human right” thesis also recognise its contingency on the aforementioned conceptual unravelling.²⁴ David Feldman notes that by virtue of the dignity that is inherent in the human condition:

“An umbrella of rights may be justified as preventing interference with this general human dignity. Subordinate forms of dignity, derived from an individual’s personal qualities and behaviour, may for some purposes also be sufficiently valuable to justify a right to protection. Such protective rights could be termed ‘rights to dignity’ in so far as they have the object of upholding dignity indirectly.”²⁵

Constraints of space prevent a more elaborate exploration of the academic debate concerning the role of “human dignity” within international human rights law. For present purposes, the essential point to retain is that whatever divergence of opinion there may be regarding legalistic technicalities (which largely stem from interpretive divergence in the first place), the general, or moral, importance of “human dignity” cannot be gainsaid.

The next two sections explore how the Council of Europe and the European Union have sought to develop the normative potential of human dignity, or in other words, to operationalise it, in the audiovisual sector.²⁶

Council of Europe

European Convention on Human Rights

The European Convention on Human Rights does not explicitly refer to “human dignity” as one of its propelling objectives. Nevertheless, it is reasonable to infer that its general ethos is consistent with upholding “human dignity” along the same lines as other international human rights instruments. This inference is based on the ECHR’s preambular subscription to the values and objectives of the Universal Declaration of Human Rights and also frequent pronouncements by the European Court of Human Rights which are general in scope and revelatory of the Convention’s overall purposes. By way of example, the Court held in *Pretty v. the United Kingdom* that the “very essence of the Convention is respect for human dignity and human freedom”.²⁷ Similarly, the Court held in *Gündüz v. Turkey* that “tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society”.²⁸

It is important to note that the jurisprudence of the Court also contains many pronouncements which are specific to particular rights guaranteed by the Convention. For instance, the Court has held that one of the main purposes of Article 3 (Prohibition of Torture)²⁹ is to protect “a person’s dignity and physical integrity”.³⁰ The Court has also emphasised the impor-

tance of human dignity in contexts such as the quality of life of the terminally ill³¹ and the recognition of (trans-)sexual identity.³² “Racial violence” has been found by the Court to be “a particular affront to human dignity and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction”.³³ Of particular relevance for freedom of expression and the media, the Court has repeatedly acknowledged the negative impact that “hate speech” can have on human dignity.³⁴ In consequence, it has consistently accepted that certain types of “hate speech”, such as Holocaust Denial, can be considered as disparagement of the dignity of the victims of the Holocaust and are therefore not entitled to protection under the ECHR.³⁵

Although the meaning of “human dignity” can be given different emphases when applied in the context of different rights, the explanatory value of those discrete emphases contribute to the development of an overall understanding of the term which is greater than the sum of its parts.

European Convention on Transfrontier Television

Article 7(1) of the European Convention on Transfrontier Television (ECTT)³⁶ insists that broadcast material (i.e., “All items of programme services”) must (in its presentation and content) “respect the dignity of the human being and the fundamental rights of others”. It also states that programmes, “in particular”, shall not “give undue prominence to violence or be likely to incite to racial hatred”. Article 7(1) was inspired by the ECHR, especially its Article 10, and should be interpreted in light of relevant case-law of the Convention’s adjudicative organs.³⁷ Reference is also made to Recommendations No. R (97) 19 on the portrayal of violence in the electronic media and No. R (97) 20 on “hate speech”,³⁸ but for present purposes, it is particularly interesting to note that Article 7(1) purports to reflect “elements contained in the preamble to the Universal Declaration of Human Rights (1948) concerning the inherent dignity and equality of all human beings, including equality between women and men”.³⁹

Standard-setting by Council of Europe Bodies

A large number of media-oriented standard-setting texts adopted by the Committee of Ministers⁴⁰ on the one hand and the Parliamentary Assembly⁴¹ on the other hand are (partly) inspired by the need to uphold human dignity, or contain references to the same, or are broadly concerned with it (even without being expressly couched in such terms). Rather than inventorise those texts and itemise pertinent references contained therein, the analytical approach here will be to loosely synthesise their content and assess their implications at the macro-level. It is also worth noting that the protection of human dignity is regularly adverted to by the European Commission against Racism and Intolerance (ECRI) in its thematic and country-monitoring work.⁴² The monitoring process for the Framework Convention for the Protection of National Minorities⁴³ has also led to useful consideration of the protection and promotion of human dignity, albeit in the specific context of minority rights and inter-ethnic relations.⁴⁴

In the context of standard-setting in respect of human dignity by subsidiary bodies of the Council of Europe, important distinctions are rightly drawn between State obligations and media responsibilities. States authorities are obliged under their general international human rights law commitments to ensure that their legal systems effectively safeguard both free-

dom of expression and human dignity. The responsibilities of broadcasters, however, are directly concerned with the material they transmit. In this regard, it is important to distinguish between preventive and promotional strategies to uphold human dignity. Whereas broadcasters can legitimately be expected not to infringe human dignity and are usually required to refrain from doing so under applicable national law, it would be potentially problematic to systematically prescribe the project of *promoting* human dignity as a value. Considerations of deference to principles of media autonomy come into play here; promotional measures are more appropriately encouraged by State authorities, leaving the media themselves to determine the extent to which they are taken up. The potential role of self- or co-regulatory bodies is often emphasised, as for example in the Committee of Ministers’ Recommendation on self-regulation concerning cyber content.⁴⁵

These considerations can usefully be considered in analogous contexts. For instance, they guided the Council of Europe’s Committee of Ministers in its decision to adopt separate Recommendations to deal with the logically complementary goals of countering hate speech⁴⁶ on the one hand, and using the media to promote a culture of tolerance⁴⁷ on the other hand:

“As concerns the propagation of racism and intolerance there is, in principle, scope for imposing legally binding standards without violating freedom of expression and the principle of editorial independence. However, as concerns the promotion of a positive contribution by the media, great care needs to be taken so as not to interfere with these principles. This area calls for measures of encouragement rather than legal measures.”⁴⁸

It is also important that standard-setting measures demonstrate awareness of the different levels at which “human dignity” operates: “the dignity attaching to the whole human species; the dignity of groups within the human species; and the dignity of human individuals”.⁴⁹ David Feldman usefully teases out the “slightly” differing legal implications of each kind of dignity, explaining that whereas the first-named kind mainly concerns the objective aspect of dignity, the second comprises objective and subjective aspects, “particularly in respect of the way in which groups visualise and constitute themselves, and the way in which individuals relate to the group”.⁵⁰ This category, especially, has to balance the sometimes opposing objectives of preventing discrimination and fostering diversity. The third kind of dignity is primarily subjective in character. To the extent that specific standard-setting measures target the safeguarding of particular kinds of dignity, it is important to frame those measures with due regard for their likely legal implications.

By way of illustration, relevant sections of the Committee of Ministers’ Recommendation on the democratic and social contribution of digital broadcasting⁵¹ and of its Recommendation on the portrayal of violence in the electronic media⁵² would fall squarely into the category of dignity “attaching to the whole human species”. What is at issue is *general* protection from particular kinds of content. Engagement with the second category, concerning the dignity of groups, is exemplified by PACE’s Recommendation on the image of asylum-seekers, migrants and refugees in the media.⁵³ As regards the third category, the Standing Committee on Transfrontier Television’s Statement on Human Dignity and the Fundamental Rights of Others (see further, *infra*), focuses more on individual dignity. Its overriding concern is *particularised* protection from particu-

lar kinds of content (or experiences resulting from particular formats). This distinction also applies, *mutatis mutandis*, to human dignity and protection of minors. In a similar vein, the Committee of Ministers' Declaration on the provision of information through the media in relation to criminal proceedings⁵⁴ homes in on specific types of individuals whose dignity, security and privacy should be respected by journalists, viz, victims, claimants and suspects. Other texts stress the need to respect the dignity of victims of terrorism.⁵⁵

In 2002, the Standing Committee on Transfrontier Television of the Council of Europe issued a Statement which focuses on the need for television programmes to uphold human dignity and the fundamental rights of others.⁵⁶ The Statement was drafted in response to the emergence - in an increasingly competitive market - of certain television formats (especially so-called "reality tv") and ideas which "can infringe upon human integrity and dignity and expose the participants in these programmes to a complete loss of their private life, as well as to gratuitous physical or psychological suffering". The concerns and objectives of the Statement can readily be traced to the ECHR and Article 7, ECTT.

The Statement is cognisant of the duties and responsibilities of regulatory authorities and broadcasters *vis-à-vis* programme formats that run the risk of adversely affecting human dignity. To this end, the Standing Committee urges regulatory authorities and broadcasters:

- to co-operate and discuss among themselves on a regular basis on the question of television programmes which might contravene human integrity or dignity, with a view to seeking consensual co-regulatory or self-regulatory solutions - as far as possible - as regards such programmes;

- to avoid contractual arrangements between broadcasters and participants whereby the latter relinquish substantially their right to privacy, since this may represent an infringement of human dignity. Contractual arrangements should be designed to protect the most vulnerable parties, namely the participants who may be tempted to waive their rights in the pursuit of popularity and money.

A final concern for relevant standard-setting measures has been neatly captured in the phrase, the "uneasy relationship between dignity and paternalism".⁵⁷ It is important that measures seeking to protect human dignity - at any of the concept's operational levels - should respect internationally-recognised guarantees of freedom of expression. In this respect, it must be remembered that the right to freedom of expression includes the freedom to receive and impart information and opinions. Moreover, individual priorities and perspectives involved in the exercise of the right can differ, depending on whether an individual is imparting or receiving a message, or indeed, is merely a third-party to the expressive act (but is somehow affected by it).

European Union

Court of Justice of the European Communities

The Court of Justice of the European Communities (ECJ) has had the occasion to engage with the notion of "human dignity"

in a number of cases,⁵⁸ but its judgment in the *Omega Spielhallen* case⁵⁹ is its most relevant to date, as far as the European audiovisual sector is concerned. The case was a reference for a preliminary ruling under Article 234 EC on essentially two questions. First, clarification was sought as to "whether the prohibition of an economic activity for reasons arising from the protection of fundamental values laid down by the national constitution, such as, in this case, human dignity, is compatible with Community law".⁶⁰ The second question was whether the ability of Member States to restrict fundamental freedoms guaranteed by the Treaty is conditional on the restriction in question being "based on a legal conception that is common to all Member States".⁶¹ As to the facts of the case: Omega, a German company, operated a so-called "laser-drome" in which "laser sport" was practised. According to the relevant authorities, one of the activities practised there involved simulating acts of homicide (with laser toys) and therefore constituted a danger to public order. A prohibition order was issued and Omega challenged the order before the courts, arguing *inter alia* that the order infringed the freedom to provide services under Article 49 EC as it "had to use equipment and technology supplied by the British company Pulsar".⁶²

On the first question, the Court ruled: "Community law does not preclude an economic activity consisting of the commercial exploitation of games simulating homicide from being made subject to a national prohibition measure adopted on grounds of protecting public policy by reason of the fact that that activity is an affront to human dignity".⁶³ It added, however, that any measures restricting the freedom to provide services "may be justified on public policy grounds only if they are necessary for the protection of the interests which they are intended to guarantee and only in so far as those objectives cannot be attained by less restrictive measures".⁶⁴ On the second question, the Court found that "It is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or interest in question is to be protected".⁶⁵

Charter of Fundamental Rights of the European Union

As consistently held by the ECJ⁶⁶ and as laid down explicitly in the Treaty of Amsterdam, 1997, the EU is bound by the fundamental rights regime of the ECHR.⁶⁷ This growing commitment to the upholding of human rights was further consolidated by the proclamation of the Charter of Fundamental Rights of the European Union at the Nice European Council on 7 December 2000.⁶⁸ Since then, the Draft Constitution for the European Union⁶⁹ has incorporated the Charter of Fundamental Rights of the European Union as its Part II. The Treaty also provides for the accession of the EU to the ECHR, and affirms that fundamental rights, as guaranteed by the ECHR and the constitutional traditions common to the Member States, "shall constitute general principles of the Union's law".⁷⁰

The Charter makes preambular reference to human dignity, which identifies it as one of the "indivisible, universal values" on which the European Union is founded (Recital 2). This reference is underscored by Article 1 of the Charter, which has been concisely formulated as: "Human dignity is inviolable. It must be respected and protected." That the Charter proper should begin by stressing the inviolability of human dignity (Article 1) is not merely of symbolic importance; it also lays down one of the document's main ideological cornerstones⁷¹ and sets the tone for the remainder of the text. It means that

human dignity is a free-standing right. Had it been bound to other rights listed in the Charter, its status might have been weakened, according to the commentary on the Charter drawn up by the EU Network of Independent Experts on Fundamental Rights.⁷²

The same commentary argues that Article 1 constitutes not only a fundamental right in itself, but the “real basis” of other fundamental rights.⁷³ Two points are relevant here. First, the drafters of the Charter cast human dignity as “a fundamental right in itself”.⁷⁴ This is at variance with some of the academic arguments canvassed *supra*. The Independent Experts’ commentary, however, queries the “practical significance” of Article 1 “as an independent test standard”.⁷⁵ It cautions that “Very careful consideration, examination and explanation are needed to derive a legal position from Article 1 that does not yet result from a specific basic right”.⁷⁶ Second, following the logic of human dignity as a basis for other rights, Article 1 necessarily relates – with varying levels of intensity – to other rights enshrined in the Charter, such as Article 11 (Freedom of expression and information) and Article 20 (Equality before the law), which is reinforced by Article 21 (Non-discrimination). It is also easy to detect its relevance to the Charter’s in-built safety mechanism, i.e., its prohibition of abuse of rights clause (Article 54).

Although the constitutions and national legal systems of many EU Member States safeguard human dignity, either explicitly or implicitly, Article 1 of the Charter is most closely modelled on Article 1 of the German *Grundgesetz*, which reads as follows:

- 1.1 Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.
- 1.2 The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
[...]⁷⁷

This is a good illustration of a process that has been termed “the interpenetration of national legal-political orders and the international system”,⁷⁸ whereby human rights standards at the international level can percolate “down” to the national level and simultaneously and conversely, standards at the national level can rise “up” to the international plane. It is a question of the higher standards being allowed to prevail. Indeed, a number of commentators have predicted that in the fullness of time, relevant existing and developing constitutional case-law in Germany⁷⁹ will prove particularly instructive for the ECJ as it continues to engage with the notion of “human dignity”.⁸⁰ Indeed, there have been a number of recent and pertinent examples of case-law.⁸¹

The “Television without Frontiers” Directive

The “Television without Frontiers” (TWF) Directive devotes surprisingly little attention to concerns for the protection of human dignity and measures to be taken to prevent the broadcasting of hateful content. Under Article 12, “Television advertising and teleshopping shall not”, *inter alia*, “prejudice respect for human dignity”. This wording is confoundingly vague: neither “prejudice” nor “respect” is self-explanatory and relating them jointly to the already indeterminate notion of “human dignity” greatly exacerbates the interpretive difficulties in question.⁸² Under current proposals for the renaming and revamping of the TWF as the AVMSD, the new Article 3g⁸³

would reconfigure Article 12, TWF, to read “audiovisual commercial communications must not [...]”.

The other provision of the TWF dealing *directly* with relevant issues is Article 22a, which reads:

“Member States shall ensure that broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality.”

Under current proposals to revise the Directive, Article 22a would be deleted, only to be reconfigured as Article 3e⁸⁴, which, according to the initial formal proposal from the European Commission,⁸⁵ would have read:

“Member States shall ensure by appropriate means that audiovisual media services and audiovisual commercial communications provided by providers under their jurisdiction do not contain any incitement to hatred based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”

The significance of this proposed revision can be summarised in two observations. First, it explicitly links the issues of “incitement to hatred” and “jurisdiction”. The tightening-up of the provisions on jurisdiction⁸⁶ was one of the major impulses in the process leading to the proposed revision of the Directive. A number of cases involving the broadcasting by satellite of “hate speech” into Europe have also conditioned regulatory thinking on this issue.

Second, the proposed revision would have extended the impermissible grounds of incitement to hatred from the quite narrow, “race, sex, religion or nationality”, to the rather more expansive, “sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”. This proposed revision would have directly incorporated the grounds of discrimination set out in Article 13 of the EC Treaty. However, the European Parliament, in its first reading of the Commission’s proposal as part of the codecision procedure, amended the proposed list of grounds of hatred to: “sex, race, ethnic origin, [...]” (emphasis added).⁸⁷ No explanation is given for this departure from the formula used in Article 13 and the preference for “race” over “racial origin” (in any event, this change of wording was not put forward by the Hieronymi Report⁸⁸).

This juxtaposition of hatred and discrimination has conceptual and practical implications. The conceptual differences between hatred and discrimination would ordinarily have been troublesome, but they are all the more so here because they are ignored. The vagueness of the notion, “hatred”, is also problematic. These concerns perhaps explain why the Cultural Committee of the Parliament recommended the insertion of “discrimination or” before the reference to “incitement”.⁸⁹ The recommended amendment was not adopted by Parliament, however.

Following the Parliament’s approval of the Commission’s proposal (as amended), draft Article 3e acquired a new tail-piece: “or offend against human dignity in any other manner”.⁹⁰ The express reference to human dignity is understandable, given its position of centrality in the Charter. It should be noted in passing that the amendment put forward by the Hieronymi Report also provided draft Article 3e with a similar tail-piece: “[...], and guarantee respect for human dignity and integrity”.⁹¹ That proposed amendment (which was not



adopted) again focused on human dignity, but asserted its importance in more positive terms. It also introduced the concept of integrity,⁹² which is developed, *inter alia*, in Article 3 of the Charter (“Right to integrity of the person”), as including physical and mental integrity.

Puzzlingly, the latest draft version of the AVMSD⁹³ formulates the proposed new Article 3e in a way that fails to incorporate the amendments described in the foregoing paragraphs. It now reads:

“Member States shall ensure by appropriate means that audiovisual media services provided by providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality.”

In December 2006, the European Parliament and Council adopted a Recommendation on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on-line information services industry.⁹⁴ It extends the scope of Council Recommendation 98/560/EC on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity.⁹⁵ In short, whereas these Recommendations also share the preoccupations mentioned in respect of the Council of Europe’s standard-setting measures, such as freedom of expression, the impact of new media tech-

nologies, the potential of self- and co-regulation, cooperative endeavours between national regulatory authorities (in terms of sharing experiences and handling complaints),⁹⁶ one cannot help feeling that human dignity is situated closer to the periphery than the centre of both Recommendations. Their overriding concern is protection of minors, a related but distinct goal (see further, *supra*).

Conclusion

Human dignity is of central importance in human rights law. Its importance is both foundational and normative. The Council of Europe and the European Union employ different means in their attempts to translate the concept into something practicable and workable.⁹⁷ In this respect, human dignity can be considered an “operative public value” in the sense outlined by Bhikhu Parekh. The normative implications of human dignity for the European audiovisual sector are numerous and significant; however, the overall development of the concept is being driven by a range of dynamics. This is due to the inherent polyvalency of human dignity and its relevance for a whole array of human rights. It is also due to constitutional and other normative developments at the European and national levels. This is an area of considerable ongoing growth and the continued application of measures for the protection of different kinds of human dignity in the audiovisual sector can make a meaningful contribution to the overall growth of the concept.

- 1) Signed on 26 June 1945 (entry into force: 24 October 1945).
- 2) Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948. See further, Klaus Dicke, “The Founding Function of Human Dignity in the Universal Declaration of Human Rights”, in David Kretzmer and Eckart Klein, Eds., *The Concept of Human Dignity in Human Rights Discourse* (The Netherlands, Kluwer Law International, 2002), pp. 111-120, at 111; Arthur Chaskalson, “Human Dignity as a Constitutional Value”, in *ibid.*, pp. 133-144, at 133.
- 3) See further, Antonio Cassese, *International Law in a Divided World* (Oxford, Clarendon Press, 1986), pp. 289-290.
- 4) For details of the drafting of the Preamble to the Declaration, see: Albert Verdoodt, *Naissance et signification de la Déclaration universelle des droits de l’homme* (Louvain, E. Warny, 1964), pp. 300-314; for a more general commentary on its provisions, see: Jan Martenson, “The Preamble of the Universal Declaration of Human Rights and the UN Human Rights Programme”, in Asbjørn Eide *et al.*, Eds., *The Universal Declaration of Human Rights: A Commentary* (Norway, Scandinavian University Press, 1992), pp. 17-30.
- 5) Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 (entry into force: 4 January 1969).
- 6) Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979 (entry into force: 3 September 1981).
- 7) Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966 (entry into force: 23 March 1976).
- 8) Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966 (entry into force: 3 January 1976).
- 9) Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 (entry into force: 2 September 1990).
- 10) World Conference on Human Rights – The Vienna Declaration and Programme of Action (1993). In particular, Article 5 of the Declaration forcefully states that: “All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”
- 11) Conor Gearty, *Can Human Rights Survive? The Hamlyn Lectures 2005* (Cambridge, Cambridge University Press, 2006), pp. 140-141.
- 12) Article 22, Universal Declaration of Human Rights.
- 13) Article 23, *ibid.*
- 14) Article 13, ICERD; Article 28, CRC.
- 15) Article 10, ICCPR; Article 37, CRC.
- 16) Article 23, CRC.
- 17) Article 39, CRC.
- 18) David Feldman, “Human Dignity as a Legal Value – Part I”, [1999] *Public Law* (Winter), pp. 682-702, at 689.
- 19) See, for example, the approach taken by the German Constitutional Court, which is supported by a number of commentators, like Eckart Klein and Wolfgang Heyde (for precise references, see further, *infra*).
- 20) Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (2nd Edition) (New York, Palgrave Macmillan, 2006), p. 363.
- 21) *Handyside v. United Kingdom*, Judgment of the European Court of Human Rights of 7 December 1976, Series A, No. 24, para. 49.
- 22) Bhikhu Parekh, *Rethinking Multiculturalism*, *op. cit.*, at 269.
- 23) Gay Moon and Robin Allen, *Dignity Discourse in Discrimination Law: A Better Route to Equality?* (n.d.), available at: <http://www.justice.org.uk/images/pdfs/dignityfinal.pdf> (consulted on 20 April 2007). This paragraph generally draws on ideas used by Moon and Allen in *ibid.*, at 6.
- 24) David Feldman, “Human Dignity as a Legal Value – Part I”, *op. cit.*, at 689.
- 25) *Ibid.*
- 26) For a more general discussion of the process of lending normative substance to a notion that is usually regarded as aspirational or hortatory, see: Oscar Schachter, “Human Dignity as a Normative Concept”, 77 *The American Journal of International Law* (No. 4, October 1983), pp. 848-854.
- 27) Judgment of the European Court of Human Rights (Fourth Section) of 29 April 2002, para. 65. See also: *Christine Goodwin v. the United Kingdom*, Judgment of the European Court of Human Rights (Grand Chamber) of 11 July 2002, para. 90.
- 28) Judgment of the European Court of Human Rights (First Section) of 4 December 2003, para. 40.
- 29) Article 3, ECHR, reads: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”
- 30) *Tyrer v. the United Kingdom*, Judgment of the European Court of Human Rights of 25 April 1978, para. 33.
- 31) *Pretty v. the United Kingdom*, *op. cit.*
- 32) *Christine Goodwin v. the United Kingdom*, *op. cit.*, esp. at paras. 90-91.
- 33) *Nachova and others v. Bulgaria*, Judgment of the European Court of Human Rights (Grand Chamber) of 6 July 2005, para. 145.
- 34) See generally: Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado & Kimberlè Williams Crenshaw, Eds., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview Press, USA, 1993); Richard Delgado & Jean Stefancic, Eds., *Critical Race Theory: the cutting edge* (2nd Edition) (Temple University Press, USA, 2000); Richard Delgado & Jean Stefancic, *Understanding Words That Wound* (Westview Press, USA, 2004); Robert C. Post, “Racist Speech, Democracy, and the First Amendment”, 32 *Wm. & Mary L. Rev.* 267 (1991).
- 35) A recent example from a long line of case-law is: *Witzsch v. Germany*, Decision of inadmissibility by the European Court of Human Rights (First Section) of 13 December 2005.
- 36) ETS No. 132 (entry into force: 1 May 1993), as amended by a Protocol thereto, ETS No. 171, entry into force: 1 March 2002.
- 37) Explanatory Report to the ECTT, para. 156.
- 38) *Ibid.*, para. 160.
- 39) *Ibid.*, para. 157.
- 40) For an overview, see: http://www.coe.int/t/e/human_rights/media/4_documentary_resources/CM_en.asp#TopOfPage/

- 41) For an overview, see: http://www.coe.int/t/e/human_rights/media/4_documentary_resources/1PACE_en.asp#TopOfPage
- 42) Aspects of ECRI's work touching on [audiovisual] media issues are reported on in IRIS. Relevant articles can be retrieved via the search facilities in the IRIS Merlin database (<http://merlin.obs.coe.int>).
- 43) CETS No. 157, adopted on 1 February 1995 (entry into force: 1 February 1998).
- 44) See further, Tarlach McGonagle, "The Road Less Travelled: An Analysis of the Strategy against Hate Speech Elaborated under the Framework Convention for the Protection of National Minorities", in Peter Molnar, Ed., *Hate Speech and its Remedies* (forthcoming, 2007).
- 45) Recommendation No. R (2001) 8 of the Committee of Ministers to Member States on self-regulation concerning cyber content (self-regulation and user protection against illegal or harmful content on new communications and information services) (Adopted by the Committee of Ministers on 5 September 2001, at the 762nd meeting of the Ministers' Deputies). See also, the texts adopted at the 5th European Ministerial Conference on Mass Media Policy (Thessaloniki, 11-12 December 1997) – *The Information Society: a challenge for Europe*, and at the 7th European Ministerial Conference on Mass Media Policy (Kyiv, 10-11 March 2005) – *Integration and diversity: the new frontiers of European media and communications policy*.
- 46) Recommendation No. R (97) 20 of the Committee of Ministers to Member States on "Hate Speech" (Adopted by the Committee of Ministers on 30 October 1997, at the 607th meeting of the Ministers' Deputies).
- 47) Recommendation No. R (97) 21 of the Committee of Ministers to Member States on the media and the promotion of a culture of tolerance (Adopted by the Committee of Ministers on 30 October 1997, at the 607th meeting of the Ministers' Deputies).
- 48) Explanatory Memorandum to Recommendation No. R (97) 20, *op. cit.*, para. 12.
- 49) David Feldman, "Human Dignity as a Legal Value – Part I", *op. cit.*, at 684.
- 50) *Ibid.*
- 51) Recommendation Rec (2003) 9, Adopted by the Committee of Ministers on 28 May 2003 at the 840th meeting of the Ministers' Deputies.
- 52) Recommendation No. R (97) 19, Adopted by the Committee of Ministers on 30 October 1997 at the 607th meeting of the Ministers' Deputies.
- 53) PACE Recommendation 1768 (2006), adopted on 5 October 2006; see further: Tarlach McGonagle, "Parliamentary Assembly: Image of Asylum-Seekers, Migrants and Refugees in Media", *IRIS* 2006-10: 6, available at: <http://merlin.obs.coe.int/iris/2006/10/article6.en.html>
- 54) Adopted by the Committee of Ministers on 10 July 2003 at the 848th meeting of the Ministers' Deputies.
- 55) Committee of Ministers' Declaration on freedom of expression and information in the media in the context of the fight against terrorism, adopted by the Committee of Ministers on 2 March 2005 at the 917th meeting of the Ministers' Deputies; Recommendation 1706 (2005), Parliamentary Assembly of the Council of Europe, 20 June 2005, see further: Tarlach McGonagle, "Parliamentary Assembly: Recommendation on Media and Terrorism", *IRIS* 2005-8: 4, available at: <http://merlin.obs.coe.int/iris/2005/8/article3.en.html>
- 56) Statement (2002)1 on Human Dignity and the Fundamental Rights of Others, Standing Committee on Transfrontier Television of the Council of Europe, 12-13 September 2002. See further: Tarlach McGonagle, "Standing Committee on Transfrontier Television: Statement on Human Dignity and the Fundamental Rights of Others", *IRIS* 2002-9: 5, available at: <http://merlin.obs.coe.int/iris/2002/9/article6.en.html>
- 57) David Feldman, "Human Dignity as a Legal Value – Part I", *op. cit.*, at 699. See further, *ibid.*, at 702.
- 58) See, for example, Case C-377/98, *The Netherlands v. European Parliament and Council of the European Union* [2001], Judgment of 9 October 2001, ECR I-7079.
- 59) Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn* [2004], Judgment (First Chamber) of 14 October 2004, ECR I-9609.
- 60) *Ibid.*, para. 23.
- 61) *Ibid.*
- 62) *Ibid.*, para. 9. For a summary of the case, see Alexander Scheuer, "European Court of Justice: Human Dignity Is a Basic Right Protected by the Constitution", *IRIS* 2004-10: 4, available at: <http://merlin.obs.coe.int/iris/2004/10/article6.en.html>
- 63) In this respect, the Court largely followed the Opinion of Advocate General Stix-Hackl of 18 March 2004; see further: Alexander Scheuer, "Advocate General: German Inhibition of 'Laserdrome' Justified", *IRIS* 2004-6: 3, available at: <http://merlin.obs.coe.int/iris/2004/6/article2.en.html>
- 64) *Ibid.*, para. 36.
- 65) *Ibid.*, para. 37.
- 66) See, for example, Case 4/73, *Nold v. Commission* [1974], Judgment of 14 May 1974, ECR 491, para. 13; Case C-260/89, *Elliniki Radiophonia Tileorasi* [1991], Judgment of 18 June 1991, ECR I-2925, para. 41; Case C-353/89, *Commission v. The Netherlands* [1991], Judgment of 25 July 1991, ECR I-4069, para. 30.
- 67) Article 6.2 (ex Article F.2) of the EU Treaty now reads: "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law." Article 6.1 sets out that "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States." Article 29 (ex. Article K1) provides, *inter alia*, a specific legal basis for "preventing and combating racism and xenophobia".
- 68) Charter of Fundamental Rights of the European Union, Nice, 7 December 2000, as published in the *Official Journal of the European Communities* of 18 December 2000, C 364/1.
- 69) OJ C 310 of 16 December 2004.
- 70) Article I-9 of the Treaty. See further, Rick Lawson, "Human Rights: The Best is Yet to Come", 1 *European Constitutional Law Review* (2005), pp. 27-37.
- 71) Article 1 reads: "Human dignity is inviolable. It must be respected and protected." See also the Charter's preambular reference to human dignity, which identifies it as one of the "indivisible, universal values" on which the European Union is founded (Recital 2).
- 72) Wolfgang Heyde, "Article 1 – Human Dignity", in EU Network of Independent Experts on Fundamental Rights, *The Commentary of the Charter of Fundamental Rights of the European Union*, June 2006, pp. 23-29.
- 73) *Ibid.*, at 25.
- 74) Note from the Praesidium, Draft Charter of Fundamental Rights of the European Union, Doc. No. CHARTE 4473/00, Brussels, 11 October 2000, p. 3.
- 75) Wolfgang Heyde, "Article 1 – Human Dignity", *op. cit.*, at 28.
- 76) *Ibid.*, at 29.
- 77) Basic Law for the Federal Republic of Germany (text edition: December 2000), available at: http://www.bundestag.de/htdocs_e/parliament/function/legal/germanbasiclaw.pdf
- 78) Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals - Texts and Materials* (Second Edition) (New York, Oxford University Press, 2000), p. 986.
- 79) An examination of that body of case-law is beyond the scope of this article, but see, by way of overview: Eckart Klein, "Human Dignity in German Law", in David Kretzmer and Eckart Klein, Eds., *The Concept of Human Dignity in Human Rights Discourse*, *op. cit.*, pp. 145-159, and for a historical perspective, Joern Eckert, "Legal Roots of Human Dignity in German Law", in *ibid.*, pp. 41-53.
- 80) Jackie Jones, "Common Constitutional Traditions: Can the Meaning of Human Dignity under German Law Guide the European Court of Justice?", *Public Law* [2004], pp. 167-187.
- 81) See further, Nicola Lamprecht-Weissenborn, "DE – Court Upholds Rulings that TV Programmes Breached Human Dignity and Youth Protection Provisions", *IRIS* 2007-3: 11, available at: <http://merlin.obs.coe.int/iris/2007/3/article16.en.html>
- 82) See also in this connection, the European Commission's Interpretive Communication on certain aspects of the provisions on televised advertising in the "Television without Frontiers" Directive, Official Journal of the European Communities, C102, 28 April 2004, pp. 2-11.
- 83) Editor's note: in the consolidated text of the amended TWF Directive published end of May 2007 Art. 3g became Art. 3d. The quoted part of the provision remains unchanged. The consolidated version is available at: http://ec.europa.eu/information_society/newsroom/cf/document.cfm?action=display&doc_id=312
- 84) Editor's note: in the consolidated text of the amended TWF Directive published end of May 2007 Art. 3e became Art. 3b. The provision remains unchanged.
- 85) Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (13 December 2005).
- 86) See further, Tarlach McGonagle & Ad van Loon, "Jurisdiction over Broadcasters in Europe: Report on a Round-table Discussion", in Susanne Nikoltchev, Ed., *IRIS Special: Jurisdiction over Broadcasters in Europe - Report on a Round-table Discussion*, (Strasbourg, European Audiovisual Observatory, 2002), pp. 1-21; Thomas Gibbons, "Jurisdiction over (Television) Broadcasters: Criteria for Defining 'Broadcaster' and 'Content Service Provider'", in A. Rossnagel, Ed., *Die Zukunft der Fernsehrichtlinie/The Future of the 'Television without Frontiers' Directive* (Baden-Baden, Germany, Nomos, 2005), pp. 53-60; André Lange & Susanne Nikoltchev, "Transfrontier Television in the European Union: Market Impact and Selected Legal Aspects", Background Paper, Ministerial Conference on Broadcasting organised by the Irish Presidency of the European Union, Dublin and Drogheda, 1-3 March 2004, available at: http://www.obs.coe.int/online_publication/transfrontier_tv.pdf.en
- 87) Amendment 107: ARTICLE 1, POINT 6 Article 3e (Directive 89/552/EEC), European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (COM(2005)0646-C6-0443/2005-2005/0260(COD)) (Codecision procedure – first reading), 13 December 2006 (Doc. No. P6_TA-PROV(2006)0559).
- 88) Report on the proposal for a directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, European Parliament Committee on Culture and Education, Rapporteur: Ruth Hieronymi, 22 November 2006, Doc. No. A6-0399/2006 (final).
- 89) This is a matter of speculation because unlike many of the amendments proposed by the Committee on Culture and Education in its Report, this one was not accompanied by a brief statement of "justification": Amendment 44, ARTICLE 1, POINT 6, Article 3e (Directive 89/552/EEC).
- 90) Amendment 107, *op. cit.*
- 91) Amendment 44, Hieronymi Report, *op. cit.*
- 92) Again, no "justification" is given as to why the reference to "integrity" was inserted.
- 93) Draft Audiovisual Media Services Directive – Consolidated text including EP First Reading amendments accepted in full and the amended Commission proposal, Non Binding Working Document 2005/0260 (COD), March 2007. Editor's note: in the consolidated text of the amended TWF Directive published end of May 2007 Art. 3e became Art. 3b. The provision remains unchanged.
- 94) 2006/952/EC, adopted on 20 December 2006.
- 95) Adopted on 24 September 1998.
- 96) See, in particular, the Annex to the 1998 Recommendation, which is entitled "Indicative Guidelines for the implementation, at national level, of a self-regulation framework for the protection of minors and human dignity in on-line audiovisual and information services".
- 97) This is evidenced, for example, by the concrete follow-up to the Recommendations, which takes the form of Evaluation Reports; more specifically, the Reports to date have placed considerable emphasis on the importance of media literacy, rating systems, the use of content descriptors, filtering, cooperation between national regulatory authorities, participatory regulatory models, etc.