



# THE 'ETHICALIZATION' OF LAW

FUNDAMENTAL QUESTIONS, DANGERS AND OPPORTUNITIES FROM AN INTERDISCIPLINARY PERSPECTIVE



UNI  
FREIBURG

Symposium, Freiburg 29./30.9.2011

## THE EXPANDING ROLE OF HUMAN DIGNITY IN INTERNATIONAL CRIMINAL LAW

(Abstract)

**J. Benton Heath**  
(NYU)

Prof. Dr. Silja Vöneky (editor).

Max-Planck-Forschungsgruppe  
Max-Planck-Institut für ausländisches  
öffentliches Recht und Völkerrecht  
Im Neuenheimer Feld 535  
69120 Heidelberg, Germany  
ethikrecht2011@mpil.de

Institut für Öffentliches Recht  
Abt. 2 (Völkerrecht und Rechtsvergleichung)  
Rechtswissenschaftliche Fakultät  
Universität Freiburg  
Platz der Alten Synagoge 1  
79098 Freiburg im Breisgau, Germany  
voelkerrecht@jura.uni-freiburg.de

[www.ethisierungrecht.de](http://www.ethisierungrecht.de)

This document is protected under German Copyright Law. Any requests shall be sent to J. Benton Heath.

## **The Expanding Role of Human Dignity in International Criminal Law**

### **Abstract**

In recent years, international criminal tribunals have begun to show a willingness to convict defendants of crimes against humanity, on the ground that the defendant's conduct violates the fundamental right to human dignity. This development is particularly striking in the context of "hate speech"—vitriolic public speech that denigrates a particular social class, but which does not constitute direct incitement to violence. In convicting the publisher of Radio Télévision Libre des Mille Collines for persecution, the International Criminal Tribunal for Rwanda held that "[h]ate speech targeting a population on the basis of ethnicity ... violates the right to respect for the dignity of members of the group as human beings."<sup>1</sup> This judgment invites us to consider more closely the conception (or the various conceptions) of human dignity at work in these criminal convictions, particularly given the deep contestation to which the concept of human dignity is subject.

This paper makes two points. First, after identifying recent expansive uses of human dignity in international criminal jurisprudence, this paper endeavors to reconstruct the conceptions which underlie these decisions. In doing so, I will draw on several theories of human dignity in political, moral and legal philosophy, including Kant's distinction between value and worth, as well as more contemporary work. I conclude that decisions such as the ICTR's hate speech holding may be helpfully explained by Jeremy Waldron's argument that human dignity expresses a "leveling-up" of all human beings to a status once held only by royalty.<sup>2</sup> Widespread, vitriolic hate speech injures human dignity by attempting to assign a lower social status to an entire class of people, thereby "re-stratifying" society (the re-stratification thesis).

Second, and most importantly for this conference, this paper assesses the wisdom of importing such a deeply contested concept into substantive criminal law. The right to dignity enshrined in Article 1 of the Universal Declaration of Human Rights lacks a clear conceptual basis, and its limits are unclear at best. It has even been suggested that dignity appears in the declaration as a

“placeholder” for a variety of moral and theological concepts that would have been politically infeasible to include.<sup>3</sup> While dignity does have a relatively clear meaning in some contexts, such as the prohibition on “outrages upon personal dignity” in armed conflicts, the expanding use of such a contested concept threatens to undermine the principle of legality, as the concept of dignity is continually repurposed in unpredictable ways.

Although the trial process may be considered a useful place for developing and reevaluating contested concepts in light of new information or changing values,<sup>4</sup> there are many reasons to be concerned about the prospect of international criminal courts elaborating theories of human dignity. First is the fear that crimes against humanity jurisprudence might become unpredictable and difficult to rely upon. Second, the fragile legitimacy of international criminal tribunals might make them a particularly inappropriate place for the resolution of contestation regarding fundamental norms such as dignity.

Tying these two strands together, this paper suggests that the re-stratification thesis provides a useful way forward for international criminal jurisprudence. First, the view of human dignity as a kind of equal rank or social status ties the conception of dignity to other fundamental norms in the international human rights system, such as equality and non-subordination, that may enjoy more widespread agreement. Second, the re-stratification thesis may provide clear conceptual limits for an otherwise amorphous concept, thus providing the clarity and stability that legality demands. This paper concludes on a cautionary note, emphasizing the risks involved in a dignity-based jurisprudence.

## Literature

<sup>1</sup> Prosecutor v. Nahimana et al., Case No. ICTR-99-52-A, Appeals Judgment, ¶ 986 (Nov. 28, 2007); see also Prosecutor v. Nahimana et al., Case No. ICTR-99-52-T, Judgment and Sentence (Dec. 3, 2003).

<sup>2</sup> Jeremy Waldron, Dignity and Rank, Tanner Lectures on Human Values at the University of California, Berkeley, at (April, 2009), available at [http://www.law.nyu.edu/news/waldron\\_tanner\\_lectures](http://www.law.nyu.edu/news/waldron_tanner_lectures).

<sup>3</sup> See Christopher McCrudden, Human Dignity and Judicial Interpretation of Human Rights, 19 Eur. J. Int'l L. 655 (2008).

<sup>4</sup> In this connection, the jurisprudential theories of Dworkin, Selznick, and Habermas are informative. See generally Ronald Dworkin, *Taking Rights Seriously* 131-49 (1977); Jürgen Habermas, *Between Facts and Norms*, ch. 5 (William Rehg trans., 1996); Phillip Selznick, *The moral Commonwealth* 463-76 (1992).