

## ARTICLE 1 UDHR: FROM CREDO TO REALISATION

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### 1. A MATTER OF FAITH

Remarkably, in their preambles, both the United Nations Charter (the Charter) and the Universal Declaration of Human Rights (UDHR or the Declaration) emphasise ‘faith’. This *faith* is not proclaimed but ‘reaffirmed’ by a subject self-identified in the Charter as WE THE PEOPLES OF THE UNITED NATIONS. This entity expresses itself as being DETERMINED ‘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’.<sup>1</sup>

Curiously, in the Dutch versions of both the Charter and the Declaration ‘faith’ has been translated as *vertrouwen*, meaning ‘trust’. Yet, in the time of the Nazi regime in Germany trust in universal human rights had been fundamentally betrayed. It was ‘faith’ (*geloof*) in those rights that had to be reaffirmed. Indeed, the obvious need for reaffirmation of faith in fundamental values was also emphasised by René Cassin, a major drafter of the UDHR who received the Nobel Peace Prize (1968) for his contribution. In response to critical remarks from members of the drafting committee that *liberté*, *égalité* and *fraternité* were already part of a human rights text of constitutional stature (the French *Déclaration des droits des hommes et de citoyens* of 1789) he noted that within ‘the preceding years millions of men had lost their lives, precisely because those principles had been ruthlessly flouted’.<sup>2</sup> Hence, he felt it ‘was essential that the United Nations should again proclaim to mankind those principles which had come to extinction and should refute the abominable doctrine of fascism’.<sup>3</sup>

In its preamble, the Declaration repeats the reaffirmation of faith by the Charter (naturally missing out the States): ‘Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women’. This confession culminates in its opening article: ‘All human

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<sup>1</sup> United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

<sup>2</sup> Morsink, J., *The Universal Declaration of Human Rights: Origins, Drafting and Intent*, University of Pennsylvania Press, Philadelphia, 1999, at p. 39.

<sup>3</sup> *Idem*.

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.’

Not surprisingly, there is hardly any jurisprudence on Article 1 UDHR (Article 1).<sup>4</sup> In the scarce literature on this foundational text, two major issues are addressed: origin and inclusion, and basic values. A primary focus, then, is on the drafting process.<sup>5</sup> The adoption of Article 1 ‘reflects the inspirational nature of the project’, as one author puts it.<sup>6</sup> It was included, he writes, ‘only after much controversy about whether it was just stating the obvious, or whether it should be included in the preamble rather than the main text [...] The reason for including it in the main text is to state firmly the basis of all human rights, the rationality of human persons and their *obligation* to deal fairly with everyone else, regardless of race, sex, wealth and so on’.<sup>7</sup> Actually, the middle part of the text - on the human endowment with reason and conscience, and that duty to treat others as fellows - was added somewhat later at the drafting stage after there had been an argument as to its factual basis. Deliberately, the article is voiced as a matter of faith rather than fact. In the General Assembly, the term ‘by nature’ - in respect of the endowing force - was deleted as the gist of the Declaration was to keep disputed (‘metaphysical’)<sup>8</sup> beliefs out of a *universal* declaration. In a similar vein, the General Assembly rejected the Dutch delegate Leo Beaufort’s amendment to the preamble, referring to ‘man’s divine origin and immortal destiny’.<sup>9</sup> Finally, the statement of duty - ‘should act towards one another in a spirit of brotherhood’ - was intentionally placed at the end. A proposed phrase referring to ‘duties to the community’ was shifted to Article 29.<sup>10</sup>

Obviously then, Article 1 was framed as opening articles of statutes and constitutions commonly are, in both public and private settings, namely as *jus divinum* in the metaphorical sense of a fundamental statement of faith and mission - a statement of principles - as opposed to *jus*

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<sup>4</sup> It is primarily ‘human dignity’ that plays its part in judicial decision-making, but only in cases in which national and/or regional sources also refer to this foundational value.

<sup>5</sup> On the origin and inclusion of Art. 1 UDHR see, notably, Morsink, *op. cit.* note 1; Facing History and Ourselves National Foundation, ‘Fundamental Freedoms: Eleanor Roosevelt and the Universal Declaration of Human Rights – Part III: The Universal Declaration of Human Rights’, available at: [www.facinghistory.org/sites/facinghistory.org/files/PartIII\\_essay\\_and\\_documents\\_0.pdf](http://www.facinghistory.org/sites/facinghistory.org/files/PartIII_essay_and_documents_0.pdf), last accessed 27 January 2013; Lindholm, T. ‘Article One’, in Eide, A. et al. (eds.), *The Universal Declaration of Human Rights: A Commentary*, Scandinavian University Press/Oxford University Press, Oslo/Oxford, 1992, pp. 31-56; Morsink’s book review of that volume, Morsink, J., ‘The Universal Declaration of Human Rights: A Commentary’, *Human Rights Quarterly*, Vol. 17, No. 2, 1995, pp. 398-402; Waltz, S., ‘Reclaiming and rebuilding the history of the Universal Declaration of Human Rights’, *Third World Quarterly*, Vol. 23, No. 3, 2002, pp 437–448; Bailey, P., ‘The Creation of the Universal Declaration of Human Rights’, available at: [www.universalrights.net/main/creation.htm](http://www.universalrights.net/main/creation.htm); Danchin, P., ‘Article 1 UDHR, drafting history’, available at: [ccnmtl.columbia.edu/projects/mmt/udhr/article\\_1/drafting\\_history.html](http://ccnmtl.columbia.edu/projects/mmt/udhr/article_1/drafting_history.html).

<sup>6</sup> Bailey, *loc. cit.* note 5.

<sup>7</sup> (Emphasis added).

<sup>8</sup> Lindholm, *loc. cit.* note 5.

<sup>9</sup> Morsink, *op. cit.* note 2, at p. 288.

<sup>10</sup> Lindholm, *loc. cit.* note 5, at p. 40.

*positivum*, implying concrete norms and rules enacted to be observed and if necessary enforced.<sup>11</sup> Indeed, the first article of the Declaration is to be regarded as an expression of the reaffirmed *faith* in fundamental human rights expressed in the preambles of both the Charter and the Declaration. Thus, human rights appear to be based on universal faith in certain crucial values. It is primarily as a normative basis for both law-making and judicial interpretation that these would have to play their part.

Notably, however, the opening article is not to be regarded as Faith (with a capital F), as the Declaration is meant to provide a globally shared reference for the protection of human dignity through inalienable rights common to all, irrespective of differences in world views and/or religious beliefs. Hence Article 1, too, needs contextual efforts to connect its faith (with a small f) with specific transcendental belief systems to which people in their own specific contexts feel attached. Such linking to people's own lifeworlds - the socio-economic, political and cultural landscapes in which right-holders live<sup>12</sup> - is a condition of its *legitimacy*.<sup>13</sup> Common acceptability based on institutions, principles, processes and outcomes that are acknowledged as 'right' is, indeed, a major requisite with regard to the implementation of values, norms and rules. In respect of human rights, this entails that its fundamental standards as formulated in crucial texts such as Article 1 are examined and discussed in contextual settings, too, in order to be linked to people's own (metaphysical) frames of reference on 'right' and 'wrong'. Consequently, in efforts to enhance the realisation of human rights, that statement of reaffirmed faith in the Declaration deserves to be lifted out of its current obscurity (even within the mission's own in-crowds).

The second focus in the literature on Article 1 concerns the basic values expressed in this text.<sup>14</sup> Notably, the first part of the statement – 'All human beings are born free and equal in dignity

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<sup>11</sup> In canon law, an amazing distinction is made between *jus divinum positivum* and *jus divinum naturale*. Notably, the term *jus divinum* is used here in a purely metaphorical sense, referring to a statement of faith.

<sup>12</sup> The term originates from Jürgen Habermas, who distinguishes between 'system' and 'lifeworld'. While by its international manifestation in documents and institutions the human rights mission presents itself as a system, it is in lifeworlds that human rights have to take roots. See: de Gaay Fortman, B., *Political Economy of Human Rights. Rights, Realities and Realization*, Routledge, London/New York, 2012, pp. 14 ff.

<sup>13</sup> As to the meaning and implications of legitimacy in respect of human rights, see: de Gaay Fortman, B., 'Human Rights as "Regulae Iuris": An Inquiry into the Dialectics of Legality versus Legitimacy', *European Review of Private La*, Vol. 20, No. 2, 2012, pp. 409–424.

<sup>14</sup> On the basic values expressed in Article 1 (with an emphasis on *human dignity*) see, notably: Schachter, O. 'Human Dignity as a Normative Concept', *American Journal of International Law*, Vol. 77, No. 4, 1983, pp. 848-854; Morsink, J., 'The Philosophy of the Universal Declaration of Human Rights', *Human Rights Quarterly*, Vol. 6, No. 3, 1984, pp. 309-334; and Odello, M. and Cavandolli, S. (eds.), *Emerging Areas of Human Rights in the 21st Century*, Routledge, London, 2011, particularly Chapter 3: Burchill, R. and Cavandoli, S. (eds.), *The Contribution of the Universal Declaration of Human Rights to the Promotion and Protection of Democracy in International Law*, Routledge, Abingdon, 2011, pp. 45-65; Spielmann, D., *Is the Universal Declaration Obsolete? Recent Trends in the Case-Law of the European Court of Human Rights*, public lecture at University College London, 2008, published in *Revista da Faculdade de Direito da UFMG*, No. 56, 2010, pp. 167-188; McCrudden, C., 'Human dignity and judicial interpretation of human rights', *European Journal of International Law*, Vol. 19, No. 4, 2008, pp. 655-724; Dicke, K.,

and rights’ – is seen as ‘the keystone, cornerstone and credo of the whole declaration as well as the basis, foundation and framework of the rights enumerated in its various articles’.<sup>15</sup> While at the drafting stage there had not been much discussion on the terms ‘free’, ‘equal’ and ‘dignity’,<sup>16</sup> it was particularly the notion of human dignity that aroused later debate. Although deliberately undefined, as usual in a *credo*, there is general agreement that this foundational value refers to the intrinsic worth of every person, simply by being human. ‘Inherent’ is the adjective used in the two preambles, meaning that human dignity is a matter of being rather than having, and hence implying that it cannot be taken away.<sup>17</sup> Indeed, as argued by US Supreme Court Justice, William Brennan, ‘even the vilest criminal remains a human being possessed of common human dignity’.<sup>18</sup>

The principle of human dignity is generally seen as limiting and governing any use of power over human beings. People count, and, in principle, no individual counts more, or less, than any other. No human being, in other words, is to be excluded from the typical human rights terms *all* and *everyone*; while its opposite *no one* is to apply to all human beings without any exception. So from a positive angle, human dignity connects the international venture for the realisation of human rights to efforts aimed at the inclusion of those still marginalised and excluded.<sup>19</sup> This intrinsic link between ‘equal in dignity’ and ‘equal in rights’ was already convincingly argued in the nineteenth century in a reflection on the rights of the slave: ‘Human beings have *rights*, because they are *moral* beings: the rights of *all* men grown out of their moral nature; they have essentially the same rights.’<sup>20</sup> Illustratively, the preamble of a French decree abolishing slavery defined that practice as ‘an affront to human dignity’.<sup>21</sup>

The implications of human dignity tend to be primarily approached from a negative angle.

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‘The Founding Function of Human Dignity in the Universal Declaration of Human Rights’, in: Kretzmer, D. and Klein, E. (eds.), *The Concept of Human Dignity in Human Rights Discourse*, Kluwer Law International, The Hague, 2002; Aquini, M. ‘Human Rights, International Solidarity and the Principle of Fraternity’, 2006, *available at: [www.new-humanity.org/en/pdf-documents/english/human-rights.html](http://www.new-humanity.org/en/pdf-documents/english/human-rights.html)*.

<sup>15</sup> Lindholm, *loc. cit.* note 5, at p. 41.

<sup>16</sup> *Ibidem* at p. 47.

<sup>17</sup> In fact, as observed by US Supreme Court Justice, William Brennan, in a comment made in 1974, ‘even the vilest criminal remains a human being possessed of common human dignity’, quoted in Wermiel, S.J., ‘Law and Human Dignity: the Judicial Soul of Justice Brennan’, *William & Mary Bill of Rights Journal*, 1998, Vol. 7, No. 1, pp. 223-239, at p. 232. Yet, although inalienable, human dignity can be violated by the individual himself—the drunkard, for example—as well as by others. In the vilest criminal’s case, both occur at the same time; a rapist, for instance, violates the dignity of both his victim and himself.

<sup>18</sup> *Furman v. Georgia*. 408 US 238 (1972).

<sup>19</sup> Actually, the whole international human rights venture originates not from just one, but from two, civilising missions:

1. Protection of individuals and collectivities against abuse of power, particularly by their own state, by enacting and enforcing *inalienable rights*; and
2. *Inclusion* of everyone in all efforts to protect people’s basic human dignity.

Whereas mission (1) may be seen as primarily ‘Western’ history, in global struggles against marginalisation and exclusion, mission (2) not rarely manifested itself as ‘anti-Western’. See: de Gaay Fortman, *op. cit.* note 12, pp. 5 ff.

<sup>20</sup> Grimké, A., Letter XII ‘Human Rights Not Founded On Sex’, in: *Letters to Catherine Beecher*, Isaac Knapp, Boston, 1838, at p. 114.

<sup>21</sup> Decree of 27 April 1848, quoted by McCrudden, *loc. cit.* note 14, at p. 661.

Thus, Ronald Dworkin has argued that the idea of human dignity ‘supposes that there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community, and holds that such treatment is profoundly unjust.’<sup>22</sup> In a similar vein, Avishai Margalit has focused his understanding of human dignity on its opposite, *humiliation*, which he relates to injury of self-respect: it is ‘any sort of behaviour or condition that constitutes a sound reason for a person to consider his or her self-respect injured’.<sup>23</sup> In an editorial of the prestigious *American Journal of International Law*, Oscar Schachter goes as far as enumerating twelve specific ‘affronts to dignity’ in two categories: ‘conduct and ideas that directly offend or denigrate the worth and dignity of individuals’ and ‘conduct and ideas that are implicitly incompatible with the basic idea of the inherent dignity and worth of human persons’.<sup>24</sup> As a direct affront, he regards, for example, ‘Vilification or derision of beliefs that people hold in reverence. Teaching that particular races, ethnic groups or religions hold “ridiculous” or dangerous views, or otherwise belittling cherished beliefs’.<sup>25</sup> As an indirect affront, he mentions, amongst other things, ‘Degrading living conditions and deprivation of basic needs’.<sup>26</sup> It seems unlikely, however, that the mere term ‘equal in dignity’ as mentioned in Article 1 were to be interpreted as a sufficient legal basis to substantiate judicial claims in such matters. (Notably, in liberal democracies ‘ideas’ are not easily made subject to public prosecution.)

While, naturally, the foundational principle of human dignity is to acquire specific meaning in contextual settings, abstract casuistics may confuse rather than elucidate its meaning. Yet, in line with the framers’ objective to formulate a *credo*, the challenge remains to conceptualise Article 1 as an integral text, implying a way of connecting dignity, liberty, equality and solidarity (‘brotherhood’) in one lucid setting that might serve as a normative basis to judge the (il)legitimacy of certain uses of power by whatever actors.

## 2. CONCEPTUALISING ARTICLE 1 AS AN INTEGRAL TEXT

In line then with the life and work of Leo Zwaak – whose immense commitment and contribution to human rights are honoured in this volume – an effort has to be made to *operationalise* the credo of Article 1, too. An integral vision underlying such an endeavour may well be summarised in the term *simultaneous realisation*.<sup>27</sup> Indeed, for the student of (non-)implementation of human rights, a crucial task is to understand the close relationship between seemingly distinct principles underlying

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<sup>22</sup> Dworkin, R. *Taking Rights Seriously*, Harvard University Press, Cambridge, 1978, pp. 198-199.

<sup>23</sup> Margalit, A., *The Decent Society*, Harvard University Press, Cambridge, 1996, at p. 9.

<sup>24</sup> Schachter, *loc. cit.* note 14, at p. 852.

<sup>25</sup> *Idem.*

<sup>26</sup> *Idem.*

<sup>27</sup> Cf. van der Kooy, T.P., *Over Economie en Humaniteit*, Zomer en Keuning, Wageningen, 1954. See also: de Gaay Fortman, *op. cit.* note 12, pp. 16 ff.

distributive justice, such as liberty and equality. Comparative analysis of the economic order, for instance, has shown positive effects of *freedom* of enterprise on effectiveness in the allocation of scarce resources. Yet, such an observation is not to be disconnected from other elements of a well-functioning market economy such as open competition and public policies tuned to a fair measure of socio-economic *equality*.<sup>28</sup> Indeed, an economy that disregards equality leads to socio-economic injustice<sup>29</sup>, while equality without liberty results in intolerable ineffectiveness in the allocation of scarce resources.<sup>30</sup> Likewise, a polity based on liberty without equality turns into exploitation, while equality without liberty becomes oppression.

In political-philosophical analyses tuned to these primary principles, liberty is usually interpreted as autonomy. Dworkin, for one, holds that in order to be legitimate, a government ‘must respect fully the liberty and right of each person to decide for himself how to make something valuable of his life’.<sup>31</sup> Article 1’s second sentence perceptibly connects such an interpretation of freedom to responsibility, since human beings ‘are endowed with reason and conscience’. Hence, from a public-political perspective, liberty requires a government’s ‘respect for responsibility’.<sup>32</sup> Concurrently, ‘it must show equal concern for the fate of every person over whom it claims dominion’.<sup>33</sup> His point then is that solutions to political problems must be found in ways that value both principles of ‘full respect for responsibility’ and ‘equal concern’, while compromising neither. The continuous challenge is ‘to find attractive solutions of each that fully satisfy both’. Strikingly, Dworkin speaks here of ‘questions of distributive justice’ calling for ‘solutions to *simultaneous equations*’.<sup>34</sup>

As a principle underlying public justice, ‘equal concern’ sounds well in line with ‘equal in dignity and rights’ as proclaimed in Article 1. Notably, its connection with full respect for responsibility is meant to serve towards simultaneous realisation. However, what about ‘free’, that is, the other foundational aspect of the state in which we are held to be born? In order to avoid ‘the danger that liberty and equality will conflict’, Dworkin distinguishes here between liberty and freedom. Your freedom ‘is simply your ability to do anything you might want to do without government constraint’, while your liberty ‘is that part of your freedom that government would do

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<sup>28</sup> See: de Gaay Fortman, B., *Theory of Economic Policy. A Confrontation of Economic, Political and Legal Principles*, North Holland Publishing Company (now Reed/Elsevier), Amsterdam, 1966.

<sup>29</sup> See: de Gaay Fortman, B. ‘Is Capitalism Possible?’, *Sociological Analysis*, Vol. 1, No. 2, 1998, pp. 43-59

<sup>30</sup> de Gaay Fortman, B., ‘Is Socialism Possible?’ in *Sociological Analysis*, Vol. 1, No. 1, 1998, pp. 97-106

<sup>31</sup> Dworkin, R., *Justice for Hedgehogs*, The Belknap Press of Harvard UP, Cambridge, 2011, at p. 2.

<sup>32</sup> *Idem*.

<sup>33</sup> *Idem*. In his *Taking Rights Seriously* he had called this ‘the idea of political equality’ (Dworkin, *op. cit.* note 21, at p. 198). In *Justice for Hedgehogs*, Dworkin also speaks of ‘resource equality’, a notion referring to equality of opportunities.

<sup>34</sup> *Ibidem* at p. 3. (Emphasis added).

wrong to constrain'.<sup>35</sup> Hence, as conceptually there is no true liberty without equal concern and no true equality without respect for personal responsibility, 'the two conceptions are thoroughly integrated: each depends on the same solution to the simultaneous equation problem'.<sup>36</sup>

While obviously this is just an abstract solution, the point is valid: liberty and equality are not to be played out against one another. 'Freedom and equality', Judge Dean Spielmann of the European Court of Human Rights concluded in a recent lecture on whether the UDHR had become obsolete, 'are the two basic ideas that ground the universality of human rights'.<sup>37</sup> It is the global faith in the dignity and worth of the human person that provides the integrating perspective here.

In its second sentence, Article 1 introduces the third core value flowing from universal human dignity, namely, 'brotherhood', literally the *fraternité* of the trio of the French revolution (1789); today one would speak of fellowship or solidarity. Notably, this is to be interpreted in line with our natural endowment with reason and conscience. At the drafting stage, there had already been discussion as to the factual basis of that statement. Yet, corresponding to the gist of Article 1 as a whole, it is to be seen as a matter of faith rather than fact (see above): the human being is to be viewed as a creature endowed with a capacity for normative judgement. Notably, the two elements of this normative anthropology are mentioned in combination, meaning that the capacity to analyse effects of human behaviour not only on one's own situation but also on other people's positions and the whole environment, is not to be used without regard to what is right and wrong. From a jurisprudential perspective there is nothing new here. With regard to 'conscience', for example, one may think of the legal principle 'ignorantia facti non juris excusat',<sup>38</sup> implying that people cannot excuse themselves out of ignorance as to what is right and what is wrong. In respect of reason, reference may be made to a legal 'rule of reason', for instance, in which the judiciary qualified the strict prohibition of 'monopolization' in American antitrust law by involving consideration of 'unworthy motives' or 'predatory practices' revealing unlawful 'intent to monopolize'.<sup>39</sup> Actually, both illustrations show how in judicial interpretation 'reason' and 'right' tend to go together. The same applies to principles of appropriate ('lawful') government such as 'Wednesbury unreasonableness', which renders unlawful any decision that no public officer in his right mind could ever dream to lay within the powers of his authority, later articulated as 'so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to

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<sup>35</sup> *Ibidem* at p. 4.

<sup>36</sup> *Idem*.

<sup>37</sup> Spielmann, *loc. cit.* note 14, at p. 187.

<sup>38</sup> Ignorance of fact may excuse, but not ignorance of law. Bouvier, J., *A Law Dictionary*, 1856, I Co. 177; 4 Bouv. Inst. n 3828.

<sup>39</sup> See: de Gaay Fortman, B. *Theory of Competition Policy. A Confrontation of Economic, Political and Legal Principles*, North Holland, Amsterdam 1966, pp. 250 ff.

the question to be decided could have arrived at it'.<sup>40</sup> What it all means is that there is no *per se* legality or illegality. By connecting human rights to a view on the human being as a creature endowed with reason and conscience, the Declaration rejects legal positivism.

Interpretative implications of *reason and conscience* are, indeed, part and parcel of jurisprudence through the ages. Thus, the *regulae juris* as incorporated in Roman as well as Canon Law, provide normative guidance in judicial decision-making. They throw light upon concrete cases in which legal rules first have to be determined as applicable and then applied in line with a proper interpretation. As *maximae propositiones* these rules in interpretation rest on reason; as concise declarations of the demands of justice (*generalia juris principia*) they are rooted in morality ('conscience'). Generally, the *regulae* tend to combine elements of both reason and conscience, illustrated, for example by the rule that the other party should be heard too ('audi et alteram partem'), or that the person who carries the burden should also be entitled to the benefits.<sup>41</sup> Such principles express what is both fair and reasonable.

The conceptualisation of the human being as a creature endowed with reason and a conscience is instantly followed by the requirement to 'act towards one another in a spirit of brotherhood'. This reference to community with other human beings is of substantial significance, certainly in a foundational document such as the Declaration.<sup>42</sup> It implies, firstly, that we should see our fellow human beings as sisters and brothers, or, in other words, in a spirit of fellowship. Understandably then, it has been related to the biblical maxim 'to love your neighbour as yourself'.<sup>43</sup> Secondly, that *credo* not only uses the term 'brotherhood' in the sense of a relationship – in the first version it spoke of 'brothers' – but also declares that in that spirit, all human beings 'should act towards one another' (rather than just 'regard each other' as it had been put in that first draft).<sup>44</sup> Thus, the 'community' to which everyone has duties (Article 29), is already implicit in the foundational discourse of the opening article, albeit not in respect of collective rights here, but rather as a socio-legal and political mentality that ought to pervade all human behaviour. Indeed, legal and political principles such as, positively, good faith, due care, good governance and sustainability, and, negatively, undue influence, abuse of law, abuse of authority, and *contra bonos*

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<sup>40</sup> This notion is based on the UK case *Associated Provincial Picture Houses v. Wednesbury Corporation* [1947] EWCA Civ 1, [1948] 1 K.B. 223, Court of Appeal (England and Wales). The subsequent articulation by Lord Diplock refers to *Council of Civil Service Unions v Minister for the Civil Service* [1983] UKHL 6 at para. 410, [1984] 3 All ER 935, House of Lords.

<sup>41</sup> Qui sentit onus, sentire debet commodum, et e contra: Vol 5,12, reg. 55 (*Corpus Iuris Canonici*: SEXTI DECRETAL. LIB. V, TIT. XII., DE REGULIS IURIS, Bonifacius VIII, Regula LV)..

<sup>42</sup> Spielmann quotes his Belgian colleague in the European Court of Human Rights, Judge Françoise Tulkens, who, when explaining human rights instruments to children who recently visited the Court, compared the Universal Declaration with international human rights treaties by saying that the Declaration is like a '*declaration of love*', whereas the treaties are like '*contracts of marriage*'.

<sup>43</sup> Founding father René Cassin, as quoted by Aquini, *loc. cit.* note 13, at p. 4, n. 6.

<sup>44</sup> Danchin, *loc. cit.* note 5.

*mores* come to mind here.

Based on this understanding of the fundamental values and principles proclaimed in Article 1, let us now focus on the core theme of this volume, *viz.* realisation.

### 3. SIMULTANEOUS REALISATION

*Opinio juris* reveals a consensus that *human dignity* is not a substantive norm ‘from which individual human rights claims can be derived immediately by deduction’ but rather possesses a ‘legitimizing function’.<sup>45</sup> Indeed, it is ‘the source from which the validity and universal authority of human rights is derived, and at the same time it functions as a critical yardstick to answer the question of which historically conditioned claims shall be recognized as human rights’.<sup>46</sup> Hence, the principles of liberty, equality and brotherhood ‘are not human rights in themselves, but rather they make the difference between political interests and human rights claims or, in other words, they are critical and regulative by nature: wherever freedom, equality and participation of human beings is endangered, respect for human dignity calls for a human rights policy’.<sup>47</sup>

Notably then, human dignity is not to be seen on one line with the values of liberty, equality and solidarity, but rather it underpins these as well as all substantive rights that follow from their concretisation. Thus, in the following triangle of human dignity manifestation, the three cornerstones of human rights all flow from that centre. The figure *infra* illustrates the distinct ways in which the three core values are interrelated as a joint normative basis for simultaneous realisation.

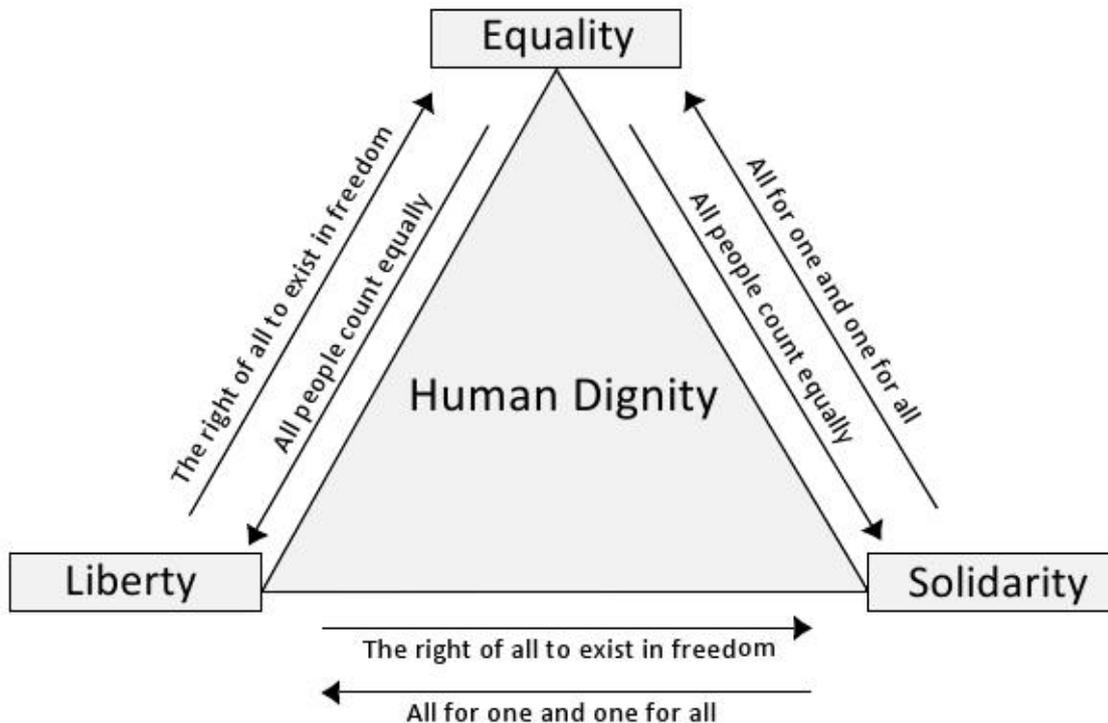
**Figure 1**  
**The ‘golden’ triangle of human dignity**  
**manifestation**

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<sup>45</sup> Dicke in Kretzmer and Klein (eds.), *op. cit.* note 14, at p. 118.

<sup>46</sup> Schwartländer, J., ‘Menschenwürde, Personenwürde’, in: Korff et al. (eds.), *Lexikon der Bioethik 2*, Gütersloh Verlagshaus, Gütersloh, 1998, at p. 687 as translated by Dicke, *Idem.*

<sup>47</sup> Dicke in Kretzmer and Klein (eds.), *op. cit.* note 14, at p. 119. ‘Participation’ appears to be his translation of ‘brotherhood’, whilst in this chapter the term ‘solidarity’ is preferred.



Source: de Gaay Fortman, *op. cit.* note 12, at p. 8.

Markedly, human dignity qualifies the three major human rights principles with the adjective *all*, while also connecting them as branches from the same tree. That crucial link between liberty, equality and solidarity implies that there cannot be a hierarchy of fundamental rights and their underlying values; a balancing exercise between different interests behind claims in the light of all relevant (competing) rights and core values is, indeed, vital. As was noted in a joint dissenting opinion in a European Court of Human Rights (ECtHR) case, ‘the Court must decide whether a fair balance has been struck between competing interests. It is not, therefore, a question of deciding which interest must, in a given case take absolute precedence over others [...] It must perform a “balancing of interests” test and examine whether in the present case the French system [the legal system at issue], struck a reasonable balance between the competing rights and interests.’<sup>48</sup>

Thus, in actual practice the three basic values also qualify one another, each with its own core perspective. Hence, it would be a mistake to see one specific right – freedom of expression, for example, as formulated in Article 19 of the UDHR – as just linked to one principle, namely, liberty. Quoting David Norris’ observation that several jurisdictions ‘have long recognised that it is a legitimate curtailment of free expression to proscribe hate speech targeted at racial distinctions’,<sup>49</sup>

<sup>48</sup> ECtHR, *Odièvre v. France*, 13 February 2003 (Appl.no. 42326/98), joint dissenting opinion of judges Wildhaber, Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellonpää.

<sup>49</sup> Norris, D., ‘Are Laws Proscribing Incitement to Religious Hatred Compatible with Freedom of Speech?’, *University College London Human Rights Review*, Vol. 1, No. 1, 2008, pp. 103-118, in Spielmann, *loc. cit.* note 14, at p. 182.

Spielmann concludes that ‘balance in freedom of expression cases is particularly difficult’.<sup>50</sup> Equality requires in this respect that the environment in which press freedom is being exercised be conducive to free speech for everyone, while solidarity implies that such freedom is not absolute in the sense of a right disconnected from the community in which it is being enjoyed. Additionally, where appropriate, each specific human right must be balanced against other rights. In an attempt to balance freedom of expression with the right to privacy (Article 12 UDHR), the ECtHR, for example, has developed a ‘right to reputation’.<sup>51</sup> Decisively, an integral interpretation of Article 1 makes a ‘right to insult’ a methodical misnomer. Human dignity, in any case, remains the foundational value against which the exercise of every human right must be tested.

Quite remarkably, in this research, concrete cases in which Article 1 was explicitly applied to issues of judicial interpretation have not been found. Three comments may be added to this surprising finding:

1. As human rights credo, Article 1 may well have played its part implicitly. To trace such an indirect jurisprudential impact remains a major endeavour;
2. This outcome underscores the importance of human rights education in distinct jurisdictional environments. Conscientisation of lawyers in general and judges in particular in respect of the methodology of Article 1 UDHR deserves a high place on human rights agendas; and
3. Case-to-case application of distinct values and norms is only one of four distinct approaches to human rights realisation (see the upper-left side of Table 1, *infra*). Actually, four distinct types of human rights strategies may be illustrated, showing the focus of human rights with regard to two major functions, protection and transformation, as well as two categories of means towards implementation: legal resources and political instruments.

### **Table 1**

#### **Human rights in a functional as well as an instrumental setting**

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<sup>50</sup> Spielmann, *loc. cit.* note 14, at p. 182.

<sup>51</sup> *Vide* Spielmann, *loc. cit.* note 14, pp. 183 ff.

	Functional	Protective	Transformative (emancipatory)
Instrumental			
Legal resources		Litigation, mediation and other forms of judicial action (case by case approach)	Structural legal aid, legal literacy programs aiming at legal empowerment and access to justice
Political Instruments		Protest, resistance and opposition to policies and actions violating human dignity	Collective action addressing structural non-implementation based on power relations that embody injustice, aiming at structural reform

Source: de Gaay Fortman, *op. cit.* note 12, at p. 36.

Legal literacy programmes, as part of human rights education (upper-right side), are a way of raising awareness on people's rights in general. Indeed, Article 1 might well serve as both beginning and end of such endeavours.

A political case-by-case approach (lower-left side) uses protest and other forms of dissent as ways of protecting fundamental interests against specific policies and action that (would) violate people's human dignity. Even in the lives of those already facing daily hardships, such resistance appears to be often necessary and might well make use of the strong text of Article 1.

Yet, the most pressing challenges lie in persistent structural non-implementation of human rights (lower-right side). It is first and foremost the economic, political and social structures behind situations in which rights are not realised that need to be addressed. Here, collective action would be called for, aiming at structural reforms. This often requires a certain escalation: from dissent, protest and opposition towards structural reform. All this might well be grounded in human dignity, human rights' foundational value underpinning liberty, equality and solidarity, as well as all substantial human rights norms.

Whilst it remains unlikely that this vital element in human rights strategies will play a major part in intergovernmental settings, in its analysis and action aiming at reform of the structures of non-implementation, the non-governmental world may well benefit from the strong methodological basis provided by Article 1. In academic programmes, too, Article 1 merits major attention. Students of Leo Zwaak, at any rate, were well aware that they had to know this credo by heart. Indeed, this colleague is a living testimony to human rights as a roadmap from faith to action. It is a genuine privilege to participate in this joint effort to honour him.