Second Ole Lando Memorial Lecture
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Contract Law and Human Dignity

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I. Introduction

Ole Lando was interested in the law governing commercial contracts. This second lecture held in his memory (Professor *Hugh Beale* hold the first one year ago in Copenhagen) will, as I promised to his sons, also be about contract law, but it will not be about commercial contracts. Rather, I have decided to direct my (and hopefully your) attention to those aspects of contract law which are directly affected by fundamental and human rights law. At first sight one might think that the one and the other only rarely get into conflict. Agreements are normally seen as something "good"; how can they clash with human rights? But I hope to be able to show that on closer analysis there is a lot to be said about agreements which for mainly or at least predominantly constitutional reasons cannot be held up as binding contracts.

II. Persons

My subject is closely connected with the law governing the natural (or physical) person. Such a "person" is a human being who, within the framework of private law, deals with other human beings (and so-called "legal persons"). It is about the "public face" of the human being. *Persona* was the mask of an actor by which one could recognize the character he played and which helped to better understand his voice. A human being appears as a person when he or she comes into contact with other subjects of private law and puts on his or her "character mask" for this purpose. The law of the natural person is therefore not concerned with the philosophical question of what a human being "is", but with his relative relationship to others, and thus also, to a large extent, with the framework within which he or she can conclude contracts with them.

III. Access to the forms of private law

A person is a person because he or she has access to the forms of private law. What does that presuppose? I think we are dealing with five components. A person must be (i) a

bearer of rights and obligations; without this basic requirement, he or she could not enter into contact with someone else in a way which is relevant under private law. Therefore, correctly formulated, a human being "is" not a person, he or she "has" a person. In any case, under Article 6 of the Universal Declaration of Human Rights "everyone has the right to recognition everywhere as a person before the law". Human existence also has both a physical and a mental and spiritual side. For this reason, the legal system (ii) must remove the body and dignity of the human being from internal private law transactions (the "trade"). Disposals of the body-soul substrate of the person must be prohibited, indeed impossible. For if a human being were able to objectify himself or herself or in cooperation with others, he or she would be deprived of his or her role as a person and thus of his or her authority to participate in legal life. Each individual "has" (iii) a sex. If, on the other hand, he or she is regarded (relative to other people) as a person, he or she is attributed a gender for individual purposes. Which purposes these are or may be, how many genders the legal system "permits", who is allowed to change from which gender to which other gender in which way and what consequences are associated with this, are consequently also questions of the law of the natural person. Part of the person is (iv) his or her name. If a person had no name at all, whole areas of law would remain closed to him or her. All register-bound rights, for example, are necessarily name-bound rights. Finally, and (v) it belongs to the person that he or she (age and mental capacity reserved) is allowed to arrange his or her private legal life autonomously. He or she has *capacity to contract*.

IV. Body and dignity

The human body is legally thought of as a whole. A human cannot split his or her body by contract, dispose of it or its parts like an owner, sell it or give it away. Closely connected with the human body is his or her dignity. The insistence on the dignity of the human being also sets limits to his or her private autonomy. "Dignity" always comes into view when people set about making themselves or others into objects. Today, the sports media like to talk and write that the football club Y "bought" the player A and that this player currently has a "value" of X million. Although a short hand formula for an arrangement surrounding the conclusion of a labour contract, it disrespects human dignity. It is similar with a bridal money agreement under which the bride's parents let the groom or his parents promise them money for the marriage. To uphold such a "contract" in court would mean degrading the bride to a kind of commodity irrespective

of whether a "bride price" is still the custom in some non-European societies and irrespective of our own history. Further illustrative material is provided by the questions of whether a woman can effectively contractually commit herself to her partner to use contraceptives regularly and whether an employer can insist on a clause in the employment contract under which the employment relationship is made subject to the resolutive condition of the employee's marriage. The German courts have denied both. In my view, the result follows directly from the consideration that contract law must not allow room for agreements that violate the constitution. Quite rightly, the French Conseil d'État banned a spectacle announced as "dwarf throwing" on the grounds that „une telle attraction porte atteinte à la dignité de la personne humaine". A country without a written constitution will most probably have more difficulties in arguing such a case.

V. Sex

Statutory contract law no longer distinguishes between men and women. The question of whether a person is a man or woman or a member of another (and then: which) sex therefore arises, in a contractual context, only at the level of some individual arrangements, for instance when a public bath is at a given time open to "women only". The question of whether a person is a man or a woman does, however, still play a significant role in some other areas of law, e.g. in family law, criminal law, labour law and company law. At least the times when a woman (married or unmarried) was deprived of the right to dispose of her own property or to acquire property independently are over. Where other law sectors are still based on gender, the corresponding rules are subject to a constantly increasing pressure to justify their application. In the long term, the fundamental question is whether the legal distinction between man and woman or father and mother should and can be maintained at all. For our purposes, it is equally important that in present day Europa you cannot change your gender anywhere exclusively on a private basis; this always requires some form of state involvement. Nor can one acquire gender by contract, neither permanently nor for a limited period of time. For some sportsmen and women born with characteristics of both sexes, this would be the solution to their problem.

VI. Participation in private legal relations

However, all private law entities are still not open to all natural persons without restrictions. On the contrary, the legal system makes it more difficult for some groups

of persons to have access to certain private law options or even denies access. This also comes under increasing human rights pressure. I only remind you that under sec. 1(6) LPA 1925 “a legal estate is not capable of ... being held by an infant”. This is hardly compatible with the UN Convention on the Rights of the Child, despite the mitigations of this strict rule under trust law and despite the possible counter argument that this is only another way of distinguishing between active and passive capacity (the child has the rights, the trustee exercises them on the child’s behalf). It remains the case, that the child has no rights at law at all. On the other hand, however, it is conceivable that property law grants persons with physical disabilities *more* rights against their fellow citizens than persons who do not suffer from such particularities. This can be observed, for example, in Italian case law on rights of way over private property for people with walking disabilities.

VII. Jus cogens

The private law of the natural person establishes, secures and forms the participation of the individual in the private legal system. Legal subjectivity (or personality) is the prerequisite for active legal capacity, active legal capacity is an expression of legal subjectivity. Physical integrity and dignity underpin and require passive and active legal capacity. Assignment to one gender opens and closes, at least at present, access to individual institutions of private law. And finally, the human being not only has a name in order to be able to assign rights to him or her, but also so that he or she does not have to identify him or her with signs, numbers or even (like goods) with bar codes alone. Certainly, many persons share the *like* name, but that is not, at least not under the continental systems, the *same* name. Under the circumstances prevailing in Europe, this would not be acceptable from the point of view of the protection of dignity, even though the so-called identification numbers are on the rise everywhere.

In the private law of the natural person, we are dealing with rules that elude private autonomy. No one, not even a healthy adult, can decide on the characteristics that the legal system attributes to him or her for the sake of his or her personhood. “Natural rights connected with the personality of a person cannot be alienated or waived” (§ 19(2) Civil Code of the Czech Republic); as it is said in France, the principle of *indisponibilité de l'état des personnes* applies. Consequently, it is always a matter of distinguishing between transactions that can still be organised in the forms of private law and those for which private law no longer offers or is no longer allowed to offer a framework. The

law of the natural person prevents people from putting themselves or others above themselves. Human dignity implies limits to the power of disposition over oneself.

VIII. Terminology

In the European legal systems, there is repeated talk of human beings having "inalienable", "unavailable", "unsaleable" or "non-transferable" rights. This is not very satisfactory. The way of speaking of "conveyancing" (etc.) refers to individual rights of patrimony. But that is not what this is about. Man does not "acquire" his personhood, not even "by birth"; it is attributed to him by the legal system from birth. In essence, the private legal system removes from its mechanisms of action all characteristics which in its view constitute man as a person. In other words, no human being can release himself from his own person, split it up or leave it to someone else, neither by unilateral declaration nor by contract. In a constitutional perspective this is self-evident; in a purely private law perspective this point is much more difficult to make.

IX. Sensitivity of the private law of the natural person to constitutional law

It is in the nature of things that the private law of the natural person is shaped by human and fundamental rights. After all, both fields of law are concerned with related subjects. Again, however, terminology becomes a problem. I understand "human rights" to mean subjective rights which have their source in an international treaty and "fundamental rights" to mean rights which have their source in the Charter of Fundamental Rights of the European Union or in a written state constitution, and I count both of them, *in terms of their content*, among the objects of constitutional law. In principle, "human rights" apply to everybody; "fundamental rights" may have a narrower personal or territorial scope. A question independent of this is that of the status of such constitutional law in terms of legal hierarchy. The "fundamental freedoms" are also ambiguous. The European Convention on Human Rights defines them as *human rights and fundamental freedoms*. In a context of European law, on the other hand, "fundamental freedoms" stand for the internal market-related freedoms of EU citizens. The latter create, among other things, a comprehensive right to mobility, which must not be violated even by rules of personal law (e.g. on the naming of children, recognition of same-sex marriages concluded within the EU and the marriage of minors).

X. The Human Rights Sources

I do not have the time to address even the most important human and fundamental rights sources here. In addition to the Universal Declaration of Human Rights with its prohibitions of slavery (Art. 4) and racial discrimination (Art. 2), I would particularly mention Art. 15(2) of the UN Convention on the Elimination of All Forms of Discrimination Against Women, which reads: "States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals". Art. 15(3) loc. cit. is even more specific: "States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void". Art. 16(1)(g) loc. cit. also obliges the States to grant wives "the same right to choose a family name" as men. Under Article 7 of the UN Convention on the Rights of the Child of 20th November 1989, every child must be entered in a register immediately after birth; it has the right from birth to a name (it would therefore be contrary to the Convention to attribute constitutive effect only to registration). (A person does not have a name because it is registered. The name is registered because it is attributed to him or her by the operation of law.) Art. 8 establishes a state duty of protection, which is specified in Art. 34 and 36 (protection against exploitation), and Art. 35 prescribes measures against child trafficking. Art. 12(2) of the UN Convention on the Rights of Persons with Disabilities recognizes "that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life". To implement this principle, Article 12(3) of the Convention states that States Parties shall take "appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity". This is a clear rejection of the law of incapacitation.

Of course, the European Convention for the Protection of Human Rights and Fundamental Freedoms and its additional protocols (ECHR) is particularly relevant for us Europeans. Its most important warranties from the point of view of private law are found in Article 8 (right to respect for private and family life) and Article 14, which states that "the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex…". Increasingly important is Article 21 of the European Convention for the Protection of Human Rights and

Dignity of the Human Being with regard to the Application of Biology and Medicine of 4 April 1997, which states that “the human body and parts thereof ... shall not be used as such for financial gain”.

XI. The distinction between ownership and exercise of rights

Hardly anything else today is as well protected in terms of fundamental and human rights as the passive legal capacity of the natural person. Whoever enjoys legal capacity is a person, and therefore belongs neither to himself nor to others. Man is a “natural person” simply because he is a human being. This is an axiom that is not open to any further justification. It is accompanied by a constitutionally protected right “to” legal capacity. It is closely linked with the constitutional protection of the right to life of man. Man has legal capacity as long as he lives; who is not yet or no longer alive does not have legal capacity. Human life is the factual side of legal capacity; legal capacity is the legal side of existence as a human being.

A distinction is usually made between passive legal capacity, the *capacité de jouissance* of *personnalité juridique* or *Rechtsfähigkeit*, and active legal capacity, the *capacité d'exercice*, or *Geschäftsfähigkeit*. Passive legal capacity then means the (abstract) ability to be the bearer of rights and obligations, active legal capacity means the (concrete) ability to acquire and dispose of rights through one's own legal action, and also to bind oneself of one's own will by assuming obligations. However, the continental distinction between passive legal capacity and active legal capacity, and this lesson is taught by English law, is not without its problems. It wants to be executed under constitutional control. The right of man to be recognised by the legal system as a bearer of rights and duties has its ultimate reason in the protection of his dignity. This means that every human being must be endowed with the ability to participate *substantially* in legal life. For this reason, as has already been noted, it is problematic in human rights terms to deprive minors of ‘ownership’ in land. And ultimately for the same reason, incapacitation is no longer tenable in human rights terms. We should never forget that the separation between ownership and the power to exercise rights is a popular trick of all totalitarian states.

XII. Slavery

A direct consequence of the right to passive legal capacity is, of course, the prohibition of slavery, which we take for granted today. In fact, however, slavery still exists today;

this is known as *modern slavery*. Its cruel manifestations must, however, be combated above all by means of criminal law. From the point of view of private law, it is a matter of violations of dignity. They cannot be the subject of an (effective) contract. In order to realise non-contractual claims for damages and enrichment, it is important to give victims better opportunities to bring legal action against large companies which do not adequately control their subcontractors in low-wage countries, and also to provide the exploited with rapid and effective legal aid.

XIII. Types of consensual violations of dignity

If one wants to reduce the distinction between contract and tort law to a simple denominator, one could perhaps say that a contract is something fundamentally good, a tort something fundamentally bad. Tortious acts violate the rights of others; contracts are based on the agreement of the parties. There are, of course, limits to the legal relevance of such agreements. In the field of contract law, this is often expressed in the sense that contracts that are contrary to law and morality are null and void (or at least "unenforceable"). This internal perspective of contract law, of course, dates from a time when fundamental and human rights did not yet play any role, or at best a political and programmatic role. Today, things are fundamentally different, at least in continental Europe. Constitutional law, not contract law, deserves precedence. It is therefore essentially irrelevant how contract law reacts to violations of fundamental and human rights on its own initiative, including whether it ranks the relevant constitutional articles among the "laws" or the "morality" that trigger the private law sanction of nullity. It is solely a matter of determining the scope of action that constitutional law assigns to contract law under private law. This applies in particular to the right of violation of dignity. As far as conduct that violates dignity is systematically a matter of tort law, the latter has in some places already become a piece of genuine constitutional private law. Contract law should follow this. Human dignity is such a fundamental category that it is not dependent on auxiliary arguments, such as the content that inhuman contracts are "immoral", even if one of the parties has agreed to their own degradation. It is precisely in such cases that one is not at all dealing with an event under internal contract law, but with a purely factual event that takes place outside the legally possible organisation of life, not because it is immoral or unlawful, but because constitutional law closes off the parties' access to the body of rules of contract law. When it comes to violations of human

dignity there is no way to distinguish any longer between "vertical" and "horizontal" effects of constitutional and human rights.

Of course, violations of dignity that have been realised by mutual agreement occur much less frequently than those that are caused by others. Two basic forms can be distinguished. In the one group one has to deal simultaneously with interventions in the body, in the other with degradations which leave the physical condition of the person affected untouched. We have already given examples from the second group in the previous section. Directly with reference to Art. 1 of the German Constitution and without the "detour" via § 138 of the German Civil Code (immoral contracts), the Düsseldorf Labour Court of Appeal also rightly considered the so-called "ethics guidelines" of an American department store chain to be ineffective, which wanted to prohibit private love relationships between its employees if they affected the "working conditions". However, the focus of the more recent discussion on the significance of constitutional law for private autonomy has shifted to agreements which deal either with euthanasia or other contracts affecting the bodily functions of the human being: surrogate motherhood, organ and tissue trade, operative sex change. For reasons of time, I shall confine myself here to a few concluding remarks on assisted dying.

XIV. Assisted dying

Assisted dying is a very sensitive issue. It is best understood as a separate case group, which is closer to killing others than to suicide, but is nevertheless characterised by the peculiarity that it is about people who want to leave life in a self-determined way, but who cannot (any longer) realise this wish through their own behaviour. They are dependent on external help. The state has a duty to protect both the dignity and the life of the people living in its sphere of influence; consequently, both dignity and life are not only deprived of state but also private arbitrariness. No one may raise himself to the lord of life and death of another, not even with his consent or as his "representative", nor does it matter whether it is about a healthy adult or a sick new-born child.

XV. Statement of facts

Assisted dying covers a wide range of circumstances. (i) The form of (indirect) euthanasia is comparatively unproblematic, which is a mere pain treatment (or palliative care) designed to make it easier for a dying person to "twilight" and is therefore also permitted if it is accompanied by a shortening of life as an unintended but unavoidable

side effect. There is, strictly speaking, no compelling reason to reserve this form of euthanasia to medical personnel or even doctors. It is always just a matter of avoiding abuse and difficulties in proving the facts. (ii) Euthanasia in the form of assisted suicide occurs when a doctor or a person close to the suicide victim remains at the side of the person concerned until the last act necessary for the suicide, but does not intervene and respects the person's wish not to be resuscitated. The suffering person hastens their own death, and the medical worker does not intervene. This, according to the correct view, is also not a crime, because it strengthens the patient's right of self-determination, which is characteristic of his dignity. The doctor does not violate his contractual obligations; he fulfils them because they have changed in content.

(iii) Euthanasia in the form of discontinuation of treatment is often inaccurately called “passive euthanasia”. A termination of treatment is in principle possible at any time at the patient's request; nobody who can make a legally binding statement may be treated against his will outside of special relationships under public law (e.g. in prisons). Anything else would be a violation of the patient's right to self-determination and his right to private life. It makes no difference whether he or she is dependent on treatment to prolong his or her life, nor does it make any difference whether he or she suffers from a disease that is curable. Interruption of treatment is only problematic if a patient can no longer force it because of his current state of health.

The most difficult and at the same time most controversial situation is (iv) the one in which a patient who has become incapable of forming his or her own will (e.g. due to advanced dementia) can no longer be "treated" medically. He or she can only be cared for, but suffers incurably from unbearable conditions and has expressed his or her will to die in free self-determination, but is no longer able to put it into practice. The last step must be taken by a doctor who has previously consulted carefully with other doctors and close relatives. One then has to deal with a special case of killing on demand. It is not a case of a treatment interruption, but a care interruption. Although it is carried out by active killing, it serves to end a severe suffering, in compliance with procedural and diligence standards. In contrast to the basic form of killing on demand, it is an act of medical care. The patient does not use his situation to make others the instrument of his death wish; he is no longer able to do so, even if he or she hoped to do so while still in a healthy state. The wish to die that was previously expressed is now only an indicator

that the suffering has become truly unbearable. Such a situation cannot be decided by reducing it to a dispute about the existence or absence of a "right to die".

XVI. No reference points of private rights

Living and dying are no reference points of private rights that are subject to the power of disposal of the individual. Whoever kills himself does not dispose of life. A person committing suicide does not, if and insofar as no other person is involved, act in the exercise of a subjective right, but completely outside the legal system. For a rule of law always presupposes the presence of at least two persons. Today, suicide is only and at most a legally relevant event if an instigator or an accomplice is involved. In the law of assisted dying, one remains within the legal order for the same reason; here too, a second person is necessarily involved. However, that latter person too does not “dispose” of life, because there is no such right capable of “disposal” at all. Life, even one's own life, is not a disposable subjective right, and certainly not of private law. Consequently, all discussions as to whether a complementary “right to die” follows from the “right to life”, which is protected by constitutional and human rights law, lead astray. There is only a *law of life and dying*, not a *right to live and die*.

XVII. Balancing the interests involved

Its main difficulty is to develop a set of rules for people who want to depart from life in a self-determined way, but who cannot (any longer) realise this wish through their own behaviour. They are dependent on external help, which at the same time means that it is not only a question of the dignity of the sick person, but also of the dignity of his family members and the medical and pharmaceutical staff accompanying him or her. Under constitutional law, the public interest in preventing abuses, including the abuse of parental care, also plays a considerable role, because the State has a duty to protect the lifes of persons subject to its authority. On the other hand, it cannot be deduced from any constitutional text that there is a public interest in the prevention of death, so that the suffering of a person would have to be preserved at all costs even against his or her will.

The law of assisted dying should primarily be geared to the plight of the person concerned. He or she is at the centre. However, there are absolute limits that are apparent in the everywhere punishable killing on demand if it occurs outside the medical care of seriously ill patients. But the situation in which such a person finds himself cannot be

compared with the situation in which a man weary of life draws others into his own misery because of his desire to die. The manner of speaking of the right to live or to die only causes an unnecessary hardening of the law in an extreme situation of human existence, in which the person concerned is dependent on care. There is neither a "creditor" nor a "debtor" of an alleged subjective "private right" to die. But this does not change the fact that, depending on the context, self-determined passing away has implications for the subjective public rights of those who want to respect the self-determination of the patient.

XVIII. Practical Concordance

Both positions must be brought to practical concordance within an objective framework that anticipates abuse. This cannot be achieved by the traditional distinctions between doing and omitting, by the distinction between "active" and "passive" euthanasia, nor convincingly by the notion of physical control of the act in question. Rather, it is a matter of determining the limits of the state's duty to protect life in accordance with the principles of dignity and proportionality. For this purpose, a legislator needs a wide margin of appreciation, but also the strength to free himself without loss of legal certainty from the woodcut-like, pointed simplifications of earlier times. The key question, which is always at stake in the end, is when the death of a person is to be attributed to another's hand and another's will, and this is a normative problem that can only be answered by evaluating all the circumstances of the individual case.

XIX. The Belgian Solution

One of the laws that has been particularly successful in achieving this balancing act in the spirit of the Oviedo Convention is the Belgian law of 28.5.2002 on euthanasia. The law defines euthanasia as "an act carried out by a third person ... by which the life of a person is deliberately ended at the request of that person" (Art. 2) and adds in Art. 3 § 1, that a doctor who provides euthanasia "does not commit a criminal offence" if he is satisfied that the patient is of age or emancipated and, at the time of the request, "is capable of acting and is aware that the request was made voluntarily, deliberately and repeatedly and was not made under pressure from outside, that the patient is in a medically hopeless situation and invokes persistent, unbearable physical or mental agony that cannot be alleviated and is the consequence of a serious and incurable accident or illness, and observes the conditions and procedures prescribed by the present

law". The physician must consult an independent colleague, give the patient comprehensive advice and come to the conclusion that "there is no other reasonable solution". The patient must have the opportunity to "discuss his request with the persons he wished to meet" (Art. 3 § 2). Special precautions apply in the event that death is clearly not likely to occur in the foreseeable future (Art. 2 § 3). The will of the patient must be recorded in writing and can be revoked at any time (Art. 4). In a separate chapter, the law regulates the advance directive, which it convincingly calls an "advance declaration of intent" (Art. 4 § 1). In it, "every adult capable of acting or a minor who has been declared of age may, in the event that he is no longer able to express his will, make a written declaration stating his wish to be assisted by a doctor" under circumstances that are described in detail "to assist in the euthanasia". A doctor who complies with this advance declaration of intent does not commit a criminal offence under the circumstances specified in Article 4 § 2. A 16-member Federal Control and Evaluation Commission prepares, among other things, a registration document and, on the basis thereof, verifies the legality of the medical measures (Art. 6-13). The law represents a major gain for humane dying. It decriminalised the so-called euthanasia, because the legislator wanted to give priority to the autonomy of the patient over the defence of life at all costs. A similar regime applies in the Netherlands.

XX. Concluding remarks

As said, I could have exemplified my subject by other questions. I am thinking, for example, of surrogate motherhood or the countless constitutional implications that characterise the modern right to belong to one sex. But I had to leave it at one example. What was important to me was to show that modern contract law must be oriented to a much greater extent than is usually perceived today towards the constitutional law that is superior to it and, in turn, towards the concept of human dignity. Contract law exists only within the framework assigned to it by constitutional law. Everything that takes place outside this framework is not the subject of an obligation relevant to contract law. It is necessary to define this framework more consciously than it seems to be the case so far. Perhaps we also need to reconsider the traditional attitude of academics working in private law to regard their field as the supreme discipline of law.