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HUMAN DIGNITY

*Giorgio Resta**

1. Human dignity has been perceived for a long time as an eminently moral, philosophical, or religious notion. Nowadays, it has acquired the status of a binding legal norm, frequently referred to as the cornerstone of the edifice of human rights. The duty to respect the dignity of every individual is solemnly stated by numerous international declarations and covenants, as well as by national constitutions and charters of rights. Even in domestic legal settings, in which dignity does not appear in statutes, the courts have increasingly referred to this principle when resolving disputes (particularly significant is the French experience of the last two decades; but also striking is the multiplication of references to dignity in the recent case law of the US Supreme Court). In short, dignity has undergone an impressive process of "juridification," having gradually lost the role of a purely moral precept and acquired that of a binding legal norm.

However, it is not easy to define "dignity." According to some scholars, the characters of vagueness and indeterminacy are distinctive features of the notion of dignity. This tends either to render it a "useless concept" or to its being used as a "knock-down argument," a magic formula apt to circumvent any rational argumentation, by appealing to the *pathos* of dignity. Although this concern might occasionally prove well-founded, particularly in the field of bioethics (where "dignity" is frequently used as a conversation stopper), the picture is not always so grim. More than fifty years of judicial confrontation with dignity have not passed in vain. By looking at national and international case law on human dignity, some clear guidelines may be inferred.

There seems to be wide consensus that dignity, at its core, implies the respect and recognition of the intrinsic worth possessed by any human person, merely by virtue of being human (see the references in the pre-

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amble and in article 1 of the *Universal Declaration of Human Rights*). However, this minimum content is flexible enough to give rise to different results in concrete cases, depending on the particular conception of dignity adopted in a specific legal system. The notion of dignity, in other words, is at the same time universal, relying on a shared value of humanity, and context-specific, deriving its meaning from the cultural and institutional frame in which it is embedded. Therefore, it seems useful to disaggregate the content of dignity into three main functions:

a) dignity as a negative right;

b) dignity as the source of a government's duty to protect;

c) dignity as the source of a government's duty to provide social benefits.

Such a taxonomy may be helpful for any comparative inquiry because different legal systems tend to emphasize one or more "functions" and disregard the others, depending on the general value-choices and the institutional features of the system (such as the presence of a constitutional complaint mechanism, the state action doctrine, etc.). At one end of the spectrum we find legal systems that rely simultaneously on all such functions and regard dignity as a foundational value; at the other end are systems that either adopt a narrow version of dignity as a duty to respect or that completely disregard the notion. Although legal borrowings are particularly frequent in this area, one should never overlook the substantive variations in the uses of dignity and the possibility of its being received, in some legal settings, as a "legal irritant."

2. The most widespread conception of dignity is one based on the liberal tradition of negative liberties. Under this perspective, dignity implies a "non-interference norm," according to which the government is obliged to abstain from acts that deny the inherent worth of the individual or interfere with personal autonomy. As famously put by the German Constitutional Tribunal in several decisions, and lastly in its assisted suicide ruling (2 BvR 2347/15), the right to human dignity makes it impermissible "to turn a person into the 'mere object' of state action or to expose them to treatment which generally questions their quality as a conscious subject."

When is such a duty violated? The first important group of cases deals with personal autonomy. Dignity is violated if the state denies an individual's freedom to make fundamental choices affecting their personal sphere. Particularly relevant from this viewpoint are the decisions concerning the human body and the domain of sexuality. The US Supreme Court case law on constitutional privacy offers several examples of such a use of the notion of dignity, with *Lawrence v. Texas*, which invalidated state sodomy laws, being one of the most famous. The European Court of

Human Rights (in *Pretty v. the United Kingdom*) and the Supreme Court of Canada (in *Carter v. Canada (AG)*) have also referred to the principle of dignity in resolving disputes concerning the right to die. In a second category, the duty to respect dignity is also infringed in cases involving the violation of the bodily and psychological integrity of the person. The prohibition of torture and other degrading treatments flows directly from this commitment. In one controversial case (1 BvR 357/05), the German Constitutional Tribunal struck down the *Aviation Security Act*, insofar as the statute authorized the shooting down of a hijacked airplane in a 9/11 situation. Such an intentional act of shooting, argued the Court, would conflict with the fundamental right to life and the dignity of the innocent passengers of the plane (see, in a similar line of reasoning, the Ontario case of *Doe v. Metropolitan Toronto Police*, criticizing the adoption of an end/means analysis, which led the police to abstain from communicating to the women living in a certain area the risks posed by a serial rapist, with the hope of arresting him on the scene of the crime; or the Israeli Supreme Court ruling on targeted assassinations of unlawful combatants in the Occupied Territories in *Public Committee against Torture in Israel v. Government of Israel*). Furthermore, the respect of the intrinsic worth of the individual is denied in cases of discrimination: here, the fundamental principles of dignity and equality tend to converge, leading to an important phenomenon of cross-fertilization of which the Canadian experience is particularly illustrative. Third, human dignity requires the respect of an intimate sphere, which must be shielded from unwarranted government intrusions. This has been the theoretical basis for the recognition by German courts of a right to informational self-determination, which assumes an enormous importance in our age of "liquid surveillance."

3. Conceived in this way as a negative right, dignity is a widely shared concept, which makes transnational dialogue among judicial institutions an important reality. The second function of dignity as the basis of a governmental duty to protect citizens is more problematic and context-specific. Article 1 of the *Charter of Fundamental Rights of the European Union* states: "Human dignity is inviolable. It must be respected and protected." The duty to protect is implied by a conception of dignity as a positive right, which would require the government not only to abstain from any interference with it ("respect"), but also to adopt affirmative measures aimed at preventing violations of dignity arising from the action of third parties ("protect"). The logical consequence of this model is that the positive commitment to protect dignity may lead, in a wide range of situations, to the restriction of the freedoms of others (particularly freedom of speech, as exemplified by the 2014 decision of the French Council of State, *Ministre de l'intérieur c. Société Les Productions de la Plume et M. Dieudonné M'Bala M'Bala*, banning, in the very name of dignity, a show created by the controversial artist Dieudonné M'Bala

M'Bala). This is the theoretical basis of the horizontal effect of fundamental rights, which has produced significant results, particularly in the area of the protection of personality rights against the mass media. I cannot explore the details here, but I would like to emphasize two related issues.

The first concerns the subjective scope of dignity. If dignity is to be considered a paramount objective value and not only a right, it should be protected regardless of the existence of a rights-bearer. Consistently with this, the dignity principle has played a role in cases involving the violation of group rights and with respect to the protection of the unborn and the deceased. Particularly relevant from this point of view is the 2011 CJEU decision in *Brüstle v. Greenpeace*, which upheld the ban on the patenting of neural precursor cells derived from embryonic stem cells, on the basis that such patents would violate the principle of respect for human dignity, as it applied to the embryo. If one considers the possible consequences of this regulatory model in the area of abortion, one could easily understand the skepticism expressed by some scholars with regard to a notion that is frequently cast in term of absolutes.

The second point relates to the possible conflict between dignity and autonomy. Once it is assumed that the state has a positive obligation to protect dignity, situations may arise in which the exercise of personal freedom may clash with the "objective" value of human dignity. In such situations, whose "dignity" should prevail? The dignity of the individual, free to make their own value-choices, or dignity as defined by an external decision-maker? This issue is illustrated by the famous "dwarf-tossing" case. The French Council of State, in *Ville d'Aix-en-Provence*, outlawed the spectacle, holding that dwarf-tossing was an attraction that affronted human dignity and that respect for human dignity was an aspect of public order. The Council also held that the principle of freedom of employment was no impediment to the prohibition of an activity that violated public order. Manuel Wackenheim, who had been employed in such a spectacle, lodged a complaint before the ECHR, and, as a last resort, before the UN's Human Rights Committee (*Manuel Wackenheim v. France*). He argued that the ban had "an adverse effect on his life" and "represent[ed] an affront to his dignity," adding that his job did not infringe human dignity, "since dignity consists in having a job." Both courts dismissed the complaint. Reading these rulings critically (one should also mention the 2004 CJEU decision on laser-shows, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, as well as the German decisions on peep shows, *ex plurimis Sittenwidrigkeit von Peep-Shows*), one gets the impression that what is really at stake is not the dignity of the *individual*, but the dignity of the species, or "human" dignity. However, one could seriously raise the question whether it is actually possible, in a pluralistic and multicultural society, to settle on a fixed "image of man" and impose this image on anybody, even on the

right-holder. Is it possible, in other words, to set the boundaries of autonomy on the basis of the concept of dignity? Or is the formula "dignitarian limits of autonomy" an oxymoron? The solution for the comparative lawyer would be to test such questions empirically by looking at jurisdictions characterized by different institutional settings and value-choices. If one takes into account the US experience, for instance, it is easy to find not only a strong scholarly opposition to such a "communitarian" vision of dignity, but also parallel cases decided in the opposite way. For example, in *World Fair Freaks v. Hodges*, the Supreme Court of Florida held that the statutory ban imposed by Florida on a spectacle not too different from the French dwarf-tossing case was unconstitutional as a violation of property, in the form of the equal right to earn a livelihood and to pursue a lawful occupation. This is consistent with a conception of dignity that is almost exclusively based on the logic of negative freedoms.

4. Can the duty to protect be expanded into a more far-reaching obligation on the state to ensure that nobody falls below a "dignified" level of existence? Article 151 of the 1919 German Constitution of Weimar, based on the social-democratic conception of dignity, contained such an affirmative duty, which is now accepted, at least to a limited extent, in several jurisdictions. The German Constitutional Tribunal (in 1 BvL 1/09, 1 BvL 3/09, 1 BvL 4/09) has recently struck down parts of the red-green reform of the labour market, holding that article 1 (in combination with article 20) of the German Basic Law imposes an obligation to ensure "a subsistence minimum that is in line with human dignity." Similarly, the Italian Constitutional Court (decision n. 217/1988) and the South African Supreme Court (*Government of the Republic of South Africa v. Grootboom*) have held that decent housing should be recognized as a constitutional social right, on the basis of the principle of respect of human dignity. Such a use of the concept of dignity may appear troubling for those who fear that the courts will exercise uncontrolled discretion under the umbrella of dignity, interfering with the role of the legislature. Indeed, this approach seems incompatible, once again, with the more libertarian perspective on dignity. However, it should not be overlooked that, in a time that has seen a steady decrease in social protections, dignity can work as the ultimate barrier against the complete dismantling of the noble utopia of "freedom from need."

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