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Dignity, Democracy, Civilisation

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Abstract This paper contributes to international discussion about the difficulty of defining human dignity as a legal concept by locating it at the heart of (European) democracy and human rights. Focusing on emerging dignity case law in the United Kingdom, the paper explores the connections among dignity, human rights and democracy, and the uses of dignity to enhance and refine democracy. While judges are key actors in the construction of dignity, they operate within the boundaries of a particular democratic 'civilisation' anchored in the core prohibitions of art 2, 3 and 4 European Convention on Human Rights, combined with those of the EU Charter of Fundamental Rights (art. 2, 3, 4 and 5). This normative core, the paper argues, is to be understood in the wider time frame of democracy and dignity, which is equally important for refining and thickening human dignity's conceptual and normative definition, as well as for reflecting on the legitimacy of its (judicial) uses.

Keywords Dignity · Human rights · Inclusion · State power · Time · Democracy

Introduction

The increasing use of the concept of human dignity in constitutions, international human rights conventions and—crucially—constitutional adjudication has been

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matched by an increasing sense of academic puzzlement and reservation about its meaning which has proved so difficult to define.[1] The more skeptical of the dignity critics consider this concept as a 'loose cannon'[2] or 'a vacuous concept'.[3] Particularly disturbing seems to be the fact that legal uses of dignity may equally support opposite sides of an argument,[4] especially in the case of euthanasia and assisted suicide, thus apparently depriving this concept of a clear meaning. Dignity's usefulness in the context of human rights adjudication is another recurring issue.[5] There is however some shared understanding that human dignity is primarily an individual quality, i.e. defined through and dependent on individuals' sense of (self-)respect, a kind of special virtue, the ability and willingness to live a good life.[6]

This paper argues that human dignity is connected to human rights and that the concept's full legal meaning and significance only become visible when it is considered in the context in which it has developed in practice since World War II (WWII), and even more so since the 1990s, namely constitutional democracy in Europe. While connections between democracy and human rights have long been established, the particular role that dignity has played in relation to democracy is more recent and dates primarily from the end of WWII. Instrumental in this process was the realisation that human rights law must ensure that human rights protection is built into an appropriate, overarching institutional design which can only be found where political power is controlled by the people and where human beings are placed at the centre.[7] According to Peter Häberle, who was one of the first (German) scholars to open up this path, dignity has therefore become a central component and mechanism of popular sovereignty.[8] In a distant echo of Kant human dignity, understood as the ability to set one's own ends and to self-determine, implies the ability and the right to take part in the democratic decision-making process; democracy therefore becomes the 'organisational consequence of human dignity'.[9] As a result, a new type of democracy, with respect for human dignity at its heart, is arguably beginning to emerge, challenging and developing a purely procedural, i.e. majoritarian democracy.[10] From this analytical perspective, the concept of human dignity is much more than the individual (intuitive and elusive) sense of self-respect and respect of others, it positions human beings at the heart of democracy, determining thus the exercise of political power.

[1] For a more detailed discussion of these critiques, see Neal (2013).

[2] Brownsword and Beyleveld (1998).

[3] Bagaric and Allen (2006) and Grover (2009).

[4] Dignity as 'a two edged-sword': Feldman (1999). Dignity as having 'completely opposing connotations': Binchy (2008).

[5] McCrudden (2008) and Carozza (2008).

[6] Dworkin (2011).

[7] A principle recently brought to the fore by the European Union in the preamble of its Charter of Fundamental Rights: '[the Union] places the individual at the heart of its activities […]'.

[8] Häberle (2009).

[9] Häberle (2009).

[10] Schnapper (2002), Weinrib (2004).

On this basis, the paper argues that the concept of human dignity is therefore at the forefront of safeguarding meaningful democracy and is reshaping its significance by protecting human beings' unique identities and interactions. The argument is developed in three stages. Firstly, the paper outlines some of the key historical connections between democracy and the protection of dignity through human rights. Secondly, the paper demonstrates the nexus of human rights, democracy, and dignity by focussing on recent developments in UK common law, where dignity has been used to decide on core democracy issues, such as the relationships between state and individuals, inclusion of otherness, and finally the ability to embrace change and to deal with the unknown within the existing constitutional structures. Finally, the paper argues that one distinctive feature of dignity-based democracy is its relationship with time, which, to borrow a term used by UK and European judges in relation to their construction of human dignity, creates a particular type of democratic 'civilisation'.

Anchoring Human Dignity in European Democracy

This section argues that locating human dignity at the heart of European democracy and human rights in particular gives the concept a much needed anchor by situating it within the cultural and normative boundaries that enable it to take its full significance.[11]

Dignity and Democracy: Connections and Evolution

Dignity is a concept with ancient and multiple roots.[12] Its construction as a legal concept has followed the vicissitudes of democracy in Europe since 1789. During the Enlightenment, the concept of dignity started to be considered as a key constitutional idea, being used by philosophers[13] and political thinkers[14] to constitute human beings as citizens, i.e. born in equality and with the ability and the right to take part in political decision-making.[15] While the French Declaration of the Rights of Man and the Citizens did not include a right to dignity, its new concepts of rights, with their revolutionary focus on equality and solidarity arguably created the conditions for dignity to emerge, much later, with explicit connections to human rights. As is well known, it is only after the advent of non-democratic regimes, notably nazi Germany, that dignity became a fully constitutional concept being prominently enshrined as the foundation of human rights in the 1948 Universal Declaration of Human Rights,[16] encapsulating the hope that the new democratic regimes would place human beings at their core, thus preventing their instrumentalisation by totalitarian and racist regimes.

[11] Douzinas (1999).

[12] Miguel (2002) and Giese (1975).

[13] Kant (1785, 1997).

[14] Paine (1791/1998). and Wollstonecraft (1792/1996).

[15] Generally, see Meyer (1987).

[16] Morsink (1999).

Since majoritarian rule had failed to prevent totalitarianism, in Europe the new type of democracy included new ingredients, namely provisions aiming to protect the political minority and all human beings' rights through a double mechanism: the creation of a constitutional court at the domestic level (with a special human rights remedy) and a human rights court at the European level (to protect the individual against the state). The prominent constitutional status of dignity and its connections with democracy were strengthened and confirmed in each wave of democratisation in Europe, in the South first with the fall of military regimes in Spain, Greece and Portugal and then in Central and Eastern Europe, with the collapse of communism in 1989.[17] Since then, dignity, equality and liberty have formed 'the triangle of constitutionalism'[18] on which European democracy is anchored. The latest stage in the connections of dignity and democracy is marked by the European Union Charter of Rights, which came into force with the Lisbon Treaty in 2009, and is headed by a resounding commitment to the protection and respect of human dignity under title 1 of the Charter.[19]

The Charter provisions on dignity reflect the whole history of this concept and its connections with democracy. Under the Charter, dignity is definitely not a 'vacuous' concept, rather it encapsulates the substance of European democracy as a regime where 'the individual is at the heart of its activities' (preamble); the death penalty is abolished (art.2),[20] eugenic practices, human cloning and making the human body the source of financial gain are prohibited (art.3); torture, inhuman or degrading treatment are prohibited (art.4); slavery, forced labour and human trafficking are prohibited (art.5)[21]; and finally working conditions have to respect workers' dignity (as well as their health and safety) under art.31. In addition, the Charter acknowledges two new concerns of 21st century European constitutionalism by giving dignity special protection in the field of medicine and biology (art.3) and in relation to the elderly (art.25). This cluster of rights arguably forms a thick definition of dignity and gives 21st century European democracy its distinctive feature as a system of government which claims to place at its centre a multi-dimensional definition of human beings and endeavours to control power so that it may not be exercised in an unjust way, such as reducing individuals to mere objects.

The Language of Rights: A Complex Normative Framework for Dignity

As mentioned above, human dignity has many connections with democracy, but the strongest and the most direct connection between dignity and democracy is human

[17] Dupré (2013a, b).

[18] Baer (2009).

[19] Dupré (2013a, b). Olivetti (2010).

[20] Additional Protocol 13 concerning the abolition of the death penalty in all circumstances and adopted in 2002 makes explicit the connection between dignity and abolition of the death penalty under its preamble.

[21] One of the first appearance of dignity as a legal concept was in the French Decree of 27 April 1848 abolishing slavery: 'considérant que l'escavage est un attentat contre la dignité; qu'en détruisant le libre arbitre de l'homme, il supprime le principe naturel du droit et du devoir; qu'il est une violation flagrante du dogme républicain: Liberté, Égalité, Fraternité'.

rights. While the exact legal nature of human dignity is sometimes discussed by academics,[22] its location within the human rights framework is general across Member States in the EU and is confirmed by the EU Charter.[23]

This location is significant for understanding human dignity and the possibilities it offers in at least three ways. Firstly, it provides judges with an overall direction for their interpretation as dignity is tightly connected with the democratic telos, often codified as the wider aims of a democratic constitution under its first provisions or in a preamble. Most (if not all) the aims that have brought European democracies together are clearly identified and enshrined under art.2 Lisbon Treaty as being: 'dignity, freedom, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities' and 'pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men.' As a result, judicial interpretation of human dignity must be guided and shaped by one or more of these aims and aspirations. For instance, human dignity may not be deployed in judicial reasoning for the promotion of intolerance, inequality and discrimination or injustice, to refer to a few aims of European democracy.

Secondly, this democratic telos grounding human rights adjudication is complemented by a smaller cluster of rights that give human dignity its thick legal meaning. As seen above, the definition of dignity lies at the crossroads of the core prohibitions of European democracy and a positive inclusion of human identities and activities. Using again the EU Charter as a convenient overarching normative reference, these identities include men and women, the sick, believers and non-believers, foreigners, children, the elderly, the disabled workers, and of course, citizens. Judicial constructions of human dignity are determined within this cluster of rights, have to comply with specific rights as well as with the overall spirit that permeates them, and are characterised by inclusion of others, solidarity and tolerance of differences.

Finally, the third implication of locating human dignity at the heart of human rights is one that is not often remembered: it is the procedural and institutional possibility—and indeed guarantee—that the concept's judicial construction is subject to an open process of discussion and, as the case may be, dissent. Judicial construction of dignity is made public with the publication of judgements, most judicial systems provide the possibility of separate (i.e. dissenting) opinions, and all provide the possibility of appeal at lower levels. Crucially, this process of discussion is not confined to the national boundaries of a given Member State. It may also lead to a complex level of discussion at the European level, with the procedural mechanism of seeking a ruling in interpretation before the Court of Justice of the European Union and filing a petition against a state before the European Court of Human Rights. In addition to these institutional bridges between national and supranational courts, a sort of informal judicial communication has been developing between courts in Europe.[24] This constant cross-fertilisation among the courts of

[22] The more vocal hesitations about dignity's legal nature as a right seem to emanate from scholars who are based in systems where dignity is a comparatively recent legal concept. For recent discussions, see: Khaitan (2012). and O'Mahony (2012).

[23] The explanations to art.1 EUCR read: 'The dignity of the human person *is not only a fundamental right in itself but constitutes the real basis of fundamental rights*. […]' (emphasis added).

[24] Glendon (1991), Dupré (2003).

Europe provides both inspiration for those courts which are perhaps less familiar with human dignity and boundaries within which they may explore the interpretative possibilities offered by this concept.

Constructing Dignity in Case-Law: Shaping Democracy

After constitution drafters, judges are the second more active dignity-makers. Their engagement with this concept is particularly difficult as by definition, they deal with disputes and disagreements about the scope and meaning of dignity and human rights.[25] Furthermore they have often been called upon to intervene because of a constitutional or legislative silence and they have to respond to acute and exceptional human rights situations. Understandably their work is closely scrutinised and criticised. In particular, scholars have often paid close attention to the more sensitive dignity issues, such as euthanasia, requests for assisted suicide (when it is illegal) or abortion.[26] Judges' role in constructing a concept of dignity, however, also involves many other issues and situations, that tend to remain out of the limelight. It is in relation to these more peripheral issues that UK judges have started developing a concept of dignity,[27] by drawing on the common law and making the most of Human Rights Act 1998 (which does not enshrine human dignity).[28] As discussed below, in so doing, UK judges's first explorations of the concept of dignity have involved addressing (some of the) core components of democracy.

Individuals/(State) Power

As argued above, essential to the definition of democracy is the power relationship between individuals and the state, and its (re)balancing in favour of human beings, a recurring issue in dignity case law. This is particularly clear in relation to people who are vulnerable for a range of reasons, such as terminal illness, mental or physical disability, or inability to earn a living. In all these cases, it is suggested that the dignity argument was raised in an attempt to foster a greater level of autonomy and quality of life for the applicants.

Chronologically, the first such instance involved making a decision about the appropriate way in which carers could and should lift persons suffering from profound physical and learning disabilities, with a seriously impaired mobility.[29]

[25] Carozza (2011). See also Burgogne-Larsen (2010).

[26] Kommers (2011).

[27] Munby J emphasised the fact that '[dignity] is a core value of the common law, long pre-dating the [European] Convention [on Fundamental Rights] and the [European] Charter [of Fundamental Rights].' in *The Queen (on the Application of (1) A (2) B (By their litigation friend the Official Solicitor) (3) X and (4) Y) v East Sussex County Council,* 18 February 2003, [2003] EWHC 167 (Admin), at para 86. One of the very first references to 'dignity' can be found in the Bland case, *Airedale NHS Trust v Bland* [2003] EWHC 1017 (Fam).

[28] Feldman (1999) and (2000); Gearty (2004); Hale (2009); and Munby (2012).

[29] *The Queen (on the Application of (1) A (2) B (By their litigation friend the Official Solicitor) (3) X and (4) Y) v East Sussex County Council,* 18 February 2003, [2003] EWHC 167 (Admin). Munby (2012).

Munby J approached this situation in terms of the dignity: the dignity of the two applicants, as well as the dignity of the carers (para 149). The ruling promotes a nuanced approach to dignity in relation to appropriate lifting methods. The gist of the reasoning in relation to respecting dignity is that one size does not fit all, and that as a result adopting blanket rules recommending a particular type of lift would not be the right approach.[30] Dignity in this ruling was understood as part of 'a complicated equation' and deployed to respond to the context and person-specific mobility needs. Reliance on dignity in this ruling led to a refined system of protection for two very disabled people, whose ability to move was almost entirely dependent on their carers' support, and managed to promote the applicants' independence as much as possible (considering their respective situations) and to guarantee them the support of carers.

In the second instance the applicant, Leslie Burke, was possibly in a state of greater dependency vis a vis public power, i.e. the National Health Service. He wanted to be reassured that he would continue to be artificially hydrated and fed in the final stages of his illness, when he would be totally paralysed and unable to communicate while being fully aware of what was happening to him and around him.[31] The High Court judge deployed the argument of dignity in an attempt to support the applicant's request, so that his wishes would be respected.[32] Despite having no resource implications, the applicant's request was rejected by the Court of Appeal, dismissing the dignity argument as being a 'mass of jurisprudence'.[33]

The third example considered here, the so-called *Limbuela* case, involved people in a very different factual situation, but also dependent on the state, as they were all asylum seekers who, due to the contested Asylum Act 1999, were unable to seek legally paid employment while their claim was being examined.[34] The House of Lords dismissed the Secretary of State's appeal that the asylum seekers' treatment had not reached the required level of severity for art.3 ECHR to be engaged. The appeal judges considered the context and the facts and held that sleeping on the street, going hungry and being unable to satisfy the most basic requirement of hygiene definitely amounted to a breach of the applicants' dignity under art.3 ECHR. Emphasis on dignity is to be found in Baroness Hale's opinion: '[art.3]

[30] 'One must guard against jumping too readily to the conclusion that manual handling is necessarily more dignified than the use of equipment. […] Dignity in the narrow context in which it has been used during much of the argument of this case is in truth part of a much wider concept of dignity, part of a complicated equation including such elusive concept as, for example (feelings of) independence and access to the world and to others. Hoisting is not inherently undignified, let alone inherently inhuman or degrading. […] Hoisting can facilitate dignity, comfort, safety and independence. It all depends on the context.' per Munby J. at para 122.

[31] *R (on the application of Burke) v General Medical Council* [2004] EWHC 1879.

[32] 'But the sanctity of life is only one of a cluster of ethical principles […] And another principle, closely connected [to self-determination], is respect for the dignity of the individual human being: our belief that quite irrespective of what the person concerned may think about it, it is wrong for someone to be humiliated or treated without respect for his value as a person.' at para 51.

[33] [2005] EWCA Civ 1003; [2006] QB 273 at [36]. See Dupré (2006).

[34] *R (Limbuela) v Secretary of State for the Home Department, R (Tesema) v Same and R (Adam) v Same,* [2005] UKHL 66.

reflects the fundamental values of a decent society, which respects the dignity of each individual human being, no matter how unpopular or unworthy she may be'.[35]

Finally, the case of Ms McDonald is one of the most recent and perhaps most emblematic illustrations of the state-individual imbalance and of how the absence of a dignity argument in the majority opinion arguably confirmed and reinforced the situation of dependency in which the applicant found herself.[36] The applicant suffered from a number of medical ailments and in particular needed to use the toilet two to three times a night, for which she was entitled to a paid carer. The Royal Borough of Kensington and Chelsea, responsible for her care, offered a new care package that the applicant contested as it involved the night carer's removal and the compulsory use of incontinence pads instead. Her appeal was dismissed by the Supreme Court, on a range of arguments, including issues of safety (i.e. that it was safer for her stay in bed rather than attempt to go to the commode even with a carer's help) and cost (provision of a night carer cost an extra £22 000 a year, a resource decision the Supreme Court did not feel it could make). Baroness Hale was the only dissenting judge and her opinion rests on the point that it is unreasonable (in the *Wednesbury* sense) 'to characterise the appellant as having a different need from the one which she in fact has' (para 78), with the consequence that the applicant is left with no choice but to soil herself when she could effectively use a commode with the support of a carer. Baroness Hale highlighted the requirement to protect the 'dignity, privacy, independence of service user*s*' that can be found under various social care regulations and guidance, with a specific mention 'that dignity is not always sufficiently considered because people were not taken to a toilet away from their bed-space and commodes were used all the time' (para 78). Finally (and convincingly), Baroness Hale linked the protection of dignity and supported access to the toilet for the non-incontinent with her understanding of the UK being a 'civilised society'.[37] Rejecting this line of thinking, the majority arguably made a situation of great dependence on state support (to need help to use the toilet) into one of greater dependence, i.e. to be refused that specific support and be made to use unnecessary incontinence pads.

Including the Other

The second type of issue also lies at the heart of democracy as it raises the question of how a particular community faces otherness and difference, i.e. those who, for one reason or another, do not fit within the majority norm on the basis of which the law was drafted. Again, a pattern seems to have emerged, whereby reliance on dignity in case law has an inclusive effect, bringing under the mainstream protection offered by the law all those who did not benefit from it due to their difference(s). For instance, in *Burke*, successful reliance on dignity would have guaranteed the patient

[35] Para 76.

[36] *R (on application of McDonald) (Appellant) v Royal Borough for Kensington and Chelsea (Respondent)* [2011] UKSC 33. Discussed in Munby (2012). See also Hale (2009).

[37] 'In the UK we do not oblige people who can control their bodily functions to behave as if they cannot do so, unless they themselves find this more convenient of course. We are, I still believe, *a civilised society*. I would have allowed this appeal.', emphasis added (para 79).

a sort of extended autonomy, in that his wishes expressed while still competent could be respected after he lost the ability to communicate in the last stage of his illness. Reliance on dignity would have made it possible to address his difference, i.e. his certain lack of autonomy and inability to express himself as compared to autonomous patients, who are able to communicate and to be involved in the type of medical treatment they receive. Similarly, it is suggested that in *Limbuela*, the asylum seekers' differences, i.e. their foreign nationality and the requirement of the state's permission to remain in the UK, were leveled out by reliance on dignity and giving them the possibility to receive financial support from the state, so as to ensure that their living conditions could be broadly in line with UK nationals. In the *Ghaidan* case, the applicants' difference rested in their homosexuality as the law was written with the 'norm' of married heterosexual couples and related rights for the surviving spouse.[38] In this case, the outcome of the ruling resulted positively in some material benefit for the applicants, i.e. Ghaidan's right to remain in his rented flat after his partner's death.

While this was an important gain for the applicant, the political significance of these cases is greater, in that they help elucidate the meaning of the 'norm' and the 'other', namely the choice of including and—crucially—excluding certain people from a quality of life and degree of human rights protection that 'normal' people can expect to enjoy.[39] In this sense, dignity is tightly connected to equality and non discrimination, as well as to the quality of democracy arising out of this.[40]

Facing the New

Essential to sustaining democracy is its law's ability to make space for the unexpected and respond to the unknown, allowing change to take place within the normal constitutional framework. In this respect too, dignity has arguably helped judges (together with applicants and their lawyers) to chart new territories and to respond to issues arising out of novel developments, for which there is no clear legal or social solution. The emergence of bioethics illustrates this role perhaps most clearly as dignity has been used in a range of legal norms (case law, statute and international instruments such as the 1997 Oviedo convention)[41] in an attempt to set some parameters within which to decide what can be and cannot be done in relation

[38] *Ghaidan v Mendoza* [2004] UKHL 22, [2004] 2 AC 557. The argument of dignity was used in two other rulings involving UK law and discrimination on basis of transsexuality and homosexuality, which were ultimately decided on by the European Court of Justice. The first involved some employment rights of a post-operative transsexual (the right to retain her job after the operation): *P v S and Cornwall County Council*, case C-13/94, 30 April 1996 and the second case involved the pension rights of a transsexual in an unmarried relationship, *K.B. v NHS Pension Agency, Secretary of State for Health*, case C-117/01, 7 January 2004.

[39] In this respect, it may not be a coincidence that Baroness Hale's dissenting opinion in the McDonald case discussed above starts with: 'This is a case about a really serious question *which could affect anyone of us*: is it lawful for a local authority to provide incontinence pads (or absorbent sheets) for a person who is not in fact incontinent but requires help to get to the lavatory or commode? (para 61, emphasis added).

[40] Grant (2007) and Moon and Allen (2006).

[41] Fraissaix (2000).

to these new technological and medical possibilities.[42] It is perhaps therefore no coincidence that in the UK, the first scholarly construction of human dignity was an attempt to provide a framework for these new technological and medical possibilities.[43] While dignity as a judicial concept has often been criticised for the fact that it can support both sides of the argument (particularly so perhaps in relation to euthanasia or assisted suicide), it is suggested here that the semantic openness of dignity does not reflect an intrinsic weakness, but rather reflects the lack of political and social consensus, e.g. should we consider that euthanasia may be good in some cases, or is it right to help people to commit suicide? The expectation that relying on dignity in those novel situations will lead to one straightforward answer is therefore arguably misleading.

What reliance on dignity in such cases can achieve, however, is to flag up the novelty of a problem that cannot be expressed with the existing and more familiar tools and words of law, and to make space in judicial reasoning for discussing it. This is a crucial hermeneutic function of dignity that is often underestimated due to the emphasis on a given ruling's outcome.[44] This is well illustrated by the *Pretty* case, where the (judicial and scholarly) discussion centred on whether it was right to allow Pretty to be assisted to commit suicide by her husband.[45] The meaning of dignity was reduced to its pro-choice dimension, i.e. the lawful possibility for Diane Pretty to choose to commit assisted suicide. However, in that case, the crucial role of dignity was arguably to make some discursive space in judicial reasoning for a new way of considering the definition of and interplay between the familiar rights protected under art.2, art.3 and art.8 ECHR. None of these rights could on their own express and shape a legal response to Diane Pretty's situation. It is therefore suggested that reliance on dignity helped express the idea that there might be something more to the right to life than the strict prohibition on state killing and doctors' duty to keep their patients alive, no matter what the physical and emotional implications for the patients (an argument ultimately rejected by the House of Lords and ECtHR). Similarly, reliance on dignity raised the issue as to whether art.3 might protect patients against a new type of situation, i.e. medical treatment to maintain people alive against their will. In other words, the question was whether the psychological distress caused to Diane Pretty by the prospect that she would suffocate to death might amount to a breach of art.3. Obviously, the outcome of the ruling must not be disregarded in relation to how it shapes the meaning of human dignity, i.e. that the right to life under art.2 may not be interpreted as the right not to live, or as the right to live in dignity at the very end of one's life. Despite the fact that the ECtHR rejected Pretty's argument on dignity, its use in the court's reasoning has not been in vain.

Very importantly, it raised the 'what if' question, that is, what if the right to life was not just about the right not to be killed or the right to be kept alive by doctors? Or what if the right to privacy includes the right to make a decision on how to end

[42] For instance, see Andorno (2009).

[43] Brownsword and Beyleveld (1998).

[44] Rixen (2006).

[45] *Pretty v United Kingdom* (2002) 35 EHRR 1.

one's life? Human dignity appears as a valuable hermeneutic tool to explore these difficult issues, an exploration that would arguably not be possible to the same extent with the more familiar rights and judicial techniques. Moreover, it is important to note that a further judicial use of dignity in this type of context is not to close a debate by providing a once and for all answer, but rather to open it, so that similar questions may be raised in subsequent instances and so that these new and controversial issues may continue to be discussed in the open framework provided by European constitutionalism.[46] Asking the 'what if?' question is an essential democratic function that the argument of dignity can perform in the context of judicial reasoning: it allows judges to explore new territories and new possibilities guided by the overall democratic telos mentioned above (enhanced human rights protection), while remaining within their allocated constitutional space.

In conclusion, a clear pattern has emerged in the judicial uses of dignity discussed above: when dignity is deployed in the (majority) reasoning, the applicants' claim is successful (*Limbuela* and *Ghaidan*), in the sense that they obtained what they sought in their application. By contrast, when the dignity argument was rejected, the application failed (*Burke* and *McDonald*). Dignity's impact arguably goes beyond the material benefit for the successful applicants: it contributes to shaping a more inclusive type of democracy and one in which the structural imbalance between the state and the individual is softened by the provision of various types of support to avoid situations of extreme imbalances. It has to be noted here that redressing these situations does not automatically involve resource allocation from the state or public bodies,[47] although it may sometimes require this.[48] Moreover, while UK judges were exploring the possibilities offered by dignity for the first time in the rulings considered here, they sought to locate their construction of dignity at the crossroads of UK legal culture and supranational norms and case law, particularly of course ECHR case law, but they also mentioned the EU Charter of Fundamental Rights.[49] Finally, while dignity has often been criticised for its eminently subjective perception and its lack of some universally shared understanding, the cases discussed above show that dignity arguably corresponds to a perception and experience of humanity that most of us share, that is the wish (or expectation) not to be forced to live in destitution, not to be made to soil oneself, or the wish to have a roof over one's head even after the death of one's partner (to refer to the examples discussed above). What comes out clearly in these rulings is a sense of dignity derived from a perception that being part of a 'civilised society' creates certain expectations about how to be treated, which judges have tried to acknowledge and respond to in a favourable way.

[46] *R (Purdy) v Director of Public Prosecution* [2009] UKHL 45.

[47] Even in the McDonald case, which raised issues of resource allocation, alternative forms of care and support to compulsory incontinence pads were available according to Baroness Hale (para 74).

[48] Bittner (2011).

[49] See in particular the High Court ruling in *Burke*: 'The recognition and protection of human dignity is one of the core values—in truth *the* core value—of our society and, indeed, of all the societies which are part of the European family of nations and which have embraced the principles of the Convention.' (para 86).

The 'Civilisation' of Human Dignity in Europe

Respect and protection of human dignity form part of a wider sense of right and wrong, which is deeply intuitive and rooted in a particular cultural understanding and form part of a civilised manner of relating to each other. In human rights law, a minimum standard of civilisation has been translated and secured in a set of key prohibitions on killing, torturing, holding in slavery and forced labour, human trafficking, human cloning and (more generally) performing medical and scientific experiments on human beings without their consent, to refer to the dignity Title of the EU Charter of Fundamental Rights (articles 1–5). In addition, day to day political choices and priorities set by the government in power contribute to setting substantive standards in relation to how human beings should be treated, and in this respect, resource allocation is often as crucial as contrversial. The reference to 'civilisation' therefore encompasses this complex set of beliefs, aspirations, as well the material resources made available and channelled towards certain aims or people. Judges contribute to the development of 'civilisation' and indeed, the reference to civilisation in relation to dignity was used by both ECtHR[50] and UK judges[51] to convey a sense of what is acceptable (and what is not). However, judges are also bound by it and, they may of course be limited by it, when, for instance, it comes to the complex and sensitive decisions on resource allocation.

The paper uses the term 'civilisation' as a springboard in order to bring to light the temporal dimension of dignity[52] (and democracy) which, while often underlying in human rights norms and adjudication, largely remains invisible and therefore needs unravelling. Dignity, it is suggested, entertains particular connections with time both as a foundation and an aim of constitutional democracy in Europe. This section draws on the emerging literature on time and constitutionalism[53] and is based on the assumption that the construction of a particular constitutional time has been crucial in fostering democratic legitimacy.[54] As judicial constructions (together with constitutional codification) of human dignity arguably proceed from and contribute to this temporal dynamic, it is argued that bringing in the time dimension in the construction of human dignity helps in refining and understanding this concept. The connections between time and dignity in European constitutionalism are explored here in terms of three basic stages: past, present and future.

Breaking with the Past

One of the first step taken by a new regime is to position itself in history and to construct an image of the past and of the future that it promises. Codification of dignity in normative texts, particularly in codified constitutions, has therefore played a crucial

[50] *SW v UK*, 22 Nov. 1995, 47/1994/494/576, para 44.

[51] *R (on application of McDonald) (Appellant) v Royal Borough for Kensington and Chelsea (Respondent)* [2011] UKSC 33 at para 79. See above n37.

[52] Dupré (2009).

[53] Inspirational were the writings of Häberle (1992), Ost (1999).

[54] Dupré and Yeh (2012).

role in this process in marking a clear break between two eras, i.e. the time before the constitution when there was no dignity and no democracy, and the time under the new constitution that guarantees dignity and democracy.[55] As a result, in a very similar way to the human rights that were first recognised in the 1789 Declaration of the Rights of Man and the Citizen, it is suggested that human dignity captures the memory of the time of indignity, and acts as a reminder for the government in power of the consequences of breaches of dignity. After WWII when dignity became the foundation of human rights, this word was primarily associated with its systematic denial by the war and the fascist and nazi dictatorships.[56] This was in particular the case under the West German Basic Law adopted in 1949, where the reference to dignity has given rise to a new type of constitutionalism, characterised by a commitment never again to make it possible for a government to breach dignity as the nazi regime had done. This constitutional construction of a past as a time that must never return is arguably anchored in a set of core prohibitions enshrined under art.2, 3 and 4 of the ECHR and, since 2009, is endorsed and strengthened under Title I of the EU Charter of Fundamental Rights (as well as in many Member States constitutions which enshrined similar prohibitions). This constitutional past has shaped the judicial interpretation of human dignity in that no use of dignity that would go against those core prohibitions, in order (for instance) to bring back torture or inhuman and degrading treatment, the death penalty or slavery (and associated forms of work) can arguably be constitutionally valid and democratically legitimate. Similarly, a (judicial, constitutional or statutory) construction of human sexuality—one of the key issues underlying the discussions on abortion—reducing it to its sole reproductive function may be understood as degrading men and women to some kind of animal or instrumental status, thus denying them the unique human quality of their sexuality.[57] In this light, protection of sexual freedom and reproductive self-determination ought perhaps to be considered under art.3 ECHR and art.4 EU Charter, as well as art. 3 EU Charter protecting 'physical and mental integrity' (and not just under privacy, as seems to be mainly the case).

Such a construction of the past and of dignity is not flawless however.[58] Nevertheless, it sets clear constitutional boundaries for judicial constructions and

[55] An alternative reading of the dignity history insists on the continuity and connects dignity to the ancient 'dignitas' and related emphasis on dignity as rank; see Hennette-Vauchez (2011). This type of approach appears to be oblivious of the historical break introduced by the French Revolution with its emphasis on equal human rights as the basis for a new political order called liberal democracy. This approach, however, highlights the need to think further the connections between dignity and equality, which are not always made explicit in human rights documents.

[56] For instance, the preamble of French 1946 constitution read: 'in the aftermath of the victory achieved by the free people over the regimes that had sought to enslave and degrade humanity'. See also preamble of EU Charter of Rights.

[57] More disturbingly perhaps, it brings to the fore how control of human sexuality was instrumentalised to meet dictatorships' ideological agendas, such as Hitler's and Ceauşescu's regimes, where couples were denied sexual privacy and freedom.

[58] For instance, it focuses on the rejection of the immediate—and most traumatic—past and excludes the 'longer past', that is the time before the advent of these dictatorships and in particular the legacy and memory of the 19th century social struggles for an economy and work contributing to an existence in dignity.

uses of dignity. Developing a (judicial) construction of dignity outside these boundaries may not only give rise to issues of unconstitutionality (and matching legal challenges) but, importantly, it would almost certainly affect the wider legitimacy and quality of European democracy.

Present: Certainty and Responsiveness

Dignity further contributes to constructing a constitutional present that is first (but not exclusively) defined negatively, i.e. by its clear demarcation from the past relegated to the time of indignity before the constitution. This present is constructed by appropriate institutional design and mechanisms guaranteeing legal certainty, continuity as well as regular—and peaceful—renewal of political power, a key requirement of the present's continuity. While it is essential to remember the time of indignity and to endeavour not to repeat it, threats to dignity are arguably not reduced to the return of nazi type regimes.[59] Therefore, defining dignity also has to embrace a positive dimension, which can be found in the constitutional present as characterised by the law's ability—and therefore the understanding of human dignity—to evolve and to remain always present without falling behind technological and social/cultural practices and expectations. Dignity's function in this dynamic process is essential as, as discussed above, it has become a primary tool for responding to new developments and for charting new routes across these unknown territories. Seen in this dynamic understanding of the constitutional present, the impossibility of crafting a complete definition of dignity once and for all is not an intrinsic weakness of this concept. Rather it is arguably one of its essential strengths, making it possible to extend the meaning(s) of dignity beyond the foundational core, in order to protect all those who had been left out from constitutional or statutory protection (as discussed above) and to extend the historical core prohibitions (under articles 2, 3 and 4 ECHR) to protect new types of negation of dignity (as under Title I EU Charter).[60] This inclusive dynamic arguably guides and frames (judicial) constructions of dignity, in that any interpretation of dignity bringing this movement to a standstill, or reversing it (i.e. excluding certain groups of human beings from human rights and dignity protection) would arguably weaken the democratic legitimacy of a dignity concept constructed in this way and would trigger a robust discussion and criticism in the various fora of liberal democracy and through the system of judicial appeals.

Future: Possibility and Openness

The future is the last dimension of constitutional time explored here and, as it has not happened yet, it is perhaps the most difficult time to think about. However, it is

[59] Knoepffler and O'Malley (2010). 'A narrow focus on atrocities can operate to render much injustice invisible': Baer (2009).

[60] This extension of dignity protection and 'thickening' of dignity meaning is particularly clear in relation to the widening of the scope of Article 3 ECHR. See for instance: *M S v United Kingdom*, 3 May 2012 (application No. 24527/08), para 39 and para 44.

suggested that this is a crucial dimension of constitutional time.[61] The first point to note here is that, in a democracy, constitutions arguably make space for the future and create mechanisms to allow for this future to unfold. Here dignity has a key role to play as one of the aims of constitutional democracy (together with the rule of law, justice, peace, respect for human rights, to refer to some of the most frequently codified aims). Its open-ended conceptual texture ensures that this aim can—by definition—never be achieved, as protection of dignity can always be taken in a different direction or become more inclusive of people and their needs and dreams; and so democracy keeps having a future. In technical terms, for the future to happen it is also crucial that constitutions include mechanisms and rules to arrange for their own future, i.e. when they will cease to exist in their current format and will be amended or altogether replaced. This is normally achieved by constitutional rules on revision and adoption. In most constitutions, dignity's key role in this respect is to keep the future of the constitution (and that of democracy) open. The term open here is understood by reference to Karl Popper's open society thinking.[62] In this sense, an open future contrasts with a 'utopian' future, and promotes a future that is gradually constructed, one step at a time, by a range of actors and following a range of processes, including human rights adjudication.

Seen from this perspective, judges have a crucial role to play in the step-by-step construction of the future, and the transparency and publicity of judicial reasoning, together with the possibilities of dissent and appeal form an integral and essential part of dignity's construction. Therefore, allowing people to choose and build their own future as they imagine or wish it (within the limits mentioned at the start of this section), is arguably a crucial part of dignity's definition. In the cases discussed above this can be formulated as a range of questions, such as will these people become increasingly (in)dependent from care and support (*R (A, B, X and Y) v East Sussex County Council (No2)* [2003] EWHC 167 (Admin) and *McDonald*), or can they construct their own future at all (*Limbuela* and *Ghaidan*)? These questions can serve as testing whether or not the dignity concept has been deployed in an effective and legitimate way. Even when it is known that the applicants' future is reduced, because (for instance) they have little time left to live due to some terminal illness, it remains important that they can keep looking forward to their future and that this should not generate distress, pain or anxiety. These questions are often underlying the difficult cases on euthanasia and assisted suicide; considering more fully these applicants' future is arguably a useful and necessary perspective to add to the discussion on the sanctity of life, to privacy and prohibition of torture. Finally, judicial uses of human dignity may protect people against an acceleration of time by bringing forward a future that could otherwise remain distant. It may enable people to live at their own pace, to sustain a tolerable status quo and crucially, to deteriorate at their own pace (if this deterioration becomes inevitable). This temporal dimension of dignity is therefore essential in most (if not all) cases involving

[61] This has been well seen by Raz (1977) in relation to the rule of law: 'Respecting human dignity entails treating human as persons capable of planning and plotting their future. Thus, respecting people's dignity includes respecting their autonomy, their right to control their future.'

[62] Popper (1962).

decisions on (medical) care. In those cases, reliance on dignity may be used to postpone states of dependence as long as possible. In this context, the remark by Baroness Hale (in the *McDonald* case) that incontinence pads may in fact reduce the applicant's independence, by making them compulsory before the patient might need them, takes its full significance.[63]

Overall and when possible, the future constructed through human dignity ought to be better than the past and than the present, so that people can keep looking forward to their life. In this sense dignity has a compelling aspirational dimension and is closely related to hope, i.e. the expectation that we are building a better future for ourselves and for those coming after us.

Conclusion

This paper has argued that the legal concept of dignity connects human beings and democracy: by placing human beings at the centre, used as a judicial argument, it re-balances the power relationship between (state) power and people, including all those who are left at the fringes of legal and constitutional rules drafted with a 'normal' person in view and allows the reformulation of answers to new and difficult problems. Judges, of course, are key dignity-makers: while their understanding of human dignity draws on intuition and a sense of commonly shared values in European and UK society, the democratic context in which they operate frames their creativity, limiting the risk of crafting a judicial concept of dignity that is mainly a reflection of their own (political) preferences. Judges have to fit their concept within the existing human rights framework, as set out at the supranational level, with the EU Charter of Fundamental Rights providing the latest and most explicit normative boundaries for dignity. Moreover, the paper has brought to light a further connection between dignity and democracy, namely the time dimension understood here as a special quality of the past, present and future as constructed by (codified) constitutions, which provides the temporal structure within which judges can explore and develop human dignity in a democratic and legitimate manner. Seen from this perspective, no judicial use of dignity is innocuous or indifferent. What is at stake is not just whether or not it is lawful, for example, to replace the provision of a night carer by compulsory incontinence pads: it is how judges construct time, humanity and democracy each time they deploy dignity as a significant judicial argument in their reasoning. What is at stake is the construction of a particular type of civilisation, which includes all human beings and sets them free to dream and create their own futures. Judges are, however, only one actor in the fragile construction of civilisation, which also involves (as can be seen at the time of writing) painful and controversial decisions on resource allocation taken by those in power.

[63] *R (on application of McDonald) (Appellant) v Royal Borough for Kensington and Chelsea (Respondent)* [2011] UKSC 33, para 75. Much more generally, see Rosa (2010).

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