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The judicial use of human dignity in social rights issues. A European perspective*

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The world found nothing sacred in the
abstract nakedness of being human

H. ARENDT, *The Origins of Totalitarianism* (1951)

1. Questioning global dignity

Both in contemporary legal discourse and in judicial applications worldwide, human dignity stands nowadays as an overarching value. Its composite moral foundations have not prevented it from becoming a standard in adjudicating fundamental rights. In addition to this, its diversified dimensions of application made the recourse to it viable in disparate situations: one can invoke the protection of dignity against the intrusion of public authority in his or her personal domain as well as against degrading practices put forth by state and non-state actors and ask, on this basis, for positive obligations for public authorities[1]. Moreover, human dignity is supposed to act both as an instrument aimed at protecting *individual* liberty and autonomy and as a basis of moral justification

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[1] M. Cohn, D. Grimm, *'Human Dignity' As a Constitutional Doctrine*, in M. Tushnet, T. Fleiner and C. Saunders (eds.), *Routledge Handbook of Constitutional Law*, London and New York, Routledge, 2013, p.193.

for the introduction of public policies aimed at safeguarding *objective* values. It is a commonplace in legal discourse that on some debated issues, like abortion, human dignity may be invoked at the same time as a vehicle of empowerment or as an instrument of constraint[2].

The risk of such a reversibility of the argument by dignity seems to be part of a larger problem. The global widespread of dignity as a guiding rhetoric for human rights protection has definitely shown that its use as a cluster of judicial arguments has travelled in several directions around the globe[3], so that one can say that the motor of human dignity has shifted from those European countries that made of it the cornerstone of their constitutions after World War II to some new 'importers countries' like South Africa, Israel, Canada and, to a certain degree, the USA[4].

This dissemination of human dignity in judicial reasoning has given rise to opposite narratives as to the reasons of such a success story. On one side of the spectrum, a more enthusiast position makes human dignity one of the basic traits of a cross-border liberal constitutionalism, centered upon values like the rule of law and the respect for human rights and personal autonomy, and in so doing it sets the premises for a detachment of human rights from the decision of political actors and their conveyance in the hands of a new judicial order[5]. At the opposite side of the spectrum, a demystifying rhetoric has emerged in the last years, according to which human dignity is the trojan horse of a broader depoliticisation project, relying upon an increasing and irresistible *montée en puissance* of human rights narrative[6].

Against this background, my intention is to demonstrate whether and to what extent the human dignity is a viable legal basis for promoting social rights

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[2] R. Brownsword, *Bioethics Today, Bioethics Tomorrow: Stem Cell Research and the 'Dignitarian Alliance'*, in *Notre Dame Journal of Ethics and Public Policy*, 17 (2012), p.20.

[3] A. Barak, *Human Dignity. The Constitutional Value and the Constitutional Right*, Cambridge University Press, Cambridge, 2015; L.R. Barroso, *"Here, There and Everywhere: Human Dignity in Contemporary Law and in Transnational Discourse*, *Boston College International and Comparative Law Review*, 35 (2012), p.331; V. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, in *Montana Law Review* 65 (2004), p.15.

[4] P. Carozza, *Human dignity in constitutional adjudication*, in T. Ginsburg, R. Dixon (eds.), *Research Handbook in Comparative Constitutional Law*, Cheltenham, Edward Elgar, 2011, p.459.

[5] C. Dupré, *The Age of Dignity*, Oxford/Portland, Hart, 2015; M. Mahlmann, *Elemente einer ethischen Theorie der Grundrechte*, Baden-Baden, Nomos, 2008.

[6] C. Douzinas, *Human Rights and Empire. The political philosophy of cosmopolitanism*, London and New York, Routledge, 2007, p.54.

and welfare policies. In so doing, I move from the assumption that the notion of 'social dignity' is a distinct feature of European constitutional tradition since it reflects, at a closer view, a peculiar bond between individual autonomy (as enshrined in fundamental rights guaranteed at both national and supranational, i.e. regional, level) and solidarity as an heritage of a shared duty to provide for the common good. This linkage between autonomy and solidarity is mediated by the value of human dignity, but it requires an ongoing reassessment of its institutional premises, that is a balance between political decision and judicial reasoning.

In a first part (2.), I briefly try to sketch out the main aspects of this theoretical debate, although my intention is rather to focus on the legal implications thereof. In a second part (3.), I dwell into an overview of judicial applications of human dignity in social rights and welfare policies in four European countries: France, Italy, Germany, and the United Kingdom. The German and the British cases, in particular, can reveal the basic variables of and the different reactions to a fully-fledged utilization of human dignity as a judicial argument in the field of social policies. In a third and final part (4.), I offer some concluding remarks about the legal epistemology of human dignity in social rights issues and the opportunity to recur to it as a moral and legal basis for promoting individual rights and social integration via judicial decisions.

2. Human dignity for social justice?

It is a commonplace that dignity was firstly introduced as a normative concept by Immanuel Kant. Although the recurrence to dignity is long-standing and far-reaching in the Western tradition and many traces of it can be found in other cultures, the modern usage of the word and its conceptualization do almost entirely coincide with the Kantian theory. As is well known, the absoluteness of the Kantian *Würde* (dignity), the relationship between means and ends that it endorses and the centrality of the individual as a moral agent have jointly led to the conclusion that human dignity can be first and foremost addressed in terms of individual autonomy[7]. For a long time, theoretical reflections have highlighted that the absoluteness of dignity works at its best when it opposes the individual agent (as bearer of rights) and the public authority (as the source of power threatening absoluteness of moral individuality). Within such a liberal arrangement, there is no place for establishing a link between dignity and the

[7] I. Kant, *Groundwork for the Metaphysics of Morals* (1785) (Mary J. Gregor trans.) Cambridge, Cambridge University Press, 1997.

social field, although the position of Kant insisted on a broader notion of autonomy, encompassing moral duties[8].

In recent years, the philosophical debate about the widespread diffusion of dignity and its multipurpose nature have called into question its relationship with welfare policies and social rights. More recent philosophical strains have highlighted the need to give to dignitya broader reading, according to which the respect of individual autonomy implies some necessary conditions for one's self-fulfilling project[9]. In this light, human dignity becomes the source of both rights and duties, since the mutual respect for autonomy calls for a limitation for individual actions that may infringe other's rights. The insistence on duties as a distinctive component of autonomy and dignity reveals the intention to provide the latter with some distributive intents. Human dignity is not a persistent and immutable quality of individuals, but is a set of entitlements that have to be safeguarded against the intrusions put forth by private and public actors, and therefore it needs to be arranged at an institutional level. A step forward in this direction is made by those scholars that stress the insufficiency of an utilitarian approach, which is accused to underestimate the cooperative potential of public institutions. Their coordinated action is able to overcome the theoretical and practical shortcomings of a purely horizontal dimension of individual aid and, in so doing, it provides a basis for the arrangement of public services like healthcare, pensions and social inclusion of disadvantaged people[10].

Such a philosophical foundation is in line with those international legal trends aimed at elevating social rights at the level of human rights. Right to access to health service, right to school, right to housing and the right to fair working conditions are since decades part of global and regional covenants, since (at least) the International Covenant on economic, social and cultural rights (1966) and the European Social Charter (1996), whose Article 26 openly recalls "The right to dignity at work". Against this background, it comes as no surprise that human dignity has been invoked in judicial decisions as a guarantee for the right to have essential needs satisfied. In the *Guatemala Street Children case*, the Inter-American Court of Human Rights asserted that the right to life "includes not only the right of every human being not to be deprived of his life arbitrarily, but also

[8] I. Augsberg, *'The Moral Feeling Within Me': On Kant's Concept of Human Freedom and Dignity As Auto-Heteronomy*, in D. Grimm, A. Kemmerer (eds.), *Human Dignity in Context. Explorations of a Contested Concept*, Baden-Baden/Oxford, Nomos/Hart, 2018, p.55.

[9] A. Gewirth, *Reason and Morality*, Chicago, University of Chicago Press, 1978.

[10] K. Steigleder, *Human dignity and social welfare*, in M. Düwell, J. Braarvig, R. Brownsword, D. Mieth (eds.), *Cambridge Handbook of Human Dignity. Interdisciplinary Perspectives*, Cambridge, Cambridge University Press, 2014, p.471.

the right that he will not be prevented from having access to the conditions that guarantee a dignified existence"[11]. In a similar line, Indian Supreme Court has interpreted right to life and personal liberty by stating that it includes "the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms"[12]. Similar decisions have been taken on similar grounds in countries like Hungary[13] and South Africa[14], thereby contributing in the last twenty years to the emergence of a human dignity judicial canon within global constitutional law.

Although these evolutions have contributed to the enrichment of human dignity's multi-faceted texture, one can read behind them a certain vague and erratic attitude: their capacity to stand as flagship of civilisation of political and socio-economic life seems to be at odds with the context in which they are called to deploy their effects. Their high moral ambitions are likely to elevate their judicial proclamation from the harsh political situations surrounding them, and in this way they express the aspirational intent of such social rights claims. This can alternatively lead to their ineffectiveness or rather to a reversal of the message they are called to uphold. A striking example comes from Hungary itself: in 1998 and 2000 the local Constitutional court delivered some pioneering decisions that emphasized in terms of a dignitarian mandate the duty of the State to secure a minimum livelihood through all the welfare benefits necessary for the realisation of the right to human dignity, in particular for the right to provide a shelter for homeless persons[15]. On 4 June 2019, after the entry into force of a new Fundamental law in 2011 and the packing of the Constitutional court, this judicial body delivered an astonishing decision according to which the criminalization and eventual imprisonment of homeless people is in line with the Constitution since, according to the majority "(…) nobody has the right to poverty and homelessness, this condition is not part of the right to human dignity" [16].

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[11] IACHR, *Villagran Morales v. Guatemala*, Nov. 1999, para 144.

[12] *Mullin v The Administrator. Union Territory of Delhi*, AIR 1981 SCR (2) pp.516, 518.

[13] Alkotmánybíróság, Decision 32/1998 (VI. 25) AB, ABH 1998, 251 and decision 42/2000 (XI. 8) AB, 5/G/1998.

[14] Since the seminal ruling delivered by the South African Constitutional court in *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).

[15] See above, nt. 3.

[16] Alkotmánybíróság, Decision 19/2019. (VI. 18.): on this decision see N. Chronowski, G. Halmai, *Human Dignity for Good Hungarians Only*, in *Verfassungsblog on matters constitutional*, June 11, 2019 (https://verfassungsblog.de/human-dignity-for-good-hungarians-only/)

3. Exploring European constitutionalism on human dignity and social rights: roots and contexts

If the relationship between human dignity and social rights is considered from a legal point of view, and from the perspective of constitutional law in particular, a step behind is to be done. Human dignity emerges as a distinctive legal component of modern constitutions after World War II, even though previous references were made in other constitutional texts (Spain and Ireland).

The close connection between human dignity and social rights should thus not surprise if one focuses on the constitutional ideas that prevailed in the aftermath of World War II[17]. At international level, Art. 1 of the Universal Declaration of Human Rights paved the way to an increasing role for dignity, by stating that "All human beings are born free and equal in dignity and rights". Even before this, a new legal and theoretical strain had emerged, according to which human dignity had to be grasped then within the social and relational contexts the individuals lived in, so that more individualist approach had to be abandoned[18]. The Italian (1948) and the German (1949) Constitutions are, among others, strongly committed to the idea that the protection of the individual could not be left anymore to the sole dynamics of social interactions and hat to be taken in charge by public authorities. In Germany, this approach has been realized thanks to the combination between Art. 1 of the Basic Law (BL) and the principle of social state enshrined in Art. 20 BL, whereas in the Italian Constitution human dignity is much more immediately related to its social dimension: it is mentioned

[17] A. Oehling De Los Reyes, *El concepto constitucional de dignidad de la persona. Forma de comprensión y modelos predominantes de receptión en la Europa continental*, in *Revista Española de Derecho Constitucional*, 91 (2011, p.135).

[18] It suffices here to mention two authors like Jacques Maritain and George Gurvitch, both highlighting that human dignity did not coincide with the qualities and entitlements of an abstract individual, but had to be grasped within the intertwinement between individuals and groups in a given society. Both authors moved thus from a pluralist and anti-statist approach: see J. Maritain, *Integral Humanism*, (J. W. Evans trans.), Notre Dame, IN, University of Notre Dame Press, 1973 (whose concept of dignity is explored by P. Valadier, *Jacques Maritain's personalist conception of human dignity*, in *Cambridge Handbook of Human Dignity. Interdisciplinary Perspectives*, cit., 260) and G. Gurvitch, *The Bill of Social Rights*, New York, International Universities Press, 1946, whose *Bill of Social Rights* at Art. 1 reads: "The goal of society is the fraternity of men and groups, which can be fulfilled only through variety in unity. – i.e. through a plurality of equalitarian associations protecting the liberty and human dignity of each member and integrated in the national community" (at 74).

with regard to the principle of equality in Art. 3 ("equal social dignity"), as a limit to the freedom of economic actors (Art. 41, par. 2) or as a basic yardstick indicating the minimum threshold for wages (Art. 36). In the French system, human dignity is not directly mentioned by the Constitution (both 1946 and 1958) and the protection of social rights emerges indirectly from the Preamble of the 1946 Constitution[19].

If we move to the judicial applications of human dignity in the social field, the connection between human dignity and social rights is however much more blurring.

The German example is quite revealing. Despite of the clear connections between the *Menschenwürde* and the principle of Social state, the Federal Constitutional Tribunal highlighted from the very beginning that the public authority (i.e. the Parliament) is under a duty to provide the individual with social services (*Leistungspflicht*) but this duty is not directly enforceable by the individual, since it stands as a purely objective constitutional mandate[20]. In extreme circumstances, the individual can claim against a manifestly insufficient legislation, but the burden of proof was deemed to be high since the individual had to demonstrate that such a shortcoming was related with an arbitrary inaction of the legislative power[21]. This can partly be related with the absence of a constitutional catalogue of socio-economic rights at the federal level, since the related clauses are enshrined in the constitutions of the German *Länder*.

A turning point in this field has been represented by the decision taken in 2010 by the Federal Constitutional Tribunal in the social minimum case (*Existenzminimum*), in which the Court clearly stated that each and every individual has a right to state benefits that "covers those means which are vital to maintain an existence that is in line with human dignity. It guarantees the whole subsistence minimum by a uniform fundamental rights guarantee which encompasses both the physical existence of the individual, that is food, clothing, household goods, housing, heating, hygiene and health . . . , and ensuring the

[19] It must however be reminded that a strong connection between social rights and human dignity emerged in several clauses of the first draft of the 1946 Constitution: Art. 22 read as follows: "Every human being has rights that guarantee his full physical, intellectual and moral development, while respecting his integrity and dignity"; Art. 27: "Neither working time nor working conditions should infringe on workers' health, dignity or familial life. Finally, Art. 28 stated that both men and women should earn wages that allow them to live a "dignified life". As well known, this draft has been repealed by the people of France on a referendum held on 19 April 1946.

[20] BVerfGE 1, 97 (104), BVerwGE , 159 (161).

[21] BVerfGE 33, 44 (51); 71, 39 (58); 75, 108 (157).

possibility to maintain inter-human relationships and a minimum of participation in social, cultural and political life"[22].

Two aspects of this seminal decision need to be highlighted.

The influence of human dignity in fostering a socially inclusive measure can be perceived at its clearest when the Tribunal emphasizes the relational potential of such an intervention, which should not be limited to provide the individual with material goods and services, but should be directed to "maintain inter-human relationships and a minimum of participation in social, cultural and political life". In so doing, the Tribunal seeks to detach social benefits from the most classical (German) domain of social state, where public intervention in favor of disadvantaged people is traditionally considered (since the Bismarck era) as a distinctive policy with some authoritative traits. The shift from such a traditional "duty of intervention" to a multifaceted idea of the individual and its basic needs is, according to many[23], the contribution delivered by the notion of human dignity and the underlying idea of individual autonomy enshrined therein. A social intervention aimed at respecting human dignity must not simply concede a subsidy, but must put the individual in condition to help himself or herself to re-establish the conditions for a dignified life in the social environment[24].

At the same time, this decision and the one taken in 2012 with regard to the social benefits of asylum seekers[25] show, at a deeper glance, the continuity with the previous approach of the Tribunal. The right of the individuals is not considered even today in terms of a fully-fledged right to assistance (*Leistungsrecht*), but in a more modest right of the individual "to be assured" (*Gewährleistungsrecht*) in the enjoyment of services that embody the social

[22] BVerfGE 125, 175 (par. 136).

[23] M. Baldus, *Kämpfe um die Menschenwürde. Die Debatten seit 1949*, Frankfurt am Main, Suhrkamp, 2016, 230. See also E. Eichenhofer, *Sozialrechtlicher Gehalt der Menschenwürde*, in R. Gröschner, O. W. Lembcke (Hrsg.), *Das Dogma der Unantastbarkeit. Eine Auseinandersetzung mit der Absolutheitsanspruch der Würde*, Tübingen, Mohr Siebeck, 2009, p.218.

[24] The methodological roots of such an approach can be found in V. Neumann, *Menschenwürde und Existenzminimum*, in *Neue Zeitschrift für Verwaltungsrecht* 14 (1995), 426. On this decision see E. Denninger, *Der Menschenwürdesatz im Grundgesetz und seine Entwicklungen in der Verfassungsrechtsprechung*, in F.-J. Peine, H. A. Wolff (Hrsg.), *Nachdenken über Eigentum. Festschrift für Alexander von Brünneck zur Vollendung seines siebzigsten Lebensjahres*, Baden-Baden, Nomos, 2011, p.397 and, more recently, S. Civitarese Matteucci, G. Repetto, *The expressive function of human dignity. A pragmatic approach to social rights claims*, in *European Journal of Social Security*, 23 (2021), p.120.

[25] BVerfGE 132, 134.

minimum in terms that do not violate the human dignity. Many commentators have argued that such a terminological shift is not just the sign of a legal pedantry, since it reflects the intimate nature of the constitutional mandate emerging from Art. 1 BL in the social field[26]. On the one hand, human dignity does not stand anymore on a terrain separated from social dynamics, it does not convey a barely natural law perspective, but it must be grasped in the light of the problems of associated life. On the other hand, human dignity sets a limit to the freedom of political actors to address measures and instruments to the advancement of social inclusion, but this limit is *not* absolute. Public authority is under a duty to justify the breadth of its interventions, it must respect some substantial and procedural standards, but its discretion as to the evaluation of the compatibility of such measures, e.g. with budgetary requirements, must be safeguarded[27]. The absoluteness of human dignity, therefore, is not deemed to be able *per se* to set an absolute limit upon the freedom of assessment of political actors.

This conclusion needs to be emphasized at a more general level. As we will see, the German case is the one that shows the deepest and closest relationship between a strong vision of human dignity and social rights and measures aimed at contrasting poverty and at favoring social inclusion. But the epilogue of such a brief surveydemonstrates that the intimate meaning of dignity seems to be at odds with its standing as a guiding principle in the field of social measures, since these ones forcefully require a graduation, a selection of interventions for which the human dignity and its absoluteness are not able to offer a valid yardstick[28].

Despite of this, the German case represents in my view a successful way of dealing with dignity in the social field, although the impression is that such an outcome has been made possible by decades of legislative interventions in the social field (in the framework of the "social code", *Sozialgesetzbuch*) which paved the way to a judicial decision aimed at securing social minimum as an individual right.

The French case demonstrates that the existence of a legislation in the social field and the commitment of public institutions to social goals does not lead *per se* to establish a link with human dignity. Even though the French *Conseil*

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[26] T. Mayen, *Das Grundrecht auf Gewährleistung eines menschenwürdigen Existenzminimums. Gewährleistungsrecht als leistungsrechtliche Grundrechtsdimension*, in M. Sachs, H. Siekmann (Hrsg.), *Der grundrechtsgeprägte Verfassungsstaat. Festschrift für Klaus Stern zum 80. Geburtstag*, Berlin, Duncker & Humblot, 2012, p.1458.

[27] BVerfGE 125, 175 (222, 224).

[28] V. Neumann, cit., p.428, explicitly referring to the Kantian idea of the incommensurability of human dignity, and S. Huster, *The Universality of Human Dignity and the Relativity of Social Rights*, in *Human Dignity in Context*, cit.,p. 415

constitutionnel referred in a pair of cases to the *dignité de la personne humaine* as a value, among others, safeguarding social right to housing[29], there is a widespread consensus as to the fact that human dignity has not emerged yet as a basic value capable of offering protection against social exclusion[30]. Despite of this, many authors have stressed the growing importance of human dignity in legislation concerning socio-economic issues[31][32], although such an outcome is deemed to cause a dilution of human dignity's absolute nature[33].

The Italian system has traditionally showed a different approach with regard to the role played by human dignity in the judicial protection of socio-economic rights. As has been remarked earlier, unlike France, the Italian Constitution mentions several times dignity in relationship to the social dimension of fundamental rights. Despite of this, an overview in the case law of the Italian Constitutional court reveals that such a principle is rarely invoked in the field of social rights (as well as in human rights litigation in general). The scant reference to human dignity in this field can be explained with two different reasons. On the one hand, the Constitutional court has traditionally left to the Parliament a wide leeway in the decision about whether, how and to what extent introducing a legislation aimed at granting social rights. In particular, the Court has developed a broad range of interpretive techniques aimed at securing a priority in the legislative evaluation of social policies, among which the principle of graduality must be mentioned: according to this, in a first instance it is up to the political authority to decide whether and to what extent the promotion of social goals is

[29] Conseil constitutionnel, 19 Jan. 1995, n. 94-359 DC, *Loi relative à la diversité de l'habitat* e 29 July 1998, 98-403 DC, *Loi d'orientation relative à la lutte contre les exclusions*: in both cases, dignity was invoked in horizontal relationships, since the right to housing had to be balanced against the right to property of other individuals.

[30] O. Dupéré, *Dignité de la personne humaine et logement decent*, in *Communication au VIIe Congrès français de droit constitutionnel. Association française de droit constitutionnel, Paris, 25-17 Septembre 2008*, http://www.droitconstitutionnel.org//congresParis/comC8/DupereTXT.pdf

[31] S. Hennette-Vauchez, *Human Dignity in French Law*, in *Cambridge Handbook of Human Dignity*, cit., p.368.

[32] E.g. the imposition of working conditions contrary to human dignity became a criminal offence in 1992 (Art. 225-13/225-16 *code penal*); a 1998 law proclaims that "the fight against social exclusion is a national imperative grounded on the respect of all human beings' equal dignity" (Loi No. 98-657, 29 July 1998 d'orientation relative à la lutte contre les exclusions).

[33] B. Mathieu, *Constitution et ethique biomédicale*, Paris, La Documentation Française, 1998, 50. It comes thus as no surprise that the recent proposal to amend the 1958 Constitution with the introduction of the principle of human dignity raised some concern: see C. Belaich, *L'inscription de la dignité humaine dans la Constitution fait debat*, in *Libération*, July 19, 2018.

compatible with budget constraints and the macroeconomic framework in general[34]. Such an evaluation can be reviewed by the Court only in case of a manifestly arbitrary assessment, but it must be added that the Court rarely called such an assessment openly into question[35]. On the other hand, a judicial correction of legislative choices is possible with regard to sectoral decisions, i.e. when a certain social benefit must be granted to other groups or categories that the Parliament decided to ignore or to treat less favorably than others. In such cases, the potential of human dignity as a tool aimed at securing social rights has been absorbed by the principle of equality and its connected interpretive technique of "reasonableness" (*ragionevolezza*, an Italian version of proportionality), whose basic meaning must be intended as a quest for systemic coherence upon the legislator[36]. With regard to both aspects, the Italian version of *dignità umana* reveals the weakness of judicial responses whenever the legislative decision enjoys a margin of choice and intervention in the social field which is counterbalanced only in a limited way by judicial actors. Rather than enabling the courts to set a core content of social rights and services that could not be lowered by the political authority, human dignity acted as a value justifying political choices, albeit with a very narrow oppositive content[37].

[34] See among others dec. nos. 128/1973, 374/1988, 455/1990, 30/2004. In more recent times, an explicit statement as to the role of the legislator in determining the objective meaning of human dignity as a limit to economic activity is made with dec. no. 141/2019, concerning the role of sex workers.

[35] An exception is to be seen in a well-known decision concerning the right to housing (dec. no. 404/1988, quoting the previous dec. no. 217/88), according to which, though in a quite declamatory fashion, the Constitutional court stated that human dignity is the goal that steers the action of public activity in pursuing the enhancement of fundamental social rights of the individuals. For a critical stance on this argument, see G. Bognetti, *The concept of human dignity in European and US constitutionalism*, in G. Nolte (ed.), *European and US Constitutionalism*, Cambridge, Cambridge University Press, 2005, p.97.

[36] An example of this can be seen in dec. no. 432/2005, concerning the constitutionality of a regional law that deprived foreign people with disabilities to enjoy facilities in public transportation. Whereas the core content of the right to health (Art. 32) has to be enjoyed by non-citizens too, the right to movement falls outside of this domain since it aims at different purposes. Despite this, the ICC has declared the legislation at stake unconstitutional since, beyond the respect of human dignity, the legislative assessment ran counter the principle of proportionality and reasonableness.

[37] D. Messineo, *La garanzia del "contenuto essenziale" dei diritti fondamentali*, Turin, Giappichelli, 2012.

Against these backgrounds, that share a basically sympathetic approach toward human dignity, the British case could be invoked as a laboratory in which the recourse to dignity comes into question as a "legal irritant"[38].

The emergence of dignity in English law has been mainly vehiculated by the entry into force, in 1998, of the Human Rights Act, that has nationalized the standards set forth in the Articles 2 (right to life) and 3 (prohibition of cruel and degrading treatments) of the European Convention on Human Rights and fundamental freedoms (ECHR). At such a general level, the entrance into the UK legal order of a principle like human dignity in its 'continental fashion' has raised peculiar concerns in those scholars who promptly argued that this risked to confer to this principle an overinclusive stance. A too broad moral content, in particular, was charged to deliver a paternalistic attitude in the protection of fundamental rights and, in this way, human dignity as a 'German legal concept' risked to replace, according to many, the prerogative of parliamentary sovereignty in the establishment of the common good on the basis of political representation[39]. The evolution of the judicial applications in the following years show a growing inclination to refer to human dignity in those areas covered by Art. 2 and 3 ECHR[40], but one could not argue that such a principle has turned into a commonplace in judicial reasoning.

At this first step, even though from a perspective aimed at safeguarding a moral reading of the institutional balance between judicial power and sovereignty of Parliament, the British case reveals a resistance against the empowerment of human dignity through judicial decisions not so different from the one at stake in the aforementioned continental systems.

If we now turn to the relationship between human dignity and social rights, things appear in an even more blurred light. In the evolution of the British system after 1945, social dignity has been often invoked as a guiding idea of the legislative process establishing a new public service aimed at securing individual security in the framework of a dignified citizenship[41]. The approval of seminal legislations like the *Education Act* (1944), the *National Health Service Act* (1946) and the *New Towns Act* (1946) show that the commitment of English Parliament to human dignity had a clear social attitude which was not related (as in Germany)

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[38] G. Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences*, in *Modern Law Review*, 61 (1998), 11.

[39] D. Feldman, *Human Dignity as a Legal Value. Part I*, in *Public Law*, 1999, p.698.

[40] *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26 e *R v Ian McLoughlin* e *R v Lee William Newell* [2014] EWCA Crim 188, *Regina v. Secretary of State for the Home Department ex parte Limbuela* [2005] UKHL 66.

[41] T. H. Marshall, *Citizenship and Social Class*, London, Pluto, 1950.

with an authoritarian tradition, but rather with the idea of a (then) 'new' relationship between the individuals and society. Sovereignty of Parliament, in this field, means that social forces have conferred to political actors some basic choices as to the inclusion of disadvantaged classes in the social realm and, in so doing, dignity could act as a guiding principle since its core content was supported from a broad ranging political and social context. Therefore, it is not surprising that when such a social and political consensus vanished, human dignity had "to cope with an attack on its whole underlying premise, namely that the electors have (through their government) any responsibility at all for the welfare of their neighbours and co-nationals"[42].

Within this framework, judicial applications of human dignity in the social field have been marked in recent years by a reluctance to move beyond the narrow margins of the 'degrading treatments' referred to in Art. 3 ECHR, whereas if other ECHR rights are invoked (for example Art. 8, *Right to respect for private and family life*), the respect of human dignity is balanced against the need to preserve limited public resources[43]. As a brief analysis of judicial decisions show, human dignity has currently lost most of its social traits and seems rather limited to preserve individual liberty and autonomy when they are at stake 'into the realms of social responsibility'[44].

What can be learnt from the adventure of human dignity in United Kingdom is that it its inability to stand as an autonomous legal basis for the promotion of social rights is related to its being dependent upon the value choices that prevail in a society at a given time. Rather than the bare institutional divide between judges and Parliament, much more revealing seems to be the fact that dignity has increasingly shifted away from the domain of legislative enactment of

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[42] C. Gearty, *The Principle of Human Dignity*, in C. Gearty (ed.), *Principles of Human Rights Adjudication*, Oxford, Oxford University Press, 2004, p.89.

[43] Among others see: *R (Q, D, J, M, F and B) v Secretary of State for the Home Department* [2003] EWHC 195, *R (McDonald) v Royal Borough of Kensington and Chelsea* [2011] UKSC 33. For an overview see C. Gearty, *Socio-Economic Rights, Basic Needs, and Human Dignity: A Perspective from Law's Front Line*, in C. McCrudden (ed.), *Understanding Human Dignity*, edited by, Oxford, Oxford University Press, 2013, 155 and J. Miller, *Dignity: A Relevant Normative Value in 'Access to Healthcare and Social Care' Litigation in the United Kingdom?*, in A. Diver, J. Miller (eds.), *Justiciability of Human Rights Law in Domestic Jurisdictions*, Heidelberg, Springer, 2016, 71. On more recent trends see Jed. Meers, *United Kingdom*, in S. Civitarese Matteucci, S. Halliday (eds.), *Social Rights in Europe in an Age of Austerity*, London/New York, Routledge, 2018, 122.

[44] B. Hale, *Guest Editorial. Dignity*, in *Journal of Social Welfare and Family Law*, 31 (2009), p.107.

social goals and moved into a realm where individuals engage each other's rights and duties in a process of social responsibility. All of this can be obviously related with a process of impoverishment of the social dimension of legislative decisions, but such an outcome testifies one more time the clash between the absoluteness of human dignity, its aim to define the essence of human nature, and the floating historical and social conditions and factors that make an individual life a dignified component of the social world[45]. With the words of a German constitutional judge referred to by Baroness Hale of Richmond: "can human dignity keep its universal quality if we try to use it in a court to win cases?"[46].

As emerges from the overview of other experiences[47], the principle of human dignity is not able *per se* to give a final answer to the question concerning whether and to what extent social rights and social equality should be constitutive for a political community. It probably can set some limits in cases of treatments endangering minimal conditions of existence[48], but beyond these very minimum thresholds there is a lot of political leeway. This should not sound as a plea for ignoring the contribution of human dignity in the social field, but rather as a confirmation that "dignity appears to become other than impossibly vague only when it is tethered to a coherent community of interpretation"[49].

Therefore, the idea of a dignified social life should aim at revitalizing the link between human rights and the political context: in this framework, the question as to whether and how to give a distinctive place to human dignity remains open.

4. Strategies and limits of judicial application of human dignity in social rights' claims

The relationship between human dignity and social rights is therefore not straightforward.

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[45] C. Sypnowich, *The concept of socialist law*, Oxford, Clarendon, 1990, p.101.

[46] B. Hale, *Guest Editorial. Dignity*, cit., p.106.

[47] A seminal analysis in C. McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, in *European Journal of International Law*, 19 (2008), p.700.

[48] I. Leijten, *The German Right to an Existenzminimum, Human Dignity, and the Possibility of Minimum Core Socioeconomic Rights Protection*, in *German Law Journal*, 16 (2015), 23 and K.G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, in *The Yale Journal of International Law*, 33 (2008), p.113.

[49] C. McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, cit., p.723.

As the brief comparative survey shows, in the four European countries that I have taken into exam, despite of the extreme variety of cases dealt with, the role of human dignity shows many differences besides of a minor set of common traits. Even with the aim of methodologically justifying the comparison among these four countries, the impression is that these similarities do not rely exclusively upon the common European and Western democratic heritage of these legal systems, but rather on a functional trait, which remains crucial in order to understand human dignity as a constitutional principle in the social field. In the aforementioned contexts, judicial assessment of individual dignity does not exhaust the semantic meaning and the legal potential of the constitutional principle at stake, because it is always the outcome of a more complex interaction between judicial actors and political bodies. Due to the peculiar aspects of social dignity, it is hardly identifiable a decision which imposes duties of protection that fall largely beyond (or rather: independently from) the decision of democratically accountable political organs.

This can lead to dissatisfaction. Unlike the pioneering decisions delivered in India, in the *Guatemala Street Children* case, in South Africa or in Hungary, 'old' European countries seems much more unease to confer to human dignity a countermajoritarian role, able of reversing decisions taken by political actors. In my view, this is not a shortcoming but, on the contrary, a sign of the proper way in which human dignity should drive the arrangement of social rights and policies[50].

In current debates, human dignity seems to be captured by a contrasting logic. On the one hand, dignity and autonomy do operate as the bulwarks of a growing individualism in which the freedom of will risks to progressively erode the premises of a democratic society lived *in common*. In this vein, social dignity should be called to uphold individual self-determination through the arranging of individual benefits and services aimed at exclusively self promoting the individual without the need to refer all of this to a common political endeavour. In this way, the risk is that human dignity vehiculates in the social field the same 'detachment from history' that Charles Taylor had critically highlighted some decades ago in terms of a "view from nowhere"[51]. On the other hand, the recourse to human dignity risks sometimes to overcharge its meaning and its potential in terms of a moral perfectionism, according to which a 'dignified life' coincides with

[50] According to H. Hofmann, *Die versprochene Menschenwürde*, in *Archiv des öffentlichen Rechts*, 118 (1993), p.366, human dignity could stand as a binding legal principle only if proclaimed by a humanity which is politically unified.

[51] C. Taylor, *The Malaise of Modernity*, Concord, Anansi, 1991. In the same vein, A. Margalit, *The Decent Society*, Cambridge (Mass.), Harvard University Press, 1996.

aspirational attitudes that may alternatively be grounded on the reproduction of an ideal world (in a *Platonian* fashion) or in the tendency to progressively imitate a transcendent order (in an *Augustinian* fashion). If such total views of common order and good life are transposed into legal reasoning and legal justification, they can lead to separate public deliberation over the common good from the basic preconditions of democratic life (rule of law, rights of minorities, freedom of expression, separation of powers)[52].

Against this background, the notion of social dignity emerging in Europe shows a much more balanced nature. My opinion is that it can be grasped in terms of a second-order principle, which is unlikely to be invoked as an immediately enforceable legal yardstick, since its main function is rather to steer constitutional conflicts in favor of a solution which is capable of maximizing both individual autonomy and public solidarity[53]. In a few words, a meta-principle which seeks to constantly reconnect the individual and the public according to different constitutional geometries and proportions. I would like to finally stress four main aspects of this approach.

1) Although, in the countries considered, human dignity is not *per se* a valid yardstick or justifying social policies and for ensuring the enjoyment of social rights, it is not deprived of any legal meaning. On the contrary, it can be invoked as both a lever for protecting basic human needs that coincide with a minimum threshold of citizenship and human rights (like the basic income regulations) and as a moral argument for addressing such a relief in direction of *individual self-empowerment*. Human dignity is at odds with the idea that social rights are instrument for governing social and political conflicts and not individual entitlements for promoting individual flourishing within the social and political community[54].

2) Human dignity in the social field *mediates between freedom and equality*. In the countries considered, the recourse to human dignity paves the way to different strategies of balancing the commitment to individual freedom and the constitutional mandate to preserve an acceptable degree of social homogeneity.

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[52] M. Nettesheim, *"Leben in Würde": Art. 1 Abs. 1 GG als Grundrecht hinter den Grundrechten*, in *JuristenZeitung* 74 (2019), p.8.

[53] R. Alexy, *A Theory of Constitutional Rights* (Julian Rivers trans.), Oxford, Oxford University Press, 1992.

[54] M. Mahlmann, *Human Dignity and Autonomy in Modern Constitutional Orders*, in M. Rosenfeld, A. Sajó (eds.), *Oxford Handbook of Comparative Constitutional Law*, edited, Oxford, Oxford University Press, 2012, p.371.

There can be different degrees and different solutions for the same questions, but human dignity remains as a sort of 'shadow principle' that preserves the need not to entirely compress one side of the balance (freedom) against the other (equality). The different ideas of the relationship between the common good and individual liberty emerge in constitutional texts but their development and reassessment is demanded to the institutional *liaison* between legislators and judges[55]. None of them has the last word as to whether and to what extent human dignity has been respected or not: the legislator without the judge is deprived of the capacity to deal with the variety of situations, whereas the judge without the legislator remains unable to offer general responses and to take into account all conflicting interests[56].

3) Human dignity seeks to *balance individual autonomy and the pursuit of community interests*. Thanks to its nature of a 'shadow principle', human dignity does not offer a final say as to how such conflicting values should be reconciled. Political constitutions do not aim at deciding every aspect of social life, since they offer rather an institutional framework within which many actors are called to interact in order to keep an ongoing conversation about the founding elements of social and political life. In so doing, they are limited by basic constraints, such as (among others) separation of powers and the respect of fundamental rights of the individuals. In this framework, human dignity enters the scene in different ways, depending on whether its role has a prominent position (e.g. Germany and Italy) or a hidden place (France and UK). In any case, its function has some basic tenets, in that it sets the outer limits of what political authorities are basically prevented from doing, with regard to the impairment of that line dividing the individual autonomy from the interests of the community[57]. That line can be drawn according to different proportions between the areas of individual and community, as the German and the UK cases clearly demonstrate. Human dignity can be alternatively invoked in order to promote individual self-help or the commitment to the enhancement of public services. But the role and the logic of functioning of human dignity remain quite similar.

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[55] M. Cohn, D. Grimm, *'Human Dignity' As a Constitutional Doctrine*, cit. 197

[56] J. King, *Judging Social Rights*, Cambridge, Cambridge University Press, 2012, p. 171 pays attention to the relationships between legislative focus on a given issue and the resulting *room of manoeuvre* for judicial enforcement of social rights, and concludes that "[t]he remedy for an absence of legislative focus in legislation itself is not entirely straightforward" (p. 172).

[57] T. Khaitan, *Dignity as an Expressive Norm: Neither Vacuous nor a Panacea*, in *Oxford Journal of Legal Studies*, 32 (2012), p.15.

4) At a deeper level, social dignity does not have a clear and a fully-fledged status since it is called to strike a balance between two radically incompatible dimensions, that are the *absoluteness of its moral aspiration and the situatedness of the social sphere*. Such an incommensurability of human dignity is a *fil rouge* that dominated legal and philosophical reflections of the XX century[58] but its implications do affect legal and political systems in several ways. The impossibility to use human dignity as a valid yardstick for assessing in quantitative terms what is 'basic' in basic income regulations is a clear example of such a problem. The need for judicial decisions to refer to political discretion in order to find a useful yardstick for assessing (though not exclusively) what respects human dignity (and what not) tells us something relevant about the place of human dignity in social issues. Even though in other fields human dignity can be strictly connected with other fundamental rights and can even act (in the words of Aharon Barak) as a 'mother right', i.e. as a source of unenumerated rights[59], in the social field its connection with fundamental rights is inevitably looser, since it rather operates as a constitutional mandate acting *behind* fundamental rights[60], tracing the outer boundaries of their mutual relationships and conferring different mandates upon the institutional actors whose decisions should forge the social dimension of modern democracies.

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ABSTRACT: Starting from the assumption that the notion of 'social dignity' is a distinct feature of the European constitutional tradition due to the link between individual autonomy and solidarity, this essay intends to illustrate the extent to which the notion of human dignity is a suitable instrument for the promotion of social rights and welfare policies. The paper analyses the jurisprudence on human dignity in the field of social rights in France, Italy, Germany, and the United Kingdom, and concludes with some remarks about the

[58] E. Bloch, *Natural Law and Human Dignity* (Dennis J. Schmidt trans.), Boston, MIT Press, 1986.

[59] One can find similarities, though not a fully converging approach, with the notion of *equal dignity* referred to by Justice Kennedy in *Oberfegell v. Hodges* (135 S. Ct. 2584): in that case, dignity is mainly connected with an *antisubordination liberty* (K. Yoshino, *The Supreme Court, 2014 Term – Comment: A new Birth of Freedom? Obergefell v. Hodges*, in *Harvard Law Review* 129 (2015), p. 174), whereas the notion of dignity discussed here is mainly related to the need to favour social inclusion *via* the legislative promotion of social equality.

[60] M. Nettesheim, *"Leben in Würde": Art. 1 Abs. 1 GG als Grundrecht hinter den Grundrechten*, cit., p.10.

legal epistemology of human dignity in social rights issues and the opportunity to use it as a moral and legal basis for promoting individual rights and social integration via judicial decisions.

KEYWORDS: human dignity; social justice; European constitutionalism, social rights, judicial assessment.

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