

THE COMPARATIVE LAW OF DIGNITY:
AN INTRODUCTION

ABSTRACT: *This paper is aimed at providing a short comparative introduction to the law of human dignity. Intentionally, it will not delve into the details of the notion of dignity, which has captured the attention of numerous philosophers and legal theorists. Rather, it will isolate and contrast competing conceptions of dignity, which reflected in the solutions adopted by national and international courts. The attention will be focused on three main issues: a) the “juridification” of dignity; b) the different functions of dignity as a fundamental right; c) the conflict between dignity and liberty.*

CONTENT: 1. The “juridification” of dignity. – 2. Three uses of dignity. – 3. Dignity and the duty to respect. – 4. Dignity and the duty to protect. – 5. Dignity and the right to “dignified” living conditions.

1. The “juridification” of dignity

Human dignity has been perceived, for a long time, as an eminently moral, philo-

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sophical or religious notion.¹ Nowadays, it has acquired the status of a binding legal norm, being frequently referred to as the cornerstone of the edifice of human rights.² The duty to respect the dignity of every individual is solemnly stated by numerous international declarations,³ covenants,⁴ as well as by national constitutions⁵ and supra-national bills of rights.⁶ Even in domestic legal settings, in which dignity does not appear in statutes, the courts have increasingly referred to this principle when resolving disputes. Particularly significant, from this point of view, is the French experience of the last two decades;⁷ but also striking is the multiplication of references to dignity in

1 On the Western roots of dignity see M. ROSEN, *Dignity: Its History and Meaning*, Cambridge, 2018; P. BECCHI, *Dignità umana*, in U. POMARICI, *Filosofia del diritto. Concetti fondamentali*, Torino, 2007, p. 153; P. KONDYLIS – V. PÖSCHL, *Würde*, in O. BRUNNER – W. CONZE – R. KOSELLECK, *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, 7, Stuttgart, 1992, p. 637. It is worth observing, at the outset, that such a rich and dense intellectual tradition has not been dispersed but continues to influence the substance of this principle. Throwing a glance at the history of ideas (see in particular C. RUIZ MIGUEL, *Human Dignity: History of an Idea*, in *Jahrbuch öffent. Rechts*, 50, 2002, p. 281), three main roots of the modern perspective on dignity must be distinguished from one another: a) the Roman notion of *dignitas*, as a manifestation of majesty and moral qualities, a sign of high social or political status, therefore a feature of the few, namely those in high office; b) the religious (Judeo-Christian) idea of man's inherent dignity, grounded on the assumption of man as *imago dei*, hence postulating the fundamental equality of every individual in *dignity*, regardless of social and economic conditions; c) the Enlightenment, and in particular the Kantian, emphasis on the linkage between dignity and autonomy, dignity being conceived as the expression of the individual's ability to form a reasoned thought and set his/her own ends. Each of these perspectives has left enduring marks on the legal conceptualization of dignity. The Roman idea of *dignitas* is behind the widespread notion of dignity of function, which was for a long time the main perspective on dignity. It is in this sense that the notion was employed in the Federalist Papers and in the earlier decisions of the US Supreme Court (see E. DALY, *Human Dignity in the Roberts Court: A Story of Inchoate Institutions, Autonomous Individuals, and the Reluctant Recognition of a Right*, in *Ohio N.U.L. Review*, 37, 2011, p. 381-382). Today, various Codes of Conduct refer to the "*dignity of a profession*" as a source of duties, rather than rights. The theological assumption of man's inherent dignity and the Kantian secular perspective on autonomy have also proved extremely influential, in particular in post-war constitutions. It can be safely assumed that they still shape the characters of constitutional adjudication in many Western legal systems (C. STARCK, *The Religious and Philosophical Background of Human Dignity and its Place in Modern Constitutions*, in E. KLEIN – D. KRETZMER, *The Concept of Human Dignity in Human Rights Discourse*, The Hague-London-New York, 2002, p. 179).

2 See R.D. GLENSY, *The Right to Dignity*, in *Columbia Human Rights Law Review*, 43, 2011, p. 65-69, referring to human dignity as "*the foundational right underpinning all other rights*"; according to R. ANDORNO, *Human Dignity and Human Rights as a Common Ground for a Global Bioethics*, in *The Journal of Medicine & Philosophy*, 34, 2009, p. 223-227, respect of human dignity represents "*the overarching principle of international biolaw*".

3 Art. 1 of the United Nations Declaration of Human Rights.

4 Among them are the 1965 Convention on the Elimination of All Forms of Racial Discrimination; the 1966 International Covenants on Civil and Political Rights, and on Economic, social and cultural rights; and more recently the Conventions on the Rights of Children (1989), of Migrant Workers (1990) and of Disabled Persons (2007), as well as the Council of Europe Convention on Human Rights and the Biomedicine (1997).

5 Most famously, Art. 1 of the German Basic Law; see also arts. 3 and 41 of the Italian Constitution; arts. 1, 7, 10, 35, 36, 39, of the post-apartheid Constitution of South Africa.

6 Art. 1, Charter of Fundamental Rights of the European Union

7 As is well known, the French Constitutional Council, relying on the Preamble of the 1946 Constitution, stated in 1994 that the protection of dignity against all forms of degradation is a "*principle of constitutional value*" (principe à valeur constitutionnelle) (see Cons. Const., 27-7-1994, 94-343-344 DC, D, 1995, jur. p. 237), and since then both the Constitutional Council and the ordinary courts (as well as the administrative courts) systematically applied the principle of dignity in the most various types of controversies (for a comparative overview see V. GIMENO-CABRERA, *Le traitement jurisprudentiel du principe de dignité de la personne humaine dans la jurisprudence du Conseil constitutionnel français et du Tribunal constitutionnel espagnol*, Paris, 2004).

the case law of the US Supreme Court.⁸ In short, dignity has undergone an impressive process of “juridification” (more precise is the German word *Ver-rechtlichung*) having gradually lost the role of a purely moral precept and acquired – at the same time – that of a foundational value⁹ and a binding legal norm.¹⁰

However, it is neither easy to define “dignity”, nor to point out the objective content of such a concept. According to some scholars, the characters of vagueness and indeterminacy are distinctive features of the notion of dignity.

This tends either to render it a “useless concept¹¹” or to it being used as a “knock-down argument¹²” a magic formula apt to circumvent any rational argumentation, by appealing to the pathos of dignity.

Although this concern might occasionally prove well founded, in particular in the field of bioethics (where “dignity” is sometimes used as a conversation-stopper),¹³ the picture is not always so grim.¹⁴ More than fifty years of judicial confrontation with dignity have not passed in vain. By looking at national and international case law on human dignity, some clear guidelines may be inferred.¹⁵

8 See in particular *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Roper v. Simmons*, 543 U.S. 551 (2005). For a more detailed overview, N. RAO, *On the Use and Abuse of Dignity in Constitutional Law*, in *Columbia Journal of European Law*, 14, 2008, p. 201; G. NEUMAN, *Human Dignity in United States Constitutional Law*, in *Zur Autonomie des Individuums: Liber Amicorum Spiros Simitis*, Baden-Baden, 2000, p. 249.

9 G. HOTTOIS, *Dignité et diversité des hommes*, Paris, 2009, p. 16; J. ISENSEE, *Menschenwürde: die säkulare Gesellschaft auf der Suche nach dem Absoluten*, in *AöR*, 2006, p. 173

10 P. FRAISSEIX, *La sauvegarde de la dignité de la personne et de l'espèce humaine: de l'incantation à la “judiciarisation”*, in R.R.J. *Droit Prospectif*, 1999, p. 1133; M.L. PAVIA, *La découverte de la dignité de la personne humaine*, in M.L. PAVIA – T. REVET, *La dignité de la personne humaine*, Paris, 1999, p. 3.

11 R. MACKLIN, *Dignity is a Useless Concept*, in *British Medical Journal*, 327, 2003, p. 1419.

12 J. SIMON, *Human Dignity as a Regulative Instrument for Human Genome Research*, in C.M. MAZZONI, *Etica della Ricerca Biologica*, Firenze, 2000, p. 39.

13 U. NEUMANN, *Die Tyrannei der Würde. Argumentationstheoretische Erwägungen zum Menschenwürdeprinzip*, in *Arch. Recht Sozialphil.*, 1998, p. 153; see also the interesting book by D. BEYLEVELD – R. BROWNSWORD, *Human Dignity in Bioethics and Biolaw*, Oxford, 2001.

14 From a legal-theoretical point of view, see F. VIOLA, *Lo statuto normativo della dignità umana*, in A. ABIGNENTE – F. SCAMARDELLA, *Dignità della persona. Riconoscimento dei diritti nelle società multiculturali*, Napoli, 2013, p. 283.

15 An excellent starting point is the essay by C. MCCRUDDEN, *Human Dignity and Judicial Interpretation of Human Rights*, in *European Journal of International Law*, 19, 2008, p. 655; see also, with specific regard to the Italian legal system, G. ALPA, *Dignità. Usi giurisprudenziali e confini concettuali*, in *Nuova giurisprudenza civile commentata*, 1997, II, p. 415; Id., *Autonomia privata, diritti fondamentali e “linguaggio dell'odio”*, in *Contratto e Impresa*, 2018, p. 45, pp. 66-70.

2. *Three uses of dignity*

There seems to be wide consensus that dignity, at its core, implies the respect and recognition of the intrinsic worth possessed by any human person, merely by virtue of being human (see Art. 1 of the Universal Declaration of Human Rights and its Preamble).¹⁶ However, this minimum content is flexible enough to give rise to different results in concrete cases, depending on the particular conception of dignity adopted in a specific legal system.¹⁷ The notion of dignity, in other words, is at the same time universal, relying on a shared value of humanity, and context-specific, deriving its meaning from the cultural and institutional frame in which it is embedded.¹⁸ In order to build a preliminary taxonomy of the scholarly and judicial uses of dignity, it seems useful to disaggregate the content of dignity into three main operative functions:

- a) dignity as a negative right;
- b) dignity as the source of a government's duty to protect;
- c) dignity as the source of a government's duty to provide social benefits.

Such a taxonomy may be helpful for any comparative inquiry, because different legal systems tend to emphasize one or more functions and disregard the others, depending on the general value-choices (libertarianism v. communitarianism; degree of secularism, etc.)¹⁹ and the institutional features of the system (such as the presence of a constitutional complaint mechanism, the state-action doctrine, etc.).²⁰

At one end of the spectrum we find legal systems - the German one is exemplary²¹ - that rely simultaneously on all such functions and regard dignity as a “foundational

16 S. RODOTÀ, *La rivoluzione della dignità*, in ID., *Vivere la democrazia*, Rome-Bari, Laterza, 2018, pp. 46-51. The debate that preceded the adoption of Art. 1 UDHR is carefully described by M.A. GLENDON, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, New York, 2001, pp. 143-146.

17 It seems useless to discuss the legal concept of dignity without taking into account the specific (and often hidden) conceptions of dignity which are at play in a particular jurisdiction: see for instance G. FYFE, *Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada*, *Saskatchewan Law Review* 70, 2007, p. 1.

18 See amplius, G. RESTA, *La dignità*, in S. RODOTÀ – P. ZATTI, *Trattato di biodiritto, I, Ambito e fonti del biodiritto*, Milano, 2010, p. 259.

19 J.Q. WHITMAN, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, *Yale Law Journal*, 113, 2004, p. 1151.

20 G. RESTA, *La dignità*, pp. 272-277; see also G. BOGNETTI, *The Concept of Human Dignity in European and US Constitutionalism*, in G. NOLTE, *European and US Constitutionalism*, Cambridge, 2005, p. 85; D. GRIMM, *The Protective Function of the State*, *ivi*, p. 137.

21 See E. KLEIN, *Human Dignity in German Law*, in E. KLEIN – D. KRETZMER, *The Concept of Human Dignity in Human Rights Discourse*, p. 154.

value;²² at the other end are systems that either adopt a narrow version of dignity as a synonym of liberty, or that completely disregard the notion. Although legal borrowings are particularly frequent in this area,²³ one should never overlook the substantive variations in the uses of dignity and the possibility of its being received, in some legal settings, as a “legal irritant.”²⁴

3. Dignity and the duty to respect

The most widespread conception of dignity is one based on the liberal tradition of negative liberties. Under this perspective, dignity implies a “non-interference norm,” according to which the government is obliged to abstain from acts that deny the inherent worth of the individual or interfere with personal autonomy.²⁵ According to the German terminology, this is the so-called “duty to respect”, solemnly stated by art 1 of the German Basic Law. Such a duty is directly implied by the famous “object-formula,” developed in perfect Kantian style by the renowned constitutional scholar Günter Dürig²⁶ and adopted by the German Constitutional Court in dozens of cases.²⁷ According to this formula, “individuals are not to be treated merely as objects of the will of others.”

When is such a duty violated?

The first important group of cases deals with personal autonomy. Dignity is violated if the state denies the freedom of the individual to make fundamental choices affecting his or her personal sphere. Particularly relevant from this viewpoint are the decisions concerning the human body and the domain of sexuality. The US Supreme Court case

22 H. HOFMANN, *La promessa della dignità umana*, *Rivista internazionale di filosofia del diritto*, 1999, p. 620, pp. 635-646.

23 See S. CHOUDHRY, *The Migration of Constitutional Ideas*, Cambridge, 2006; C. MCCRUDDEN, *Human Rights and Judicial Use of Comparative Law*, in E. ÖRÜCÜ, *Judicial Comparativism in Human Rights Cases*, London, 2003, p. 1.

24 As regards, the notion of legal irritant see G. TEUBNER, *Legal Irritants: How Unifying Law Ends up in New Divergences*, in P.A. HALL – D. SOSKICE, *Varieties of Capitalism. The Institutional Foundations of Comparative Advantage*, Oxford, 2001, p. 417.

25 See R.D. GLENSY, *The Right to Dignity*, p. 120.

26 G. DÜRIG, *Der Grundrechtsatz von der Menschenwürde. Entwurf eines praktikablen Wertsystems der Grundrechte aus Art 1 Abs 1 in Verbindung mit Art 19 Abs II des Grundgesetzes*, in AöR, 1956, p. 117; on this perspective see N. HOERSTER, *Zur Bedeutung des Prinzips der Menschenwürde*, in JuS, 1983, p. 93

27 For a detailed overview, see H. DREIER, *sub Art. 1*, in *Grundgesetz Kommentar*, H. DREIER, vol. I, Tübingen, 2013.

law on constitutional privacy offers several examples of such a use of the notion of dignity.²⁸ *Lawrence v. Texas*,²⁹ which invalidated state sodomy laws, is one of the most famous cases. Both the European Court of Human Rights³⁰ and the Supreme Court of Canada³¹ have also referred to the principle of dignity in resolving disputes concerning the right to die. In this field, the nexus between dignity, identity and personal choices is most clearly evidenced, even at a literal level, by the 2017 Italian law on living wills.³² In a second category, the duty to respect dignity is also infringed in cases involving the violation of the bodily and psychological integrity of the person.³³

The prohibition of torture and other degrading treatments flows directly from this commitment. Similarly, death penalty has been declared incompatible with human dignity by the South Africa Supreme Court in the famous *Makwanyane case*,³⁴ and the German Constitutional Court held a life sentence without parole to be unconstitutional.³⁵ In one controversial case, the German Constitutional Court³⁶ struck down the Aviation Security Act (*Luftsicherheitsgesetz*), insofar as the statute authorized the shooting down of a hijacked airplane in a 9/11 situation. Such an intentional act of shooting, argued the Court, would conflict with the fundamental right to life and the dignity of the innocent passengers of the plane. Indeed, they would be treated as mere objects in order to avert danger to the rest of the community.³⁷ In a similar line of reasoning, see also the Ontario case of *Jane Doe v. Metropolitan Toronto Police*,³⁸ criticizing

28 See generally E.J. EBERLE, *Dignity and Liberty. Constitutional Visions in Germany and the United States*, Westport, 2002; N. RAO, *Three Concepts of Dignity in Constitutional Law*, in *Notre Dame Law Review*, 86, 2011, p. 183, pp. 202-219.

29 539 U.S. 558 (2003).

30 EuCtHR, 29-4-2002, App. N. 2346/02, *Perry v. UK*; see on this topic F. HUFEN, *In dubio pro dignitate. Selbstbestimmung und Grundrechtsschutz am Ende des Lebens*, in *Neue Juristische Wochenschrift*, 2001, p. 849.

31 *Carter v. Canada*, 2015, SCC, 5.

32 See Art. 1, par. 1, Law 22-12-2017, n. 219, *Norme in materiali di consenso informato e di disposizioni anticipate di trattamento*.

33 On this see the thought-provoking analysis by P. ZATTI, *Note sulla semantica della dignità*, in *ID.*, *Maschere del diritto, volti della vita*, Milano, 2009, p. 29.

34 *State v. Makwanyane and Mchunu*, 1995 (6) BCLR 665 (CC).

35 BVerfG, 21-6-1977, BVerfGE 45, 187 (1978).

36 BVerfGE, 109, 279 (2004).

37 For a comment and a discussion of the underlying controversy see W. FRENZ, *Menschenwürde und Persönlichkeitsrecht versus Opferschutz und Fahndungserfolg*, in *Neue Zeitschrift für Verwaltungsrecht*, 2007, p. 631.

38 (1998), 39 O.R. (3rd) 487, 160 D.L.R. (4th) 697 (Gen. Div.).

the adoption of an end/means analysis, which led the police to abstain from communicating to the women living in a certain area the risks posed by a serial rapist, with the hope of arresting him “on the scene” of the crime; or the Israeli Supreme Court ruling on targeted assassinations of unlawful combatants in the Occupied Territories.³⁹

Furthermore, the respect of the intrinsic worth of the individual is denied in cases of discrimination: here, the fundamental principles of dignity and equality tend to converge,⁴⁰ leading to an important phenomenon of cross-fertilization, of which the Canadian experience is particularly illustrative.⁴¹

Thirdly, human dignity requires the respect of an intimate sphere, which must be shielded from unwarranted government intrusions. This has been the theoretical basis for the recognition by German courts of a right to “informational self-determination” (*informationelle Selbstbestimmungsrecht*),⁴² which assumes an enormous importance in our hyper technological age of “liquid surveillance,⁴³” and starkly influenced - which is not surprising - the development of the EU law on data protection.⁴⁴

4. Dignity and the duty to protect

Conceived in this way as a negative right, dignity is a widely shared concept, which makes transnational dialogue among judicial institutions an important reality. The second function of dignity, as the basis of a governmental duty to protect citizens, is more problematic and context-specific. Art. 1 of the European Charter of Fundamental Rights, a provision literally modelled on Art. 1 of the German Basic Law, states: “Human dignity is inviolable. It must be respect and protected.” The duty to protect is implied by a conception of dignity as a positive right, which would require the gover-

39 *Public Committee against Torture in Israel v. Government of Israel*, HCJ 769/02 (Sup. Ct. sitting as High Court of Justice, 2005).

40 On this point see S. BAER, *Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism*, in *University of Toronto Law Journal*, 59, 2009, p. 417.

41 For specific references, see C. MCCRUDDEN, *Human Dignity and Judicial Interpretation of Human Rights*, p. 690.

42 BVerfG, 15-12-1983, BVerfGE 65, 1 (1984); see E. BENDA, *Menschenwürde und Persönlichkeitsrecht*, in E. BENDA – W. MAIHOFFER – H.J. VOGEL, *Handbuch des Verfassungsrechts*, 1, Berlin-New York, 1995, p. 161, pp. 173-179.

43 Z. BAUMAN – D. LYON, *Liquid Surveillance*, Cambridge, 2012

44 On this point see F. BIGNAMI – G. RESTA, *Transatlantic Privacy Regulation: Conflict and Cooperation*, in *Law & Contemporary Problems*, 78, 2015, p. 231, pp. 232-233; P.M. SCHWARTZ – K.N. PEIFER, *Transatlantic Data Privacy Law*, in *Georgetown Law Journal*, 106, 2017, p. 115, p. 126.

ment not only to abstain from any interference with it (“respect”), but also to adopt affirmative measures aimed at preventing violations of dignity arising from the action of third parties (“protect”). The logical consequence of this model is that the positive commitment to protect dignity may lead, in a wide range of situations, to the restriction of the freedoms of others (particularly freedom of speech, as exemplified by the 2104 decision of the French Council of State, banning, in the very name of dignity, a show created by the controversial artist Dieudonné M’Bala M’Bala,⁴⁵ as well as economic freedoms).⁴⁶ This is the theoretical basis of the horizontal effect of fundamental rights, which has produced significant results, particularly in the area of the protection of personality rights against the mass media.⁴⁷ I cannot explore the details here, but I would like to emphasize two related issues.

The first concerns the subjective scope of dignity.⁴⁸ If dignity is to be considered a paramount objective value, and not only a right, it should be protected regardless of the existence of a rights-bearer.⁴⁹ Consistently with this, the dignity principle has played a role in cases involving the violation of group rights,⁵⁰ and also with respect to the protection of the unborn⁵¹ and the deceased.⁵² Particularly relevant, from this point of view, is the 2011 CJEU decision in *Brüstle v. Greenpeace*,⁵³ which upheld the ban on the patenting of neural precursor cells derived from embryonic stem cells, on the basis that such patents would violate the principle of respect for human dignity, as

45 Cons. Etat, ord. 9-1-2014, Société Les Productions de la Plume et M. D., n. 374508

46 C. Enders, The Right to Have Rights: *The Concept of Human Dignity in German Basic Law*, in *Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito*, 2010, p. 1-2.

47 See generally G. ALPA – G. RESTA, *Le persone fisiche e i diritti della personalità*, Torino, 2010, pp. 506-550.

48 H. SCHMIDT, *Whose Dignity? Resolving Ambiguities in the Scope of “Human Dignity” in the Universal Declaration on Bioethics and Human Rights*, in *Journal of Medical Ethics*, 33, 2007, p. 578.

49 F. HUFEN, *Erosion der Menschenwürde?*, in *Juristenzeitung*, 2004, p. 313

50 Paris, 28-5-1996, D, 1996, jur, 617.

51 See with specific regard to the protection of the unborn in the case Law of the German Constitutional Court, D. KOMMERS, *Liberty and Community in Constitutional Law: The Abortion Cases in Comparative Perspective*, in *Brigham Young University Law Review*, 1985, p. 371; E.J. EBERLE, *Dignity and Liberty. Constitutional Visions in Germany and the United States*, p. 161; E. KLEIN, *Human Dignity in German Law*, p. 154.

52 See the famous Mephisto decisions of the German Federal Supreme Court (BGH, 20-3-1968, Mephisto, in NJW, 1968,1773) and of the Constitutional Court (30 BVerfGE, 73); and the analysis by M. KLOEPFER, *Leben und Würde des Menschen*, in *Festschrift 50 Jahre Bundesverfassungsgericht, II, Klärung und Fortbildung des Verfassungsrechts*, Tübingen, 2001, p. 77.

53 CJEU, *Grand Chamber*, 18-10-2011, C-34/10.

it applied to the embryo.⁵⁴ If one takes into account the possible consequences of this regulatory model in the area of abortion, one could easily understand the scepticism expressed by some scholars with regard to a notion that is frequently cast in terms of absolutes.

The second point relates to the possible conflict between dignity and autonomy.⁵⁵ Once it is assumed that the state has a positive obligation to protect dignity, situations may arise in which the exercise of personal freedom may clash with the “*objective*” value of human dignity. In such situations, whose “dignity” should prevail? The dignity of the individual, free to make his or her own value-choices, or dignity as defined by an external decision-maker?⁵⁶

This issue is illustrated by the famous “dwarf-tossing” case. The French Council of State⁵⁷ outlawed the spectacle, holding that dwarf-tossing was an attraction that affronted human dignity, and that respect for human dignity was an aspect of public order. The Council also held that the principle of freedom of employment was no impediment to the prohibition of an activity that violated public order. Manuel Wackenheim, who had been employed in such a spectacle, lodged a complaint before the ECHR, and, as a last resort, before the UN’s Human Rights and Anti-Discrimination Committee.⁵⁸ He argued that the ban had “an adverse effect on his life” and “represented an affront to his dignity”, adding that his job did not infringe human dignity, “since dignity consists in having a job”. Both courts dismissed the complaint. A similar line of reasoning has been followed by the German courts in the peep shows controversies,⁵⁹ as well as by the Court of Justice of the European Union in the famous

54 For a discussion, see G. RESTA, *Dignità, persone, mercati*, Torino, 2014, p. 61.

55 G. RESTA, *Dignità, persone, mercati*, at 43-58; G. PIEPOLI, *Tutela della dignità e ordinamento della società secolare europea*, in *Rivista critica del diritto privato*, 2007, p. 7.

56 See S. RODOTÀ, *La rivoluzione della dignità*, p. 60.

57 Cons. Etat, Ass., 27-10-1995, Ville d’Aix-en-Provence.

58 *Manuel Wackenheim v. France*, Communication No 854/1999, UN Doc CCPR/C/75/D/854/1999 (2002).

59 BVerwG, 15-12-1981, NJW, 1982, 664; BVerwG, 30-1-1990, in *Juristenzeitung*, 1990, p. 382. For an analysis see T. DISCHER, *Die Peep-Show-Urteile des BVerwG*, JuS, 1991, p. 642.

Omega case,⁶⁰ dealing with the ban issued by German local authorities against the commercialisation of laser games imported from the United Kingdom.

Reading these rulings critically, one gets the impression that what is really at stake is not the dignity of the individual, but the dignity of the species, or “human” dignity.⁶¹ However, one could seriously raise the question whether it is actually possible, in a pluralistic and multicultural society, to settle on a fixed “image of man” (*Menschenbild*)⁶² and impose this image on anybody, even on the right-holder. Is it possible, in other words, to set the boundaries of autonomy on the basis of the concept of dignity? Or is the formula “dignitarian limits of autonomy” an oxymoron?

The solution for the comparative lawyer would be to test such questions empirically by looking at jurisdictions characterized by different institutional settings and value-choices. If one takes into account the US experience, for instance, it is easy to find not only a strong scholarly opposition to such a “communitarian” vision of dignity,⁶³ but also parallel cases decided in the opposite way. For example, in *World Fair Freaks v. Hodges*⁶⁴ the Supreme Court of Florida held that the statutory ban imposed by Florida on a spectacle not too different from the French dwarf-tossing case was unconstitutional as a violation of property, in the form of the equal right to earn a livelihood and to pursue a lawful occupation. This decision is interesting not only because it frames in terms of property an interest that the French dwarf tried to present with reference to the lexicon of dignity, but also because it shows a completely different vision of the relationship between the individual and the political community. This is consistent with a conception of dignity based on the idea of negative freedom and a

60 CJEU, 14-10-2004, C-36/02, *Omega Spielhallen- und Automatenaufstellungs GmbH c. Oberbürgermeisterin der Bundesstadt Bonn*. See the comment by C.T. SMITH – T. FETZER, *The Uncertain Limits of the European Court of Justice's Authority: Economic Freedom v. Human Dignity*, in *Columbia Journal of European Law*, 10, 2004, p. 445.

61 B. JORION, *La dignité de la personne humaine ou la difficile insertion d'une règle morale dans le droit positif*, in *Revue du droit public*, 1999, p. 197, p. 214; O. CAYLA, *Le coup d'Etat de droit?*, in *Le débat*, 1998, p. 108, pp. 122-132; *with regard to the specific sector of biolaw*, D. BEYLEVELD – R. BROWNSWORD, *Human Dignity in Bioethics and Biolaw*, pp. 29-39.

62 On the specifically German notion of *Menschenbild*, M.W. FINKIN, *Menschenbild: The Conception of the Employee as a Person in Western Law*, in *Comparative Labor Law & Policy Journal*, 23, 2002, p. 577; E. BENDA, *Menschenwürde und Persönlichkeitsrecht*, p. 163.

63 N. RAO's paper, *On the Use and Abuse of Dignity in Constitutional Law*, is exemplary; see also S. PINKER, *The Stupidity of Dignity: Conservative Bioethics' Latest, Most Dangerous Play*, in *New Republic*, 28 May 2008; and in the (not that different) English context D. FELDMAN, *Human Dignity as a Legal Value, I*, in *Public Law*, 1999, p. 682.

64 267 So.2d 817 (Fla. 1972).

model of constitutional adjudication significantly removed from post-war canons.⁶⁵ It is not by chance that the doctrine of state action has prevented the US courts from developing a consistent body of rules aimed at enforcing the state's obligation to protect fundamental rights.⁶⁶

5. Dignity and the right to “dignified” living conditions

Can the duty to protect be expanded into a more far-reaching obligation on the state to ensure that nobody falls below “dignified” living conditions?

Art 151 of the 1919 German Constitution of Weimar, based on the social-democratic conception of dignity, contained such an affirmative duty,⁶⁷ which is now accepted, at least to a limited extent, in several jurisdictions, and first of all in the provisions (arts. 3 and 41) of the Italian Constitution.⁶⁸ The German Constitutional Tribunal famously struck down parts of the red-green reform of the labour market, holding that Art. 1 of the European Charter “imposes an obligation on the state to provide at least minimal subsistence to every individual.”⁶⁹ Similarly, the Italian Constitutional Court,⁷⁰ the French Constitutional Council,⁷¹ and the South African Supreme Court⁷² have held that “human dignity requires that decent housing be secured for all citizens as a constitutional social right”. Such a use of the concept of dignity may appear troubling for those who fear that the courts will exercise uncontrolled discretion under the umbrella of dignity, interfering with the role of the legislature. Indeed, this approach seems incompatible, once again, with the more libertarian perspective on dignity. However, it cannot be

65 L. E. WEINRIB, *The Postwar Paradigm and American Exceptionalism*, in S. CHOUDHRY, *The Migration of Constitutional Ideas*, p. 84; G. BOGNETTI, *The Concept of Human Dignity in European and US Constitutionalism*, p. 85.

66 For a comparison Europe/US, see D. GRIMM, *The Protective Function of the State*, p. 137

67 See G. RESTA, *La dignità*, p. 264.

68 See generally M.R. MARELLA, *Il fondamento sociale della dignità umana*, in *Rivista critica del diritto privato*, 2007, p. 67.

69 BVerfG 9-2-2010, 1 BvL 1/09, 1 BvL 3/09, 1 BvL 4/09; for a comment see G. DELLEDONNE, “Minimo vitale” e Stato Sociale in una recente pronuncia del Tribunale costituzionale, in *Forum di Quaderni Costituzionali*, 2010.

70 Corte Cost., 11-2- 1988, n. 217, Giur. it., 1988, I, 1789

71 *Conseil constitutionnel*, 94-359 DC, 19-1-1995, *Loi relative à la diversité de l'habitat*, in D., 1995, somm., 137; on this issue see V. GODFRIN, *Le droit au logement, un exemple de l'influence des droits fondamentaux sur le droit de propriété*, in *Mélanges Christian Bolze*, Paris, 1999, p. 137.

72 *Government of the Republic of South Africa and Others v. Grootboom and Others*, 2000 (10) BHR 84 (CC).

should not be overlooked that, in a time that has seen a steady decrease in social protections, dignity can work as the ultimate barrier against the complete dismantling of the noble utopia of “freedom from want.”⁷³ This was one of the most forceful messages of the late Stefano Rodotà,⁷⁴ which deserves to be seriously reflected upon in a time of unprecedented social inequality and growing democratic crises.

73 See generally J. HABERMAS, *Il concetto di dignità umana e l'utopia realistica dei diritti dell'uomo*, in Id., *Questa Europa è in crisi*, Roma-Bari, 2012, pp. 3-31.

74 See lastly S. RODOTÀ, *La rivoluzione della dignità*, p. 54; Id., *Restituire forza teorica e politica alla dignità*, in Id., *Critica del diritto privato. Editoriali e saggi della Rivista Critica del Diritto Privato*, Napoli, 2017, p. 57; Id., *Solidarietà. Un'utopia necessaria*, Rome-Bari, 2014, pp. 101-102; Id., *Il diritto di avere diritti*, Rome-Bari, 2012, p. 179.