Migrating with Dignity: Conceptualising Human Dignity Through EU Migration Law†

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Human dignity in the jurisprudence of the Court of Justice of the European Union – Human dignity in EU migration law, particularly in the area of asylum law and irregular migration – Requirement of dignified treatment of third-country nationals in the EU – Relationship between human dignity and substantive values such as tolerance, identity, rights, justice, and the law – Human dignity as a moral right, a legal status, and a political status – Human dignity as a moral principle with a legal pedigree, which underpins determinations of the scope of rights of third-country nationals in EU migration law

Introduction

A concept on the rise in the contemporary legal landscape, and not only that of Europe, is human dignity. Recently we have entered the 'Age of Dignity', some have remarked.[1] Over the last few decades, human dignity has slowly come to dominate human rights constitutionalisation and adjudication, in national and international jurisdictions alike.[2]

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[1]C. Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Hart Publishing 2015).

[2]C. McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights', 19 *European Journal of International Law* (2008) p. 655.

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Many constitutional orders – or modern 'communities of values' – recognise human dignity as a concept that expresses the social, political and legal identity of these orders and that provides a value orientation for structures of governance;[3] it is a concept that is arguably indispensable for 'understand[ing] internal tensions of liberal constitutionalism'.[4] Nevertheless, due to its ontological complexity and constitutional novelty, human dignity remains an 'essentially contested' concept,[5] in both its theoretical and practical dimensions.[6]

The concept has gained ground in the EU constitutional sphere, too. As will be discussed in the following section, there are numerous references to dignity in the Union's primary and secondary law, which have been multiplying recently. For its part, the Court of Justice likewise appears to be taking human dignity seriously.[7] Its jurisprudence reflects the ever-increasing importance of this concept in EU constitutional adjudication, providing a plethora of examples of steadily developing dignity case law across different substantive areas of regulation.[8]

An area of dignity-oriented jurisprudence that particularly stands out is EU migration law.[9] This is by no means a coincidence. The way EU law determines how member states ought to treat third-country nationals in respect of their human dignity, particularly asylum seekers and irregular migrants perceived as not belonging to the polity, is an important determinant of the Union's own political identity. As Weiler famously noted, the way a society treats aliens – the 'other' – is the core of its democratic pedigree.[10] Yet, the influence of the

[3]D. Schulztiner and G.E. Carmi, 'Human Dignity in National Constitutions: Functions, Promise and Dangers', 62 *American Journal of Comparative Law* (2014) p. 461.

[4]D. Grimm et al., 'Human Dignity in Context. An Introduction', in D. Grimm et al. (eds.), *Human Dignity in Context: Explorations of a Contested Concept* (Nomos 2018) p. 13 at p. 21.

[5]P.-A. Rodriguez, 'Human Dignity as an Essentially Contested Concept', 28 *Cambridge Review of International Affairs* (2015) p. 743.

[6]C. Ruiz Miguel, 'Human Dignity: History of an Idea', 50 *Jarhbuch des öffentlichen Rechts der Gegenwart* (2002) p. 281.

[7]D. Petrić, '"Different Faces of Dignity": A Functionalist Account of the Institutional Use of the Concept of Dignity in the European Union', 26 *Maastricht Journal of European and Comparative Law* (2019) p. 792.

[8]Consider, illustratively, landmark dignity judgments ECJ 9 October 2001, Case C-377/98, *Netherlands* v *Parliament and Council*, ECLI:EU:C:2001:523; ECJ 14 October 2004, Case C-36/02, *Omega*, ECLI:EU:C:2004:614; ECJ 18 October 2011, Case C-34/10, *Brüstle*, ECLI:EU:C:2011:669.

[9]We consider legislation adopted and judgments delivered until June 2020, and focus particularly on EU asylum and irregular migration law.

[10]J.H.H. Weiler, 'Federalism and Constitutionalism: Europe's *Sonderweg*', in K. Nicolaïdis and R. Howse (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford University Press 2001) p. 54 at p. 65-66.

right to human dignity on the rights extended to third-country nationals in EU migration law is overlooked in the literature.

This paper seeks to fill this doctrinal gap. Our aim is twofold. We will first assess how human dignity is used and to what ends it is invoked in the jurisprudence of the Court of Justice in EU migration law, particularly in the area of asylum law and irregular migration, examining the ways in which human dignity conditions the treatment of third-country nationals. Such a practical analysis will, in turn, allow us to further substantiate human dignity as a theoretically contested and intricate doctrinal concept, and to reflect on its relationship with the substantive values that are often associated with it, such as tolerance, identity, rights, justice, and the law. Human dignity will be conceptualised as a moral right, as well as a legal and a political status. We will argue that human dignity, as evident from the jurisprudence of the Court of Justice, represents a moral principle with a legal pedigree, giving it the potential to more vigorously underpin determinations of the scope of rights of third-country nationals in EU migration law.

Conceptualising dignity in the EU legal framework

The Court of Justice famously ruled in *Omega* that 'the [Union] legal order undeniably strives to ensure respect for human dignity'.[11] And indeed, human dignity seems firmly embedded in every corner of the EU constitutional framework,[12] being considered a constitutional value, an independent human right, and a general principle of EU law.

It is positioned as the first among the EU founding values in Article 2 TEU. Similarly, it appears in the preamble to the Charter of Fundamental Rights, which considers this value a part of the Union's indivisible spiritual and moral heritage, 'placing the individual at the heart of its activities'. Human dignity is also 'inviolable', listed as the first among the fundamental rights in Article 1 of the Charter, belonging to every human being irrespective of their nationality.[13] The entire Title I of the Charter bears the name 'Dignity', including (in addition

[11]Case C-36/02, *Omega*, *supra* n. 8, para. 34.

[12]M. Avbelj, 'Human Dignity and EU Legal Pluralism', in G. Davies and M. Avbelj, *Research Handbook on Legal Pluralism and EU Law* (Edward Elgar 2018) p. 95.

[13]On the 'mirroring'-like content of Art. 1 of the Charter and Art. 1 of the German *Grundgesetz*, and the influence of the German constitutional doctrine on the understanding of the concept of human dignity in EU law, *see* J. Jones, '"Common Constitutional Traditions": Can the Meaning of Human Dignity Under German Law Guide the European Court of Justice?', *Public Law* (2004) p. 167.

to dignity itself) the right to life, the right to physical and mental integrity, the prohibition of torture and inhuman or degrading treatment or punishment, and the prohibition of slavery or servitude, and of forced or compulsory labour.

Human dignity and respect for the individual have likewise been considered a core value in the area of freedom, security and justice.[14] All regulations and directives adopted under the TFEU's Title V on policies on border checks, asylum and immigration law emphasise that their goal is to ensure full respect for human dignity and other Charter-based fundamental rights of non-EU citizens.[15] Together they provide a plethora of human dignity references in relation to the standards of treatment of third-country nationals moving to the EU territory, including refugees, asylum seekers and other vulnerable persons.

For example, the Schengen Borders Code explicitly provides that when carrying out border checks, border guards must fully respect the human dignity of every person.[16] The Frontex Regulation and the European Border and Coast Guard Regulation stress the same for all measures taken during surveillance operations at sea and while performing other tasks at the borders, including return operations and interventions.[17]

The Reception Conditions Directive further provides that, upon their entry to the Union territory, asylum seekers should be ensured 'a dignified standard

[14]Communication from the Commission to the European Parliament and the Council, *An Area of Freedom, Security and Justice Serving the Citizen*, COM (2009) 262 final, Brussels, 10 June 2009, p. 7.

[15]*See*, for example, Recital 19 of the Preamble to Regulation (EU) No 656/2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex Regulation); Recital 49 of the Preamble to Regulation (EU) 2016/1624 on the European Border and Coast Guard (European Border and Coast Guard Regulation); Recital 60 of the Preamble to Directive 2013/32/EU on common procedures for granting and withdrawing international protection (Asylum Procedures Directive); Recital 35 of the Preamble to Directive 2013/33/EU laying down standards for the reception of applicants for international protection (Reception Conditions Directive); Recital 16 of the Preamble to Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (Qualification Directive); Recital 24 of the Preamble to Regulation (EU) No. 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Dublin III Regulation); Recital 2 of the Preamble to Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive).

[16]Recital 7 of the Preamble and Art. 7(1) of Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

[17]Recital 10 of the Preamble and Art. 4(6) of Regulation (EU) No. 656/2014; Arts. 21 and 35 of Regulation (EU) 2016/1624.

of living and comparable living conditions in all Member States',[18] particularly for matters of residence and freedom of movement, access to healthcare, schooling and education, employment and vocational training, while providing for special protection for vulnerable persons, including minors, unaccompanied minors, and victims of torture and violence. Asylum seekers in detention must also be treated with full respect for their human dignity.[19] The reduction or withdrawal of material reception conditions are likewise conditioned upon ensuring a 'dignified standard of living' for all concerned asylum seekers.[20]

The Asylum Procedures Directive guarantees that when conducting individual searches, member state authorities must fully respect the human dignity and physical and psychological integrity of asylum seekers.[21] The same goes for medical examinations to determine the age of unaccompanied minors who lodge asylum applications.[22]

Finally, the Return Directive recalls the objective of a repatriation policy – that returns of people from the EU territory to their countries of origin must be made 'in a humane manner and with full respect for their fundamental rights and dignity'.[23] It also mandates 'a humane and dignified' treatment of third-country nationals awaiting removal in detention.[24] In this regard, third-country nationals should, as a rule, be held in specialised detention facilities, separated from ordinary prisoners.[25] If coercive measures are necessary to carry out the removal, third-country nationals who resist removal must have their dignity and physical integrity fully respected.[26]

Conceptualising dignity through jurisprudence

The references to human dignity in the EU legislative framework seem only to confirm the criticism of this concept as underdetermined and, therefore, 'essentially contested'.[27] In addressing these concerns, recourse should be made to jurisprudence. By relying on arguments related to the idea of human dignity,

[18]Recital 11 of the Preamble to Directive 2013/33/EU.
[19]Recital 18 of the Preamble to Directive 2013/33/EU.
[20]Recital 25 of the Preamble and Art. 20(5) of Directive 2013/33/EU.
[21]Art. 13(d) of Directive 2013/32/EU.
[22]Art. 25(5) of Directive 2013/32/EU.
[23]Recital 2 of Directive 2008/115/EC.
[24]Recital 17 of the Preamble to Directive 2008/115/EC.
[25]Recital 17 of the Preamble and Art. 16(1) of Directive 2008/115/EC.
[26]Art. 8(4) of Directive 2008/115/EC.
[27]Rodriguez, *supra* n. 5, p. 743.

the Court of Justice, through its case law, necessarily gives practical expression to and 'breathes life' into this abstract concept.[28] In Paolo Carozza's words,

> [t]he process of specifying the meaning and application of the general and abstract concept [of human dignity] in concrete circumstances is a classic example of the *determinatio* of moral principles through the positive law.[29]

The Court of Justice's dignity case law regarding the movement of third-country nationals is of a newer date,[30] yet firmly established with a series of important rulings. In them, the Court rarely applied human dignity from Article 1 of the Charter as a standalone ground for its decision. Rather, it read Article 1 'in conjunction' with other Charter rights – most often Articles 4 (prohibition of torture and inhuman or degrading treatment) and 7 (the right to private life) – which are themselves arguably the concretisation of human dignity.[31] The same approach to applying human dignity from the Charter's Article 1 is emerging in the case law of the member states' high courts.[32]

In most judgments, the Court of Justice uses the concept of human dignity as an interpretive principle, when interpreting secondary EU law in conformity with that concept. Throughout the entire asylum procedure (i.e. during third-country nationals' application for asylum, temporary detention, the process of return to their country of origin or safe third country, or upon their return),[33] the Court constructs the rules of EU asylum and irregular migration law against what it perceives as their underlying *telos* – the protection of human dignity. This way, the Court strengthens certain requirements imposed on the member states'

[28] *Cf* ECJ 18 March 2004, Opinion of Advocate General Stix-Hackl in Case C-36/02, *Omega*, ECLI:EU:C:2004:162, para. 85.

[29] P. Carozza, 'Human Dignity in Constitutional Adjudication', in T. Ginsburg and R. Dixon (eds.), *Research Handbook in Comparative Constitutional Law* (Edward Elgar 2011) p. 459 at p. 465.

[30] On the gradual expansion of the Court's jurisdiction in the AFSJ, *see* K. Lenaerts, 'The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice', 59 *International & Comparative Law Quarterly* (2010) p. 255. For an explanation of the Court's initial self-restraint in cases involving the rights of non-EU nationals, *see* J.H.H. Weiler, 'Thou Shalt Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals – A Critique', 3 *European Journal of International Law* (1992) p. 65 at p. 70.

[31] For this doctrinal approach – taking dignity 'in conjunction' with other fundamental rights – (comparatively) typical in constitutional adjudication, *see* Jones, *supra* n. 13, p. 168-174; D. Petrić, 'Dignity, Exceptionality, Trust. EU, Me, Us', 26 *European Public Law* (2020) p. 451 at p. 457-459.

[32] As an example, *see* Supreme Court of Slovenia, Decision I Up 10/2018 of 4 April 2018, and Supreme Administrative Court of Finland, Decision 3891/4/17 of 13 April 2018, both reported in European Commission, *supra* n. 14, p. 16, p. 38, and p. 59; and European Union Agency for Fundamental Rights, *Fundamental Rights Report 2019* (EU Publications Office) p. 48-49.

[33] Avbelj, *supra* n. 12, p. 96; ECJ 27 September 2012, Case C-179/11, *Cimade and GISTI*, ECLI:EU:C:2012:594.

authorities regarding the treatment of asylum seekers and irregular migrants. There are several illustrative examples.

In *Abdida*, national legislation did not recognise the suspensive effect of an appeal against a return order nor did it provide for effective health treatment during the appeal procedure.[34] In *El Dridi*, national legislation provided for the imprisonment of illegally staying third-country nationals solely because they remained, without valid grounds and contrary to an order to leave, on the territory of that member state.[35] In both cases, the Court's interpretation of the Return Directive in conformity with the concept of dignity resulted in precluding the application of national laws on account of their failure to ensure appropriate standards of treatment of asylum seekers or illegal immigrants.

Similarly, the Court has relied on arguments based on human dignity to expand the criteria under which asylum seekers should not be transferred to other member states under the Dublin III Regulation. In *C.K.*, the Court moved away from requiring 'systemic deficiencies' to suspend Dublin transfers to examining whether the transfer would subject a particular third-country national, in their individual circumstances, to the risk of inhuman or degrading treatment in disrespect of human dignity.[36]

Furthermore, the concept of dignity featured prominently in the Court's forceful rejection of certain examination methods based on the Qualification Directive that intrude into asylum seekers' personal sphere. In *A and Others*, the Court ruled that sexual orientation (pseudo-)medical tests or 'expert reports' conducted by national authorities in the assessment of fear of persecution on grounds of that sexual orientation 'by [their] nature infringe human dignity'.[37]

[34]ECJ 18 December 2014, Case C-562/13, *Abdida*, ECLI:EU:C:2014:2453.

[35]ECJ 28 April 2011, Case C-61/11 PPU, *El Dridi*, ECLI:EU:C:2011:268. In *El Dridi*, the Court directly invoked the argument of ensuring the effectiveness of EU law on returns procedures. The Court's reasoning was, however, indirectly underpinned by the need to ensure respect for human dignity in conducting those procedures. *See* para. 31: 'It must be borne in mind in that regard that recital 2 in the preamble to Directive 2008/115 states that it pursues the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and *with full respect for* their fundamental rights and also *their dignity*' (emphasis added). Since protection of human dignity is one of the goals of return procedures, we consider that the Court's reliance on the argument related to the effectiveness of those procedures implies respect for the human dignity of individuals subject to those procedures. In our view, an 'effective removal policy' can only be an 'effective *dignity-conforming* removal policy'.

[36]ECJ 16 February 2017, Case C-578/16 PPU, *C.K.* v *Slovenia*, ECLI:EU:C:2017:127, para. 59.

[37]ECJ 2 December 2014, Joined Cases C-148/13 to C-150/13, *A and Others*, ECLI:EU:C:2014:2406, para. 65; *see also* ECJ 25 January 2018, Case C-473/16, *F.*, ECLI:EU:C:2018:36 and ECJ 5 October 2017, Opinion of Advocate General Wahl in Case C-473/16, *F.*, ECLI:EU:C:2017:739.

In *Germany v Y and Z*, the Court further held that asylum seekers cannot be expected to abstain from publicly demonstrating their faith upon return to their country of origin in order not to expose themselves to a real risk of persecution.[38] As Advocate General Bot explained, that would violate their human dignity since:

> [b]y requiring the asylum-seeker to conceal, amend or forego the public demonstration of his faith, we are asking him to change what is a fundamental element of his identity, that is to say, in a certain sense to deny himself. However, no one has the right to require that.[39]

The Court's interpretation of the Reception Conditions Directive in conformity with the concept of human dignity also extended member states' obligations to secure appropriate reception conditions for asylum seekers. For instance, in *Saciri*, the Court held that the provision of material reception conditions to asylums seekers in the form of financial aid grants 'must be sufficient to ensure a dignified standard of living and adequate for the health of applicants and capable of ensuring their subsistence' in the host member state.[40] For the same reason, the Court in *Jawo* concluded that there can be no transfers to member states in which an applicant for international protection would face:

> a situation of extreme material poverty that does not allow him to meet his most basic needs, such as, inter alia, food, personal hygiene and a place to live, and that undermines his physical or mental health or puts him in a state of degradation incompatible with human dignity.[41]

Nevertheless, under the Reception Conditions Directive, member states may decide to reduce or withdraw, either temporarily or permanently, material reception conditions from asylum seekers who behave violently, breach rules of the reception centres, or pose threats to security in general. In *Haqbin*, the Court ruled that, when making such a decision, national authorities must under all circumstances ensure full respect for asylum seekers' human dignity. This translates into their obligation to guarantee a continuous dignified standard of living

[38]ECJ 5 September 2012, Joined Cases C-71/11 and C-99/11, *Germany* v *Y and Z*, ECLI:EU:C:2012:518.

[39]ECJ 19 April 2012, Opinion of Advocate General Bot in Joined Cases C-71/11 and C-99/11, *Germany* v *Y and Z*, ECLI:EU:C:2012:224, para. 100.

[40]ECJ 27 February 2014, Case C-79/13, *Saciri*, ECLI:EU:C:2014:103, paras. 40-51.

[41]ECJ 19 March 2019, Case C-163/17, *Jawo*, ECLI:EU:C:2019:218, para. 92; ECJ 19 March 2019, Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17, *Ibrahim and Others*, ECLI:EU:C:2019:219, paras. 90-91. *Cf* ECtHR 21 January 2011, No. 30696/09, *M.S S.* v *Belgium and Greece*, paras. 252-263.

that caters for asylum seekers' basic needs and provides appropriate subsistence in terms of housing, food, clothing, hygiene, healthcare, etc.[42] This is expected to put an end to practices in several member states by which violent or disobedient asylum seekers are removed from the reception centres and thrown onto the street.[43]

Finally, due to human dignity concerns, member states are prohibited from detaining illegally staying third-country nationals waiting for removal in facilities with ordinary prisoners, even when they consent to that.[44]

The concept of human dignity runs through and ties together all these judgments in several threads.

First, dignity as an interpretive principle was employed to substantiate rights already granted to asylum seekers by positive law, i.e. to give these rights more specific expression and chart their practical consequences in different situations. At the same time, in certain instances, the scope of the rights that the Court was constructing and expounding was in effect extended. Such use of the concept of dignity represents a classic feature of the jurisprudence of high (national and supranational) courts.[45]

Second, through the substantiation or broadening of individual rights, the Court afforded even greater protection to the categories of third-country nationals who are particularly vulnerable. For instance, asylum seekers and unaccompanied minors almost by definition have their human dignity endangered, and gross attacks on their humanity may occur relatively frequently. So, it is of particular importance to guarantee them the opportunity of a dignified life.[46]

Third, by contributing to the extension of the scope of existing asylum seekers' rights, the concept of dignity has likewise contributed to the extension of the negative and positive obligations of the EU and the member states' authorities.[47] Both have arguably been construed rather broadly in their scope: for example, the negative obligation to refrain in every aspect from putting asylum seekers at risk – actual or potential – of inhuman or degrading treatment; or the positive

[42]ECJ 12 November 2019, Case C-233/18, *Zubair Haqbin*, ECLI:EU:C:2019:956.

[43]S. Progin-Theuerkauf and M. Helena Zoeteweij, 'Case C-233/18 Haqbin: The Human Dignity of Asylum Seekers as a Red Line', *European Law Blog*, 9 December 2019, ⟨https://europeanlawblog.eu/2019/12/09/case-c-233-18-haqbin-the-human-dignity-of-asylum-seekers-as-a-red-line/⟩, visited 22 July 2021.

[44]ECJ 17 July 2014, Case C-474/13, *Pham*, ECLI:EU:C:2014:2096 and ECJ 30 April 2014, Opinion of Advocate General Bot in Case C-474/13, *Pham*, ECLI:EU:C:2014:336; *see also* ECJ 27 February 2020, Opinion of Advocate General Pikamäe in Case C-18/19, *WM*, ECLI:EU:C:2020:130.

[45]McCrudden, *supra* n. 2, p. 693-701, p. 721-722; Petrić, *supra* n. 7, p. 806-808.

[46]Similarly, C. Dupré, 'Human Dignity', in S. Peers et al. (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) p. 3 at p. 5.

[47]*Cf* C. McCrudden, 'In Pursuit of Human Dignity: An Introduction to Current Debates', in C. McCrudden (ed.), *Understanding Human Dignity* (Oxford University Press 2013) p. 1 at p. 50.

obligation to ensure appropriate reception conditions and ensure 'dignified' standards of living.

In particular, by emphasising this broad positive obligation in cases like *Jawo* and *Haqbin*, the Court acknowledges the fundamental link between human dignity and welfare: the 'existential minimum' of material resources is a precondition for ensuring a dignified life as well as in practical terms for the efficient realisation of other human rights. This represents a holistic view of a person that does not distinguish between their physical and mental wellbeing.[48]

Conceptualising dignity as a moral right and as a legal and political status

The previous sections have demonstrated how the concept of human dignity features in EU law and in the jurisprudence of the Court of Justice regarding the treatment of refugees, asylum seekers and irregular migrants who enter the Union territory. Against this background, in what follows, we offer a further theorisation of human dignity of third-country nationals as non-EU citizens – the 'other' – using the concepts of moral rights and legal and political status. More specifically, we will argue that human dignity could be thought of, first, as a moral right to hold legal rights; second, as the legal status of a bearer and claimer of legal rights; and third, as the political status of membership in a political community.

Contemporary constitutional discourse is dominated by two specific conceptions of human dignity. The first stands for 'the position occupied by [man] within public life'; the second for 'the special position of man within the cosmos'.[49] The former is particularistic and posits that dignity is possessed only by virtuous ones who enjoy high societal status; the latter is universalist and posits that dignity is possessed by everyone, without exception. Under the first understanding, dignity is relative 'in the sense that it can both be acquired and lost'; under the second, it is absolute 'in the sense that it cannot either be enhanced or reduced'.[50] Hence, human dignity as a constitutional category in its former notion resembles more the ancient Roman *dignitas* – societal rank, reputation, honour,[51] whereas in its latter notion dignity resembles the Arendtian 'right to have rights'.[52]

[48]Dupré, *supra* n. 46, p. 17-18.

[49]P. Becchi, 'Human Dignity in Europe: Introduction', in P. Becchi and K. Mathis (eds.), *Handbook of Human Dignity in Europe* (Springer 2019) p. 1 at p. 2.

[50]Ibid., p. 3.

[51]J. Waldron, 'Dignity, Rank, and Rights: The 2009 Tanner Lectures at UC Berkeley', *NYU School of Law, Public Law & Legal Theory Research Paper Series, Working Paper No. 09–50* (September 2009) p. 1 at p. 22-23.

[52]Becchi, *supra* n. 49, p. 7-8.

When talking about the concept of human dignity as it appears in EU law, it becomes clear that what we should aspire to is this universalist, absolutist conception. After all, Article 1 of the Charter implies that human dignity is possessed by *everyone*, and that it *is* inviolable and indivisible.[53] But what does it mean that human dignity is this 'right to have rights', especially in relation to non-EU citizens?

One way of looking at it would be to characterise human dignity as the foundational or original right from which all other human rights stem.[54] Such understanding has notably been present in the German constitutional doctrine.[55] Human dignity is an aprioristic, meta-right that defines the relationship between individuals as moral agents and between individuals and the government. Every public interaction and act of government must respect and promote the human dignity of every individual. In practice, this is realised through the protection of specific fundamental rights that give concrete expression to human dignity. Human dignity thus constrains the government and shields individuals from the arbitrariness of public authorities, at the same time making them subjects rather than objects of governmental and other public affairs. Here lies the predominant motif of this view of human dignity: the Kantian *Objektformel* ('object formula'), which mandates treating human beings not merely as a means but rather as an end in themselves.[56]

The same could be said of the EU's concept of human dignity, at least prima facie. The Explanatory Note on Article 1 of the Charter thus states that:

> [t]he dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights. [...] It results that none of the rights laid down in this Charter may be used to harm the dignity of another person, and that the dignity of the human person is part of the substance of the rights laid down in this Charter. It must therefore be respected, even where a right is restricted.[57]

[53]*See* ECJ 14 May 2020, Opinion of Advocate General Bobek in Case C-129/19, *Presidenza del Consiglio dei Ministri* v *BV*, ECLI:EU:C:2020:375, paras. 107-108.

[54]Some conceptual problems associated with this reading of human dignity as a 'second order' right are presented in P. Sourlas, 'Human Dignity and the Constitution', 7 *Jurisprudence* (2016) p. 30 at p. 41.

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

[56]Becchi, *supra* n. 49, p. 5; M. Mahlmann, 'The Basic Law at 60 – Human Dignity and the Culture of Republicanism', (11) *German Law Journal* (2010) p. 9.

[57]Note from the Praesidium on Draft Charter of Fundamental Rights of the European Union, Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50, CHARTE 4473/00 (2000), p. 3.

Advocate General Stix-Hackl in *Omega* similarly reasoned that:

> [h]uman dignity, as a fundamental expression of an element of mankind founded simply on humanity, forms the underlying basis and starting point for all human rights distinguishable from it; at the same time, it is the point of convergence of individual human rights in the light of which they are to be understood and interpreted. [. . .] As an emanation and as specific expressions of human dignity, however, all (particular) human rights ultimately serve to achieve and safeguard human dignity [. . .].[58]

In other words, human dignity as the 'right to have rights' in EU law would represent a background moral right on which all other human rights are grounded. As such, human dignity becomes a link between (positive) law and morality.[59] In a society committed to the rule of law, this expresses the ideal that what counts as *the law* cannot be distinguished from substantive justice. Rather, 'law' captures moral rights that may be enforced through courts. In Ronald Dworkin's theory, this 'rights' conception of the rule of law presupposes the existence of moral rights that inform the content of *the law* and are additional and prior to the rights posited by the lawmaker. This is opposed to the legal positivist – or the 'rulebook' – conception of the rule of law, which is indifferent to the content of *the law*.[60]

Moreover, under the 'rights' conception of the rule of law – which, like human dignity, is another 'essentially contested concept'[61] – all interactions, public as well as private, in a given society become a matter of justice. And justice itself is 'a matter of individual right', and not 'a matter of the public good'.[62] We will return shortly to this question of justice.

By now it has probably become clear that the EU's concept of human dignity would fit squarely into the 'rights' conception of the rule of law. The EU's 'rulebook' contains an explicit right to human dignity of Union citizens and non-citizens in Article 1 of the Charter. This right can also be found in the preambles to many important legislative acts as expressing their purpose, which courts are called upon to enforce.

[58]Opinion of Advocate General Stix-Hackl in Case C-36/02, *Omega*, *supra* n. 28, paras. 74-81.

[59]J. Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights', 41 *Metaphilosophy* (2010) p. 464.

[60]R. Dworkin, 'Political Judges and the Rule of Law', in A *Matter of Principle* (Harvard University Press 1985) p. 9. For Dworkin's more elaborate view of the concept of human dignity, *see* R. Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) p. 191 ff.

[61]J. Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?', 21 *Law and Philosophy* (2002) p. 137.

[62]Dworkin (1985), *supra* n. 60, p. 32.

As we saw earlier, the Court of Justice frequently relies on human dignity as an interpretive principle. This means that when the 'rulebook' is silent or its terms are subject to competing interpretations, the Court tends to opt for the solution that best enforces the background moral rights of individuals, thus possibly going beyond the 'rulebook'.[63] These moral rights are underpinned by deontological justification – respect for the individual's human dignity for its own sake, as an end in itself – and trump any utilitarian calculus that posits that the right is what is good for the majority population and hence is good for the entire community. In doing so, one may view the Court of Justice as acting as a Dworkinian court:[64] choosing from among the several meanings of EU primary and secondary law the one that would best *fit* the Union's institutional history and at the same time be *morally justified* in the light of human dignity's central position in the normative foundations of the EU constitutional order.[65]

Besides being a moral right, human dignity, as the 'right to have rights' in EU law, can also be conceptualised as a legal status. To get there, first we should explain how the 'rights' conception of the rule of law, along with the values of substantive justice, embodies certain proceduralist values too.

In his work, Jeremy Waldron reinterprets Dworkin's account of the rule of law as being committed to certain procedures as much as to substantively just outcomes reached through any kind of procedure.[66] The idea that moral rights ought to be enforced through courts presupposes that there exist judicial procedures capable of that. So Waldron, in his account of the rule of law, focuses on the argumentative aspects of the law and on a 'dignitarian' conception of the individual as a moral agent capable of contributing to comprehension and application of the law. Hence the importance of legal procedures, which are the pathway for

[63]Although this tendency is particularly evident in the field of asylum and irregular migration, it can also be noticed in other areas of law. *See*, for instance, landmark judgment ECJ 30 April 1996, Case C-13/94, *P.* v *S.*, ECLI:EU:C:1996:170, concerning the application of the right not to be discriminated against to transgender persons. For a discussion, *see* Petrić, *supra* n. 7, p. 806-808.

[64]R. Dworkin, 'Hard Cases', 88 *Harvard Law Review* (1975) p. 1057. For a characterisation of the Court of Justice as 'the Hercules of a Dworkinian legal world', *see* T. Ćapeta, 'Ideology and Legal Reasoning at the European Court of Justice', in T. Perišin and S. Rodin (eds.), *The Transformation or Reconstitution of Europe* (Hart Publishing 2018) p. 89 at p. 96; and N. Bačić Selanec, *A Realist Account of EU Citizenship* (PhD Thesis, University of Zagreb 2019) p. 64.

[65]Dupré, *supra* n. 46, p. 19-20 (characterising human dignity as standing 'at the top of the EU normative pyramid', as 'the axiomatic foundation of the whole EU'). Similar exposition of Dworkin's 'moral reading of the Constitution', albeit in more general terms, can be found in Sourlas, *supra* n. 54, p. 34.

[66]J. Waldron, 'The Rule of Law as a Theater of Debate', in J. Burley (ed.), *Dworkin and His Critics* (Blackwell 2004) p. 319.

individuals to express their view on the content of the law and reasonably argue about the competing understandings of what is and ought to be the law.[67]

Seen in this way, law – going back to Dworkin – becomes a matter of argumentation and interpretation.[68] And one's human dignity lies in being treated by a norm-applying authority as an agent capable of explaining itself.[69] Thus, the law's 'dignitarian' aspect, in Waldron's own words, is that:

> it conceives of the people who live under it as bearers of reason and intelligence. They are thinkers who can grasp and grapple with the rationale of the way they are governed and relate it in complex but intelligible ways to their own view of the relation between their actions and purposes and the actions and purposes of the state.[70]

Judicial procedures structure opportunities for individuals to exercise reason and make arguments in their interactions with authority and among themselves. Therefore,

> [c]ourts, hearings and arguments [. . .] are integral parts of how law works; and they are indispensable to the package of law's respect for human agency. [. . .] what the Rule of Law rests upon [is] respect for the freedom and dignity of each person as an active intelligence.[71]

Under this reading, human dignity is conceptualised as a status or subjecthood recognised within a society's normative system;[72] a status that allows an individual to be an acting subject and express themselves and argue about the law as it applies to them; and to do so in a legal forum consisting of stable procedures. Hence, human dignity as a status appears as the 'right to argue about rights' or the 'right to claim rights'.[73]

[67]J. Waldron, 'The Rule of Law and the Importance of Procedure', *Working Paper No. 10-73, New York University School of Law Public Law & Legal Theory Research Paper Series* (2010) p. 1.

[68]R. Dworkin, 'Law as Interpretation', 60 *Texas Law Review* (1982) p. 527; R. Dworkin, *Law's Empire* (Harvard University Press 1986).

[69]Waldron, *supra* n. 67, p. 14.

[70]Ibid., p. 17.

[71]Ibid., p. 21-22.

[72]For an argument that human dignity is 'more compatible with the notion of status than with the notion of right', *see* Sourlas, *supra* n. 54, p. 42.

[73]*Cf* Joel Feinberg's take on the activity of 'claiming' one's rights, in J. Feinberg, 'The Nature and Value of Rights', 4 *The Journal of Value Inquiry* (1970) p. 243 at p. 252 ('what is called "human dignity" may simply be the recognizable capacity to assert claims [about rights]. To respect a person then, or to think of him as possessed of human dignity, simply is to think of him as a potential maker of claims').

Does the EU's concept of human dignity capture these proceduralist values as well? We believe so.

As we have already seen, the human dignity of every individual, including an alien, and the rights that stem from it exist in the EU's 'rulebook' and are to be enforced before the courts. But also, the EU as a community based on the rule of law acknowledges for every person the status of a moral agent and 'active intelligence' capable of arguing about the 'rulebook' that determines their presence and behaviour. Furthermore, EU law insists on legal procedures that allow every individual to exercise their subjectivity by asserting claims about the rights associated with this status, whether these are rights that EU citizens or non-EU citizens possess. And these claims are to be respectfully taken into consideration by administrative and adjudicative institutions of the Union and its member states. These institutions, conversely, ought not only to refrain during these proceedings from treating individuals superficially and bureaucratically as mere objects that can be disposed of. Rather, they ought to treat them as moral subjects who deserve to be given proper reasons and justification for any official exercise of authority over them. Again, all this applies equally to everyone, be it an EU citizen who claims social benefits from the host member state or a non-EU citizen who lodges an asylum application.

So far, we have offered a more *legal* reading of human dignity as the 'right to have rights' in EU law. But the previous discussion of dignity as a status also fits well into a *political* reading of human dignity which is somewhat truer to the original idea of the concept of the 'right to have rights', as was famously proposed by philosopher and political theorist Hannah Arendt in her book *The Origins of Totalitarianism*.[74]

In her work, Arendt discusses the causes of totalitarian regimes of the twentieth century, epitomised in concentration/internment camps such as Auschwitz and Dachau. These camps were the final solution for the unwanted – perceived as the 'scum of the Earth' – minorities, refugees, and stateless people, most often – after solutions such as repatriation or naturalisation failed miserably.

These people initially fled their home countries, of which they were political subjects and where they enjoyed pertaining rights, to seek refuge elsewhere. However, upon arrival in their host countries, they were not accepted as political subjects and hence had no rights that members of those communities possessed.[75] For these individuals, then, there was no law or state that provided for them – they were a legal anomaly, placed outside the pale of the law. As Arendt argues, for

[74]H. Arendt, *The Origins of Totalitarianism* (Harcourt Brace & Company 1979).

[75]Hence, allegedly universal and inalienable human rights 'proved to be unenforceable even in countries whose constitutions were based upon them – whenever people appeared who were no longer citizens of any sovereign state'. *See* ibid., p. 293.

them it was better to become criminals and thus enter within the pale of the law.[76] This way, they would benefit from some recognition by the state and the law, and would enjoy some rights, as any ordinary citizen who transgresses the law would. Otherwise, they would have no rights or legal recognition, so the only solution for them was the camps. As Arendt continues, 'the only practical substitute for a nonexistent homeland was an internment camp [. . .] this was the only "country" the world had to offer' them.[77]

In these camps, those interned were deprived of their humanness. They entered a place 'in which human life is reduced to bare life', thus becoming *homo sacer*, that is:

> a figure from the Roman criminal law, a guilty person who is put in a unique situation; he cannot be sacrificed, but if someone kills him, this will not be seen as homicide. *Homo sacer* is alive but he can be killed without any legal consequences by anyone at any time. He is alive but as good as dead, he is doomed to death, a living corpse. *Homo sacer* is a living representation of bare life. The sovereign is the one who decides when a man becomes a *homo sacer*.[78]

Therefore, as Arendt powerfully concludes in a paragraph that merits reproduction in full,

> [t]he calamity of the rightless is not that they are deprived of life, liberty, and the pursuit of happiness, or of equality before the law and freedom of opinion – formulas which were designed to solve problems within given communities – but that they no longer belong to any community whatsoever. Their plight is not that they are not equal before the law, but that no law exists for them [. . .] Not the loss of specific rights, then, but the loss of a community willing and able to guarantee any rights whatsoever, has been the calamity which has befallen ever-increasing numbers of people. Man, it turns out, can lose all so-called Rights of Man without losing his essential quality as man, his human dignity. Only the loss of a polity itself expels him from humanity.[79]

In this passage we find the purest *political* reading of Arendt's concept of the 'right to have rights':[80] Man can lose human rights without ceasing to be human, without losing his human dignity. By losing his political community, man loses

[76]Ibid., p. 286-287.

[77]Ibid., p. 284.

[78]Z. Kurelić, 'Telos of the Camp', 46 *Politička misao/Political Thought* (2009) p. 141 at p. 147.

[79]Arendt, *supra* n. 74, p. 295-296.

[80]For a contemporary discussion of the concept of human dignity as the central motive of Hannah Arendt's political philosophy, *see* J. Douglas Macready, 'Hannah Arendt and the Political Meaning of Human Dignity', 47 *Journal of Social Philosophy* (2016) p. 399; J. Douglas Macready, *Hannah Arendt and the Fragility of Human Dignity* (Lexington Books 2017).

human dignity and is completely thrown outside humanity. Man becomes *homo sacer*.

This is not a metaphysical or essentialist account of human dignity that hinges on an image of man as being God-created or equal in nature. Rather, it is a relational and political account of human dignity that conceives of a man as Aristotle's *zoon politikon*.[81] Arendt tried to understand human dignity as it emerges from and is conditional upon political experience. In this view, human dignity depends on political action:

> it is dependent on the assertion of dignity by its bearer and/or the recognition by the political community of which the bearer is a member or from which he/she seeks membership or asylum.[82]

Outside this political expression – individual assertion and the community's recognition and guarantee of protection – human dignity cannot and does not exist.

Seen as such, human dignity amounts to the right of every individual human being to have a place in the world, the right to keep belonging to humanity – 'the right to belong to a political community and never to be reduced to the status of stateless animality'.[83] And this is what is meant by the 'right to have rights'.

We should now reach back to our earlier discussion of the EU's concept of human dignity and ask if it can be given this *political* reading, as a proper Arendtian 'right to have rights'?

Perhaps unsurprisingly, we believe it can, and for both sides of this equation: for those who assert their human dignity and for those who (ought to) recognise it. Recall for a moment references to human dignity in EU law and the case law of the Court of Justice. Where they serve to establish material and procedural conditions for individual asylum seekers or irregular migrants to claim and have their rights enforced, they can be understood as a vehicle for those seeking asylum or basic protection to assert their human dignity in their host political community. At the same time, the EU's concept of human dignity strengthens the duty of the EU political community to acknowledge the dignity thereby asserted by asylum seekers and irregular migrants. When the EU or member states' institutions fail to recognise it, they negate these persons' 'right to have rights'.

Concluding remarks

Connecting abstract theories and ideas to the lived reality may be a starting point to some wider societal change. Because judicial arenas are less susceptible than

[81]Douglas Macready, *supra* n. 80, p. 414.
[82]Ibid., p. 399.
[83]Ibid., p. 411.

political ones to populist manipulation and attempted banalisation of human destinies, and given their institutional pedigree, courts (especially high courts) 'play[] a role in shaping and developing the binding normative framework' of their political community, at the same time contributing to the making of 'the overall rhetoric which is constitutive of the political culture of the polity'.[84] Judicial pronouncements on human dignity in migration law matter. They constitute an important part of internal discourse and attitudes towards the 'other' in Europe. What the courts are charting as the EU's way of treating the 'other' might even be a defining element of the EU's moral authority and its nascent political identity.[85]

In migration law, there is the perennial dilemma over whether treatment of the 'other' is a matter of charity or a matter of justice. This dilemma is colourfully presented by Slovenian critical philosopher Slavoj Žižek:

> There is a distinct difference between charity and justice, not just empirically [but] even theoretically. In Europe that is the problem with refugees now. We are moralising it. We are changing this into a problem of charity. So that we are like: 'How good we are . . . ' No, it should be a matter of justice. [. . .] Some journalist asked me: 'So you feel charity, empathy? Would you like to receive some refugees in your apartment?' I said: 'No, I hate them. But it is not a matter of me liking them. It is [a matter of] justice. I have to do it'.[86]

In other words: is the tolerance and good treatment of migrants we offer in the EU – when we do offer it – because 'we are good' or because 'we must'?

A much too common response of our times would be that international and national migration, refugee and asylum policies are best understood as a matter of charity.[87] The correlative of our 'charity' would then be a weaker notion of the 'rights' of asylum seekers and irregular migrants.

But enter human dignity, and the dilemma is reframed into a matter of justice.[88] As Sourlas reminds us, '[i]n law, our main concern is justice. Transgressing human

[84]Weiler, *supra* n. 30, p. 69.

[85]Ibid., p. 65-67.

[86]S. Žižek, PBS interview with Tavis Smiley (October 2015).

[87]*Cf* G. Loescher, *Beyond Charity. International Cooperation and the Global Refugee Crisis* (Oxford University Press 1993).

[88]Some moral philosophers work with a much stricter notion of charity, notably the ideal of Christian 'charity' as a virtue that is more akin to 'love' and has not much to do with the predominant usage of the term in contemporary philosophy. Such a notion of 'charity' is mandatory and absolute and thus arguably even stronger than 'justice'. It goes beyond 'rights' in the treatment of the 'other' and concern for their wellbeing. *See* R. Hursthouse, 'Human Dignity and Charity', in J. Malpas and N. Lickiss (eds.), *Perspectives on Human Dignity: A Conversation* (Springer 2007) p. 59.

dignity is the most flagrant form of injustice'.[89] So, when the human dignity of a fellow human being is violated, we are not just failing ourselves, our virtuous and charitable manners, we are failing the requirements of justice. And to honour justice, the way in which we treat the alien and respect their human dignity must be conceived as a duty. A stronger notion of 'rights' of the alien would then correlate to our duty.

Having a deontological rather than consequentialist underpinning, the concept of human dignity as it stems from the jurisprudence of the Court of Justice makes this point clear: the way the Union and its member states treat asylum seekers and irregular migrants is not a gesture of charity. Their human dignity (and corresponding rights) is not something generously bestowed upon them. On the contrary, their human dignity is founded in justice. And our duty is to respect it.

If only the Union's political institutions and its member states would demonstrate the same enthusiasm.

[89]Sourlas, *supra* n. 54, p. 45.

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