How *dignity* was introduced into the law and what *dignity* contributed to the law

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Abstract

The exact content of the relation between dignity and law has not been fully clarified yet. We only know that, although it has been used since antiquity, the notion entered international legislation and national constitutions only after WWII. Since then, the law uses the term, but it does not define it. Under the circumstances, can we talk about a legal concept? Is dignity a means or a purpose to law? Which is its relation with the fundamental human rights? Is it a right among others, or a basic ground for all of them? Here are a few questions to which the present article is trying to provide some answers…

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It is remarkable how the good old notion of „dignity" entered the realm of law: hardly through the advent of the human rights, as we are inclined to believe, but two centuries later, through the gate opened by the barbarity of the two world conflagrations that splattered blood over the first half of the 20th Century on an unprecedented scale.

Hence the acquaintance of *dignity* with the law was not the result of a deliberate project, the conclusion of the meeting of several enlightened minds that understood the need for the concept to be transferred into the regulatory area. Instead it was prompted by dramatic events that crippled the human being in a forthright shaking manner, on a wide scale. In other words, human dignity needed to be massively mutilated in order to remind us of its existence.

However, the fact in itself is not surprising. In truth, no fundamental institution of a state founded on the rule of law – or the rule-of-law state itself – was ever born out of a project or a vision but „in the midst of the storm" and „civil discord", as Alexis de Tocqueville[2] put it. The struggle between the King and the Parliament that unfolded with the death of Elisabeth I and the economic policies pursued by the Stuarts led to the first great articulation of the „freedom of the subjects" principle and of that of the equality of the citizens before the law. With the abolition of the hateful *Star Chamber* in 1641, it was the first attempt to establish the independence of judges, whereas the need to restrain the arbitrary use of power by the Parliament caused the American colonists to draw up the first written Constitution. The great debates of the 17th and 18th Centuries on various notions such as *freedom, the supremacy of the law, equality, the rule-of-law state, the separation of powers, the social contract* and so on were held within the

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[2] quoted by Friederich A. Hayek, *The Constitution of Liberty,* the European Institute, Iaşi, 1998, p. 77.

context of the Civil War, of the Glorious Revolution and of the French Revolution. And on those occasions however when there was an attempt to put rationalist, plausible and seemingly logical theses into practice – and we refer here to the French and the Bolshevik Revolution – the failure was as spectacular as it was lamentable and at such a dear price[3].

As we have mentioned before, what is remarkable about this encounter between dignity and law is therefore not the context in which it occurred but the *lateness of its timing*[4], considering that the historic „ferment" had been right there all along, as had been the opportunities. Any serious analysis should take into account the fact that human dignity, as we understand it today, has been systematically violated - if not virtually trampled upon - in the course of history. Slavery, serfage, colonialism, unimaginable tortures, homicidal shows, sacrifice ceremonies – the human history (*sic!*) abounds in such instances where the human being was nothing more - for their own peers! - than just a work tool, a tool of mockery or a device used to test the sufference. And we do not refer here to obscure, occasional cases or situations that happened in a particular setting, but to *institutionalized and collectively accepted structures*!

Only one instance was missing from this gruesome panoply: that of the human being used as an *experimental subject* of scientific research. This is, frankly speaking, the episode newly opened by the Second World War (opened, but not yet closed – a caveat to those entertaining the illusion that such horrors are framed in the past tense!) But basically no one can say without blushing that until Hitler or Stalin came to power human *dignity* had been respected! What we *may* say is rather that the holocaust experience was „the last straw" or that it occurred at a time when humanity had just started to deny – at least officially – its bloody and oppressive past.

As a matter of fact, the surprising thing is that *dignity* is not invoked in any of such regulatory acts - a sign that the past is „discarded"! Let us not forget that, at that time, the Fundamental Declaration of Human Rights in France, the Bill of Rights in the United States and the Slavery Abolition Act in the United Kingdom had been adopted for over a century!

It really seems strange that a notion with a philosophical backbone that goes such a way back in history might be so utterly ignored both in the classic human rights declarations - of the 18th Century - and in the 19th Century codifications. No terminological association, no community of meaning, not even the slightest connection was established by the lawmakers of the time between the two terms – *human rights* (young and freshly conceived at the time) and *dignity*. An association that today is almost "intuitively" imperative, beyond all evidence or „philosophy", is just absent from the vision of our honorable ancestors. *Freedom*, *equality* before the law and the *natural law* are the conceptual grounds pur forth by the authors of the celebrated documents. No reference though to *dignity*.

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[3] Friederich A. Hayek, *op. cit*, pp. 186-187.

[4] Jurgen Habermas, quoted by Marius Dumitru Linte in *On dignity in law and more*, „Pandectele Române", no. 6/June 2011, pp. 111-112.

The mystery behind this striking deficiency is revealed and the fact is fully explained once we cast a glance backwards and follow – generically and briefly, without going into details that are outside the subject matter of our survey - the genealogy and evolution of the notion of *dignity* within the historical realm of what we have commonly come to identify as the „Western civilization".

The notion of *dignity* essentially entered Western tradition through the secular medium of the Latin authors, whose influence largely replaced that of the Greeks during the 17th Century. Indeed, ancient Greece doesn't even appear to have used a corresponding term for what we call *dignity* today. Virtue and value *(arete),* honor *(time),* reputation *(doxa)* and glory *(kleos)* were however important ethical and political notions, based on a significance was much similar to that of the Latin notion of *dignitas*[5].

The Latin notion of *dignitas* basically referred to *value,* as an attribute undoubtedly attached to the human being. And not just any value, but value associated to some form of public recognition – either as the dignity conferred by the filling in of a public office, or as an aristocratic attribute of the *happy few* (patricians or „optimates"), or, finally, as an accomplishment, the attainment of human excellence in a certain field, through the development of an ability or personal disposition[6].

In other words, *dignitas,* far from embodying the universalist ideal of the human rights, designated – on the contrary – a highly elitist virtue, specifically meant to *distinguish* between the happy owner and the shapeless mass of „the many". Therefore, this is why the illustrious lawmakers of the 18th Century did not understand to establish any correlation between the notion of „dignity" and that of „civil rights": simply because at that time it did not call forth a universal value, intrinsic to the human being, but just the opposite, namely an elitist appanage whose only function was to bring to mind obsolete perquisites that the *rights* set out to abolish.

The same reason – that would have been anyway sustained by the reserve typical to the „Age of Enlightenment" over the Christian heritage – also precluded such heritage from being availed of. Although it comes up with one of the most complex interpretations of dignity, as we understand it today (an interpretation which is however either subject to mystification by an excessively politicized Church – in the Catholic realm – or kept aloof from the public debate space by the discreet but highly tried Orthodox Church), in the Middle Ages the Christianism itself did not make use of the proper notion, based on the same consideration of terminological inaccuracy[7].

In fact, the significance that we attach today to the term comes from Kant. He is the one who, in his *„Metaphysics of morals",* is interpreting *dignitas* in a

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[5] Jack Donelly – *Human Dignity and Human Rights,* University of Denver, 2009; the document is available on-line at: http://www.udhr60.ch/report/donnelly-HumanDignity_0609.pdf; last visit: 5 May 2012.

[6] Jack Donelly, *op. cit.*

[7] The new *Catechism of the Catholic Church* makes explicit reference to *human dignity,* built on the creation of man *„in the image and likeness of God".* But such *Catechism* was drawn up in 1992 and published for the first time in 1995, therefore long *after dignity* had been incorporated in the international treaties!

universalist vein. For Kant, dignity is the absolute value inherent to the human being, by virtue of which the human being is entitled to demand *respect* from the others and is obligated, in turn, to give it. Therefore, people are bound to one another by a *bond of respect*. „Act in such a way that you always treat humanity – whether in your own person or in the person of any other – as an end in itself and never simply as a means", or „Be no man's lackey!" – are just some of the urgings by means of which the Konigsberg philosopher further attempted to illustrate and develop the notion of respect. And it is again Kant who places dignity, as a value that is intrinsic to the human being, at the foundation of their civil and political rights[8].

The reason why *dignity* in the acception of Kant was not assimilated by the lawmakers of the time is because the famous philosopher designed his theories of dignity and freedom almost concomitantly with the period when the first human rights practices were being implemented by the American and French Revolutions[9]. More than one century and two world conflagrations had to pass in order for the term with its new connotation to be assimilated by the social theories, to then penetrate the collective mind and finally to be incorporated into the body of national and international regulations.

The logical question following from this brief historical excursus is: are we to understand that up until Kant there was no other term, no similar notion (other than *dignitas*) to designate the concept of the *intrinsic value*, unconditioned by merit or birth, *of the human being*? It is a question that only a linguistic or philosophy scientist might venture to answer in a thorough and absolute sense. Nevertheless, as regards the legal terminology employed by the authors of the first human rights declarations (or, to be more precise, the terminology used prior to the Universal Declaration of Human Rights adopted in 1948 – the legal text that references for the first time „dignity" among the fundamental values of human rights), we are able to identify a matching term for *dignity* in what those texts refer to as *natural rights*.

The scope and purpose of this work do not allow for an in-depth excursion into the evolution of the *natural law* doctrine, whose origins are buried deep in time. By opposing the *natural rights* to the divine right of kings, the Enlightenment thinkers did nothing more but resurrect the tradition generated by the Roman Republic. Tacitus and, first of all, Cicero are the authors who disseminated the tradition during the Latin Renaissance of the 17th Century, although the partenity of the idea of equality of the people and divine/natural justice is due to the Stoics, whereas some voices attribute it even to Aristotle[10]. Still more interesting is the fact that, as the natural law theories came to be acutely (re)formulated, as we have said, within the effervescent context of the Enlightenment, the *natural law* concepts had already been "assimilated with tenacity by the English common law through the entire Catholic Middle Ages, thanks especially to the influence of Henry de

[8] Jack Donnely, *op. cit.*
[9] Ibidem.
[10] http://en.wikipedia.org/wiki/Natural_law last visit: 5 May 2012.

Bracton (d. 1268 - a/n) and Sir John Fortescue (d. cir. 1476 - a/n)"[11]. And yet, among these concepts, as we shall see, is the equality before the law or the primacy of the law over the prince. In the midst of the Feudal Age, such ideas could easily be perceived as radical, if not outright... *outrageous* !

The *natural rights* that are referenced in most of the important regulatory texts on human rights of the 17th and 18th Centuries stem, in their turn, from the *natural law* doctrine. But what are, in essence, the postulates of such doctrine and how do they differ from the concept of *dignity* which, two centuries later, was going to replace that of *natural rights* in all of the international papers on human rights?

The *natural law* affirms the existence of an order of human relations that is superior, fair and valid in absolute terms and that originates from the divine or the "natural" order. The *natural law* does not overlap with – on the contrary, it often opposes – the *positive law* seen as a human product, frequently meant to support party interests. The latter varies from one community to another, while the former remains immutable, the same in every place, since it is derived from divine justice, from its profound rationality and naturalness. *The positive law* divides and classifies human beings and shows an irrepressible propensity for hierarchization and asymmetry in the relationships among them; the *natural law*, on the other hand, asserts that, in their essence, people are equal and independent and before God, both the slave and the prince are held to account according to the same rules. Finally, *natural law* supports *natural rights*, as an inalienable heritage of each individual. We are talking about the right to „freedom, ownership, security and defence against oppression", and „the right to life and the right to pursue and obtain happiness".

The reference to *natural rights* is absent from the Universal Declaration of Human Rights adopted in 1948. It is replaced by the phrase *fundamental rights* and supplemented by the notions of *dignity* and *value* – as attributes of the human being.

Ergo what is the difference? What new elements are brought by – or what elements are missing from – the notion of *dignity*?

As we have seen, both *dignity* (in the Kantian conception), and *natural law* take their significance from the fact that they support an *intrinsic, a-priori value* of the human being. However, while in respect of *natural law*, such value is invoked as a mere *legitimation* of the social order it asserts (and, therefore, of the fundamental rights as an integral part of such order), *dignity*, on the other hand, is not satisfied with only that: for it, the existential value of the human being is not just a *justification* of the fundamental rights but, moreover, it entitles the owner – meaning us all – to *respect*. And in point of fact, *respect* is not a mere argument, it is an *obligation* ! I am respectable, hence the others need to respect me. And in my turn, I respect them, because they too, as human beings, are respectable. How is

[11] Charles Howard McIllain, *Constitutionalism: Ancient and Modern*, rev. ed. (Ithaca, N.Y.: Great Seal Books, Cornell University Press, 1958; org. 1947), p. 71-89, quoted by http://en.wikipedia.org/wiki/Natural_law#cite_note-45

this binding *mutual respect* put into practice? Through the protection bestowed on me by the fundamental rights, through honoring and respecting the fundamental rights of the other and, finally, though the way I exercise such rights. *Respect* is, therefore, at the core of the fundamental rights which are, in turn, the tool by means of which respect is put into practice and realized. In other words, *dignity* built on *respect* is, at the same time – unlike *natural law* – both the *grounds* and the *purpose* of the fundamental rights. Thus *dignity* becomes, alongside *freedom*, the second target of the rights – since it is these two notions that eventually define the *economic and social purpose* for which the fundamental rights of every human being were established.

To the mind of any lawyer familiar with the principles that underlie the exercise of the subjective rights, such difference of status entails an array of tangible consequences - hence, of overwhelming importance. And the reason is that, as any law graduate is aware, the *economic and social purpose* for which a right is established is not a mere rhetoric of law but rather one of the main instruments to assess the *lawful exercise* of such right, since it demarcates, along with *good-faith*, the *internal limits* of the respective right. But it is precisely the exercise of any subjective right within the boundaries of the external limits but outside the boundaries of the internal limits that is construed as an *abuse of right* and is prohibited and sanctioned by the law!

Let us briefly resume the *abuse of right* theory: in order to be legitimate, the exercise of a right has to cumulatively meet the following conditions: 1) according to the content of the right, as established by the legal text regulating it (the *external limit* of the right); 2) to *good-faith* and, finally, 3) according to the *economic and social purpose* for which the respective right was established by the lawmaker (the last two conditions representing the *internal limits* of the right). The exercise of the right within the boundaries set out by the legal text (within the *external limits*, therefore), but outside the *internal* boundaries (that is, without good-faith or contrary to the economic and social purpose for which the right was established) is an *abuse of right*, and is prohibited[12].

For this reason, the encounter between *dignity* and *law* – or, more specifically, the reference made for the first time in history, in the Universal Declaration of Human Rights of 1948, to *dignity* alongside *freedom*, as a foundation-value for such rights – generates by far more consequences than we would be inclined to believe! And this is because the supplementation of the list of defining values for the purpose of the rights means *the interpretation of such purpose in a more restrictive vein* and, therefore, *the compression of the internal limits*. But specifically by restraining the area of the *internal limits*, the intermediary area – assigned to the *abuse of right* - is automatically extended. In other words, once *dignity* is incorporated into the law, the risk of committing an *abuse of right* in the exercise of the fundamental rights is increasing! And the reason is that, from now on, the exercise of the rights should *also* take into account

[12] see also Gabriel Boroi, *Civil Law, General Part, Persons*. All Beck Publishing House, Bucharest, 2002, p. 65.

the respect we owe to one another, not only the need to act without restraints. It is very unlikely that such change will be without effect on judicial practice![13]

We now need to quantify *the extent* of such effect. The answer to that determination depends on the maner in which the notion of *dignity* is defined. And also on the manner of *interpreting* such definition! Because we have on our hands a term that is precise enough to lend itself to a definition with practical consequences but, at the same time, imprecise – or rather *subjective* – enough to be deprived of a univocal definition that would not be liable to intepretation. And because there simply is no legal definition.

As regards the attempts of the legal doctrine to shape a definition and the difficulty that any such action is inevitably faced with – these issues will be addressed in a future article...

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[13] Let us take for example the freedom of expression (Art. 18 of the *Declaration*). It might be that, until 1948 and by virtue of such freedom of expression, nothing would have prevented me from editing a gossip tabloid focused on commenting, in a more or less derogatory manner, the figure, nose, wrinkles, „stupidity" or the taste in clothing of public figures. Well, since 1948 things have changed. And yes, judges may really step in! Why don't they? We don't know. The important thing is that they might anytime!