International Association for the Defence of Religious Liberty

Conscience and Liberty

Special Edition
Volume I

WORLDWIDE HUMAN RIGHTS
AND
RELIGIOUS LIBERTY
A NEW EQUILIBRIUM
OR NEW CHALLENGES

Two anniversaries:

313-2013 - 1700 years since the Edict of Milan
1948-2013 - 65 years of the journal C & L

Bern, Switzerland
Dignity linked to religious freedom

José Miguel Serrano Ruiz-Calderón

1 Dignity and common custom

As we have previously discussed, dignity is the fundamental topic in the bioethical debate. The "Strasbourg Convention for the Protection of Human Rights and Human Dignity" makes special reference to human dignity. Through this reference the Law recognizes the sanctity of human life. This concept stems from a basic intuition and from a tradition, without which basic elements of our social structure would be left without support. That is, we understand that the concept of dignity is complex and has its specific history. This recognition of human dignity flourishes in the context of Western civilization, although we believe it can spread to other areas and, in this regard, would lead to universal concepts. In what we may call our common tradition, we encounter the confluence of classical Greco-Roman thinking, Christianity and democratic development that have illuminated the discernment of human dignity. Paradoxically, we can say that Western society has produced major political systems which have most harshly violated human dignity, as in the case of totalitarianism that originated in the West, though some of its most enduring effects were certainly experienced in the East.

It also seems clear that the very concept of dignity is itself at risk due to the specific developments within the Western tradition. Where once this threat was Totalitarianism, a typically Western phenomenon, nowadays it has been replaced by Scientism.

In conclusion we can affirm that one of our main problems is explaining how a concept that finds its explanation in a very specific tradition and that by

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59 The Convention for the Protection of Human Rights and the Dignity of the Human Being with regard to the application of biology and medicine, or Convention on Human Rights and Biomedicine was adopted on 19 November 1996 by the Committee of Ministers of the Council of Europe and opened for signature on 4 April 1997.
to religious freedom

Enriqueta Ruiz-Calderon

1.1 Genesis in Common good

It is well known that not all civilizations place human dignity at the center of their value system. Therefore the concept of dignity that appears in the Declarations of Human Rights from postwar constitutions, has had an arduous genesis to arrive at the concept that links to what the legal philosopher John Finnis has named the common good. The idea is for humankind to experience equal dignity, this implies equal rights and the same protection of fundamental rights. The thesis we support is the regard for dignity that appears in the radical definitions, is totally different from the center ground that we have defined to the point of characterizing it.

In this way the evolution of the concept of dignity is a paradox with regard to its starting point. Indeed, at this auspicious moment in history, it serves to justify equal dignity, however, its starting point is clearly anti-equality since what is different is worthy, what is excellent, that which is not possessed by all.

1.2 External circumstances

According to the American author Leon Kass, this paradox does not stand alone. The concept of dignity, for example, includes two meanings that are diametrically opposed. One regarding external circumstances or the behavior of others, the other regarding the subject's response to this great challenge in their life. In a sense, martyrdom is radically undignified and yet, the discourse on the dignity of mankind has been consistently referred to as how we face up to this final challenge.

Originally the adjective of dignity appears linked to that which has special nobility, usually derived from strength or superiority. There are dignified and undignified animals, in certain religious traditions and within our culture in general. In this sense certain food prohibitions are linked to the "unworthy" character of the animal in question; reinterpreting them from the topic of health, if you like from the "religion of health" is a peculiar anomalism.

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In regard to mankind, dignity was linked to certain roles as in military and priestly ones but not in others. Another example of these distinctions is found in Cicero’s theoretical evolution view; he considered that the adjective of dignity referred to the special value of mankind in relation to the animal kingdom\textsuperscript{62}.

Within law, the main purpose of dignity was linked to the behavior required of a person or role. In certain societies, undignified behavior that did not correspond to this role had a penalty. To complicate matters furthermore, in some societies certain types of behavior were considered shameful by the law. Think of aristocratic society for instance and even some bourgeois societies - the act of something legally irreproachable or rather legally obliged, such as refusing a duel.

We conclude therefore, that in order for modifications to be made to the concept of dignity the most important step to take is in its application to the value of human beings. This undoubtedly occurs in Christianity. Thomas Aquinas exemplifies that humanity is unique when asking theoretically why people use the term ‘person’ to refer to mankind he suggests that this indicates the special dignity of the term “person”\textsuperscript{63}.

The reference to dignity, is not of course, only related to religious thought; in fact the equal dignity of human beings can be found in the Universal Declaration of Human Rights, on which, with certain optimism, it was hoped to establish the postwar order of things.

With reference to both of its modern meanings - equally the sacred value of human life and the acceptance of Kantian ethics of man as a legislator - dignity refers to that which is beyond worth. Mankind’s value is beyond measure. As Kant notes, in his “kingdom of ends” “everything has a price or its due worth; that which is beyond any price is dignified, it is beyond comparison”\textsuperscript{64}.” Dignity is an end in itself”.

The legal innovation of our times lies in defining absolute dignity, not a quantitative measure of it. This is expressed by what the law stipulates as “fun-


\textsuperscript{63} See Thomas Aquinas, Summae Theologicae, Prima pars: General morality, God, Creation, Quest. 29, art. 1, art. 2, sol. and ad 1, art. 3, vol. 2 ad. 3 Digital Edition: Librairie Editions du Cerf, 1999.

\textsuperscript{64} E. Kant, Grundwerk of the Metaphysics of Morals, trans. V. Delbou, http://classiques.uspc.ca/classiques/kant_emmanuel/fondements_meta_moeurs/fondements.html
HUMAN DIGNITY LINKED TO RELIGIOUS LIBERTY

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This ultimate truth about dignity has also been referred to as the sacredness of human life and is present in the so-called religious argument, as defined by the German philosopher Spemann. From his perspective, being religious is not about any particular religion, it is about "Why one is religious?" As the argument can only be comprehended when mankind discovers something that is sacred. That which is sacred is beyond measure, it cannot be proved or functionally derived, it is good understood as an absolute teaching.66

In his appearance before the Spanish Senate Committee for the study of euthanasia [which he held from September 1998 to November 1999, translator's note]; the Professor of Theology Eudald Forment affirmed the difference that exists between: dignity of life and personal dignity; and how dangerous it is when the latter depends upon the first. Indeed this dependence prevents the equal dignity of all people and undermines the basis of fundamental rights. The metaphysical position explains that one is in fact always a person never in power, always an actual person and always a person to the same degree.66

The metaphysical meaning of a person allows us to avoid the modern day danger of ranking a person on any scale, which on the contrary is what occurs when we base the formal constituent of a person on their qualities. If we used the example of good health, the person that had better health would be considered superior, while the person with worse health would be inferior; in some cases it could even lower the threshold to a question of personality, for example when referring to the case of those who are dying.

The personal status based on the right to life that remains intact even in the moments of greatest impairment in the right to life. The concept of ontological dignity supports, in turn, that of ethical dignity and takes us back to the problem of freedom and volition. The discrepancy occurs between those who defend the dignity of every human being and those who argue, for example, that if someone asks to die they should be given that right.

We therefore observe the possible effects of a definition of dignity that can turn against those who fail to fully comply with certain parameters. We

66 Eudald Forment, Testimony before the Senate Committee on Euthanasia, Senado-Comission, 26 October 1999, no. 502, p 2-3.
think of what happened to certain definitions of "good life" in the past; such is the case of Aristotle, so successful in other fields. Aristotle in fact, refused the definition of good life for women and slaves, and this was probably true from the perspective of the social conditions endured by some groups during almost all ages. This description can be used in two ways, critically to show its inconsistency and deal with slavery or prevent discrimination against women, but also uncritically - precisely to prove these prejudices. The same can happen with the deconstruction of the concept of dignity.

For example, the Italian bioethicist, Singer, as well as other authors such as Alberto Giubilini and Francesca Minerva, link dignity, or if you prefer, it's subjective right, to the possession of rational autonomy and the ability to perceive unpleasant sensations.67 Indeed, a new example of this use of the "scientific debate" for cultural reversion, which would take us to the era of the wide expanse of infanticide, has occurred in the Journal of Medical Ethics. In an article by Alberto Giubilini and Francesca Minerva, After birth abortion: Why Should the baby live?68, sustaining that the reasons for abortion, not only eugenic, should be extended to infanticide for a period varying from the purely eugenic reasons to immediate detection of "neonatal deficiency". Otherwise granting the parents a term to evaluate the other causes, usually related to the parents own convenience, that are to be considered.

The authors do not consider themselves to be radical; they quickly make clear that they would prefer early abortion, but they are making a proposal on the basis of medical ethics, less frequently referred to in other cases.

The article rounds up the type of the complacent bioethics denounced by Kass, starting with the game of euphemisms. They prefer to call infanticide "postnatal abortion", but do not clarify the obvious fact with any critical application of ethics. The main reason for the euphemism is to conceal the act.

The editor of the magazine, Julian Savulescu, tried to convert the infanticide proposition case into a case of inmoderate reaction towards the "academic discussion". I'm afraid it is very difficult to give this argument any credibility.

It is not true that magazines such as the aforementioned support any argument presented in an academic way. In fact, a review of the positions on

67 At this point consult the article of Adrano Pessina "Se questa è una persona", in Osservatore Romano, 22-03-2012.

68 After-birth abortion: why should the baby live? Journal of medical ethics, from 23/02/2012; http://jme.oxfordjournals.org/content/early/2012/03/01/jme ethics-2011-100411.full
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abortion or euthanasia of large bioethical establishment journals proves that his position is biased. There are not, for example, a significant number of items differing from the main view of favoring the death of people in a persistent vegetative state by means of dehydration. That is to say, the magazine considered it plausible to argue in favor of infanticide, within medical ethics, as one step further in the already accepted argument.

The already accepted argument is that abortion for any reason (with some moralist exceptions concerning sex selection) and neonatal euthanasia are acceptable from the position of medical ethics. The proposition of the article, for which the authors are responsible but also the journal that evaluates and suggests it, is that infanticide should be allowed in any case in which abortion is permitted, i.e. in all cases.

Besides the sophisticated system to convince us that the protection of a living human being is only valid when the person is included in the arbitrary proposition of the authors, the article is very revealing about the consequences of abortion as a means of absolute control of a strong will over a human being in a position of weakness. This leads him to the conclusion, for example, that men found in a phase of serious deterioration do not differ much from disabled infants (referring to those who support the neonatal euthanasia). Both groups of people have no self-consciousness, neither are rational or independent; thus considerations about the right to life and respect for autonomy would not apply to them. In the words of Singer, even if they are alive biologically, they are not so biographically.

As noted before, the fundamental problem is in introducing a quantitative criterion that is usually defined as qualitative in the definition of dignity. In history quantitative criterion has certainly been the most used. This criterion allows one to define subjects with more dignity and less dignity, resulting in a scale of men according to their qualities, a scale that has been created according to the criteria in force at each era of history. In fact, historically having this process allowed for such descriptions of the subject of social order that lacked dignity along with others who were less worthy. This approach has not been used precisely for the benefit of those defined as “unworthy” and there is no reason to think that this constant historical will not repeat itself in the future.

Along these lines, it could be considered that dignity is a cultural mat-

ter, understood as relative, and not essential to the human person, although it

would be necessary to make clear the meaning of "not essential". Those who think this way express that dignity is an arbitrary allocation. The basis of this consideration is a biological thought. Thereby the former member of the Ethics Committee of Spain claimed: dignity is not an essential element for human beings, but is a cultural attribute that we have given to ourselves.\footnote{"Personally I do not think that dignity is essential to humans, but a cultural attribute that we have given ourselves since we have the natural capacity to produce this series of judgements. Because if dignity were intrinsic, it would have to be of genetic origin, and if it did, it would have to bear the genetic responsibility - not to mention the burden - of all beings who have preceded us, including the reptiles themselves." Marcelo Palacios, Testimony before the Senate Committee on Euthanasia, Senado - comisión, 8 de abril de 1999, p 23. http://www.ffd.upm.es/archivos/legales/marcelopalacios.pdf?phpMyAdmin=f1e07c20b-1b35a0e62b1285d9038}

2. Dignity and Law

2.1 Acknowledgement of dignity

Human dignity as a legal concept received its most important acknowledgment in the constitutions enacted after the Second World War, especially by the defeated powers. It also appears specifically in the Spanish Constitution of 1978 which could be considered a post-war constitution. To a large extent it is the ultimate realization of a concept that is grounded in our legal tradition. It has thus been argued that the Spanish legal custom is centered on recognition of the dignity and centrality of it in social life. Both concepts would derive from scholastic philosophy. The \textit{Laws of the Indies}, a maximum practical representation of the Second Scholastic would be a clear example of the concern for the dignity of the person, inheriting a tradition which goes back to medieval charters, the basis for many of the individual freedoms\footnote{See for example Alfonso García Valdecasas, El hidalgo y el honor. The gentleman and the honor. Biblioteca Contemporánea. Madrid, 1998.}.

In the current legislation, the dignity of the person is the focus of management based on the Universal Declaration of Human Rights and the European Convention, and of course on the standards required by the EU itself and NATO.

2.2 Dignity in the statements of Rights

However, the plurality of conceptions collected by the statements lead us to affirm that John Foster Dulles, U.S. Secretary of State, was right when the Universal Declaration was drafted, when considering that the Declaration was a...
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crucial achievement of democracy over the totalitarian states or those who were
on their sustained march toward totalitarianism.
But after more than sixty years after the Universal Declaration was is-
ssued, it is appropriate to ask ourselves whether we have succeeded in meeting its
fundamental objective that, from my point of view, was to avoid the state tem-
tation to set filters for personal condition and recognition of the fundamental
ights. It is commonly said that it was desired to avoid the arbitrary use of that
capacity; I think that the key would more likely be in the statement of a reality
that all states admit, which determines all discrimination as arbitrary.

2.3 Sub-division of human life
Undoubtedly, after decolonization, the new push against slavery, recognition
women’s equality and overcoming the totalitarian regimes in Central and
Eastern Europe, we have advanced in the process of extending the defense of dig-
ity; however, discrimination between human beings has returned by the path of
the temporary sub-division of pre-natal life. In this way and along with abortion, a
decrease is made possible by the combination of assisted reproduction and regen-
erative medicine. It is this process that, according to José Luis Requero\textsuperscript{22}, produces
the effect of legal sub-division of human life. The beginning of the process, as the
author states, is given in the judgment of the Constitutional Court 53/85 and
it is definitely expressed in 14/2006, where through the acceptance of the term
pre-embryo the sub-division is radicalized. As Requero says, “If the unborn child
is the holder of his/her right to life, but life as embodied in its evolutionary
stage puts him/her at a lower level – this is a constitutionally protected legal right
-, for the fetus the fate of the egg is more problematic. The level of protection
drops further with the introduction of the pre-embryo: the Constitutional Court
understands that acts contrary to the dignity of the human person cannot be taken
away from the embryo and its fate.”\textsuperscript{23}

In the analysis of constitutional jurisprudence, Andres Ollero was es-
especially acute when analyzing the handling process that the embryo suffers \textit{in vitro}. As he states, referring to the STC 212/1996: “Following the life’s earlier

\textsuperscript{20} “Reality is harsh and it can be summed up in a statement that I have already put forward: let us just
say, between you and me, that the legal status of the unborn child is highly precarious. Since the crime
of abortion was decriminalized 20 years ago, in three countries, thanks to the classification system ...” - J. L.
Requero, “Derecho a la vida y vida embrionaria”, Right to life and embryonic life, \textit{Perspectiva y Vida}, 54,

\textsuperscript{22} Idem. p 219.
state as a continuum, it begins to subdivide... The continuum has disappeared. We do not find ourselves before a legal right - human being or vital subject destined to become a person - rights holder - in the absence an action... What we should now put to the vote is whether it is permissible to fabricate human beings or even if it is permissible to fabricate people.74

The crux is apparently in the differentiation between a person and human individuals, part of which contemporary thought uses to dismantle the strongest effects of the 1948 proposal. On this differentiation the Italian philosopher Sergio Cotra already warned us when he said: "It can be concluded on the debated issue: above philosophical differences, the most serious and constant theoretical speculation agrees in stating the real identity of the person and of the human individual. The true watershed in this common tradition exists between the thinkers who see the person as a participant in the divine transcendence, or open to transcendence or in connection with the self; and those who, on the contrary, consider it settled in immanence. In none of these currents can the widespread modern opposition between person and individual be easily found. The person is the human individual. This precise meaning is shown here by using the term."75

The distinction between person and human individual occurred in regard to prenatal life, from the complete acceptance of the concept of pre-embryo in the Warnock report,76 though this was later abandoned, therefore achieving the intent to devalue its worth.

The threat to the philosophical and legal concept of "person" is therefore the application of this term, in a restrictive way, which is used only for the fully developed person or the person who lives in "fully dignified conditions." This allows, for example, the destruction of surplus embryos within the assisted reproductive technique or the use of these for experimental purposes or for tissue and cell procurement, allegedly used for curing certain diseases. This route is worrying because there is a constantly growing category of members of the hu-


human race whose life is not protected and because the arguments that are used to prove the value of a "semi-dignified" life are increasingly trivial.

2.4 Dignity in the Spanish Constitution

Regarding the concept of dignity in the Spanish Constitution, Jesús González Pérez held a naturalist perception. For this author, Article 10.1 of the text to which we refer is the consecration of the person and his dignity as a guiding principle of the legal order. As Hernández Gil indicated at the time, this is not only about a specific legal provision, but outwardly shows how the constituent understands the foundation of the legal order and social peace. This would obviously link the Spanish constituent, as previously the German or Italian, to a concept of natural law which is the base for dignity and recognizes its true meaning. Obviously this does not mean that the Constitution hosts a particular school or has what you might call a finished design. We can conclude that, as in the majority of the founding positions of the fundamental rights, such as the American founding fathers, the basis of the legislation is the recognition of pre-existing rights, not in the sense of rights prior to the political community, but rights recognized by the community in its constitution. It is a given term, not one that is built.

As indicated in an opposite view by Nicolás Gómez Díaz: “The first revolution flared up when it occurred to some fool that rights could be invented.” This reading has been described as naïve and subject to revision by positivist schools that have dominated in recent years. It is interesting to note that whatever is meant by dignity, once it is formalized, is not appropriate to give it a meaning that mainly satisfies the rebuilders of this concept. This is what happens to most defenders of the radical agenda. They are truly consistent when they insist that the concept of equal dignity, which is what legislation provides, is meaningless. At the same time they re-interpret the concept depriving it of a definite sense. Dignity cannot be what occurs to the legislator, to the constitutional interpreter or to the doctrine, depending on the specific agenda of the moment. If so, it would be pointless to have collected it in constitutional texts so insistently and with such relevance. We would then witness a constitutional amendment in a certain direction, carried out by those who have no power to address it. This is more shocking in more rigid systems than the Spanish one.

González Pérez insists that, regardless of the ambiguity of the terms used by the constituent (author of the Constitution) - value, sometimes; principles, other times - we find ourselves in front of a general principle of law that does not lose its nature when being taken in by the existing law. Of the three types of general principles - the natural law, traditional and political, this one is indubitable in all three. If there is something permanent in the Law, it is the dignity of the person. For many, dignity would also be a principle initially recorded in our legal custom. Finally, as recognized by the Constitution, it is a guiding principle of political order.

Regardless of its nature, much discussed nowadays, the functions of the general principles have been specially considered by the Spanish doctrine. Dignity would be a directly applicable principle not needing mediation. It would also be the foundation of order, for example as guidance in the interpretation of the law itself, which results in a standard of conduct and a limit of the exercise of rights by imposing two types of obligation on the behaviour of man. One, in relation to others: a positive obligation by which mankind should seek the utmost respect for the dignity of people whom he/she relates to, and a negative one, when the dignity of others operates as a limit in the exercise of his own rights. Finally, the principle we analyse has the function of integration of the legal system, as stated in Article 1.4 of the Civil Code.

2.5 Dignity in the German Constitution
Under the important position that dignity has in the Basic Law of Bonn, the German doctrine made a great effort in structuring the system. The most classical position remained defined by G Dürig, who referred to the principle of non-exploitation on a Kantian basis. The concept, however, has been rebuilt until it became unrecognizable, in both what affects the beginning of life and its end, as we shall see in due course. As a result of this reconstruction, even authors who were critical toward the above related concept were shocked by the effects that had been produced and which they probably did not foresee. So Böckenförde, seeing the effects of reconstruction, pointed out alarmingly in the Frankfurter Allgemeine Zeitung on September 3, 2003 that "human dignity

79 "The general principles of law apply in the absence of law or custom, without prejudice to the fact that they help shape the legal system," Spanish Civil Code, Preliminary Title, c. 1, art. 1:4, text in Spanish: http://civil.usc.es/normativa/estatal/cc/que.htm
regardless of the ambiguity of the terms the Constitution) - value, sometimes; princes in front of a general principle of law that taken in by the existing law. Of the three, it is nothing permanent in the Law, it is the dignity would also be a principle initially recognized by the Constitution, it is a guiding principle not needing mediation. It would be example as guidance in the interpretation of an example of conduct and a limit of the exercise of the right of the right of man. One, by which mankind should seek the action of mankind which he/she relates to, and a negative states as a limit in the exercise of his own. It has the function of integration of the of the Civil Code.

Constitution

That dignity has in the Basic Law of Bonn, effort in restructuring the system. The most by G. Dürig, who referred to the principle of dignity. The concept, however, has been rebuilt both what affects the beginning of life and what does not. As a result of this reconstruction, even the above-related concept were shocked by which they probably did not foresee. So, as a result, pointed out alarmingly in the September 3, 2003 that "human dignity in the absence of law or custom, without prejudice to the fact of the Civil Code. Preliminary Title, c. 1, art. 1.4, text in Spanish.

Menschwerde - The fundamental right of human dignity was tangible." All of this in a context in which they discussed whether it could be interpreted that torture itself was not contrary to human dignity.

It is for these reasons that we understand that dignity is a fundamental element of the struggle for Rights in the description of Ihering.

So Ignacio Gutiérrez said that "Therein lies the struggle for Rights, with a capital R. Not a struggle for limited and limitable rights, the struggle to impose the tiny rights under the law or the constitution, subject to a legal regime that necessarily constrains them, but the struggle for the Rights understood as a principle of collective behavior based on the mutual recognition of the dignity of each individual."