European University Institute

Department of Law

EUI Working Papers

LAW 2008/18

A Human *Dignitas*?
The Contemporary Principle of Human Dignity as a Mere Reappraisal of an Ancient Legal Concept

Stéphanie Hennette-Vauchez

EUROPEAN UNIVERSITY INSTITUTE
DEPARTMENT OF LAW

A Human Dignitas?
The Contemporary Principle of Human Dignity as a Mere Reappraisal of an Ancient Legal Concept

STÉPHANIE HENNETTE-VAUCHEZ

EUI Working Paper LAW No. 2008/18

ISSN 1725-6739

Printed in Italy
European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy

http://www.eui.eu/
http://cadmus.eui.eu/

Abstract

This paper suggests that the contemporary principle of human dignity in so far as it is used as means of limiting the exercise of individual freedom (in such landmark cases as the dwarf-throwing ones, as well as when used against prostitution, certain sexual conducts or the right to refuse medical treatment…) does not have much to do with the human dignity principle that was consecrated after WWII. Rather, it shares many a resemblance with the ancient concept of *dignitas*, for it has the same function (ground obligations –and not rights), structure (obligations towards oneself) and regime (inalienability). The bondage between contemporary and ancient dignity is a crucial one, for it implies that the 'foundation of human rights' paradigm, very common to post-WWII usages of human dignity, can no longer serve as a justification for the human dignity principle.

Keywords

Human Dignity – Dignitas – Rights – Obligations – Fundamental rights.

A Human Dignitas?
The Contemporary Principle of Human Dignity as a Mere Reappraisal of an Ancient Legal Concept

Stéphanie Hennette-Vauchez

The concept of human dignity is a two-edged sword[1]. Worse, "the content of its central core is not clear, making it an uncertain guide"[2] that "has failed to assist in providing a principled basis for decision-making"[3]. Although this may be due to its being invoked "as a kind of ultimate article of faith rather than as a principle open to rational debate", thus typically functioning "as a 'conversation stopper'"[4], there is strong suspicion in contemporary legal thought that the human dignity principle (HDP) conveys politically conservative and theoretically naturalist stances. Indeed, it is argued that since "the notion of dignity can easily become a screen behind which paternalism or moralism are elevated above freedom in legal decision-making"[5], "[it] is often appealed to by those who seek to prevent change"[6]. Conversely, strong evidence supports the view that Western law's recently massive infatuation with the HDP does not owe so much to its intrinsic qualities (either symbolic or instrumental) as it does to a scholarly enterprise of promotion of the principle, seized as a consensual vector (who opposes human dignity?) for operating a non-consensual moves (reinvigorating the idea that natural law, in the clothes of human dignity, is the ultimate foundation of legal orders)[7]. It would be possible to stretch at significant length this list of criticisms aimed at the HDP (HDP) in recent legal scholarship; but the point is clear already: it is a highly controversial and quite unsatisfactory principle.

---

[1] D. Beyleveld, R. Brownsword, Human Dignity in Bioethics and Biolaw, (Oxford : Oxford University Press, 2001), 25.

[2] D. Feldman, 'Human Dignity as a Legal Value –Part II', (2000) Public Law, 61, 75.

[3] C. McCrudden, 'Human Dignity', Working Paper 10/2006, April 2006, University of Oxford Faculty of Law Legal Studies Research Paper Series (downloadable at : http:/papers.ssrn.com/Abstract=899687 as of Nov. 6th, 2007).

[4] D. Birnbacher, 'Ambiguities in the Concept of *Menschenwürde*', in K. Bayertz ed., Sanctity of Life and Human Dignity (Dordrecht : Kluwer Academic Publishers, 1996), 107.

[5] D. Feldman 'Human Dignity as a Legal Value –Part I', (1999) Public Law, 682, 697.

[6] H. Kuhse, 'Is There a Tension Between Autonomy and Dignity?', in P. Kemp, J. Rendtorff, eds, Bioethics & Biolaw, vol. ii, Four Ethical Principles (Copenhagen: Rhodos International Science and Art Publishers, 2000), 61.

[7] S. Hennette-Vauchez, 'When ambivalent principles prevail. Leads to explaining Western legal orders' infatuation with the HDP', (2007) Legal Ethics, vol. 10, No2, 193.

How, then, is one supposed to account for its simultaneous apotheosis in Western legal orders –and beyond. Indeed, it is impossible to mention the HDP today without insisting on the wideness of its consecration. International covenants, universal[9] and regional[10], old[11] and new[12], general[13] and specific[14], soft and hard[15]… almost all refer to the HDP. The Constitutions that refer to the principle are also numerous[16] -and their number increases at an accelerated pace as a number of new legal orders are founded[17] on the debris of dictatorships[18]. Even in countries in which the principle originally seemed to be rather marginal –such as, for example, the United States[19]- it is gaining in importance[20]. Not to mention the fact that it has been inferred by a number of

[9] Among other examples: United Nations Charter, preamble : "We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person…". Also, Universal Declaration of Human Rights, art. 1: "All human beings are born free and equal in dignity and rights".

[10] See the African Charter on Human and Peoples' Rights of 1981, whose art. 5 proclaims that 'every individual shall have the rights to the respect of the dignity inherent in a human being', or the Arab Charter on Human Rights of 1997, whose preamble refers to the Arab nations' belief in human dignity.

[11] See the UN Declaration on the Elimination of all Forms of Racial Discrimination of 1963, for example.

[12] See the EU Charter of Fundamental Rights of 2000.

[13] Such as the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966), who both say that the rights they proclaim "derive from the inherent dignity of the human person".

[14] Such as the Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine (1997), or the UNESCO Declaration on the Human Genome and Human Rights (1997).

[15] Directive 98/44/EC of 6 July 1998 on the Legal Protection of Biotechnological Inventions, recital 16: "patent law must be applied so as to respect the fundamental principles safeguarding the dignity and integrity of the person".

[16] It is not possible here to list all the Constitutions that refer to the HDP; let us only mention they are as varied as those of Afghanistan (2003), Madagascar (1998), Brazil (1988)…

[17] Typically in this respect, see the 1949 German Basic Law; or the 1947 Japanese Constitution whose art. 24 states that in "manners pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and essential equality of the sexes".

[18] This was successively true of Greece (1975), Portugal (1976), and Spain (1978), but the phenomenon has been multiplied by numerous factors since the fall of the Berlin wall and the refoundation of many Eastern European legal orders: the HDP is mentioned in most of the corresponding constitutional texts; see for a monograph on the Hungarian case C. Dupré, Importing the Law in Post-Communist Transitions. The Hungarian Constitutional Court and the Right to Human Dignity (Oxford: Hart, 2003). As D. Feldman (above n 5, 696) puts it: "It is a common feature of new constitutions in States which are trying to shake off a legacy of disregard for the human dignity of some, at least, of its citizens". The South African example is also very interesting in this respect, since the HDP is assigned a very important role and serves as en emblem of the breaking up with the apartheid. On this specific example, see A. Chaskalson, 'Human Dignity as a Foundational Value of our Constitutional Order', (2000) 16 S. African Journal on Human Rights, 193.

[19] On the paucity of references to human dignity in recent American law, see J. Paust, 'Human Dignity as A Constitutional Right: A Jurisprudentially Based Inquiry Into Criteria and Content', (1984) 27 Howard Law Journal, 145.

[20] Recent Supreme Court decisions have interestingly made strong references to the HDP, in order to strike down a Texan law prohibiting sodomy (*Lawrence v. Texas*, 539 US 558 (2003)), or to establish that capital punishment was a violation of the Eight amendment when applied to minors (*Roper v. Simmons*, 125 US 1183 (2005)) or the mentally retarded (*Atkins v. Virginia*, 536 US 304 (2002)).

constitutional courts even in cases in which it was not explicitly written in the text of the Constitutions. This occurred for instance in France[21] and Poland[22]. These quantitative aspects are only strengthened by qualitative appreciations of the HDP. "Underpinning what one might call legal humanism"[23], it is said to be not only a fundamental right in itself, but also the basis of all fundamental rights[24] and sometimes even the founding value of legal orders altogether[25]. To put it shortly: "if we were looking for one phrase to capture the last fifty years of European legal history… we might call it the high era of 'dignity'"[26].

Arguably, the HDP's apotheosis owes much to its imprecision, for nowhere is it precisely defined. The lack of fixed unquestionable meaning of the HDP has indeed significantly contributed to its generalized consecration, every other legislator, judge or political assembly in all likelihood taking advantage of the possibilities it offers of speaking a common language without being constrained by a common meaning. However, generalization must not be mistaken for uniformization; and to this day, "there is little common understanding of what dignity requires across jurisdictions"[27]. Many authors agree on this point.

They do not, however, agree on the different meanings the HDP can be assigned. For some, dignity mostly derives from the ancient legal protection of honor and reputation[28]

---

[21] See Conseil Constitutionnel, decision 94-343-344DC, 27 July 1994 (available at: http://www.conseil-constitutionnel.fr, last visited nov. 6th 2007).

[22] B. Lewaszkiewicz-Petrykowska, 'Rapport Polonais', in Commission Européenne pour la Démocratie par le Droit, Le Principe du Respect de la Dignité de la Personne Humaine, (Strasbourg: Ed. Du Conseil de l'Europe, 1999), 15.

[23] D. Feldman, above n 5, 682.

[24] See the explanatory report of the *Praesidium* of the Convention that authored the EU Charter of Fundamental Rights.

[25] See the way this is expressed by the Federal Constitutional Court of Germany, who sees in the HDP the "highest value of the constitutional order" (*Life Imprisonment Case* of 1977, 45 *BVerfGE* 187) and judges that "the Basic Law erected a value-oriented order that limits public authority" (*Elfes case* of 1957: 6 *BVerfGE*, 32), "this value system, which centers upon the dignity of the human personality developing freely within the community, must be looked upon as fundamental constitutional decision affecting all spheres of law" (*Lüth case* of 1958, 7 *BVerfGE* 198). English versions of these decisions in D. Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany (Durham & London: Duke University Press, 1997), 305, 315 and 363. But this is true also elsewhere, see section 1 of the 1996 Constitution of South Africa: "The Republic of South Africa is one, sovereign, democratic state *founded on the following values: a) human dignity*…"[emphasis added]; art. 1 of the amended 1976 Constitution of Portugal: "Portugal is a sovereign Republic, *based on the dignity* of the human person…" [emphasis added]. Not to mention that the same discourse is held –albeit in a necessarily less authoritative manner- by scholars engaged in the active promotion of the principle. For an analysis of French legal scholarship in this respect, see C. Girard, S. Hennette-Vauchez, eds, La Dignité de la Personne Humaine. Recherche sur un Processus de Juridicisation (Paris: Presses Universitaires de France, 2005).

[26] J.Q.Whitman, 'On Nazi Honor and New European Dignity', in C. Joerges, N.S. Ghaleigh, eds, Darker Legacies of Law in Europe. The Shadow of National Socialism and Fascism over Europe and its Legal Traditions (Oxford: Hart Publishing, 2003), 243.

[27] C. McCrudden, above n 3, 21.

[28] See notably the important works of J.Q. Whitman such as: 'Enforcing Civility and Respect: Three Societies', (1999-2000) 109 Yale Law Journal, 1279; 'The two Western Conceptions of Privacy : Dignity versus Liberty', (2003-2004) Yale Law Journal ; 'On Nazi honor and New European Dignity',

whereas for others, that aspect of the principle's genealogy is completely overlooked[29]. For others, dignity is the translation at law of the Kantian imperative according to which human beings must never be treated solely as means, but always as ends[30]. Furthermore, the HDP can be assigned two main meanings: "dignity as empowerment" and "dignity as constraint"; the former implies that dignity's function is mostly to grant individual rights and is closely connected to the concept of autonomy, whereas the latter reduces dignity's function to limiting rights in the name of social values and is linked mostly to the idea of duties and obligations of the individual[31]. The HDP can also be said to operate at three levels: "the dignity attaching to the whole human species ; the dignity of groups within the human species ; and the dignity of human individuals"[32]. Finally, other tentative taxonomies are even looser, and list wide ranges of meanings attached to the principle, from "another way of expressing the idea of human rights" to "a right or obligation [in itself]", a "justification for limiting the protection of rights or obligations, similar to a public order or public morals exception[33]… Certainly other classifications could be mentioned here: the quest for a substantive definition of the HDP may well be said to be potentially endless.

In contrast, greater unanimity features the answers that are given to the question of the HDP's origins. Indeed, when explaining where the HDP actually comes from, legal scholarship usually answers that it appeared in the wake of the Second World War, as a result of the international[34] and national[35] legal communities' desire to solemnly condemn the atrocities committed within and aside from the conflict, as well as to restore their attachment and faith in humankind[36]. Therefore, the HDP is commonly presented as the foundation of the very idea of human rights. The aim of this paper is to question this narrative, in that such a focus on post-WWII dignity overlooks two significant evolutions of the legal understanding of human dignity that have taken place since then. First, there has been a critical enhancement of the HDP's obligations-grounding function, to the detriment of its rights-founding one. Second, the contemporary version of the HDP strongly echoes, in different respects, the ancient *dignitas* principle –and this also needs to be reflected upon. These, in a nutshell, are the

---

above n 25; and Harsh Justice. Criminal Punishment and the Widening Divide Between America and Europe (Oxford: Oxford University Press, 2003).

[29] See notably D. Beyleveld, R. Brownsword (2001), above n 1 who only browse the ancient version of the concept in their developments referring to 'the dignity of the nobles and dignified conduct', at 58-63; D. Feldman (1999, 2000), above n 2 and 5.

[30] Among many examples: C. Starck, "The Religious and Philosophical Background of Human Dignity and its Place in Modern Constitutions", in D. Kretzmer, E. Klein, eds., The Concept of Human Dignity in Human Rights Discourse (The Hague: Kluwer, 2002), 179.

[31] D. Beyleveld, R. Brownsword, above n 1, 11-12.

[32] D. Feldman, above n 5, 684.

[33] C. McCrudden, above n 3, 22-24.

[34] United Nations Charter, Universal Declaration on Human Rights, UN Conventions of 1966…

[35] See, emblematically, the German (1949), Italian (1948), and Japanese (1947) constitutions.

[36] This indeed is the most commonly stated genealogical presentation of the HDP. See, among many references : D. Kretzmer, E. Klein, above n 29; J. Malpas, N. Lickis, eds., Perspectives on Human Dignity : A Conversation (Dordrecht : Springer, 2007) ; G. Fletcher, 'Human Dignity as a Constitutional Value', (1984) University of Western Ontario Law Review, vol. 22, 171.

reasons for which it will be argued that the HDP as we know it today is an heir to pre-modern *dignitas* more than it is to post WWII dignity[37].

To be sure, it may seem rather counter-intuitive to compare *dignitas* and dignity of the human person –let alone to assert the existence of any kind of genealogical bondage between the two. One would need only to glance at a Legal Dictionary[38] to see how tenuous the link, for whereas human dignity is generally associated with equality (for precisely its main feature is that it is bestowed equally upon men and women), the concept of *dignitas* essentially and contrarily refers to that of inequality. Indeed, *dignitas* necessarily indicates the existence of a hierarchy; it is an element of social distinction. Furthermore, *dignitas* is not specifically human: institutions, the States, its emblems[39]…. may well be dignified in that sense. This is the reason for which the concept of *dignitas* most often remains ignored by scholarship relating to the contemporary HDP. As David Feldman puts it: « it is not human dignity of the sort which could conceivably be treated, in a sane world, as a fundamental value or as capable of generating a fundamental constitutional right »[40]. However, I wish to reverse the picture, and consider from the outset of this paper as a general hypothesis that it is heuristically very fruitful to consider that there is a strong genealogical link between the ancient legal *dignitas* principle, and the contemporary 'dignity of the human person' one.

The stakes of such endeavor are high, for what is ultimately challenged here is the legitimization device the HDP rests upon. Principles hardly appear unaccompanied; utterances are always connoted. In the particular case, what the HDP is generally said to come along with is no less than the entire human rights philosophy grounded on the necessary respect for all humanity as it has been proclaimed in many a legal tool after the second world conflict. However, if the hypothesis according to which the contemporary version of the HDP (e.g. "dignity of the human person") actually has only little to do with the 1945 one (e.g. "equal dignity") is verified, then the entire process of justification and promotion it has undergone would need to be started all over again from scratch. Indeed, one would then need to consider that the politico-axiological (positive) connotation of the HDP-as-a-reaction-to-Nazi-horrors can not longer serve as a legitimizing ground. It should then be acknowledged that whereas the HDP has often been coined as the humanist and universal foundation of human rights[41], in fact it is

---

[37] For the identification of three competing meanings of a legal principle of dignity (*dignitas*, post-WWII dignity and contemporary dignity), see C. Girard, S. Hennette-Vauchez, above n 24.

[38] See for example: Black's Law Dictionary (8th ed., Thomson/West, 2004), 488: "Dignity: 1. The state of being noble; the state of being dignified 2. An elevated title or position 3. A person holding an elevated title; a dignitary 4. A right to hold a title of nobility which may be hereditary or for life".

[39] American law for example is familiar with notions such as the dignity of the State, of the flag, of the coat of arms… Generally speaking, as far as non-human usages of the HDP are concerned, see J. Resnik, J. Chi-hye Suk, (2002-2003) 'Adding Insult to Injury : Questioning the Role of Dignity on Conceptions of Sovereignty', Stanford Law Review, vol. 55, 1921.

[40] D. Feldman, (1999) 'Human Dignity As a Legal Value. Part I', Public Law, 682. above n 5.

[41] It is impossible to list all the works according to which the HDP serves as a foundation for human rights: they are way too numerous. Besides a number of references cited here (and see in particular those cited above, n 35), one can wish to keep in mind that such a narrative has become actual law. The European Charter of Fundamental Rights is indeed accompanied by a document entitled 'Explanations relating to the complete text of the Charter', which notably reads page 15: "The dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights"

more accurately described as the application of a contingent and inegalitarian organizational principle to the social world.

Two distinct argumentative lines will be followed here for justifying this tentative matching between *dignitas* and dignity of the human person. A first theoretical one will aim at demonstrating that the very contemporary acception of the HDP is not alien to the notion of status –which throws a first bridging element in direction of ancient *dignitas.* I believe this can be said irrespective of the fact that whereas ancient *dignitas* referred to statuses in that they were either *social or professional* (magistrates, clergymen…); it is with the much wider *human status* that contemporary dignity can be associated. For indeed, it can be contended that as a matter of fact, the HDP does construct humanity as a status (Part I). A second, more technical register will then lead to suggesting that ancient *dignitas* and contemporary dignity share very similar functions (ground obligations), structure (ground obligations towards oneself) and regime (inalienability) (Part II).

I. From Social Status to Humanity as a Status: Constancy of Dignitas/y

Albeit counter-intuitive and thus frequently misjudged or even silenced, the idea of a genealogical bondage between *dignitas* and dignity of the human person has nonetheless been argued before, notably by James Q. Whitman. In several works,[42] Whitman suggests that the commonly told story of the HDP coming to existence in the wake of WWII is erroneous. According to him, the principle's historical origins are to be found in the old legal norms of honor. He explains that throughout the centuries, honor-protection mechanisms were gradually extended to everyone and that subsequently, the protection afforded to the layman was elevated to the level of the one only upper classes of society had initially enjoyed[43] –what he calls a "leveling up process"[44]. The result of such a process would contemporarily be illustrated by the contemporary dignity principle.

The present article will both draw and part from this dimension of Whitman's work. It will draw from it in so far as it shares the assumption according to which it is

(available at: http://ue.eu.int/uedocs/cms_data/docs/2004/4/29/Explanation%20relating%20to%20the%20complete%20text%20of%20the%20charter.pdf last visited June 6, 2008) .

[42] See references above n 27. In addition to these works by Whitman, I must acknowledge here that the very idea of strong links between ancient *dignitas* and contemporary dignity was suggested to me by historian Anne Simonin during a conference I organized in 2004 on the HDP. I expect to find many elements to support the present demonstration in her forthcoming Histoire de l'indignité nationale (Paris: Grasset, 2008).

[43] J.Q. Whitman, 'On Nazi 'Honor' and New European 'Dignity'', above n 25, 245-46: "Modern 'dignity', as wee see it in continental legal cultures, is in fact often best understood, from the sociological point of view, as a generalization of old norms of social honor… What has happened, in continental Europe, is indeed fundamentally this: old norms of 'honor', norms that applied only to aristocrats and a few other high-status categories of persons in the 17th and 18th centuries, have gradually been extended to the entire population".

[44] See for instance J.Q. Whitman, 'The Two Western Cultures of Privacy', above n 27, 1166 as well as 'Enforcing Civility and Respect : Three Societies', above n 27, 1387: "there is authentic egalitarianism in European dignitary culture, but [that] it is a high-status egalitarianism… Today, it is the deep ambition of European dignitary thinking to make all persons high-status-equals".

heuristically most stimulating to hypothesize genealogical continuity between *dignitas* and dignity –and this shall be put to the test. But it will also draw apart from Whitman's insights, for if they shed a most revealing light on processes that took place during the 18th and 19th centuries, they fail –in my view- to account for the massive distortions the dignity principle has undergone during the 20th century. Notably, they seem to ignore the very existence of a difference between post-WWII human dignity and human dignity in its yet more contemporary (*fin de siècle*) acception (1.). Whitman's analyses nonetheless constitute a decisive starting point for unfolding the present hypothesis according to which the contemporary version of the HDP rests on a conceptual construction of humanity as a status (2.).

1. From Role-dignity to Human Dignity: Presenting and Assessing the Thesis of J.Q. Whitman

Whitman explains the shift from the ancient norms of honor conveyed throughout the *dignitas* principle to the more contemporary understanding of the dignity principle by the unfolding of a leveling process. He defines this process as one by which ancient norms of honor have been generalized, to the point they were now apply to the entire population. According to him, "'human dignity' for everybody, as it exists at the end of the 20th century, means definitive admission to *high social status* for everybody"[45]. I wish to part from these analyses, by suggesting that the leveling up process Whitman describes eventually has led to the recognition and proclamation of the common belonging of all individuals to a common humanity rather than to the admission of everyone to high social status. In other words, where Whitman sees only one process taking place and being conveyed by the semantics of dignity (the leveling up process), I believe there are valid grounds for distinguishing between two (extension of the scope of norms of honor on the one hand, appearance of the idea that all humans have equal and intrinsic worth on the other hand).

The idea according to which the importance of social status massively decreased as a mode of social organization throughout the 19th century seems rather unquestionable. I do not wish to challenge Whitman's correlative demonstration that the juridical norms of respect and honor that the matrix of ancient *dignitas* had given birth to were then generalized. However I do not share the idea according to which such a generalization would have been brought to its full consequences. Indeed, I do not agree with the idea according to which the ancient norms of honor have become applicable to everyone – and even less do I agree with the one that they have become encapsulated in a principle of dignity. If generalization did occur, the process never became comprehensive. I do not think the statutory logic of the norms of honor has been subverted by its generalization, for such generalization might have been massive and of the utmost importance, it has remained partial –or incomplete. My contention here is grounded on the very fact that the statutory logic of ancient *dignitas* has not disappeared and still infuses many a contemporary legal norm. The law of professions, or the law of citizenship, for example, provide with many illustrations of legal norms that are attached to specific functions and do not, by definition, apply to everyone.

[45] J.Q. Whitman, 'On Nazi 'Honor' and New European 'Dignity'', above n 25, 246 (emphasis added).

I also believe that this first evolution (generalization albeit only partial of norms of honor) has not precluded the parallel (but distinct) apparition of another concept of dignity, this one primarily conveying the idea that all human beings equally belong to humankind. One can trace back to the early 19th century many a legal norm or narrative echoing the simple –but novel- idea according to which the sole quality of human being bestows dignity upon each and every individual. By doing so, such legal utterances recourse to a meaning of dignity that has nothing to do with the one encapsulated in the old *dignitas*. Whitman does not see this second movement though; he analyses all the manifestations of the semantics of "dignity" as though they were unified and does not distinguish according to whether they have to do with the notion of status (by definition, unequal) or with that of equality (throughout a reference to the notion of humanity)[46]. However, the distinction deserves to be made, notably because they both have paved the way for different acceptions of the HDP. It may well be considered that this second specifically human meaning of the dignity principle eventually consolidated in the shape of post-WWII dignity, for it has to do with the promise of 1789 finally coming true throughout the 19th century –i.e. with the idea according to which men have rights simply because they are human.

In French law –an example that Whitman quite heavily relies upon-, this progressively takes place at the turn of the century. The major evolution that then affects civil law is the "anthropologization of the legal category of the 'person'"[47], an expression used to designate the fact that finally, empirical coincidence between the physical and the juridical persons occurred. Such a coincidence was indeed only made possible by the abolition of institutions such as slavery or civil death that entirely rested on the very possibility of denying the quality of (juridical) persons to (human) beings[48]. Criminal law went along a similar path as offenses became less and less dependant on the rank or functions of the victim[49]. In other words, in parallel to the progressive loss of

[46] In fact, this distinction is often ignored. For but one example, one can refer to the Israeli Basic Law: Human Dignity and Liberty of 1992, often referred to as an example of the generalization and juridification of the post-WWII HDP whereas it is more accurately analyzed as yet another confirmation of the perennity of a *dignitas*-like conception. See O. Kamir, 'Honor and Dignity Cultures : the Case of *Kavod* and *Kvod ha-Adam* in Israeli Society and Law', in D. Kretzmer, E. Klein, eds, above n 29, 233 : "In fact, although the combined phrase *kvod ha-adam* does connote 'human dignity', the word *kavod* is also the only Hebrew term for 'honor', 'glory' and 'respect'… The Basic Law's 'dignity-honor-glory-respect' is not exactly the Universal Declaration's 'dignity'"; and at 234: " suggest that, although unacknowledged, it is a *kavod-honor* rather than a *kavod-dignity* that has been a predominant, fundamental feature of the Zionist movement and the Zionist state"

[47] See notably Y. Thomas, '*Fictio Legis*. L'empire de la fiction romaine et ses limites médiévales', (1995) Droits, n°21, 17; and Y. Thomas, 'Le sujet concret et sa personne', in O. Cayla, Y. Thomas, Du droit de ne pas naître. A propos de l'affaire Perruche (Paris: Gallimard, 2002), 130.

[48] Indeed, it is only once slavery has been abolished that Glasson could write that "every physical man is a person" ["tout homme physique est une personne"] in Eléments de droit français (Paris: Pedone-Lauriel, 1884), n°20 (cited by D. Deroussin, 'Personnes, choses, corps', in E. Dockès, G. Lhuilier, eds., Le corps et ses représentations (Paris: Litec, 2001), 79, at 113). The great disruption caused by this eventual coincidence between the physicial and the juridical person must not be underestimated; also, it must be clearly affirmed that such coincidence is neither necessary nor evident. For this reason, common *opinio iurus* of the civilians of the early 19th century was undisputedly closer to formula such as: "a man and a person are not synonymous terms" (Toullier, Le droit civil français suivant l'ordre du Code (Paris, t. 1, 1830, n°166; cited by D. Deroussin, *Ibid.* at 101).

[49] It is interesting to look for example at A. Vitu (Traité de droit criminel. Droit pénal special (Paris: Ed. Cujas, 1982), 1574) commenting on nascent law of the press –and of defamation-, because Whitman

importance of status, a new concept of dignity seems to find its way in the legal discourse, founded above all on the idea that all men are equal. It is argued that these first formulations of dignity as a synonym for equal and intrinsic worth are the ones that eventually consolidated and triumphed half a century later, in such utterances as: "all human beings are born free and equal in dignity and rights"[50], "considering that… recognition of the inherent dignity and of the equal inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world"[51], or : "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited"[52].

It is then granted that the ancient notion of *dignitas* has evolved, in so far as its initial scope, limited to the protection of the honor due to certain persons because of their rank and functions, did widen. However, its intrinsic and genuine statutory (and thus unequal) meaning has not disappeared; the ancient *dignitas*'s extension in scope was not pushed to the point that it would now apply to everyone under the auspices of a HDP. Rather, the HDP is yet *another* principle, and is solely responsible for conveying the idea of the respect due to all men solely in virtue of their belonging to humankind. This conception of dignity differs significantly from the ancient one –if only because it is egalitarian by essence. Consequently, it cannot convincingly be said to be an heir to ancient *dignitas* (despite Whitman's contention of the contrary). Notwithstanding, Whitman's analyses remain of utmost importance. Despite the fact that they fail, in my view, to account for the HDP as it has been consecrated in the wake of WWII, they ironically (involuntarily) shed a most valuable light on the even more contemporary HDP-*fin de (20th) siècle*. This is why I shall now test the hypothesis according to which the most contemporary version of the HDP (the one that grounds the validity of dwarf-throwing prohibitions[53], of criminal charges against people engaging in sadist-masochist sexual relationships[54] or of drastic limitations of a patient's right to refuse a medical treatment[55]) is accurately described as an heir to the old statutory conception of dignity - *dignitas.*

himself does so (J.Q. Whitman, 'Enforcing Civility and Respect : Three Societies', above n 27, 1358) in order to back up his analyses that aim at demonstrating the continuous strength of the notion of honor, even after its protection democratizes, ie., after it becomes applicable to everyone. Yet, I do not read the same thing in Vitu's words. Quite contrary to Whitman's interpretation, I am under the impression that what Vitu refers to by using the word "dignity" precisely has nothing to do with old norms of honor (or, for that matter, with *dignitas*), but rather illustrates the emergence of a radically new meaning of the concept, that of dignity in virtue of the sole belonging to humankind.

[50] Universal Declaration of the Rights of Man, 10 December 1948.

[51] International Covenant on Civil and Political Rights, 16 December 1966.

[52] African Charter on Human and People's Rights, 27 June 1981, art. 5.

[53] See Conseil d'Etat, Ass., 27 october 1995, *Cne de Morsang-sur-Orge*, Recueil Lebon p.372.

[54] ECtHR, 19 February 1997, *Laskey, Jaggard and Brown v. R.U.*.

[55] See for example the *conclusions* of the *commissaire de gouvernement* M. Heers in the case: Cour Administrative d'Appel de Paris, 9 juin 1998, *Senanayake et Donhoy*, in: (1998) Revue Française de Droit Administratif, 1231.

2. Contemporary Human Dignity and the Renewal of a Statutory Conception of Dignity

The confirmation of the hypothesis according to which the contemporary HDP would really be but a mere reappraisal of an ancient statutory conception of dignity necessitates that the possibility of conceiving of humanity as a status be established. In its ancient fashion, dignity (*dignitas*) was all about statuses that were awarded to people according to their functions (political, religious, judicial…) or their rank (social). *Dignitas*'s *raison d'être* was to protect those statuses. Accordingly, verifying our hypothesis implies the demonstration that the contemporary HDP has a similar function; in other words, that its aim is to protect humanity as a status.

As a matter of fact, it does seem that the contemporary legal discourse on the HDP has precisely devoted much conceptual efforts to developing a statutory conception of humanity; in other words, it does seem that humanity has been constructed as a dignity in the statutory sense. The commentary of the *KA and AD v. Belgium* ECHR 2005 case by a leading French scholar, Professor Muriel Fabre-Magnan[56], is emblematic in that respect. In this case, the European court was once again confronted with the question whether criminal sentences decided against people who have taken part in extremely violent sadist-masochistic practices are to be qualified as violations of ECHR's article 8. Parting partially from its previous stance in a similar case[57], the Court decided that "the right to engage in sexual relationships stems from one's right to dispose of her body, an integral part of the notion of personal autonomy"[58]. As a consequence, the Court judged that in principle criminal law shall not interfere with sexual practices, unless there are imperious motives to the contrary[59]. It also considered that in the particular case, such imperious motives did exist, for it stemmed from the facts of the case that the free will and consent of one of the participants in the incriminated practices had not been respected at all times[60]. This very specific aspect of the Court's mode of reasoning

[56] ECtHR, 17 February 2005, *K.A. et A.D. c. Belgique* ; and commentary by M. Fabre-Magnan, "Le sadisme n'est pas un droit de l'homme", (2005) Recueil Dalloz, 2973.

[57] ECtHR, 19 February 1997, *Laskey, Jaggard and Brown v. U.K.* In this decision, §36 indicated that a given activity does not necessarily fall under the protection of article 8 for the sole reason that it takes place behind closed doors. For a critique, see: O. Cayla, "Le plaisir de la peine ou l'arbitraire pénalisation du plaisir", in D. Borillo, D. Lochak, eds, La Liberté Sexuelle (Paris: PUF, 2005), 89.

[58] §83 of the decision [my translation for, interestingly enough the decision is available only in French on the HUDOC database, which could account for the absence, to my knowledge, of commentaries of the case in English language].

[59] §84 of the decision: "Il en résulte que le droit pénal ne peut, en principe, intervenir dans le domaine des pratiques sexuelles consenties qui relèvent du libre arbitre des individus. Il faut dès lors qu'il existe des « raisons particulièrement graves » pour que soit justifiée, aux fins de l'article 8§2 de la Convention, une ingérence des pouvoirs publics dans le domaine de la sexualité".

[60] §85 of the decision: "En l'espèce, en raison de la nature des faits incriminés, l'ingérence que constituent les condamnations prononcées n'apparaît pas disproportionnée. Si une personne peut revendiquer le droit d'exercer des pratiques sexuelles le plus librement possible, une limite qui doit trouver application est celle du respect de la volonté de la « victime » de ces pratiques, dont le propre droit au libre choix quant aux modalités d'exercice de sa sexualité doit aussi être garanti. Ceci implique que les pratiques se déroulent dans des conditions qui permettent un tel respect, ce qui ne fut pas le cas. En effet, à la lumière notamment des éléments retenus par la cour d'appel, il apparaît que les engagements des requérants visant à intervenir et arrêter immédiatement les pratiques en cause lorsque la « victime » n'y consentait plus n'ont pas été respectés. De surcroît, au fil du temps, toute

ignited Fabre-Magnan's strong criticism of the decision. She reproaches the Court with giving too much weight and centrality to the notions of autonomy and consent; rather, she argues, the Court should have recoursed to the human dignity principle:

"Human dignity was at stake in the examined sadist-masochistic relationships, because it is at stake every time humanity is injured… The concept of human dignity arouse because traditional human rights, centered on the individual, his liberty, his private life, and his autonomy, precisely were no longer sufficient… The principle of dignity marks the unity of the human genre. Throughout each individual person, humanity can be injured and so can all others. The emergence of the HDP is the sign that there is something superior (transcendent) to individual wills…. No one can renounce the HDP, obviously not for others but no more so for oneself: no one can thus validly consent to having his dignity violated. The relationship of one with oneself does not resort only to the private sphere but also has to do with the public one. We rejoin the first meaning of the word dignity: the humanity of man resembles an entrusted office, but an office one can not dispense himself of nor be dispensed of; a dignity that, as in its original meaning, never dies"[61].

Be it only from a rhetorical standpoint, one is necessarily struck by the resemblance between such a presentation of the HDP and ancient *dignitas*. Such an elaboration of the contemporary HDP echoes quite strongly what Ernst Kantorowicz for instance writes about royal *dignitas* in his analyses of medieval political theology[62]. As a historian, he recalls the centrality of the metaphor of the Phoenix in medieval legal commentaries of the royal *dignitas*. Among other examples, he refers to the manner in which Baldus used it: "the Phoenix represented one of the rare cases in which *the individual was at once the whole existing species* so that indeed species and individual coincided"[63]. But the same narrative structures contemporary legal scholarship about dignity: in this more recent fashion also the HDP is said to bridge together the individual and the human species, for it is simultaneously one and multiple –or universal. This, in the text by Fabre-Magnan, is expressed as follows: "The principle of dignity marks the unity of the human genre. Throughout each individual person, humanity can be injured and so can

organisation, tout contrôle de la situation étaient devenus absents. Il y a eu une escalade de violence et les requérants ont eux-mêmes avoué qu'ils ne savaient pas où elle se serait terminée".

[61] M. Fabre-Magnan, above n 55, 2978-80 [my translation from: "La dignité de la personne humaine était concernée par les pratiques sadomasochistes de l'espèce, car elle est en jeu toutes les fois qu'il est porté atteinte à la dignité humaine… Le concept de dignité de la personne humaine est apparu parce que les droits de l'homme traditionnels, centrés sur l'individu, sa liberté, sa vie privée, et son autonomie, ne suffisaient précisément plus… Le principe de dignité marque l'unité du genre humain. A travers chaque personne, c'est l'humanité qui peut être atteinte et donc tous les autres. L'émergence du principe de dignité est ainsi le signe qu'il y a quelque chose qui dépasse (transcende) les volontés individuelles… Nul ne peut renoncer au principe de dignité humaine, ni pour autrui bien sûr, ni pour lui-même : nul ne peut donc valablement consentir à ce que lui soient portées des atteintes contraires à cette dignité. Il y a ainsi un aspect du rapport de soi à soi qui n'est pas de la seule sphère du privé mais qui a à voir avec la sphère publique. On rejoint le premier sens du mot 'dignité' : 'l'humanité de l'homme est assimilable à une charge confiée', mais une charge dont on ne pourrait ni être dispensé ni se dispenser, une dignité qui, comme en son sens premier, ne meurt jamais"].

[62] E. Kantorowicz, The King's Two Bodies : Essays in Medieval Political Theology (Princeton University Press, 1957) and especially the chapter *Dignitas Non Moritur*, at 383.

[63] E. Kantorowicz, *Ibid.*, 389 [emphasis added].

all others"[64]. In other words, one can say that humanity today serves as an emblem of the dignity principle, quite the same way the Phoenix did in medieval times. Additionally, in both its contemporary and medieval versions, the dignity principle is featured by an essential duality, for it is always simultaneously public and private. Fabre-Magnan writes about contemporary dignity that there is an aspect of the relationship of one with oneself that does not resort only to the private sphere but also has to do with the public one[65], whereas Kantorowicz insists that *dignitas* "was of a public, and not merely private, nature"[66]. A third strong resemblance can be found between the two elaborations of the dignity principle, for when contemporary dignity is said to "never die"[67], this is but yet another indication that it would be relevant to view it as an heir to medieval royal *dignitas* that was best described by the following aphorism: *Dignitas non moritur*. In other words, it can well be argued that from this contemporary discourse on human dignity, it stems that "humanity itself is a dignity"[68], the HDP being the legal vector of the philosophical assertion.

This little exercise in parallel reading of contemporary scholarship on the HDP and medieval conceptualizations of *dignitas* could be continued. However, I wish to complement it with a more technical aspect of the demonstration, in order to ascertain the validity of the initial hypothesis of a strong genealogical bondage between the two. Therefore, my aim in the remainder of the article will be to suggest that contemporary HDP and ancient *dignitas* share similar functions, structure and regime.

---

[64] M. Fabre-Magnan, above n 55.

[65] M. Fabre-Magnan, *Ibid.*

[66] E. Kantorowicz, above n 61, 384.

[67] M. Fabre-Magnan, above n 55.

[68] E. Kant, Métaphysique des Mœurs, II, Doctrine de la vertu [trad. J. et O. Masson] (Paris: Gallimard La Pléiade, 1986), vol. 3, 758. It is worth noticing that Kant refers to the concept of dignity not only in order to argue on the intrinsic worth of man, but also as a way of referring to certain ranks or specific functions. See on this particular aspect M. J.Meyer, 'Kant's concept of dignity and modern political thought', (1987) History of European Ideas, vol. 8, n°3, 319, at 328: "Kant uses and discusses the idea of the natural dignity of mankind while at the very same time he makes extensive use of the idea of a dignity within established social hierarchies… The bulk of these remarks on social dignity can be found in Kant's ethical writings on jurisprudence, in The metaphysical elements of Justice (1797) –primarily in the second part on 'Public Law'". It therefore is incorrect or, at least, partially wrong to mention Kant as a thinker of the sole dignity of man –and not of *dignitas*-like dignity. Similarly, it would be worth the while to engage in a critical assessment of the rather common tendency of contemporary scholarship to refer to the kantian categorical imperative ("So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means") in order to 1- define the substance of the dignity principle et 2- legally ground obligations of the individual towards herself (cf. "in your own person"). For indeed, this categorical imperative is central to Kant's moral philosophy and depicts the reign of ends which –in Kant's own acknowledgment- is an ideal elaboration. For those reasons, drawing normative consequences from such utterances is, to the best, unfaithful and to the worse contradictory with the very structure of kantian argument. For a modest tentative demonstration, see S. Hennette-Vauchez, 'Kant contre Jéhovah ? Refus de soins et dignité de la personne humaine', (2004) Recueil Dalloz, 3154.

II. *Dignitas* and Dignity: Legal Morphing[69]

As is well known, the contemporary HDP has attracted much attention and interest on behalf of legal scholars, judges, legislators and legal theorists. When one looks at all the studies that have been devoted to the subject, the massive focus on substantive issues is rather striking, for most works aim at identifying the 'true meaning' of the HDP. It is not necessary here to recall or discuss the different 'definitions' that have thus been produced. Instead, I wish to underlie the fact that despite their high numbers, such works have not succeeded in stabilizing a meaning of the HDP that would be either axiologically satisfying or instrumentally useful[70]. For that reason, it is argued that it might be interesting to operate differently and focus on what the HDP *does* instead of what it *means*. This renewed formal approach will lead to the conclusions that the contemporary and the ancient dignity principle share the same functions, structures and regime.

1. Similar Functions: Ground Legal Obligations

It is contended here that by many aspects, *dignitas* and contemporary dignity are similarly oriented towards grounding legal obligations[71] (or prohibitions[72]).

This unquestionably is true as far as the contemporary principle of dignity of the human person goes[73]. In the famous French dwarf-throwing case, the HDP was used as a ground for prohibiting the game[74]. In the South African Constitutional Court's Jordan decision of 2002, the HDP was used for upholding a prohibition to engage in prostitution[75]. In other French appellate court cases, the HDP grounded the prohibition

---

[69] Morphing can be defines as the smooth transformation of one image into another by computer; in a more metaphorical manner, it refers to a process of transformation of one thing ino another.

[70] See S. Hennette-Vauchez, above n 7.

[71] D. Beyleveld, R. Brownsword, above n 1, qualify the approach that particularly values such a conception of dignity (dignity as contraint) as a "duty-led approach".

[72] From a theoretical standpoint, obligations and prohibitions belong to the same category, the latter being a negative version of the former. See in this perspective for example: A. Ruiz-Miguel, A.-J. Arnaud, "Prohibition", Dictionnaire encyclopédique de théorie et de sociologie du droit (Paris: LGDJ, 1993, 2nd edition), 482 : "La relation entre prohibition et obligation est bien claire et se concrétise dans l'usage de la négation : prohibition et obligation sont interchangeables moyennant la négation de la conduite dont il s'agit… En d'autres termes, une interdiction est une obligation négative".

[73] As a matter of fact, this HDP's function of grounding obligations is so primary that there has been a debate in Germany as to whether the HDP could ground anything else than obligations –e.g. fundamental rights. After a while, it was finally decided that it could; however the sole fact that the question was asked is interesting. See on this aspect C. Walter, 'La dignité humaine en droit constitutionnel allemand', in Commission européenne pour la démocratie par le droit, Le principe du respect de la dignité de la personne humaine, (Strasbourg: Ed. du Conseil de l'Europe, 1999), 26, at 28.

[74] Conseil d'Etat, Ass., 27 oct. 1995, *Commune de Morsang sur Orge*, Recueil Lebon p. 372.

[75] Constitutional Court of South Africa, 9 oct. 2002, Case CCT31/01, *Jordan v. the State* (available at: http://www.constitutionalcourt.org.za/Archimages/661.PDF last visited 4 June 2008) : "The very nature of prostitution is the commodification of one's body. Even though we accept that prostitutes may have few alternatives to prostitution, the dignity of prostitutes is diminished… but by their engaging in commercial sex work".

to refuse a lifesaving blood transfusion[76]… As L.-E. Pettiti has expressed it, dignity entertains closer connections with duties than with rights: "The exercise of rights does not necessarily reveal dignity. *Dignity has more to do with respecting duties and obligations*" [77]. Such legal usages of the HDP invariably rest on the same mode of reasoning. Every human being is a repository (but not a proprietor)[78] of a parcel of humanity, in the name of which she may be subjected to a number of obligations that have to do with this parcel's preservation at all times and in all places. The HDP synthesizes all the obligations that stem from the mere belonging to humankind[79]. Such obligations are of an objective nature and they bind all legal actors: the State, third parties, and the individual herself (I shall return later to this question of obligations of the individual towards herself). In other words, the HDP is something like the *Grundprinzip*[80] of legal orders that define founding prohibitions as the condition for man's freedom[81]. In other words: "In a context of rights inflation and of disqualification of duties, the principle of dignity enables to find solutions that free us from the dead-end in which a conception of Law made only of rights has taken us, and to reintroduce charges and obligations under the vocabulary of fundamental rights"[82].

Such an obligatorian approach of the HDP is typical of contemporary legal scholarship shares many a resemblance with the one that once (and, in certain aspects, still does) unfolded about dignity as status (*dignitas*). There is no question that the very purpose of statutory dignity was also to ground obligations and prohibitions. Anyone (the *dignitas* bearer as well as any third party) who infringed upon such obligations was to be sanctioned. Indeed, anyone who offended a *dignitas* bearer was to be subjected to whatever punishments were associated with insult or affront[83]. Similarly, the bearer herself could be degraded, condemned or even exiled[84] if found guilty of disrespect towards the *dignitas* in her. Furthermore, this specific function of the statutory

---

[76] Cour administrative d'appel de Paris, 9 juin 1998, *Senanayake et Donhoy* (available at: http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000007436393&fastReqId=1558200836&fastPos=9 last visited June 6, 2008).

[77] L.-E. Pettiti, 'La dignité de la personne humaine en droit européen', in M.-L. Pavia, T. Revet, La dignité de la personne humaine, (Paris: Economica, 1999), 53, at 57 [emphasis added].

[78] Cf. the quite telling expression coined by C. Labrusse-Riou, ('Servitudes, Servitude', in B. Edelman, C. Labrusse-Riou, eds, L'homme, la nature et le droit, (Paris: Christian Bourgois ed., 1988), according to which the individual is "dépositaire, mais pas propriétaire" of human dignity.

[79] As O. Cayla puts it: "[les] droits de l'humanité… sont précisément opposables aux individus lesquels sont assujettis à des *obligations* envers cette humanité qui les transcende", in 'Le droit de se plaindre. Analyse du cas (et de l'anti-cas) Perruche', in O. Cayla, Y. Thomas, Du droit de ne pas naître. A propos de l'affaire Perruche, above n 46, at 48.

[80] I allow myself this formula in order to echo M. Fabre-Magnan's analogy between the HDP and the kelsenian hypothetico-deductive *Grundnorm*. See her: 'La dignité en droit: un axiome', (2007) Revue Interdisciplinaire d'Etudes Juridiques, 1 at 10, and at n 89 at 29.

[81] This is what A. Supiot calls "law's dogmatic function", which he defines as one of "interposition" and "prohibition"; see Homo Juridicus. Essai sur la fonction anthropologique du droit, (Paris: Seuil, 2005), at 82.

[82] M. Fabre-Magnan, 'La dignité en droit: un axiome', above n 79, at 14 (souligné par nous).

[83] See in Roman law, the *actio iniurarium* as well as, later on, the legal mechanisms intended to compensate for insult that have notably been analyzed by J.Q.Whitman, 'Enforcing Civility and Respect : Three Societies', above n 27.

[84] C.R. Miguel, 'Human Dignity: History of an Idea', *Jahrbuch des Öffentlichen Rechts*, 2002, vol. 50, 281.

conception of dignity has not disappeared to this day, as demonstrate the law of citizenship or the law of professions that remain highly permeated by the concept of *dignitas*.

Historically, the very concept of citizenship drew from the notions of status and *dignitas*[85]. In France for example, it is well-known that the revolutionary ambition to abolish all privileges (including the dignities of vote) failed in parting completely with *dignitas*' inner logic, as the rapid restoration of the distinction between active and passive citizens exemplifies, as well as other less famous illustrations of the post-revolutionary remnants of *dignitas* such as the creation by the 1791 Penal Code of the "civic degradation" sentence. At the time, the new sentence was justified by reference to a statutory conception of dignity; one of its promoters before the National Assembly argued that "the degraded man is not dignified enough for being a French citizen; he must loose all his rights. This sentence belongs to free countries in which the honor of being a citizen his still held to be of importance"[86]. The civic degradations ceremonies certainly were cruel and humiliating –much in a fashion that would lead us to say they are contrary to human dignity in its contemporary sense. However, it is crucial to keep in mind the fact that they aimed at the citizen more than at the man behind it. The sole fact that such degradation could come to and end (and thus, the status of citizen be retrieved) demonstrates this crucial aspect[87]: civic degradation as a penalty targeted *statutory* dignity and not *human* dignity.

Such a conception of citizenship as a dignity susceptible of being withdrawn as a means of sanction in the case of the bearer's undignified conduct did not disappear after the Revolution; it even has several quite contemporary illustrations. The republican ordinance of August 26, 1944 created the "crime of national indignity" intended to serve as punishment for those who had collaborated with the German enemy.[88]. Closer to our times still, numerous are the countries in which contemporary law of nationality and of

---

[85] "Roman public life is in good measure a tense tug-of-war between the *dignitas* of the great man and the *libertas* of the small man, the former exercised through the quasi-monarchical authority of great public offices and the latter through the legal protections afforded private citizens in the courts": D. Burchell, 'Ancient Citizenship and Its Inheritors', in E.F. Isin, B.S. Tuner, Handbook of Citizenship Studies (London: Sage, 2002), 96. See also D. Heater, What is Citizenship? (Cambridge: Polity Press, 1999), 85: "For long in the classical world citizenship was a status to be coveted, a privilege to be prized, therefore the possession of a worthy elite… If the *honour* [of citizenship] was diluted, it was meaningless. For those who have earned it, its dilution was an insult". Finally, read: "On distinguait à Rome dans la personne du citoyen deux éléments: la *caput*, c'est à dire la personnalité capable d'être citoyen actif ou passif d'un droit et l'*existimatio*, c'est à dire l'honorabilité… Le *caput*, la personnalité juridique suffit pour permettre l'exercice de tous les droits civils, mais pour l'exercice des droits politiques, il faut quelque chose de plus que la capacité civile, il faut l'*existimatio*" : H. Michel, Cours de droit romain, (Paris: manuscript, 1875-1879), cited by A. Simonin, 'Être non-citoyen sous la Révolution Française. Comment un sujet de droit perd ses droits', in R. Monnier, ed, Citoyens et Citoyenneté sous la Révolution Française, (Paris: Sté des études robespierristes, 2006), 289, at 296.

[86] Adrien Duport, cited by par A. Simonin, 'La dignité de la personne humaine n'est pas une idée révolutionnaire', in C. Girard, S. Hennette-Vauchez, La dignité de la personne humaine. Recherche sur un processus de juridicisation, above n 24, 310 (emphasis added).

[87] A. Simonin, *Ibid.*.

[88] A. Simonin, 'De l'indignité nationale à l'atteinte à la dignité nationale: a-t-on jugé le bon crime?', in S. Boulouque, P. Girard, Traîtres et Trahisons. Guerres, Imaginaires Sociaux et Constructions Politiques, (Paris: Seli Arslan, 2007), 90. Concretely, those convicted of this new crime lost their civil and political rights, were excluded from a number of professions, and could be subjected to specific taxes.

citizenship remains inspired by the model of a dignity that can, by hypothesis, be withdrawn. Regardless of the fact that, throughout most of Europe, the most common cause of loss of nationality is the voluntary acquisition of another[89], it nonetheless remains true that the naturalized are generally speaking more exposed than others to such a possibility, especially in the case they can be convicted of not respecting certain behavioral standards (which takes us back to the notion of honor)[90]. Congruent in this respect is D. Fassin and S. Mazouz's analysis of the French naturalization process, for they insist on the centrality of the concepts of 'dignity' and 'honor': candidates must prove they are dignified enough for being elevated to French nationality[91]. Therefore, the notions of *dignitas*, of status –and the corresponding obligations- are far from alien to the contemporary construction of citizenship; rather, they still produce visible effects.

The law of professions too remains a contemporary locus of *dignitas*-like manifestations of the dignity principle. The links between *dignitas* and the law of professions are both ancient and well-documented. During the Roman Empire, the magistrature was above all considered to be an honor[92]; and it still was the case during the middle Ages, if only because of the irradiating effect of the royal dignity it was said to be deriving its authority and legitimacy from[93]. Up to the present days, in most countries, the magistrature is still in part defined as an office one must be dignified enough for exercising, and any breach of the corresponding obligations may result in professional sanctions[94]. Moreover, such logic is not specific to the judicial offices, for many other professions, legal[95] and not (physicians…); derive from it as well –not to mention most

[89] Cf. D. Lochak, 'Le droit à l'épreuve des bonnes mœurs. Puissance et Impuissance de la norme juridique', in J. Chevallier, ed, *Les bonnes mœurs*, (Paris: PUF/CURAPP, 1994), 15, at 28: "A défaut de pouvoir rejeter hors de la collectivité nationale les Français qui ont de mauvaises mœurs, du moins s'efforce-t-on de n'admettre en son sein les personnes de nationalité étrangère que si elles en sont dignes".

[90] R. Baubock et al., Acquisition and Loss of Nationality. Policies and Trends in European Countries, (Amsterdam: Amsterdam University Press, 2006), vol. 2. See notably the example of a Belgian legislative proposal cited at 100 (n. 46) that aimed at withdrawing nationality in case of "fraud or false declarations"; or the idea according to which, according to Irish law, "a lack of faithfulness and loyalty to the State" remains a grounds for withdrawal of nationality for the naturalized (at 315).

[91] D. Fassin, S. Mazouz, 'Qu'est-ce que devenir français ? La naturalisation comme rite d'institution', (2007) 48 Revue française de sociologie, n°4, 723, at 730.

[92] See: "Honor (*honos*) : The dignity and privileges attached to the power of a magistrate, both in Rome and municipalities ; hence the reverence, consideration due to him (*honorem debere, tribuere*). Honor is frequently synonymous with *magistratus*. When both terms occur together, *magistratus* refers to the power and its exercise, whereas honor covers the dignity, rank and privileges connected with a magistracy. Honor was extended later to any honorific position occupied by a person in a municipality", in A. Berger, Encyclopedic Dictionary of Roman Law, (The American Philosophical Society: 1953), 488. See also *D.* 1.2.2.10 : *honorarium dicitur quo dab honore praetoris venerat* cited by J.A.C. Thomas, Textbook of Roman Law, (Amsterdam: North Holland Publishing Co, 1976), 35.

[93] As Kantorowicz recalls: "[the presidents of Parlement] represent the King's person or the doing of Justice, which is the principal member of his Crown and by which he reigns and has sovereignty"; above n 61, 415.

[94] See for example French Ordinance n°58-1270 of 22 december 1958 article 43: "any breach of the duties linked to [a judge's] status, to honor, to tactfulness or dignity, constitutes a disciplinary fault" [my translation].

[95] A. Tyrell, Z. Yacub, The legal professions in the new Europe, (London: Cavendish Publishing, 1996, 2nd ed.), notably at 84, 186, 225, and 289 for examples drawn from the Belgian, Greek, Italian, Portuguese law of professions.

systems of civil service[96]. In any case, such contemporary remnants of statutory dignity are strong enough for a statistical analysis of judicial usages of the concept of dignity in French law to have revealed that a critical proportion of them (49.8%) actually are references to *dignitas*-like dignity, and not human dignity[97]. Such numbers place the assertion according to which statutory dignity (e.g. the one that essentially grounds obligations) still is quite strong well beyond the question. Yet, if in such case, the tentative investigation into genealogical links between ancient *dignitas* and contemporary dignity gains in relevance, for if the former remains more vigorous than is generally held, the idea according to which it would actually inform or influence contemporary usages of the HDP becomes more plausible –less counter-intuitive.

2. Similar Structures: Ground Obligations Towards Oneself

Beyond the fact that they share similar functions in that they both serve to ground obligations, ancient and contemporary dignity also share similar structures for they both serve as a justification for a very specific type of obligations that otherwise rests on rather uncertain theoretical grounds, that is obligations towards oneself. Indeed, there is a particular magic to the concept of *dignitas*, that has to do with its capacity to ground obligations that can be opposed not only to third parties, but also –and quite remarkably- to the *dignitas* bearer herself. To be sure, there is an element of artifice in such a construction, for it rests on the fiction of the bearer's two bodies (in Kantorowicz's words): one by virtue of which she is subjected to a number of obligations, and the other in virtue of which she is dignified. In other words, whereas the obligations that stem from *dignitas* may appear to be obligations the bearer has towards herself, what they really aim at is the function, the office in her: they are linked to the office and not to the person.

Let us illustrate these analyses by a number of examples drawn from the law of insult and defamation as it applies to repositories of public interests and offices. It is easily shown that the corresponding legal rules are intended to protect the offices more than the persons. Were a public official to be insulted in public, she would be in a position to invoke the protection of a number of specific legal rules that apply to the particular case because of the office she is in charge of[98]. But such protection becomes unavailable to her the very minute she is divested from the public office that granted her a form of *dignitas*; only "regular" legal protection remains, the one that everyone enjoys. This is

---

[96] J. Ziller, Egalité et Mérite. L'Accès à la Fonction Publique dans les Etats de la Communauté Européenne, (Bruxelles: Bruylant, 1988) and the examples cited at 290: "les fonctionnaires doivent, dans le service comme dans leur vie privée, éviter tout ce qui pourrait porter atteinte à la confiance du public ou compromettre l'honneur ou la dignité de leurs functions" (arrêté royal belge portant le statut des agents de l'Etat, 2 octobre 1937) ; or at 305 : "Le fonctionnaire doit, dans et hors ses fonctions, éviter tout ce qui altèrerait la dignité de ses fonctions ou sa capacité à les exercer, susciterait scandale ou compromettrait les intérêts publics" (statut général luxembourgeois des fonctionnaires de l'Etat, loi du 16 avril 1979).

[97] See notably C. Girard, S. Hennette-Vauchez, above n 24, at 107, at 114.

[98] See for example article 433-5 of the French Penal code: "Constituent un outrage puni de 7.500 euros d'amende les paroles, gestes ou menaces, les écrits ou images de toute nature non rendus publics ou l'envoi d'objets quelconques adressés à une personne chargée d'une mission de service public, dans l'exercice ou à l'occasion de l'exercice de sa mission, et de nature à porter atteinte à sa dignité ou au respect dû à la fonction dont elle est investie".

the reason for which the compensation linked to the injuries caused by the taking and publishing of photographs of both former president F. Mitterrand[99] and préfet C. Erignac[100] only some minutes after their deaths was awarded on *common* legal grounds. In the Mitterrand case, the judge ruled that his heirs' right to the protection of private life had been violated. In the Erignac one, it decided that human dignity (that is, dignity as it applies to all, and not statutory dignity linked to Erignac's office as a préfet) as a limit to freedom of expression had been misjudged. In other words, the very moment public officials die, the only (legal) protection that remains applicable is the one awarded to the (lay)person; but the ones that are linked to the public office no longer operate, for the function as it never dies, no longer coincides with the deceased person.

This particular ability of the *dignitas*-concept of dignity to ground obligations towards oneself (or, more accurately, towards the status in her) is all the more interesting from a strategic point of view[101] that it corresponds to a normative aim of many a promoter of the contemporary principle of dignity that it is otherwise difficult to theoretically ground[102]. Numerous and diverse are the works of political and legal philosophy that identify 'Others' as valid grounds for limiting or restricting the exercise of individual rights. Less numerous are those who conceive of oneself[103] as validly performing the same function[104]. Some theoretical works even deny the very idea that rights or obligations towards oneself exist[105].

---

[99] Cour d'Appel de Paris, 2 July 1997; (1997) Recueil Dalloz, 596, commentary by B. Beignier.

[100] Cour de Cassation, 1re ch. Civile, 20 December 2000; (2001) Recueil Dalloz, 885, commentary by J.-P. Gridel.

[101] See O. Cayla, 'Le coup d'Etat de droit', (1998) Le Débat, n°100, 108, 125 : "le concept de dignité est apparu, à ce puissant courant jusnaturaliste antimoderne, comme le moyen idoine… de parvenir à réglementer d'abord et surtout le rapport que chacun entretient avec lui-même, afin de lui interdire, au nom d'un impératif éthique supérieur, de disposer de son propre corps d'une manière qui, le reléguant à la qualité de chose, porte absurdement atteinte à sa dignité de personne. De sorte qu'il soit enfin possible de mettre un terme salutaire à la naïve illusion de la souveraineté de l'individu, grâce à la *médiation* que le droit introduirait dans le rapport qu'il entretient avec lui-même, en lui imposant la pudeur du respect de soi, c'est à dire le respect de l'humanité qui est en lui, mais dont il n'est pas propriétaire".

[102] See generally the important works of O. Cayla and especially above n 100, and above n 78.

[103] It may be insisted here on the fact that I refer here to legal and political philosophy –and not to moral philosophy. However, I believe it would be too simple to simply draw normative (legal) consequences from Kant's ("So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means"), Ricoeur's (since "Self" is "as Another") or others' moral precepts or axioms. Principles of moral philosophy may not be "simply" transposed from the moral to the legal field.

[104] It might be added that moral philosophy of the 20th century in particular has insisted on what has been called the ethics of responsibility, based on the idea that man is under a number of obligations for the sole reason that he is a man. Levinas and Jonas, among others, have argued this point. They, however, also have been severely criticized for doing so, notably for the "absolute confusion between ethical and juridical categories" they have favored. See G. Agamben, Remnants of Auschwitz. The Witness and the Archive (Homo sacer III), (New York: Zone Books, transl. D. Heller-Roazen, [1998] 1999), 20-25.

[105] This is what an author like F.C. von Savigny expresses (Traité de droit romain [trad. Ch. Guenoux] (Paris: Firmin Didot, 1840), t. 1 as he expresses his tripartite vision of the empirical world. According to him, the individual is situated at the center of three concentrical circles, of which she forms the nucleus (the original me), the second circle being defined as 'me prolonged by family', and third circle referring to the exterior world. Within this framework Savigny argues, there is no law, no legal relationships in the nucleus: "the primitive me… is out of reach of positive law" (at 338).

It thus follows that the concept of dignity appears to be of immediate theoretical interest to all those who wish to fill in what they consider to be a legal gap, that is, the absence of a general principle that would straightforwardly serve as a ground for defining legal obligations of the individual towards herself. This particular aspect most likely can be seen as a critical element of the HDP's recent success in Western legal orders and their quite massive infatuation with it.

3. Similar Regimes: Inalienability

Finally, similarities in the legal regime that is associated with the dignity principle in both its ancient (*dignitas*) and contemporary fashions must be added to the previous functional and structural ones. Indeed, both versions of the dignity principle seem to heavily rely on the concept of inalienability when it comes to their legal regime. Then again, theoretical stakes are high on this particular issue, for the question of human dignity's inalienability re-opens the wider one of rights waivers in general. Yet it is well-known that the question of waiving rights is a highly difficult one. It must be admitted that it is somewhat disturbing to envisage the configuration in which a given individual behaves in a way that is exactly opposite to the one that is generally expected of her –which is the case, for instance, when she waives fundamental rights. It can indeed convincingly be argued that the quest and recognition of human rights have been long and painstaking enough processes for one to legitimately expect that their beneficiaries wish not to renounce them!

This is probably why human rights literature sometimes expresses uneasiness towards the whole issue of fundamental rights waivers, and deems it somewhat indecent[106] to reflect upon the case of the patient who refuses a benign but lifesaving treatment or of the mute convict who refuses to be defended by a lawyer. Furthermore, this would be the reason for which it is sometimes considered that human rights (or, at least, core human rights) are inalienable (hence they can not be renounced) [107]. The European Court of Human Rights had initially implicitly intended as much: in 1983, it did declare that "admittedly, the nature of some of the rights safeguarded by the Convention is such as to exclude a waiver of the entitlement to exercise them"[108]. However, such a difficult question does not satisfactorily bear blunt and categorical answers; and the European Court herself never went any further down that path. Notably, she did not engage on the terrain on which he was most expected: that of developing a theory according to which those rights for which the Convention itself excludes the possibility of derogations (e.g. those listed under art.15) are insusceptible of being waived. As a consequence, it must be admitted that the rights protected by the ECHR may be waived –no particular

[106]Cf. B. Lavaud-Legendre, Où sont passées les bonnes moeurs?, (Paris: Presses universitaires de France / Le Monde, 2005), 127 : "Il est choquant d'affirmer que le droit protège la liberté d'avoir un comportement contraire à sa propre dignité".

[107]Although it would be too long to fully justify this option here, I shall consider in the remainder of the article that inalienability encompasses inavailibity as well as non-renounciability.

[108]ECtHR, 10 Feb. 1983, *Albert et Le Compte*, §35; the Court cautiously went on: "but the same cannot be said of certain other rights".

difference between procedural and substantial rights being relevant from that point of view[109].

It thus follows that if human dignity were considered to be a right (be it human, fundamental…) it would be exposed it to similar challenges. It would indeed necessarily follow that exactly like other human rights, human dignity could be waived[110]. It is easily understood that such a perspective frontally contradicts an important part of the axiological grounds on which the HDP has been flourishing in contemporary legal thought, for indeed, a critical aspect of the interest contemporary legal scholars have paid to the HDP precisely had to do with the fact that they believed it could be credibly presented as an absolute, transcending, inalienable, axiomatic principle. For many authors, the major interest of the HDP is linked to its presumed capacity to escape the tragic fate of all other human rights[111], implacably undermined –despite many efforts to oppose it- by their alienability. This explains the relentlessness of the efforts undertaken by significant trends of legal scholarship in order to convince that the HDP is not similar to other legal principles, that it is specific. The HDP is thus often said to be a "matrix" [112] more than a regular legal principle; it is presented as "absolute" [113], "objective"… In other words, "it is a very unique legal principle" [114], quite different from the other regular legal principles. Some authors even go as far as refusing to

[109]On this particular aspect, see notably Ph. Frumer, La renonciation aux droits et libertés. La Convention européenne des droits de l'homme à l'épreuve de la volonté individuelle (Bruxelles: Bruylant, 2001). The author considers (at 439) that "un inalienable right would be… a right of which citizens could not be deprived without legislative or constitutional amendments… In other words, a right's inalienability would not be an imediment to its democratic modification or even abrogation".

[110]Even Ph. Frumer, who however tries to validate the hypothesis according to which human dignity would be a ground for ascertaining fundamental rights' inalienability, recognizes that he does not manage to satisfactorily do so. Read, for example, at 319: "the current strengthening of the HDP would *a priori* be an indication that an irreducible minimum of rights so inherent to the human person that they could not be waived exists. However, such an idea is only at the cradle, and one must at this stage avoid any speedy conclusion". Further, Frumet eventually rejects the idea (see at 447sq).

[111]Symetrically, many efforts are also undertaken in order to oppose as invalid all legal usages of the HDP that ignore such presumed specificity. See for example the way significant trends of French legal scholarship have criticized the Constitutional Council's recourse to the HDP in the field of social rights, on the basis that it induced contingency in this absolute principle; B. Mathieu, in N. Lenoir, B. Mathieu, D. Maus, eds., Constitution et Ethique Biomédicale (Paris: La Documentation Française, 1998), 50-51 : "L'extension du principe de dignité à des droits sociaux que le Conseil constitutionnel a opéré dans une décision postérieure, conduit à protéger non plus la personne humaine mais l'individu, aux prises avec les contradictions et les tensions du champ social. Le principe de dignité perd alors de sa spécificité, il est dilué, rabaissé au niveau des autres droits sociaux avec lesquels il entre alors en concurrence").

[112]B. Mathieu, 'Pour la reconnaissance de 'principes matriciels' en matière de protection constitutionnelle des droits de l'homme', (1995) Recueil Dalloz, 211.

[113]B. Mathieu, 'La dignité de la personne humaine : quel droit ? quel titulaire ?', (1996) Recueil Dalloz, 282; see also N. Lenoir, 'Bioéthique, Constitutions et droits de l'homme', (1995) Diogène, 13, at 26: "the dignity principle is of an absolute nature. This means that it cannot be subjected to any restrictions, unlike the other principles, those who found liberties"; and at 29: "As a source of new specific rights, and as a general principle of absolute nature, human dignity appears to be the indérogeable right par excellence".

[114]M. Fabre-Magnan, above n 79, at 13 ; and also N. Lenoir, above n 112 at 26 : "'Every man is all mankind': the famous phrase by J.-P. Sartre summarizes the legal and philosophical scope of the dignity principle, in that it is to be distinguished from all other existing legal principles".

consider human dignity as a right[115], in order to oppose the idea of its renounciability in an even more convincing manner. What is of interest for the sake of our demonstration in these elements is the justification that this claim for the HDP's specificity rests upon: how do these trends of scholarship argue in favor of the idea according to which since human dignity is inalienable, its bearers cannot renounce it? Yet again, I believe that the grammar of statutory dignity provided with many attractive and strategic features that enabled the conceptual operation that consisted of transposing its inalienabilist dimension to contemporary dignity. In this respect, it seems quite justified to consider the so successful contemporary concept of human dignity as a mere reappraisal of the ancient *dignitas* one.

There indeed is no doubt about the fact that *dignitas* is inalienable. Be it in its Roman or medieval version, in contemporary law of professions or of citizenship, *dignitas* is by definition exterior to and out of reach of the individual. The *dignitas* bearer appears to be a merely temporary repository; as a vulgar mortal, she is implacably submitted to dignity's brilliant eternity and intemporality. Once again, this particular magic operates thanks to the fact that what *dignitas* really is linked to is the function and not the person. On such bases, it can be argued that such a technical conceptual construction has been copied in contemporary legal thought. By many means, it can be argued that the notion of humanity has been used as a mediator between the individual and human dignity. As an abstract concept that has to do with eternity and intemporality, humanity may well be described as deposited within each and every one of us. But at the same time, humanity remains unchallenged by individual disappearances[116]; it is eternal and intemporal. In other words, 'dignity' in the contemporary HDP is linked to humanity, but not to individual men and women. This allows for the notion of humanity to play the same role that specific (social, professional, religious…) functions used to play in the ancient concept of *dignitas*. Its mission is to operate as a mediator between individual and dignity, and make the latter insusceptible of being alienated by the former[117]. Since human dignity relates to humankind more than it does to the human individual, it remains out of the latter's reach[118]: she cannot renounce it, she is stuck with it[119].

---

[115]It is the case for example of B. Edelman, 'La dignité de la personne humaine, un concept nouveau', (1997) Recueil Dalloz, 185.

[116]See B. Lavaud-Legendre, above n 105, at 136: "[The respect due to dignity] does not refer to the respect due to this or that individual as much as it does to humanity in its entirelty throughout her. As a consequence, it would be problematic to legally compensate the infringement on the dignity of an individual, for the dignity of the human person only aims at the dignity of all the members of the human genre".

[117]B. Lavaud-Legendre, above n 105, at 136 refers to a concept of 'fundmental dignity' as opposed to 'actuated dignity': "Fundamental dignity designates an inavailable quality of every human person. It constitutes a fact that is out of reach of man: his dignity enables to distinguish him from things as well as animals". These two notions are in fact borrowed to B. Maurer, Le principe de respect de la dignité humaine et la Convention européenne des droits de l'homme (Paris: La Documentation Française, 1999.

[118]See: B. Edelman, above n 114; and also M. Fabre-Magnan, above n 79, at 21: "in fact, the HDP… does not have the protection of a particular person as a horizon, no more than that of a particular group of persons; it aims at protecting humanity in general".

[119]We borrow the expression to E. Heinze, Sexual Orientation : A Human Right (Dordrecht: Martinus Nijhoff, 1995), at 143: "fundamental rights… may not be so readily compromised. They may not be taken away (e.g. by force) or even 'contracted' away (e.g. by consent). We are 'stuck' with them, for we are 'stuck' with our humanity".

The previous paragraphs do not stem from abstract flights of fancy. They rely on an analysis of positive law. Indeed, the modes of reasoning they describe are precisely the ones that ground a number of normative solutions such as ones that are both explicit and frequent in German law. The Federal Constitutional Court has made it clear that the HDP, as the cardinal point of the "objective order of values"[120] against which the entire German legal order rests, does not refer to the individual but to the human species[121]. Similarly, the Federal Administrative Court has made explicit statements as to the impossibility of renouncing the HDP[122]. The French Council of State reasons in a very similar fashion as it upholds municipal orders prohibiting dwarf-throwing shows in accordance with the *commissaire de gouvernement*'s plea that: "the respect for human dignity, absolute concept if any, can not accommodate to any kind of concession depending on subjective appreciations" [123]. In these examples, the human dignity it is referred to is human dignity intended as a quality of the whole species, of humankind – and not of the sole individual. Another French case is more enlightening in this perspective still. At the beginning of the 1990s, the Benetton Company decided to go for yet another provocative advertisement campaign; this time, the photographs that were used represented body parts that were tattooed 'HIV Positive'. AIDS patients' associations as well as the public opinion were quite shocked by the ad; and the former eventually sued the company –and won their case, for the Benetton company was found guilty of exceeding the limits of freedom of expression in that it recoursed to "degrading symbolic of stigmatization" that injured "the dignity of people who implacably suffer in their flesh and soul", by "provoking or accentuating at their expense of phenomenon of exclusion"[124].

What is most interesting in our present perspective is the technical fact that the petitioners in this case actually had no link whatsoever with the incriminated photographs: none of them had posed for the photographs the campaign was based on, none of them had a relationship with the Benetton Company. Therefore, the court could well have dismissed the case, on the basis that the legal grounds chosen by the petitioners (a violation of their right to the respect of private life) was inappropriate for condemning offenses that had nothing to do with these particular individuals. However, the court decided differently, and judged that the petitioners' sole membership of humankind constituted a sufficient ground for their course of action; it thus admitted the

[120]On this notion, see O. Jouanjan, 'La conception allemande des droits fondamentaux', (1998) Actualité Juridique Droit Administratif, special issue, 44.

[121]*BVerfGE* 87, 209 (1992): "Human dignity is not only the individual dignity of every person, but also the dignity of the human being as a species. Everybody possesses human dignity, regardless of his characteristics, achievements, or social status; those who cannot act in a meaningful way because of their physical or psychological condition also possess human dignity. It is not even forfeited by means of 'undignified' behaviour; it cannot be taken away from any human being" (English version in in S. Michalowski, L. Woods, German constitutional law. The protection of civil liberties (Dartmouth, 1999), 99).

[122]*BVerwGe*, 15 déc. 1981, cited by P. Frumer, above n 108, at 463 (in English in S. Michalowski, L. Woods, above n 121 at 105 : "This violation of human dignity is not excluded or justified by the fact that the woman performing in the peep show acts voluntarily. Human dignity is an objective, indisposable value, the respect of which the individual cannot waive validly").

[123]P. Frydman, conclusions on C.E., Ass., 27 oct. 1995, *Cne de Morsang sur Orge et Ville d'Aix en Provence*, in (1995) Revue Française de Droit Administratif, 1209.

[124]Cour d'Appel de Paris, 28 mai 1996, (1996) Recueil Dalloz, 618, commentary by B. Edelman.

case and eventually upheld their views. As it has been commented: "before the court, the patients' [associations] had argued that the photographs excluded them from the community of humans. In other words, they did not place their action on the grounds of private life, but on that of humanity. Hence this double consequence: on the one hand their demand became perfectly admissible for they only claimed to be recognized as members of humanity, and on the other hand, dignity prevailed over freedom of expression"[125].

Conclusion

As he diagnosed the obsolescence of the concept of honor in 1970 and explained it by a wish of the individual to free herself from institutions, sociologist Peter Berger insisted on the precariousness of the situation this resulted in[126]. He then warned that "the contemporary mood of anti-institutionalism is unlikely to last… Man's fundamental constitution is such that, just about inevitably, he will once more construct institutions to provide an ordered reality for himself"[127]. Future developments proved him right, for it does seem that the recent successes of the legal HDP have amounted in constructing Humanity as the new institution. Such a return of the repressed further corresponds (as Berger had also foreseen) to a return to honor in so far as, as this paper has tentatively argued, the contemporary HDP is but a mere reappraisal of ancient *dignitas*. Hence current legal conceptualizations and usages of the HDP are only erroneously seen as derivations from post-WWII dignity; rather, they descend from the old *dignitas*, essentially statutory more than humanist. Such a distinction is crucial: the HDP is not all about human rights.

In the most contemporary version of the HDP, humanity thus corresponds to the status at which the individual has been admitted or elevated. However, and by definition, statutory dignity may be withdrawn. French dwarf M. Wackenheim, as a matter of fact, has pleaded that the famously upheld prohibition that affected his professional demonstrations amounted in a violation of his dignity; and Ms Jordan (the South African prostitute), M. Senanayake (the French Jehovah Witness who wished to refuse a blood transfusion) and MM. Laskey, Jaggard and Brown (the English men who engaged in sadist-masochist relationships) are most likely under very similar impressions. Here lies the most crucial aspect of the problem: is it possible to ensure that the contemporary HDP, in that it shares so much with ancient *dignitas*, has positively and for good parted with its inherent contingency and fragility (its conditionality)? How is it possible to simultaneously construct dignity as a status and guarantee that no one will be stripped of it[128]? If dignity primarily refers to (moral) duties and (legal) obligations, what is to become of those who refuse to comply with those?

---

[125]B. Edelman, above n 114 at 188.

[126]P. Berger, 'On the Obsolescence of the Concept of Honour', (1970), European Journal of Sociology, vol. 11, repr. in M.J. Sandel, ed., Liberalism and its critics, (Oxford: Basil Blackwell Publisher, 1984), 149.

[127]*Ibid.*, 158.

[128]This question is all the more complex as we part from the simplistic and incomplete humanistic approach according to which all man are human and thus deserve dignity. As Agamben's reading of

It is because there are no clear-cut answers to questions of such utmost importance that it does matter to figure whether or not the HDP belongs to the human rights paradigm. Shall one see it as linked to the promise of 1948 ("all men are born equal in dignity and rights"), or as the result of a democratization process that would against all odds have applied to an institution central of the *Ancien Régime*? Is it a humanist and inclusive answer to the question asked by Primo Levi (*If* this is a man[129]) or an injunction that would permanently weigh on men and women and thus rather resembles a Saint-Just inspired aphorism (no liberty for the enemies of liberty; no dignity for the enemies of dignity)?

Levi's testimony recalls, "One must acknowledge the insufficiency of the two opposed theses built upon Auschwitz: that of the humanistic discourse, that affirms that all men are human, and that of the anti-humanistic, that wishes to reduce the quality of human to some men only. The testimony says something quite different, possibly summarized as: "men are inhuman men", or more accurately: "men are men in that they testify for the non-human"": G. Agamben, above n 103, 132. For, indeed, (at 47) : "As for Levi… the nature of the experience to which he was called to bear witness was never in question. 'Actually what interests me is the dignity and the lack of dignity' (Levi)… The new ethical material that he discovered at Auschwitz allowed for neither summary judgements nor distinctions and whether he liked it or not, lack of dignity had to interest him as much as dignity. As suggested by the ironically rhetorical Italian title *Se questo è un uomo* (literally 'If this is a man', translated as 'Survival in Auschitz in English), in Auuschwitz ethics begin precisely at the point where the Muselmann, the 'complete witness' makes it forever impossible to distinguish between man and non-man".

[129]G. Agamben, above n 103, strikingly insists on the conditional (and uncategorical) form of Levi's title (*If* this is a man) (at 47). In other words, he reminds us how complex it is to affirm that it is a man, precisely because there is a stage of suffering and degradation beyond which "dignity and self-respect have become useless", "concepts [that] make no sense" (at 63-64). Hence: "This is also why Auschwitz marks the end and the ruin of every ethics of dignity and conformity to a norm. The bare life to which human beings were reduced neither demands nor conforms to anything. It itself is the only norm; it is absolutely immanent. And the 'ultimate sentiment of belonging to the species' cannot in any sense be a king of dignity. The good that survivors were able to save from the camp –if there is any sense of speaking of a good here- is therefore not dignity. In the contrary, the atrocious news that the survivors carry from the camp to the land of human being is preciserly that it is possible to loose dignity and decency beyond imagination, that there still is life in the most extreme degradation".