

Chapitre 5

HUMAN DIGNITY: REGULATIVE PRINCIPLE AND ABSOLUTE VALUE

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Rapid scientific, medical and social developments necessitate a structure of legal regulation to deal with the hard cases that push established moral actions and principles into conflict. Such cases should not be resolved by expediency or according to majority opinion. Rather, the process of resolving such cases as well as the solutions themselves ought to respect and reflect the moral convictions of a pluralistic society. The search for common moral bonds between people sharing different ideological positions – religious and secular – is independent from the legal process, but it is integrally associated with it and can learn much from its example of resolving hard cases. Citizens accept the legal system that governs them to the extent that they believe its laws represents their interests and values, and to the extent that they believe they share some

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participatory access to the continuing development of those regulations. This is a way of saying that the law has legitimacy.³ Legitimacy does not imply that the system of law represents a situation of perfect justice, especially in a pluralistic society with divergent notions of justice. Yet legitimacy and respect for the law go hand-in-hand, whether we are referring to constitutional articles or local statutes. While legitimacy and the objective justice of the law are two different things, the effectiveness of the law depends upon a people's conviction that the law reflects their fundamental moral convictions – or at least does not violate them.

The following argument seeks to demonstrate that just as the law's legitimacy requires fundamental principles of human rights, the legitimacy of moral discourse and decisions depends upon the recognition of human dignity as a principle with absolute value. Though this recognition provides no easy solutions, it plays an essential regulative role that provides a framework for resolving cases of conflict. The paper concludes with an example from embryo research explicating the theoretical discussion.

1. HUMAN DIGNITY HAS ABSOLUTE VALUE

1.1. The principle of human dignity was affirmed following the experience of its violation

In 1945, the world community knew the full extent of the Nazi's racially motivated crimes against the Jewish people. The murder of millions of Jews was a singular crime that together with the other atrocities of the period awakened the consciences of people across the world. The depth of the Nazi's inhumanity was also demonstrated by their treatment of other ethnic groups including the Slavs. A statement of Himmler from October 4, 1943 is documented on a memorial plaque in the concentration camp Flossenbürg:

“What happens to the Russians and what happens to the Czechs are matters to which I am completely indifferent. Whatever good blood we can find among them to enrich our own people we will simply take. If necessary, we will steal their children and raise them among us. Whether the other peoples live in

³ The notion of legitimacy here is broad enough to include the range of theories from Frank Michelman to Habermas. It is essentially the basis of the western contractarian principle of democracy.

prosperity or if they are ravaged by hunger – that interests me only to the degree that we can make them slaves to serve our culture. Everything else is uninteresting. Whether digging a tank ditch entails the death of 10,000 Russian women from exhaustion, or not, I am only interested to the degree that the tank ditch is completed for Germany.”

The foundation of these Nazi atrocities consists of two principles:

1. You are nothing, the nation is everything.
2. The Aryan race is uniquely valuable; all other races are inferior and some should be destroyed.

This history motivated the Charter of the United Nations (1945), the Universal Declaration of Human Rights (1948) and the West German Basic Law (1949) to affirm the principle of human dignity unequivocally and thereby reject the Nazis’ two principles. The words of the UDHR (1948): “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

The UNDR is very clear, in one article after another, that it is responding to the horrifying human rights violations of the Nazis, responsible for the deaths of more than 20 million people (see Morsink 2001). Against this background, therefore, the principle of human dignity must be understood as standing in contraposition to the two Nazi principles in the following sense:

1. The principle of human dignity affirms the conviction that every person possesses a fundamental subject status. This means that the individual may never be sacrificed for another purpose, whether that purpose is the nation or a utilitarian principle of increasing the happiness of the greatest number of people.
2. The principle of human dignity affirms the fundamental equality of all human beings, regardless of race, skin color, gender, religious or philosophical convictions, wealth, or capacities.

1.2. The Principle of Human Dignity in Light of the Principles of Marxism and Utilitarianism

The Preamble of the UDHR intrinsically links the principles of human dignity and human rights when it recognizes that “the inherent dignity and ... the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.” This understanding of human dignity

should be distinguished from the so-called humanism based on Marxist theories. Unlike the Nazis and other fascist theories such as Italian fascism, socialists following Marxist principles did not adopt racist practices or beliefs and actually accepted the fundamental principle of human equality. However, they roundly rejected the principle of universal human subject status. Whereas the Nazis claimed “You are nothing, the nation is everything”, the socialists declared “You are nothing, the party is everything.” Thus Erich Mielke, the former DDR (GDR) minister of national security, declared that “We cannot tolerate a single rogue to survive in our midst. If I have knowledge of one now, he would not survive through tomorrow. There is no reason to delay. Because I am a humanist – that is why I am of such a mind. [...] This whole business against death sentences and executions – its all baloney (Käse) comrades. Just execute him. If necessary, without a court order.”

An ethical system that emanates from the principle of human dignity also differs in principle from utilitarianism. Utilitarianism negates the principle of human subject status, the first principle, in a moral calculus that prioritizes the happiness of the greatest number. Such a calculus places the individual in potentially jeopardy. The second principle of fundamental equality is also relativized within a system that is so teleologically ordered to an end of fostering empirical or subjective quantities of happiness without safeguarding principles for individual persons. Taking the example of preference utilitarianism, the claim is that because happiness is a subjective experience, every person must determine for themselves what is “good” for them. This places a burden on individuals to be capable of cognitive abilities, i.e., recognizing their preferences. A person with severe mental retardation lacks the ability to develop preferences, whereas a so-called healthy person has preferences for such things as education, basic protections, political participation, etc. If the subject is therefore responsible for determining his own good, the resulting society is one that lacks universal rules that treat all people equally (see Singer 1994).⁴

Holding to the principle of human dignity and the associated principles of human rights necessarily precludes treating human beings instrumentally – as merely means, as opposed to ends in themselves. This is a fundamental contrast to fascist systems, of course, to the socialist systems that existed in Eastern Europe, Asia and elsewhere, and to forms of utilitarian convictions that continue to inform political decisions today. Holding to a principle of human dignity precludes, therefore, the instrumentalization of human beings for economic,

⁴ Perhaps one could make an argument for Rule Utilitarianism, where the greatest possible happiness requires that the dignity of every person is recognized and protected.

social, religious or political ideals. The classic formulation of this principle was made by Kant in the categorical imperative, the well-known end-in-itself principle (1785). “Act in such a way that you always treat people as ends, and never merely as means to an end. This applies to yourself and every other person.” This formula is clearly open to various interpretations and applications, and it does not lend itself to a simple or obvious ethical determination. Rather, its use in ethics is in shedding light upon when persons are being instrumentalized such that they have become merely instruments, and they are thus not being treated as ends in themselves. A common misinterpretation of the “never merely as means” principle includes the following objection: We use people as means all the time, such as for example, when we ask for directions to the train station. Yet asking a question that treats the questioner as a means does not at the same time rob that person of their status as an end in themselves. Asking for directions allows the person to respond or not in freedom, without exploiting them, and thus they are not “merely” a means.

This Kantian mode of ethics has influenced the German courts’ interpretation of human dignity. The principle of “the subject status of every person” has been integrated into the way the German highest court interprets the Basic Law’s first article on human dignity. According to the Federal German Constitutional Court, the principle of human dignity prohibits any action that “treats a person simply as an object of the state, whether through direct action or the absence of action, and thereby fundamentally endangers their status as a subject” (BVerfGE 50, 166/175; 87, 209/228).

1.3. Differentiating Other Conceptions of Dignity

Human Dignity is to be differentiated from the following:

1. Dignity understood generically. The dignity of human beings as a species is a dignity “in that weak sense in which we also ascribe to the human body as having ‘dignity’” (Birnbacher 2001, 400). Such a generic dignity would not be violated if, for example, the rights of some random individual were violated. But this is precisely what is involved with the determination of human dignity as a fundamental principle of equality and dignity.
2. Dignity in the sense of a claim demanding not to be humbled. This sense of dignity does not achieve a universal level and is in many ways dependent upon other people to grant the dignity whether through a recognition or at least a level of tolerance. Further, such a notion of

dignity has also been associated with the view that only those possessing a certain degree of mental competence can have such a dignity violated.

3. Dignity with distinct levels, such as that which the Swiss constitution grants animals, i.e., a dignity inferior to that of humans. It is inherently contradictory to posit various levels of a dignity principle that claims fundamental equality as well as subject status. How could one assert equality while simultaneously differentiating levels of equality status? It is meaningless and somewhat silly to claim that some are more equal than others. Similarly, there can be no differences in claims to dignity and likewise to the need for the protection of dignity.

Human dignity and fundamental rights associated with it (to life, physical integrity, freedom of religion, etc.) are not dependent upon persons' capacities or upon how they exercise them. Rather, persons have dignity simply by virtue of their being human beings. As a crucial principle for every human society, human dignity, in the sense argued for in this paper, is therefore only alienable through death. As such, it should also be differentiated from the following:

4. Social dignity, granted by society because of a public role (Latin, *dignitas*). This is the dignity of rank and respect, and it can be lost or alienated. Such is the dignity owed a bishop or a mayor. Persons have it by virtue of their social position, though it is like honor in the sense that its quality is dependent upon a range of social factors and its value can be degraded.
5. Expressive dignity. This is the dignity earned by sustaining one's station in life. One earns it by meeting social expectations and by persevering in family and occupational roles even under difficult circumstances. Examples include the honest banker, the hard-working farmer, the knowledgeable salesperson, etc.
6. Moral dignity. This dignity is granted by society because of moral action, the hero's dignity. Such honor is bestowed upon people in society through actions expressing the moral standards of society: of courage, strength, good will, sacrifice, ... etc. Moral dignity can also be lost through less revered behavior or the shifting of social mores.
7. Aesthetic dignity. Mountains or cathedrals have dignity because they are distinct and visually awesome.

2. THE PRINCIPLE OF DIGNITY AS A REGULATIVE PRINCIPLE

The principle of dignity should not be confused with less fundamental and more malleable moral principles. Such principles might be amendable, negotiable or repealable under specific conditions or time-sensitive contexts. For example, physicians have standard disinfecting practices before surgery that include washing hands. If an emergency arises that demands urgent action, however, the surgeon might forgo the standard protocol with its hand-washing rule. Such a decision under such circumstances would even be praiseworthy.

The principle of dignity, by definition, cannot be scrapped in the pressure of competing principles or compromising circumstances. It is a claim with universal validity and there can be no situation where its violation is praiseworthy or even tolerable. Precisely because of its fundamental nature, the principle should be considered not merely one important principle among others, but rather as a central principle necessary for understanding and applying all moral reasoning. It thus is most appropriately categorized as a meta-principle.

Human dignity, as a meta-principle, dynamically affects the relationship of the moral actor and the situation requiring moral action. What does this mean? It means that, like Kant's categorical imperative, the principle has a formal character with content supplied by the moral actors and decisions made. Concrete decisions and actions together with reflection upon the principle itself take place within a specific context. Over time, the utilization of the principle provides a dynamic of learning achieved by the continual challenges posed by either new situations, or the internal contradictions that emerge from previous decisions.

This point may seem either blatantly obvious or overly theoretical, so the analogy of moral to constitutional argumentation should help clarify it. A nation's constitution is a necessarily short and general legal outline, and most constitutions have generously borrowed from other nations' constitutions in both structure and content. The UDHR, for example, had a powerful influence on the writing of the West German Basic Law that was promulgated in 1949. Yet that document was a purely formal and theoretical thing before it was put to the test by inevitable challenges. As those challenges were resolved during the course of the nation's history, the actual words of the Basic Law may have remained the same, with modest amendments, but the nation's legal system achieved a hard-won pattern of understanding. The continual negotiating and investigation in no way constitutes an erosion of the meaning or absolute validity of the principle of

human dignity. Instead it reveals the authors' conviction that the principle of human dignity possesses a special plasticity that parallels the diversity of authentic but unique human cultures. Thus the meaning contained in the principle unfolds in its use in a way that is not entirely predictable from an abstract consideration.

The principle of human dignity is therefore a different kind of principle than individual rights. Human dignity is not the simple sum of the fundamental rights and duties given to all humans implicitly, but rather dignity is their foundation. It would not be hard to demonstrate that virtually all ethical approaches allow the restriction or dismissal of basic rights under specified circumstances. Self-defense is a good example of when rights and duties can come into collision. And the law follows this broad moral consensus, as the German Basic Law succinctly demonstrates with reference to the right to life, physical integrity and personal freedom: "These rights may be interfered with only according to the law" (article 2 paragraph 2 GG). The unconditional principle of human dignity, however, is subject to no conditions (such as certain restrictions imposed by law). Because it is the foundation of basic human rights, it exists on a different level. It cannot be denied. Rather, either dignity is honored, or it is not.

Therefore, human dignity, in contrast to principles of human rights, is a unique and higher-order principle. It is the principle "behind" the principles, the foundation of the edifice of ethical principles. Klaus Dicke (2002, 115) therefore speaks of dignity as the fundamental principle in the light of which all political and legal decisions are made. We would add ethical decisions to that list as well.

3. THE ROLE OF EXPERIENCE IN THE FOUNDATION OF HUMAN DIGNITY

The recognition of human dignity as a principle is rooted in a collective experience: people experienced the terrible consequences of the violation of this dignity, and they thereby recognized the need to establish a new world organization grounded in the transparent and concrete principle of human dignity together with the associated human rights and values. That is why the preamble of the UDHR (1948) begins with the fact that only the "recognition of the inherent dignity and equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." The Preamble also cites three core values to be preserved by the human dignity and human rights. These values were distinguished as essential for a successful human life. The recognition of human dignity and human rights and related

values of freedom, justice and peace have a fundamental objective of creating conditions so that human life could be protected and thereby succeed.

We are not arguing that the experience of human atrocity is a necessary element for recognizing human dignity and its associated values. People have also come to be convinced of these principles' value and necessity without such an experience, and have testified to their consent with heroic actions of implementing the values in concrete ways. Many of our contemporary generations have lived their whole lives in peace and have never experienced war firsthand. And yet they are convinced of the perduring human values of life, liberty, justice and peace. They are working for peace in the world by various means available to them. Ironically, the generation of students who studied in the 1950s were in some ways less sensitive to violence and suffering. For example students of that era who studied Catholic religion were thrilled with the Bible accounts of the God of Abraham, Isaac and Jacob throwing the Egyptians into the Red Sea and thus saving the people of Israel. Students from the 1970s, however, were concerned with the nature of a God who could be so cruel in simply killing so many Egyptians.⁵ And today, the religious figures who function as shining examples are many people of peace, like Mahatma Gandhi and Martin Luther King.

But what does it mean to say that the values of human dignity and human rights and their associated values such as life, freedom, justice and peace have been experienced? This way of speaking indicates that these values were not constructed. They do not have their existence because of a process of negotiation and their continuing existence is not dependent upon the reasonableness of their constructions. Rather, this approach leaves open the question whether this coming-to-consciousness and affirmation of dignity involved a process of (re-)discovery such as natural law theorists would argue, or if it was a process of true historical innovation. The mothers and fathers of the UDHR were very careful in avoiding a position regarding this question, and the intervention of the Chinese representatives insured that they avoided any explicit reference to natural law doctrines.

It is possible to understand human dignity, human rights and the rights protected in the values to life, liberty, justice and peace as real historical innovations. The argument in favor of innovation is a compelling one because at one point in history there was no trace of them. Historians have shown the development of rights as they expanded from subjective rights first for

⁵ I thank my uncle, Father Karl Jahnke, who had taught Religion for forty years at a secondary school, for this example.

individuals and special groups, then to national citizens before being universalized in the American and French constitutions. And there are fewer but analogous treatments of human dignity, freedom, justice and peace as they developed through the centuries. If they undergo development as the history seems to clearly show, how do we understand the relationship between human experience and the creation of norms and values such as human dignity and human rights? If they are indeed innovations, does the recognition of them as such lessen their validity and force? Our argument here is that they should be recognized as innovations and not primarily as constructions because the values have the property of having been developed over history on the basis of human experience and reflection. And we argue that their innovative emergence in no way harms the absolute nature of human dignity.

Human dignity's historical character as an innovation, and not a construction, acknowledges the human agency involved in achieving such an understanding of the importance of protecting every single person. A construction implies the creation of something for a specific purpose, such that another construction might also serve that purpose. But, dignity is not a construct that can be torn down and replaced with something else. It is an achievement that represents something true, such that its loss through deconstruction could not be replaced with another constructed understanding of human life. The recognition of dignity won through bitter experience remains a poignant landmark. We should not forget or lose the depth of urgency contained in the demand "never again". The innovation with respect to human dignity implies the achievement or birth (Foucault, Bottero) of a principle that is unique and irreplaceable insofar as it reveals the value of every human person.

4. THE QUESTION OF THE EXTENSION OF HUMAN DIGNITY AND HUMAN RIGHTS

The global consensus on human dignity and human rights, as it is expressed in international declarations, applies to all people. And it can be understood as gaining clarity and wide application through an experience of consensus among peoples of widely different world views and religions. "All people are born free and equal in dignity and rights." All people are enclosed within the UDHR's mantle of protection regardless of their capacities, location or material circumstances. This mantle of protection means different things for different peoples and speaking pragmatically, as Roberto Andorno has argued, it is "soft

law" without authority to overrule systems of national law.⁶ But as soft law it remains a form of law and is not simply list of ethical guidelines or hopeful aspirations. The movement from soft law to "hard" law happens in two general ways. Either it takes the form of binding treaties or it develops as part of nations' customary law. This development, in both cases, reveals the persisting relevance of the UDHR's trajectory from the experience of moral tragedy, to the innovation of human dignity and human rights, to the concretization of the international declaration in national and local laws. The moral force of horror at the violation of human dignity remains relevant even as that experience takes the form of specific laws promulgated in national constitutions and legal statutes and enforced by their respective governments. Moral conviction influences consensus regarding the law, and this is no small aspect of the law's continuing legitimacy.

The UDHR's source in experience continues to influence how we perceive and condemn violations of human rights and human dignity. Revulsion at Nazi atrocities makes us especially sensitive to situations when people are targeted as less than human. Every person is born with dignity. It is his genuine right. This claim to rights, which is currently linked to no other criterion than that of being human, rose in this world from the experience of what happens when human rights are excluded from people for various reasons: people can be excluded from the legal community and murdered. This is why we immediately recognize the name of "Auschwitz" as a symbol of violated human dignity. We continue to tap into its memory when we condemn analogous contemporary violations of human dignity, and the insight of its lesson can be expanded to recognize the injustice perpetrated because of other race, gender, sexual preference, ... etc. differences among human beings. The experience of Auschwitz arms us with insight to see the injustice and potential violence lurking behind of all attempts to define who belongs outside the circle of human beings. Such an attempt to exclude is synonymous with the authorization of an ultimately arbitrary court composed of citizens. They judge who is to be included as worthy of social inclusion, and who is not. (Schweidler 2003, 25) The memory and lessons of Auschwitz continue to reinforce the necessity of "a public commitment to the unmitigated respect for human dignity" (ibid., 24).

The insight from section 3 is that we have a practical as well as moral motivation for protecting the universal aspect of dignity. If we allow exclusions to what it means to be "human", or if we allow exceptions in a universal

⁶ Andorno, Roberto, "Human dignity and human rights as a common ground for a global bioethics." *Journal of Medicine and Philosophy*, 2009, 34(3): 223-240.

principle, then we have cracked the rational structure of the principle itself. We then do not have a weakened dignity, we have a broken principle.

The experience of 1933 to 1945 is unique, especially in its motivation of the UDHR, yet the insight into both the universality of human dignity and the potential for humans to violate that dignity is not essentially bound to any single remembrance. In fact, the singular focus on one experience screens us from the dangers to human dignity that fall beyond the scope of what the Nazis did. The international community is pretty good at recognizing and condemning certain kinds of crimes, but others such as economic depravity and mass hunger go effectively unaddressed. The Declaration just leaves open, for example, the question regarding when human dignity applies to a human organism. In addition, the Declaration leave the question open regarding how we might apply the principle of human dignity to a person wishing to end their own lives for whatever reason.

5. EXAMPLES FROM MEDICAL ETHICS

This section applies examines the classic cases of conflict arising from the lack of consensus regarding precisely when we can say that human life begins and ends. The attribution of human dignity is difficult in cases without this hard line of consensus.

5.1. Beginning of Life

Life begins: Essentially three positions advocated:

- Position 1: claims that human dignity exists from conception, namely with the union of genetic material from the egg and sperm cells.
- Position 2: claims that human dignity belongs to the embryo from the formation of the primitive streak.
- Position 3: claims that the human embryo or fetus has human dignity at a later date, the latest at birth.

Representatives of the first position cannot allow any adverse treatment of the embryo, whether it be for research on the embryo or obviously abortion. Cases involving saving the mother's life might be allowed with a double-effect or similar rationale. But the embryo from the moment of conception is a human due every element of dignity that is due to a university professor. If one grants an

embryo the status of human being, then it is not a reach to apply Kant's "never as a means" categorical imperative. A person ought never to be sacrificed as a means for another person's well being, and that prohibition also applies with respect to the health of future generations. (Schockenhoff 2008, 127) Representatives of the second and third positions do not see the life of the embryo as a full-standing human person, and seek to balance its well being with the good to be gained from embryo research. But only the representatives from the third position could possibly give ethical sanction to abortion. For the third position, the dignity and self-determination of the mother have over-riding preeminence. Of course, following the rulings of the German Constitutional Court, most abortions are illegal in Germany.

5.2. End of life

At life's end, the question must be understood in a different way. For the patient with a very serious illness, whose disease is irreversible and who may not have long to live, the relevant question is whether that person might conscientiously decide to end their own lives. There are two mutually exclusive positions and both rely on human dignity. One position holds that the dignity of the person dying must be respected. The other position forbids any actions which are deliberately intended to shorten the patient's life because the dignity of life cannot be served by ending life.

After a position now to demand respect for the dignity of the dying man fulfill his wish, after another request, this position may not be met, just because life is the necessary condition that someone belongs to human dignity.

6. CONCLUSION

These two situations also show how helpful is the principle of human dignity for the differentiation of conflict situations. But they also show why additional assumptions are necessary if one wants to arrive at clear solutions. Additionally, it is clear to see, that the absolute value of human dignity, the understanding of which was made possible with the experience of its negation, in certain contexts has only regulatory significance, but is not capable of determining uncompromising solutions.

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