

DIGNITY AT THE MARGINS – THE CONTESTATORY DYNAMIC OF THE PRINCIPLE OF HUMAN DIGNITY

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Introduction

Does the world need more discussion of human dignity? Some might look at the ocean of academic commentary that has been produced on the topic over the last decade or so, and conclude not. But, as the other chapters in this book illustrate, a rich topic like human dignity is difficult to exhaust. This chapter sets out to mine one specific seam. It examines how the principle of human dignity functions as a ‘contestatory norm’, and is invoked to destabilise the legal status quo and justify the expansion of human rights law into new terrain – with this dynamic illustrated by reference to recent European human rights jurisprudence concerning access to state social welfare support.¹

The idea of human dignity playing a dynamic and destabilising role may strike some readers as counter-intuitive. Human dignity is generally understood to be a *conserving* idea, i.e. a concept that affirms and protects the intrinsic, unchanging, baseline worth of all human persons.² So, how does this conserving principle end up becoming a vector of legal change? The answer lies in the contestatory power of human dignity: legal and political actors generally invoke its normative authority when they wish to challenge state action that is out of kilter with the dignity principle, and call into question existing limits on legal protection of rights that might otherwise insulate such state action against attack. In other words, dignity is invoked to destabilise – to challenge the status quo, to call into question specific forms of state action, and to expand the existing scope of legal protection for individual rights.³ This explains why dignity concerns are frequently cited as justification for stretching the contours of existing human rights norms, at national, regional and international levels.

At present, in European legal systems, this dynamic is playing out with particular force in a specific context: namely at the intersection of human rights law with national health care, housing and social security systems. Human dignity concerns are regularly cited to justify the development of socio-economic rights standards, which are supposed to guide state action in these areas of activity. They are also increasingly invoked to justify another significant new development in human rights law – namely the incremental extension of established ‘strong’ (i.e. judicially enforceable) forms of civil and political rights protection into traditionally non-justiciable socio-economic terrain.

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¹ The term ‘human rights law’ is used here to refer to both international human rights standards and domestic constitutional rights norms.

² See J. R. Wallach, ‘Dignity: The Last Bastion of Liberalism’ (2014) *Humanity* 313-328. For the argument that this nominally *conserving* orientation reflects the origins of the principle in religious thought, see S. Moyn, ‘The Secret History of Constitutional Dignity’ (2014) 17 *Yale Hum. Rts. & Dev. L.J.* 39-73.

³ Carozza has noted how the principle of human dignity serves as a ‘bearer’ of ‘extra-legal and super-positive’ values that are used to ‘justify new or expanded rights’: see P. G. Carozza, ‘Human Dignity and Judicial Interpretation of Human Rights: A Reply’ (2008) 19(5) *European Journal of International Law* 931-944.

Similarly, Catherine Dupré has argued that dignity functions as a vector for change from the ‘inhumanity’ of some past law and state practice: C. Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Hart 2015).

Now, this dynamic is far from frictionless. Attempts to invoke the principle of human dignity to challenge state restrictions on access to health care, housing and social welfare often flounder - sometimes precisely on account of its supposedly imperative significance, which is used to justify interpreting dignity in narrow and reductionist terms.⁴ As a result, the contestatory impact of the dignity principle only really takes effect at the margins of state social service provision.⁵ However, this impact can still be significant, and have a tangible and concrete effect on individual lives.

Part I of this chapter develops this line of analysis by examining the scope of the human dignity principle, and analyses the dynamics of its functioning as a contestatory legal norm. Part II explores how this dynamism has manifested itself in the context of legal challenges to access barriers that restrict entitlement to state social service provision. Part III examines the tensions underlying the dignity-influenced expansion of human rights law in this regard, focusing by way of illustration on recent jurisprudence of the European Committee on Social Rights (applying the provisions of the European Social Charter). The Conclusion pulls these strands of analysis together, and makes some wider observations about the contestatory impact of the principle of human dignity and its contribution to democratic life.

I. The Dynamic of Dignity

I.i Back to Basics: The Conceptual Core of Human Dignity

Human dignity is often placed upon a pedestal. In particular in the European context, dignity has assumed an elevated place in the hierarchy of governance values: commitment to this value is supposed to mark a repudiation of the fascist/imperial past, and an embrace of the individual rights-centred *Zeitgeist* of the post-1945 era – even if the genealogy of the concept is more complex and ambiguous than many assume.⁶

However, as readers will know, human dignity has also attracted critics, for whom its elevated status resembles a bad case of the ‘emperor’s new clothes’.⁷ At the heart of these criticisms is a concern that human dignity as conventionally understood is ‘not a load-bearing idea’, as Waldron neatly puts it⁸ - and that, specifically within legal discourse, the rhetorical invocation of dignity often glosses over an absence of meaningful legal substance.⁹ None of this implies that the concept lacks emotive or rhetorical resonance. However, according to its critics, the danger is that promiscuous use of dignity may distort the real issues at stake in legal and political debates, and gloss over subjective value choices by judges and other adjudicators who invoke the concept.¹⁰

⁴ Appeals to human dignity can mesh well with neo-liberal and other minimalist approaches to socio-economic rights protection, and state social provision more generally: see S. Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard University Press, 2018).

⁵ See in general C. O’Cinneide, ‘The Present Limits and Future Potential of European Social Constitutionalism’, in K. Young (ed.), *The Future of Economic and Social Rights* (CUP, 2019), 324-352.

⁶ See in general M. Rosen, *Dignity: Its History and Meaning* (HUP, 2018); Moyn above at n. 12.

⁷ See e.g. R. Macklin, ‘Dignity is a Useless Concept’ (2003) *British Medical Journal*, 327:1419; A. Sangiovanni, *Humanity Without Dignity: Moral Equality, Respect, and Human Rights* (Harvard University Press, 2017). O’Mahony, while recognising that human dignity is an important value, has questioned whether it can be coherently enforced as an individual right: C. O’Mahony, ‘There Is No Such Thing as a Right to Dignity’ (2012) 10(2) *International Journal of Constitutional Law* 551–74.

⁸ J. Waldron, ‘How Law Protects Dignity’ (2012) 71(1) *Cambridge Law Journal* 200–222, 201.

⁹ C. McCrudden, ‘Human Dignity in Human Rights Interpretation’ (2008) 19 *European Journal of International Law* 655-724.

¹⁰ For discussion of this in the specific context of Canadian and South African equality jurisprudence, see respectively S. R. Moreau, ‘The Promise of *Law v Canada*’ (2007) 57 *University of Toronto LJ* 415; C.

These criticisms have hit home. In academic debates at least, the concept of human dignity is viewed with greater scepticism now than would have been the case two decades ago. However, even sceptical takes on human dignity usually acknowledge that the concept has a kernel of substance.¹¹ For example, McCrudden suggests that it is possible to identify a ‘minimum core’ of human dignity, which he analyses as containing three key elements:

The first is that every human being possesses an intrinsic worth, merely by being human. The second is that this intrinsic worth should be recognized and respected by others, and some forms of treatment by others are inconsistent with, or required by, respect for this intrinsic worth. The first element is what might be called the ‘ontological’ claim; the second might be called the ‘relational’ claim...[The third element] is the claim that recognizing the intrinsic worth of the individual requires that the state should be seen to exist for the sake of the individual human being, and not vice versa (the limited-state claim)...¹²

McCrudden is sceptical about much of the conceptual superstructure that dignity enthusiasts attempt to construct, using this minimum core as a foundation. However, the core itself has a certain conceptual value.¹³ As described by McCrudden, the ‘ontological’, ‘relational’ and ‘limited-state’ dimensions of human dignity have meaningful normative content in and of themselves. The ontological dimension affirms that all humans possess a certain inherent status – a claim that has an intimate affinity with the notion of ‘basic equality’ outlined by Jeremy Waldron, which is predicated upon the idea that there are no morally significant fundamental divisions among humans (taken as a single species).¹⁴ By extension, its relational dimension affirms that this intrinsic ‘equality of status’ should be respected by others – thereby precluding treatment that expresses contempt for a person or class of persons, or otherwise effectively denies their equal worth as human beings.¹⁵ The ‘limited-state’ dimension affirms that this ‘requirement of equal respect’ constitutes an overriding normative requirement, which potentially applies across every aspect of interaction between the state and the individual.¹⁶

In other words, as Gilabert puts it, the notion of human dignity articulates the ‘inherent, non-instrumental, egalitarian, and high-priority normative status of human persons’.¹⁷ In essence, it

McConnachie, ‘Human Dignity, “Unfair Discrimination” and Guidance’ (2014) 34(3) *Oxford Journal of Legal Studies* 609–629.

¹¹ Thus, even Sangiovanni’s attempt to jettison dignity in its entirety from conceptual justifications of equality and human rights norms (see n. 7 above) is vulnerable to the charge that he still assumes that humans possess an inherent status. See A. Etinson, ‘On “Aristocratic” Dignity’ (2019) 19(3) *European Journal of Political Theory* 399–407.

¹² McCrudden, ‘Human Dignity in Human Rights Interpretation’, 679.

¹³ See generally S. Riley, *Human Dignity and Law: Legal and Philosophical Investigations* (Routledge, 2017).

¹⁴ J. Waldron, *One Another’s Equals: The Basis of Human Equality* (Harvard University Press, 2017). See also more generally R. Dworkin, *Law’s Empire* (Harvard University Press, 1977), especially at 370; T. Nagel, *Equality and Partiality* (Oxford University Press, 1991). See also L. Valentini, ‘Dignity and Human Rights: A Reconceptualisation’ (2017) 37(4) *Oxford Journal of Legal Studies* 862–885, for an alternative take on the provenance of such ‘status’ claims.

¹⁵ J. Waldron, *Dignity, Rank and Rights* (Oxford University Press, 2012); Dworkin, *ibid.*

¹⁶ As Bos and Riley have argued, human dignity is perhaps best viewed as an ‘interstitial concept’ which bridges ‘different fields of regulation—human rights, bioethics, humanitarian law, equality law and others’, at both the national and regional/international levels. This ‘common principle’ requires interactions between collective state institutions and the individual to be structured in a manner that respects the inherent status of all human persons. See G. Bos and S. Riley, ‘Human Dignity’, *Internet Encyclopaedia of Philosophy*, April 2016, available at <https://iep.utm.edu/hum-dign/#SH4b>.

¹⁷ P. Gilabert, *Human Dignity and Human Rights* (OUP, 2018).

encapsulates the underlying justificatory logic that underpins the emergence of modern liberal, rule of law-based democracies out of the hierarchical and stratified societies that preceded them – namely that every person should be recognised by state structures as enjoying a certain intrinsic equality of status, both before the law and also in democratic processes of collective decision-making. In Emily Kidd White’s words, human dignity is thus in effect ‘a normative classification, reflecting the universalization of the treatment that high-ranking persons have historically enjoyed under the law’, which is ‘concomitantly used to convey the demand that [this] status should actually be respected’.¹⁸

I.ii Human Dignity as Contestatory Norm

Now, all of this might be viewed as an accumulation of abstract phraseology – or as an extended exercise in abstract liberal formalism. However, by affirming intrinsic equality of status, the concept of human dignity lays down a marker. It outlines a baseline standard of individual treatment, which all state action is expected to respect. This baseline standard is acknowledged to be a fundamental principle underpinning international human rights law.¹⁹ Furthermore, as mentioned above, it reflects the underlying justificatory logic of the development of modern democratic states.²⁰ Indeed, as Neal has argued, all modern liberal democracies have effectively acknowledged the overriding importance of this core concept of human dignity, by committing themselves to respect basic human rights and rule of law norms: she suggests that this core concept now constitutes a ‘substantive basic norm’ for all contemporary liberal democratic constitutional orders.²¹ By extension, any state action that can be construed as effectively repudiating or denying this minimum core commitment is vulnerable to political or legal challenge: it is exposed to the charge that it runs against the grain of a fundamental norm, namely the obligation to treat all individuals in accordance with the essential elements of the principle of human dignity.²²

Thus, the dignity principle may be abstract - but it still represents an important affirmation of fundamental values. Also, thanks to its acknowledged status as a basic norm for democratic societies, it represents a normative yardstick, by reference to which state action can be assessed and challenged – especially state action which appears to be out of kilter with its conceptual core. Allegations that the principle has been violated are often formulated by reference to inductive

¹⁸ E. K. White, ‘There Is No Such Thing as a Right to Dignity: A Reply to Conor O’Mahony’ (2012) 10(2) *International Journal of Constitutional Law* 575–84. For a similar analysis, combined with a useful discussion of the often overlapping concepts of ‘status’, ‘worth’ and ‘rank’, see also Waldron, *Dignity, Rank and Rights*, n. 15 above.

¹⁹ The Preamble of the Universal Declaration of Human Rights states that the various fundamental rights set out in its text ‘derive from the inherent dignity of the human person’, with the Preambles of the International Covenant on Civil and Political Rights (ICCPR) and the international Covenant of Economic, Social and Cultural Rights (ICESCR) following suit. Similarly, human dignity has been described as the ‘very essence’ of the European Convention on Human Rights: see *Pretty v. United Kingdom* [2002] ECHR 427, at para. 65.

²⁰ Shulztiner and Carmi argue that dignity is acknowledged as a core constitutional value in the preamble or fundamental principles part of 97 state constitutions: see D. Shulztiner & G.E. Carmi, ‘Human Dignity in National Constitutions: Functions, Promises and Dangers’ (2014) 62(2) *American Journal of Comparative Law* 461–490.

²¹ M. Neal, ‘Respect for Human Dignity as “Substantive Basic Norm”’ (2014) 10(1) *International Journal of Law in Context* 26–46. As Waldron has argued, rule of law norms are predicated upon a commitment to this ‘status equality’ understanding of human dignity: J. Waldron, ‘How Law Protects Dignity’ (2012) 71(1) *Cambridge Law Journal* 200–222.

²² See T. Khaitan, ‘Dignity as an Expressive Norm: Neither Vacuous Nor a Panacea’ (2012) 32(1) *Oxford Journal of Legal Studies* 1–19; J. Waldron, ‘Is Dignity the Foundation of Human Rights?’ (2013) *NYU School of Law, Public Law Research Paper No. 12–73*.

analogies drawn with forms of degrading or demeaning treatment that have already been acknowledged to breach the principle, or by a close contextual focus on the circumstances of specific cases.²³ This means that the abstract contours of the dignity principle tend to be flashed out by a gradual, accumulative, inductive case by case process, analogous to common law reasoning and the development of human rights jurisprudence. This type of inductive reasoning helps to fill in the otherwise vague outline of human dignity: it extrapolates from the type of state action has been acknowledged to breach the principle, and thereby helps to flesh out its requirements.²⁴

So, while the substantive content of the principle is contested, it still serves as a focus point for challenges to state action that is accused of being radically out of step with its conceptual core. In other words, the dignity principle functions as a 'contestatory norm': it is invoked to call into question whether specific forms of state action comply with the obligation to respect individual equality of status, and whether they can be said to 'fit' with prevailing notions of what respect for this principle entails. Such challenges will often be launched through legal routes, depending on the extent to which the dignity principle is directly or indirectly protected through law in a given jurisdiction. Alternatively, such challenges may be channelled through the political process. Either way, the dignity principle is the 'hook' on which the contested claim is based. (This paper is focused on the more prominent legal dimension to this dynamic.)

State action that appears predicated on the inferiority or disposability of particular persons will be particularly vulnerable to contestation, as this clearly is out of kilter with the conceptual core of the principle. This is especially true when the treatment in question is potentially analogous to torture, or other forms of inhuman or 'brutal' treatment that are widely viewed as constituting archetypal violations of human dignity.²⁵ Challengers can use such inductive comparisons to challenge the state action under attack, forcing courts and other decision-makers to rule on their validity. Alternatively, a claim can be based on a close contextual analysis of a particular fact situation. There are some circumstances where the treatment of individuals is so morally troubling, or exposes them to a sufficiently clear risk of degradation, as to invite a positive finding that the principle has been breached - even in the absence of clear analogies in existing case-law.²⁶ As discussed below, the contestatory force of human dignity tends to have particular impact in such cases, when baseline standards are clearly on the line.

This is not to say that liberal democracies always respect human dignity, or consistently yield to arguments invoking its contestatory force. Challenges to state action that are rooted in appeals to human dignity get channelled through courts, legislatures and other mediating state institutions – and often end up diluted, deflected or denied. The malleable and uncertain scope of the dignity principle can be read down in ways that minimise its destabilising force. For example, as discussed later in this chapter, narrow interpretations of the principle are often justified as necessary to maintain its conceptual integrity. If claims are based on analogies to recognised forms of degrading treatment, then such analogies can be rejected, or minimised, or treated as involving differently

²³ As discussed further below, this point explains why the principle's lack of definite content has not proved to be an obstacle to its regular invocation by courts, legislators and other political and legal actors.

²⁴ This is why academic qualms about the abstract nature of the dignity principle can be overstated: as with other key legal/normative concepts, such as equality, its content can be infilled by analogous reasoning: see in general P. Carozza, 'Human Rights, Human Dignity, and Human Experience', in C. McCrudden (ed.), *Understanding Human Dignity* (British Academy, 2013), 615-631.

²⁵ M. Neal, 'Respect for Human Dignity as "Substantive Basic Norm"', 42-46. See also Waldron, 'How Law Protects Dignity', 218.

²⁶ For an example of this, see App. no. 14065/15, *Lăcătuș v. Switzerland*, Judgment of 19 January 2021, discussed further below.

situated individuals and groups. Legal systems may be structured in a way that limits the extent to which state action may be challenged on the basis of the dignity principle.

However, as Waldron says, there is ‘an implicit commitment to dignity in the tissues and sinews of law’ – a claim that can be extended to constitutional governance in general.²⁷ Dissonance between this aspiration to respect dignity, and the limited protection it sometimes receives within national constitutional systems, opens up room for legal and political challenges to the status quo.²⁸ In particular, gaps in legal protection for human rights that are closely aligned with the dignity principle can be difficult to reconcile with its assumed fundamental importance – and are vulnerable to contestation on that basis.

The dignity principle can thus be invoked to call into question the structures, practices, procedures and substantive contents of national legal systems, on the basis that they fail to adequately respect and protect human dignity. By extension, the principle can also be pressed into service to make the case for expanding the capacity of legal systems to protect human dignity. As Dupré argues, respect for human dignity entails the ‘humanisation’ of constitutional systems, i.e. making them more responsive to dignitarian concerns.²⁹ As human dignity has significant normative weight attached to it, it is not surprising that this expectation can drive the expansion of human rights law. This contestatory ‘dynamic of dignity’, and the way in plays out in national legal systems, is illustrated in what follows.

II. The Dynamic of Dignity in Action

II.i Human Dignity as Justification for Human Rights Expansionism

The dictates of human dignity – and the expectation that law will comply with them - are relevant across the entire legal system. For example, dignity-related concerns plays a prominent role in the realm of medical ethics,³⁰ anti-discrimination case-law,³¹ and the design of social welfare systems.³² However human dignity particularly impacts upon the field of human rights law. Indeed, it is often described as the foundational value of this area of law. This claim may be overstated.³³ Other related but distinct values – such as, for example, respect for collective self-determination, or individual autonomy – have also influenced the development of human rights norms, and contribute to their pluralist conceptual foundations.³⁴ However, human dignity has inspired much of the post-1945 evolution of national and regional/international human rights law, and provides a unifying rationale for many of its specific elements.³⁵

²⁷ Waldron, ‘How Law Protects Dignity’, 222.

²⁸ Neal, Respect for Human Dignity as “Substantive Basic Norm”, 46.

²⁹ C. Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Hart 2015). Dupré also highlights the importance of such a ‘humanisation’ process to ensuring the health of democratic self-government: see also E. Daly, *Dignity Rights: Courts, Constitutions, and the Worth of the Human Person* (U. Penn Press, 2021).

³⁰ C. Foster, ‘Dignity in Medical Law’, in A. M. Phillips, T. C. de Campos and J. Herring, *Philosophical Foundations of Medical Law* (OUP, 2019), 151-161.

³¹ J. Waldron, ‘How Law Protects Dignity’, n. 21 above.

³² C. K. Chan and G. Bowpitt, *Human Dignity and Welfare Systems* (Policy Press, 2005).

³³ J. Waldron, ‘Is Dignity the Foundation of Human Rights?’, in R. Cruft, M. Liao and M. Renzo (eds.), *Philosophical Foundations of Human Rights* (Oxford University Press, 2015), 117-137.

³⁴ J. Tasioulas, ‘Human Dignity and the Foundations of Human Rights’, in C. McCrudden (ed.), *Understanding Human Dignity* (OUP, 2013), 293-314.

³⁵ Waldron, ‘Is Dignity the Foundation of Human Rights?’, n. 33 above.

In particular, human dignity provides much of the underlying rationale for the scope and substance of human rights claims: the existing framework of national and international rights standards could be viewed as a map of where dignity is understood to be at risk. Human dignity also justifies the universality of human rights law, i.e. its requirement that all individuals should benefit from human rights protection, irrespective of their nationality, race, sex, or any other 'status' markers. The normative case for such universality is predicated on the intrinsic status equality of all humans, i.e. on the core ontological claim underpinning the concept of human dignity.³⁶ Furthermore, human dignity provides a key rationale for the claim that human rights law should enjoy priority status within national and international law. Legal guarantees protecting human rights help to shore up respect for individual dignity – and give substance to the imperative force of its normative demands.³⁷

As Waldron argues, dignity should thus be taken into account in interpreting human rights legal provisions, and in determining 'the spirit in which we should proceed in advancing rights-based claims, as well as the way in which we deal with possible conflicts of rights and the question of their limitation'.³⁸ Dignitarian concerns shape the scope and substance of many human rights guarantees, and are often integral to their justification.

Furthermore, the contestatory dynamic of dignity often influences how rights guarantees are interpreted and applied. Both the scope of protected rights – the type of state interference with individual lives that come within their purview – and the issue of whether such interference is justified is often determined by reference to the need to secure human dignity.³⁹ Furthermore, such guarantees are periodically extended by courts and other adjudicatory bodies to cover new situations where state action is alleged to be undermining the dignity principle, through the type of analogous reasoning discussed above. Claimant lawyers draw comparisons between the way their client was treated and other situations where case-law has established that the dignity principle has been infringed and rights consequently violated: if the adjudicatory body accepts the analogy, then the principle is deemed to be engaged and the relevant rights guarantees are interpreted accordingly.⁴⁰ Nor is this interpretative, expansionary dynamic confined to the courtroom: similar reasoning can drive legislative reform, or the evolution of international human rights standards as they develop through inter-state processes.

Thus, for example, the right of freedom from torture and inhuman and degrading treatment, a core human right, protects individuals against forms of treatment that are recognised to demean the human person. Its absolute character, as recognised in national and international human rights law, reflects the imperative force of the obligation to respect the intrinsic worth of all individuals: torture and analogous forms of degrading treatment cannot be justified, because of how they attack human dignity at a fundamental level.⁴¹ Furthermore, the legal definition of what constitutes torture and/or

³⁶ Ibid. See also Baroness Hale, *P (by his litigation friend the Official Solicitor) v Cheshire West and Chester Council & Anor* [2014] UKSC 19, [36]: 'The rights set out in the European Convention are to be guaranteed to "everyone" (article 1). They are premised on the inherent dignity of all human beings whatever their frailty or flaws.'

³⁷ Tasioulas, 'Human Dignity and the Foundations of Human Rights', n. 34 above.

³⁸ Waldron, 'Is Dignity the Foundation of Human Rights?', n. 33 above.

³⁹ See E. Webster, 'Interpretation of the Prohibition of Torture: Making Sense of "Dignity" Talk' (2016) 17 *Human Rights Review* 371–390.

⁴⁰ For an incisive analysis of how analogical reasoning functions within legal systems in general, see F. Schauer and B. Spellman, 'Analogy, Expertise, and Experience' (2017) 84(1) *Uni. Of Chicago L. Rev.* 249–268.

⁴¹ J. Waldron, 'Torture and Positive Law: Jurisprudence for the White House' (2005) 105(6) *Columbia Law Review* 1681–1750.

inhuman and degrading treatment has expanded over time.⁴² Courts have accepted arguments that forms of treatment analogous to recognised categories of torture and degrading treatment can come within the prohibitive scope of this right – including for example specific types of demeaning prison conditions,⁴³ explicitly discriminatory and prejudiced actions by public authorities,⁴⁴ and a failure to keep children in the care of the state from exposure to serious forms of abuse.⁴⁵ Furthermore, national legislation has sometimes followed suit, by for example introducing stronger legal protection against particular forms of child or elder abuse, or mistreatment of persons with disabilities, that campaigners have succeeded in framing as fundamental violations of the dignity principle.⁴⁶

Nor is this process just confined to the right of freedom from torture and inhuman and degrading treatment, with its obvious link to dignity. The expansionist dynamic associated with the dignity principle surfaces in other contexts too. For example, within the mainstream of civil and political rights adjudication before the ECtHR, it has influenced the development of the right to life,⁴⁷ the right to freedom from slavery and forced labour,⁴⁸ equality and non-discrimination standards,⁴⁹ and a range of other Convention rights.⁵⁰

A recent judgment of the Strasbourg Court provides a particularly vivid example of this dynamic in action. In *Lăcătuș v Switzerland*,⁵¹ the applicant was fined 500 Swiss francs for begging on a street in Geneva. She was illiterate, came from an impoverished family background, and had no entitlement to receive public benefits. Her lawyer argued that the imposition of the fine breached *inter alia* her Article 8 ECHR right to personal privacy, on the basis that it was a disproportionate and unnecessary response to the applicant's recourse to begging. In response, the Court agreed that the applicant was in a clearly vulnerable situation. It went on to affirm that she had the right, inherent in human dignity as protected by Article 8, to convey her plight and try to meet her basic needs by begging. The Court then concluded that the imposition of the fine breached the principle of human dignity and by extension the essence of her Article 8 rights.⁵²

This is a ground-breaking judgment. It is the first time that the Strasbourg Court has ruled that the imposition of a fine for begging breached the Convention. It thus expands the reach and impact of the Strasbourg case-law, adding a new dimension to the Court's already stretched Article 8 jurisprudence.⁵³ And the invocation of human dignity was central, both to how the case was argued

⁴² See in general N. Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (Hart, 2021).

⁴³ *Price v UK* (2002) 34 EHRR 53.

⁴⁴ Application no. 7224/11, *Aghdgomelashvili and Japaridze v Georgia*, Judgment of 8 October 2020, [42], [47]-[49].

⁴⁵ *Z v UK* [2001] 34 EHRR 97.

⁴⁶ See e.g. S.44 of the UK Mental Capacity Act 2005 and the accompanying Code of Practice.

⁴⁷ See e.g. Application no. 77766/01, *Dzieciak v Poland*, Judgment of 9 December 2008, [91].

⁴⁸ See e.g. *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1, [282].

⁴⁹ Application no. 38832/06, *Kiss v Hungary*, Judgment of 20 May 2010, [44].

⁵⁰ See in general S. Heselerhaus and R. Hemsley, 'Human Dignity and the European Convention on Human Rights', in P. Becchi and K. Mathis (eds) *Handbook of Human Dignity in Europe* (Springer, 2019) 1-24.

⁵¹ App. no. 14065/15, *Lăcătuș v. Switzerland*, Judgment of 19 January 2021.

⁵² *Ibid*, [107]-[114].

⁵³ Note that Switzerland accepted that Article 8 was engaged – a concession that perhaps smoothed the way for the court's judgment. Note also that, in a separate opinion, Judge Ravarani disagreed with the Court's reasoning as to why Article 8 was engaged, on the basis that human dignity could not be interpreted as establishing a need to beg. Like Judges Keller and Lemmens, he (convincingly) argued that the Court had been too quick to dismiss the potential applicability of other articles of the Convention, such as Articles 10 and 14.

and the reasoning of the Court. The applicant's legal arguments focused on her highly vulnerable condition, and the specific context she found herself in – with her legal representative drawing an explicit contrast between her plight and the background wealth of Geneva. In other words, a contextual argument was made as to why the fine impacted on her human dignity, with her representatives using this argument to challenge the criminalisation of begging. The Court accepted this logic, highlighting the particular vulnerability of the claimant in its judgment. Furthermore, it emphasised the fundamental importance of human dignity in justifying the broad interpretation given to the scope of the Article 8 privacy right – and in ruling that the essence of the right had been violated, meaning that Switzerland could not avail of the wide discretion usually given to national governments to determine what measures were necessary to preserve public order.

There are dimensions to the judgment that are a little peculiar, in particular the lack of detailed engagement with Articles 3 and 14 ECHR.⁵⁴ However the way the Court shoehorned its dignitarian concerns about the treatment of the applicant into the framework of Article 8 neatly demonstrates the potency of the dignity principle. The Court effectively stretched the framework of Article 8 to accommodate its contextual finding of a breach of the principle, thereby taking its case-law into new terrain - exactly in line with the account of the contestatory dynamic outlined above.

II.ii Human Dignity as Justification for the Expanded Reach of Human Rights Law into Socio-economic Terrain

The way the dignity principle is used to justify the expansion of human rights law plays out across the full spectrum of fundamental rights guarantees. This includes an area with some thematic overlap with the *Lăcătuș* case – namely the range of socio-economic rights protected by international treaty instruments such as the ICESCR and the European Social Charter (ESC), as well as national constitutional provisions.

As is well-known, the status of such rights is controversial. Some commentators have suggested that they lack much in the way of meaningful substance.⁵⁵ Nevertheless, there exists a wide international consensus that such rights exist. Furthermore, human dignity underpins their existence. Talk about status equality means little if individuals do not enjoy a minimal degree of access to important social goods such as employment, access to adequate health care, education, housing and social security protection.⁵⁶ Socio-economic rights recognise this social dimension to human dignity, by affirming that state action should secure access to such goods – and refrain from exposing individuals and families to degrading living conditions.⁵⁷

For further analysis, see C. Heri, 'Beg your Pardon!: Criminalisation of Poverty and the Human Right to Beg in *Lăcătuș v. Switzerland*', *Strasbourg Observers Blog*, 10 February 2021, available at <https://strasbourgobservers.com/2021/02/10/beg-your-pardon-criminalisation-of-poverty-and-the-human-right-to-beg-in-lacatus-v-switzerland/>.

⁵⁴ Heri, *ibid.*

⁵⁵ See the debate in C. Gearty and V. Mantouvalou, *Debating Social Rights* (Hart, 2010).

⁵⁶ J. King, *Judging Social Rights* (OUP, 2012).

⁵⁷ S. Liebenberg, 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21(1) *South African Journal on Human Rights* 1-31; C. O'Connell, 'The Constitutionalisation of Socio-economic Rights', in H. Alviar García, K. Klare, L. Williams (eds.), *Socio-economic Rights in Theory and Practice: Critical Inquiries* (Routledge, 2014), 258-276.

All this explains why human dignity concerns feature so prominently in the design and interpretation of socio-economic rights.⁵⁸ Human dignity justifies their existence, and has been invoked to justify stronger legal protection for them. Thus, Liebenberg has highlighted the influence of dignitarian considerations in the ongoing development of the South African socio-economic rights jurisprudence.⁵⁹ The same is true for the evolving social rights dimension of the case-law of the Inter-American Court of Human Rights.⁶⁰ In Europe, the Finnish Constitution provides for a degree of judicial enforcement of socio-economic rights, and dignitarian concerns have exerted significant influence over the developing case-law of the Finnish courts applying such rights.⁶¹ As discussed in further detail below, dignity has also played an important role within the expanding jurisprudence of the European Committee for Social Rights (ECSR) - the expert body which interprets the provisions of the Council of Europe's social rights instrument, the European Social Charter.

Human dignity concerns have also driven a related set of developments in human rights law - namely the extension of the stronger legal protection afforded by more conventional civil and political rights jurisprudence into socio-economic terrain. It is increasingly common for rights such as freedom from inhuman and degrading treatment, or the right to privacy, to be interpreted in ways that protect individual access to certain limited and specific forms of social support - including access to essential health care, social welfare, or pension entitlements.⁶² Dignitarian concerns have repeatedly been invoked to justify this extension of established human rights law into the socio-economic realm - and to justify departing from old inhibitions about judges interfering in issues of resource allocation and social welfare provision.

Thus, for example, in the UK, cases such as *R (Bernard) v London Borough of Enfield*⁶³ and *R (Adam) v Secretary of State for the Home Department*⁶⁴ have established that a failure by public authorities to provide welfare and housing support for impoverished individuals may breach the requirements of the ECHR, if (i) state responsibility for their plight is directly engaged and (ii) the failure to provide adequate support risks reducing them to a state of destitution or degradation sufficiently grave as to cross the Article 3 ECHR threshold of being 'inhuman and degrading', or amount to a clear breach of the right to private, home and family life protected by Article 8 ECHR.⁴⁵ In *Adam*, Baroness Hale emphasised that Article 3 ECHR reflected and protected the 'fundamental values of a decent society, which respects the dignity of each individual human being, no matter how unpopular or unworthy she may be'⁶⁵ - while Lord Hope's analysis of the relevant Article 3 ECHR case-law focused on those elements which most closely engaged with the imperative demands of the dignity principle.⁶⁶

⁵⁸ For a useful overview, see A. Corkery, *Defending Dignity: A Manual for National Human Rights Institutions on Monitoring Economic, Social and Cultural Rights* (Asia Pacific Forum of National Human Rights Institutions/Centre for Economic and Social Rights, 2015).

⁵⁹ Liebenberg, 'The Value of Human Dignity in Interpreting Socio-Economic Rights', n. 69 above. See also *Khosa v Minister for Social Development* [2004] ZACC 11, [40]-[45].

⁶⁰ T. Ojanen, 'Human Dignity in Finland', in P. Becchi and K. Mathis (eds) *Handbook of Human Dignity in Europe* (Springer, 2019), 245-258.

⁶¹ T. M. Antkowiak, 'A "Dignified Life" and the Resurgence of Social Rights' (2020) 18 *Northwestern J. Hum. Rts.* 1, 1-51.

⁶² C. O'Conneide, 'The Problematic of Social Rights - Uniformity and Diversity in the Development of Social Rights Review', in L. Lazarus, C. McCrudden, N. Bowles (eds.), *Reasoning Rights: Comparative Judicial Engagement* (Hart, 2014), 297-315.

⁶³ [2002] EWHC 2282 (Admin).

⁶⁴ [2005] UKHL 66. See also *R (W, a child) v Secretary of State for the Home Department* [2020] EWHC 1299.

⁶⁵ *Ibid*, [76].

⁶⁶ *Ibid*, [45]-[55].

Analogous developments have taken place within the jurisprudence of the Strasbourg Court. In the 2011 case of *M.S.S. v Belgium and Greece*,⁶⁷ the Strasbourg Court held that the Greek authorities had violated the Article 3 ECHR rights of the claimant by failing to have due regard for the applicant's vulnerability as an asylum seeker, with the result that the state was responsible for the state of extreme poverty to which he was reduced, namely 'living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs'.⁶⁸ This was the first time the Strasbourg Court had found a state to be in breach of the Convention based upon a failure to provide adequate social support to persons in need: normally reluctant to intervene in such situations, the Court justified its finding of a violation here on the exceptionally degrading conditions to which the claimants were exposed.

Similarly, in *Paposhvili v. Belgium*,⁶⁹ the Court adjusted its Article 3 ECHR case-law on the expulsion of seriously ill migrants. It held that the removal of a seriously ill person in circumstances where they would be at substantial risk 'of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy' would breach Article 3, as well as clarifying the duties of the expelling state to seek appropriate reassurances from receiving states before deportation of seriously ill migrants could happen. Again, dignitarian considerations loomed large in the judgment, as reflected in the Court's emphasis on the need to avoid 'intense suffering' – and were used to justify a departure from the much more *laissez faire* approach to such deportations that the Court had previously adopted in the case of *N v UK*.⁷⁰

Dignitarian concerns have also been invoked by national courts to justify reviewing state social welfare provision. Thus, in 2010, the German Constitutional Court concluded that the manner in which the level of unemployment benefit had been fixed under the 2005 'Hartz IV' reforms to the German welfare system had failed to adequately respect the principle of human dignity set out in Article 1 of the Basic Law, and required the German legislature to reconsider how living expenses should be assessed in recalculating the level of benefit to be paid out under this welfare programme.⁷¹ The Court further ruled in *Asylum Seekers Benefits* that the amount of cash benefit paid to asylum seekers awaiting processing of their claims was incompatible with the requirements of the human dignity principle, and again required the legislature to reconsider how the level of the benefits in question were calculated.⁷² In both of these judgments, the Court affirmed that the state is obliged to take positive steps to protect individuals from becoming subject to a state of destitution – with the Court emphasising that the level of social protection available from the state should be such as to enable all individuals participation with dignity in social, economic and cultural life of society in general. (A standard termed the '*Existenzminimum*').⁷³ Again, in both of these judgments, the human dignity principle was invoked to justify a significant extension of existing legal doctrine into socio-economic terrain.

⁶⁷ (2011) 53 EHRR 2.

⁶⁸ [263]. See also *Tarakhel v. Switzerland*, Application no. 29217/12, Judgment of 4 November 2014.

⁶⁹ App. no. 41738/10, Judgment of 13 December 2016, [GC].

⁷⁰ (2008) 47 EHRR 39. For critical commentary on *N*, see V. Mantouvalou, 'N v UK: No Duty to Rescue the Nearby Needy?' (2009) 72(5) *Modern Law Review* 815-828.

⁷¹ BVerfG, 1 BvL 1/09, 9.2.2010. For an analogous UK decision, see *R (Refugee Action) v SSHD* [2014] EWHC 1033 (Admin), where the *Hartz IV* judgment was discussed at [113]-[116].

⁷² BVerfG, 1 BvL 10/10, 18.7.2012.

⁷³ See C. Bittner, 'Human Dignity as a Matter of Legislative Consistency in an Ideal World: The fundamental right to guarantee a subsistence minimum in the German Federal Constitutional Court's judgment of 9 February 2010' (2011) 12(11) *German Law Journal* 1941; S. Egidy, 'The Fundamental Right to the Guarantee of a Subsistence Minimum in the *Hartz IV* Case of the German Federal Constitutional Court' in same volume, 961.

Taken together, these judgments are striking examples of the dignity principle being used to justify the development of an enhanced 'social dimension' to existing human rights – and to roll back traditional constraints on the reach of human rights law, which had formerly limited the extent to which courts would interfere in disputes relating to social welfare entitlements. They graphically illustrate the norm-bending impact of the contestatory force of dignity.

III. The Potential and Limits of the Contestatory Dynamic of Dignity

However, in outlining the way the dignity principle has been used to expand the reach of human rights law, it is important to remember that this dynamic does not play out in a void. Pro-human rights commentators, activist lawyers and NGOs are usually quick to welcome the extension of human rights law into new terrain – not to mention the individuals and groups who may benefit from enlarged legal rights protection, who are often exceptionally vulnerable. However others tend to be less enthusiastic. Widespread concern exists that the reach of human rights law is over-extended, and risks losing its normative authority if it is stretched too far.⁷⁴

As a result, the expansion of human rights law is vulnerable to backlash, from political or state-bureaucratic actors. This is so even when expansion proceeds under the flag of human dignity. National governments can and do push back against the extension of human rights norms into new terrain, through overt political criticism, foot-dragging in implementing newly established legal rights standards and so on.⁷⁵ Expansion is also vulnerable to internal pushback within courts and other legal bodies. Judges and other legal actors can be very reluctant to stretch the envelope of rights protection too far – often expressing concern that the normative authority of the dignity principle may become devalued through over-inflation.

All this means that the contestatory dynamic of the dignity principle is prone to being blunted – and, at times, even neutralised. This is particularly the case when it comes to socio-economic rights, and the context of state solidarity entitlements more generally. Resource allocation in areas like health care or social welfare is generally viewed as a political matter *par excellence* - and thus as something best left to majoritarian decision-making processes. As a consequence, national governments are often hostile to attempts to extend the reach of human rights law in this area, with its inevitably constricting impact on their freedom of action. Courts also tread with great caution when it comes to adjudicating issues relating to access to state solidarity entitlements, even when the principle of dignity is invoked by claimants.

This blunting effect can be seen in how national governments have resisted the expansion of socio-economic rights norms. They have generally emphasised the vague 'progressive realisation' aspect of such norms, and dragged their feet when it comes to ratifying treaty mechanisms which would allow complainants to contest alleged denials of their socio-economic rights before international expert bodies.⁷⁶ The cautious approach of courts is reflected in the tentative manner in which the

⁷⁴ H. Hannum, *Rescuing Human Rights: A Radically Moderate Approach* (Cambridge University Press, 2019). Tasioulas, 'Rescuing Human Rights from Human Rights Law', n. 8 above.

⁷⁵ See in general L. Vinjamuri, 'Human Rights Backlash', in S. Hopgood, J. Snyder and L. Vinjamuri, *Human Rights Futures* (CUP, 2017), 114-134.

⁷⁶ For example, only 15 of the 43 state parties to the European Social Charter have ratified the Collective Complaints Protocol to the Charter, which allows certain types of representative bodies such as trade unions and international NGOs to submit complaints alleging a breach of the Charter for resolution to the European Committee on Social Rights. Similarly, only 26 of the 171 state parties to the International Covenant on Economic, Social and Cultural Rights have ratified the Optional Protocol to the Covenant, which would allow individuals to bring complaints of a breach of the Covenant before the Committee on Economic, Social and Cultural Rights

dignity-influenced, expansionist judgments mentioned above have been subsequently applied to other fact situations. Thus, the UK courts have repeatedly emphasised that the type of Convention breach established to exist in cases such as *Bernard* and *Adam* (see above) would be rare and exceptional.⁷⁷ The ECtHR has been similarly slow to find state socio-economic measures to be in breach of the Convention, even after its breakthrough judgment in *M.S.S.*⁷⁸ And the German Constitutional Court followed its 2010 *Hartz IV* judgment by emphasising in a subsequent 2014 judgment the need to respect the margin of discretion enjoyed by the political branches of the state in fixing welfare benefits⁷⁹ - even if the Court later struck down certain welfare conditionality requirements for obtaining benefits, which were deemed to threaten individual dignity.⁸⁰

This suggests that the principle of human dignity is a double-edged sword. It can be used to contest state action that is potentially degrading, and to justify an expansion of existing legal categories of rights protection – but the sacrosanct status of human dignity also provides a justification for applying it restrictively, and keeping a lid on any such expansion.⁸¹ When it comes to solidarity rights, this ambivalence tends to play out in a way that keeps the contestatory force of the principle on a tight rein. It provides a legal route in certain circumstances for challenging denials of access to essential forms of state social support.⁸² However, beyond that, the principle is rarely given effect in wider, more transformative ways. In general, dignity jurisprudence has had limited impact on the overall functioning of state social solidarity systems. Indeed, it mainly takes effect at the margins of such systems, rather than opening up their foundations to contestation.⁸³

However, such marginal impacts can still be significant. Access to national health care, housing and social welfare entitlements is often subject to restrictive and demanding conditions. Particular social groups may only be granted conditional and/or limited access, such as irregular migrants and other peripheral minorities. Furthermore, even those segments of society who enjoy guaranteed access to state benefits receive increasingly meagre levels of social support, as austerity pressures have eroded European welfare safety nets over the last few decades.⁸⁴ The impact of these cuts and restrictions is often overlooked, not least because those most directly affected often lack much in the way of meaningful political leverage. However, the dignity principle offers a way of contesting their treatment through legal avenues - and of problematising such exclusionary approaches to welfare entitlement more generally.⁸⁵

⁷⁷ See e.g. *R (McDonald) v Royal Borough of Chelsea and Kensington* [2011] UKSC 33; *Anufrijeva v London Borough of Southwark* [2003] EWCA Civ 1406; *R (McDonagh) v London Borough of Enfield* (2018) EWHC 1287 (Admin); *R (TG) v London Borough of Lambeth* [2011] EWCA Civ 526 (6 May 2011).

⁷⁸ See e.g. App. no. 24816/14 and 25140/14, *Hudorovic v Slovenia*, Judgment of 10 March 2020.

⁷⁹ BVerfG, 1 BvL 10/12, 1 BvL 12/12, 1 BvR 1691/13, 23.07.2014.

⁸⁰ BVerfG, 1 BvL 7/16, 05.11.2019.

⁸¹ Indeed, the principle of dignity could be interpreted as encouraging self-reliance, and thus as being compatible with minimalist accounts of the scope of state obligations: N. Mavronicola, 'Heeding Human Dignity's Call: C Dupré, *The Age of Dignity* (Hart 2015) – Review' 92016) 36(4) *Legal Studies* 725-737.

⁸² C. O'Connell, 'A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights' (2008) *European Human Rights Law Review* 583-605.

⁸³ See in general C. O'Connell, 'The Present Limits and Future Potential of European Social Constitutionalism', in K. Young (ed.), *The Future of Economic and Social Rights* (Cambridge University Press, 2019), 324-352.

⁸⁴ For an overview, see C. O'Connell, 'Austerity and the Faded Dream of a Social Europe', in A. Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press, 2014), 169-201. Cambridge University Press.

⁸⁵ On this point, see in general E. Daly, *Dignity Rights: Courts, Constitutions, and the Worth of the Human Person* (U. Penn Press, 2021).

Such contestation tends only to raise issues about bare sufficiency, rather than the overall justice and fairness of state solidarity systems taken as a whole.⁸⁶ But, in an area of legal regulation often characterised by capricious, careless and discriminatory decision-making, the contestatory space opened up by the principle of human dignity has nevertheless opened up important avenues for asserting the intrinsic worth of all persons – and thus pushing back against the dehumanising logic that disfigures much of state social welfare decision-making in particular.⁸⁷

The cases cited above as examples of the contestatory dynamic of dignity playing out in the socio-economic context – *Bernard, Adam, M.S.S., Paposhvili, Hartz IV, Minimum Asylum Seeker Benefits* and, most recently, *Lăcătuș* - all illustrate this point in different ways. However, a linked string of legal determinations by the European Committee on Social Rights (ECSR) in interpreting the European Social Charter provide a further and final example to reinforce the point, while also highlighting how the impact of such determinations is not always confined to their formal legal impact.

In 2012, the Dutch central government prohibited local authorities from providing temporary housing to irregular migrants as part of a set of measures designed to discourage unauthorised immigration. This was controversial, with city authorities in Amsterdam, Utrecht, and elsewhere objecting on the basis both of human rights concerns and also on account of the inevitably negative financial and social consequences of such a policy.⁸⁸ ‘Hard’ human rights law—such as the ECHR—offered no clear avenue of challenging the central government’s decision.⁸⁹ However, civil society groups brought collective complaints before the ECSR, the expert body that interprets the ESC, alleging that this prohibition breached the rights to social assistance and housing set out in Articles 13 and 31 of the revised Social Charter.⁹⁰

States generally enjoy a wide margin of appreciation under both the ECHR and the ESC when it comes to regulating access to public housing and other forms of state solidarity entitlements. Furthermore, the Appendix of the ESC expressly limits its personal scope of application to migrants ‘lawfully resident or working regularly’ in the state concerned. The Committee nevertheless concluded that these restrictive provisions of the Appendix had to be read subject to the principled foundations of the ESC taken as a whole, and in particular its overriding emphasis on securing human dignity.⁹¹ In essence, the Committee accepted that the provisions of the Appendix would ordinarily take effect so as to exclude irregular migrants from the protective scope of Charter rights – but the Dutch government was estopped from relying on these provisions to justify a failure to

⁸⁶ On this point, see Lord Hoffmann’s comments in *Matthews v Ministry of Defence* [2003] UKHL 4, [26]: ‘I think it is well arguable that human rights include the right to a minimum standard of living, without which many of the other rights would be a mockery. But they certainly do not include the right to a fair distribution of resources or fair treatment in economic terms - in other words, distributive justice. Of course distributive justice is a good thing. But it is not a fundamental human right.’

⁸⁷ For a useful conceptual analysis of dignity’s role in acknowledging vulnerability and affirming human potential, see Dupré, *The Age of Dignity*.

⁸⁸ B. Oomen and M. Baumgärtel, ‘Frontier Cities: The Rise of Local Authorities as an Opportunity for International Human Rights Law’ (2018) 29(2) *European Journal of International Law* 607-630..

⁸⁹ Indeed, the European Court of Human Rights subsequently ruled that the change in Dutch law did not by itself violate any of the civil and political rights set out in the ECHR: see Application no. 17931/16, *Hunde v Netherlands*, Judgment of 5 July 2016.

⁹⁰ The Netherlands is one of the fifteen Council of Europe states that have signed up to this unique complaints process: see n. 91 above,

⁹¹ Complaint No. 90/2013, *Conference of European Churches (CEC) v. the Netherlands*, Decision on the merits of 1 July 2017; Collective Complaint 86/2012, *FEANTSA v. The Netherlands*, Decision on the merits of 9 July 2014. Both decisions are accessible at <https://hudoc.esc.coe.int/>.

provide emergency shelter to persons facing a real risk of exposure to degrading living conditions, on account of the imperative character of the dignity principle. The Committee thus went on to hold that the Dutch government had breached the requirements of the ESC by imposing a comprehensive ban on irregular migrants being granted emergency shelter in state housing facilities, irrespective of their individual state of need and the risk of destitution.⁹² (Full disclosure: the author was a member of the Committee at this time, and participated in its legal deliberations in respect of these collective complaints.)

The Dutch government formally objected to the ECSR's decision, on the basis that it was incompatible with the express provisions of the Appendix to the Charter.⁹³ It also pointed out that Dutch authorities were not required as a matter of national law to give effect to decisions of the ECSR, which did not enjoy the same status as judgments of the European Court of Human Rights. However, various Dutch local authorities announced that they would treat the ECSR's decision as an authoritative determination of the positive obligations of the Dutch government under international human rights law, and proceeded to open up emergency public housing facilities to irregular migrants.⁹⁴ The controversy that followed proved to be politically divisive, with sharp splits emerging in the Dutch ruling coalition. Eventually, a compromise position emerged, whereby access to emergency housing shelters would be legally permitted - subject to a requirement that housed migrants co-operate with immigration control measures.⁹⁵

This sequence of events serves as a nice example of how the contestatory dynamic of dignity can play out in the context of socio-economic rights. The dignity principle was invoked by complainants and subsequently by the ECSR to justify a departure from a standard legal position, in the interests of protecting individuals from state action that risked forcing them into a state of destitution. The invocation of dignity did not take the form of a radical challenge to the status quo. Instead, it was used to carve out an exception designed to protect a highly vulnerable group against a significant risk of exposure to degrading living conditions. This expansion of existing ESC norms was very controversial, and triggered a backlash against the decision by the Dutch government. However, it also demonstrates the persisting normative potency of the dignity principle: despite the controversial nature of the ECSR's decisions, a range of different Dutch political actors were willing to engage with the Committee's conclusions and push for a change of law and policy. This dynamic played out at the margins of the Dutch social solidarity system, but its real-world implications were

⁹² In this regard, the Committee followed its previous decision in Collective Complaint 47/2008, *Defence of Children International v The Netherlands*, Decision on the merits of 20 October 2009, which had focused specifically on the issue of whether undocumented migrant children should have an explicit legal entitlement to access social services. See also Collective Complaint No. 14/2003, *International Federation of Human Rights Leagues v. France*, Decision on the merits 8 September 2004; Collective Complaint No. 69/2011, *DCI v. Belgium*, Decision on the merits of 23 October 2012.

⁹³ See the comments of the Dutch government, attached to Resolution CM/ResChS(2015)5, *Conference of European Churches (CEC) v. the Netherlands*, Complaint No. 90/2013, adopted by the Committee of Ministers on 15 April 2015, at the 1225th meeting of the Ministers' Deputies. See also Resolution CM/ResChS(2015)4, *European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands*, Complaint No. 86/2012, adopted by the Committee of Ministers on 15 April 2015 at the 1225th meeting of the Ministers' Deputies.

⁹⁴ Oomen and Baumgärtel, 'Frontier Cities: The Rise of Local Authorities as an Opportunity for International Human Rights Law', n. 101 above.

⁹⁵ C. O'Cinneide, 'The Human Rights of Migrants with Irregular Status: Giving Substance to Aspirations of Universalism', in S. Spencer, A. Triandafyllidou (eds.), *Migrants with Irregular Status in Europe. Evolving Conceptual and Policy Challenges* (Springer, 2020), 51-71.

nevertheless significant. The upshot has been an extension of existing human right standards – albeit one that remains contested.

Conclusion

This chapter has outlined how the principle of human dignity is used by legal actors to challenge and destabilise the boundaries of existing legal norms, and to justify the expansion of existing human rights law. In particular, it has examined how this ‘contestatory dynamic’ has played out in the context of state social solidarity frameworks. It has also analysed the potential and limits of this expansionary dynamic, and the tensions it can generate. A case has been made to the effect that the dignity principle only impacts on the margins of such solidarity rights - but this impact can still be significant, and have a tangible and concrete impact on individual lives.

More generally, the argument set out here suggests that the principle of human dignity often functions as a disruptor of existing legal and political norms, rather than as a static curator of an established status quo. It is frequently invoked to argue for an expansion of existing human rights law, to reflect new thinking about what qualifies as degrading treatment – or, more generally, to make the case that established state practices must change if they are to adequately respect the notion of intrinsic human worth.

Some may view this expansionary dynamic with concern, both out of scepticism about the desirability of expanding judicial power and a concern that it risks over-inflating the value of the dignity principle. However, there are other relevant considerations in play. Human dignity is everywhere acknowledged to be a ‘substantive basic norm’, to use Neal’s phrase – something deserving of effective legal protection. It is also endangered by factors such as poverty, social exclusion, and the marginalisation of particular social groups who often lack meaningful political influence. As things stand, the contestatory force of the dignity principle, as invoked by various claimants and campaigners in cases such as *Lăcătuș*, *Adam*, *N.S.S.* and the Dutch collective complaints heard by the ECSR, has generated partial protection for vulnerable persons relegated to the margins of society. As such, the destabilisation generated by the dignity principle has helped, in a small way, to ‘humanise’ (to use Dupré’s phrase) the impact of state action on the lives of such groups.

It could thus be argued that this contestatory impact makes a positive contribution to our collective democratic life together in society – by exerting pressure on the legal and political status quo in favour of enhanced protection for human dignity. Far from representing a misuse of the dignity principle, it is perhaps better viewed as a faithful reflection of its inner logic. For taking human dignity seriously will sometimes entail changing the status quo, and embracing change.