Human Dignity in Malta

David Edward Zammit and Mary Muscat

Contents

Abstract

The concept of dignity draws upon roots diffused throughout Malta's mixed legal system, reflecting the historical influence of the *Ius Commune*, as modulated through Civilian doctrine and jurisprudence and complemented by British Constitutional principles and Socialist and Liberal ideals. In the colonial period, express legislative references to dignity concerned nonhuman entities, including particular professions and institutions. After Independence in 1964, the concept of human dignity was introduced through three distinct generations of legislation

D. E. Zammit (✉) · M. Muscat
Department of Civil Law, Faculty of Laws, University of Malta, Msida, Malta
e-mail: david.zammit@um.edu.mt

P. Becchi, K. Mathis (eds.), *Handbook of Human Dignity in Europe*,
https://doi.org/10.1007/978-3-319-28082-0_27

comprising: (a) the Constitution as subsequently complemented by the European Convention of Human Rights Act, (b) postcolonial legislation, and (c) legislative efforts to align Maltese and EU law. Thanks to the activity of the courts and the legislator, various concepts of dignity coexist within Maltese legal discourse and the concept of human dignity has sometimes been broadly applied as synonymous with respect to the intrinsic humanity, identity and equality of all human persons. However, the treatment of informal migrants and undocumented asylum-seekers provides a clear practical counterexample, revealing how the compartmentalised approach to legal interpretation in Malta's mixed jurisdiction places significant constraints on the possibility of further developing human dignity as a fundamental value underlying all Maltese legislation.

Keywords
Malta · Legal hybridity · Jurisprudence · Professional/institutional dignity · Generation of legislation · Compartmentalisation · Human dignity · Undocumented migrants · Dignity of the worker · Dignity of the spouse · Dignity of the tort victim

1 Introduction

As a mixed jurisdiction (Andò et al. 2012, pp. 528–576; Attard 2012, pp. 41–42), the Maltese legal system has various characteristics which have strongly influenced the manner in which the concept of dignity has entered and developed. These characteristics include the prominent role played by court judgments (jurisprudence) rather than doctrine (Andò 2011, pp. 238–239), particularly as a vehicle for introducing and developing new legal concepts (Donlan et al. 2012). Codification is limited to five codes (the Criminal Code, the Civil Code, the Code of Organization and Civil Procedure, the Code of Criminal Procedure and the Commercial Code). These were promulgated in the nineteenth and early twentieth centuries and have not been consistently updated. The Civil Code is noteworthy in that important Civil law statutes, such as that relating to the validity and formalities of Marriage (Cap.255, Laws of Malta), have never been incorporated into it and in that: '[t]he precept of the Code de Rohan that whenever a dispute cannot be decided by the provisions of the Municipal law, regard must be had to the (Roman) common law has never in civil cases been repealed and is still applied' (Zammit 2016a, pp. 86–87; Bonello 2004).

These structural features of the Maltese jurisdiction have had a profound impact on the way in which dignity has diffused into the legal system (Zammit and Xerri 2015). Its hybrid character (Donlan et al. 2012) has translated into a variety of trajectories for the concept and at the same time meant that jurisprudence has played a leading role in the process. As Biagio Andò observes: 'in Malta the important role of 'system-builder' is played by judges, notwithstanding the absence of a doctrine of binding precedent' (Andò 2011, p. 257). He further claims that while Maltese judges often refer to foreign models, they do so in a selective, pragmatic and eclectic manner; 'that has not produced an all-encompassing acceptance of the same models'

(Andò 2011, p. 260). This chapter endorses Andò's description of the *modus operandi* of the Maltese courts, while also arguing that he overstates the judges' agency by describing them as 'system-builders'. This claim ignores the structural constraints upon their ability to intervene; even if their 'system-building' activities are understood to be limited to preserving the legal tradition of the island by acting: 'to make the external sources consistent with the local legal framework' (Andò 2011, p. 260). Inherent to the very role of all these judges – once the Maltese system not only lacks a doctrine of binding precedent but also lacks a Court of Cassation – is the limitation of their field of vision to the resolution of the case before them, which in and of itself dramatically restricts their ability to develop the legal system holistically according to a uniform theoretical blueprint. This comment, repeatedly encountered by the first author while conducting ethnographic research in Maltese courts and legal offices, epitomises this approach: 'it is impossible to generalise because every case is different' (Zammit 1998, p. 130).

Moreover, the pragmatic case-by-case approach of the Maltese judges has developed within an overarching context of British colonial governance expressed through a bilingual jurisdiction in which private law continues to be based on Civilian sources while public law came to be completely dominated by Common law models (Donlan et al. 2012; Ganado 1950). This has engendered a 'compartmentalised' attitude to law itself, epitomised by the comment of the Maltese jurist Joseph Ganado that: 'To avoid confusing legal principles deriving from different sources, it is natural that caution is to be exercised. I would say that it is necessary to view the system as composed of a number of clearly distinguished compartments' (Ganado 1996, p. 247). We shall see how this 'compartmentalised' hermeneutical approach relates to the incomplete character of Maltese codification, the importance of jurisprudence, Malta's adherence to the dualist school of thought in regard to international law (Aquilina 2018, p. 50; Said-Pullicino 2001), and the belated and sporadic introduction of express legislative references to human dignity so as to reduce the courts' ability to develop human dignity as a fundamental value which lies at the heart of the Maltese legal system.

2 Methodology and Structure of Paper

In order to cater for the various sources of dignity in Maltese law, the principal methodology employed consisted of an electronic search in statutory legislation, not only for the term 'dignity' but also for synonyms such as 'respect', 'humane', 'decency' and 'decorum'; as also antonyms such as 'indignity', 'inhuman', 'dehumanising', 'disrespect', 'dishonourable' or 'degrading treatment'. This was conducted on the Malta Ministry of Justice website dedicated to reproducing all Maltese legislation and is updated until the 1 January 2018 as far as legislation was concerned (http://www.justiceservices.gov.mt/ Accessed on 16/9/2018).

A similar search was subsequently conducted using the 'text search facility' of the 'Sentenzi online' section of the same website, in order to identify all the relevant judgments delivered between the 1 January 2000 and the 31 December 2017 where

the word '*dinjita*' (dignity in Maltese) expressly figured. These were scrutinised in order to eliminate cases where dignity did not play an important role in the judgment and eventually some 154 judgments, delivered by various Maltese courts, were identified and summarised. The summaries of these cases were then categorised according to whether they referred to (a) Professional or Institutional Dignity, (b) Human Rights litigation, (c) Criminal litigation and (d) Civil Litigation and incorporated into a single document, which was then drawn upon in this paper. This search brought up a series of judicial decisions that treat dignity as an integral part of the ruling although the term is not expressly utilised in the legislation invoked in the case. These included 42 judgments which treat dignity as an essential element of the matrimonial '*consortium vitae*'.

In this chapter, we first explore the concept of dignity as it emerges expressly from Maltese legislative texts. We focus particularly on four generations of legislation which can be seen to have historically introduced various permutations, together with the jurisprudence which relates to this legislation. Secondly, we focus on how the courts have invoked dignity through jurisprudence without any express legislative backing. Finally, having illustrated the variety of sources and the historical evolution of the concept, we take a closer look at the constraints which prevent the Maltese courts from developing and applying a broad, unitary, concept of human dignity, rooted in Maltese law. These explain why the failure to develop an overarching concept of human dignity has translated into a patchy and inconsistent approach, with troubling implications for human rights.

One should further note that here and throughout this chapter, all references to primary legislation are being made to the appropriate chapters of the Laws of Malta, which are known as 'Capitoli' or 'Cap.' in short. Throughout this chapter, the acronym 'SL' stands for subsidiary (delegated) legislation, which in Malta, provided it is authorised by the enabling law, has exactly the same force as statutory law. Quotations from judgments were translated by the authors from Maltese into English.

3 Express Legislative References to Dignity

The term 'dignity' is found in 45 legislative texts within the Maltese system, including the Constitution and the European Convention Act (Cap. 319), which deal specifically with fundamental human rights. There are two main expressions of 'dignity' in legislation: the first being integral to institutions and to the occupational identity of specific professions and the second describing the treatment expected to be given to individuals by institutions. The history of how 'dignity' came to enter the Maltese legal system is dominated by a sequence of four distinct clusters of legislation. These clusters can be referred to as 'generations' in that they are distinct not solely or so much due to their timing, but mainly due to their role in introducing different aspects of the dignity concept. In short, the first generation (1920–1927) focused primarily on professional dignity and the source of these laws is to be sought in the colonial context, since Malta was a British colony from 1800 until 1964, albeit

experiencing extended periods of internal self-government between 1921 and 1964. The second generation is primarily governed by the 1964 Constitution, which came into effect following Independence gained in September of that year and which lists judicially enforceable Fundamental Rights and Freedoms of the Individual in Chapter ▶ "Human Dignity in Austria". The third generation is the home-grown legislation spanning from 1994 to 2002 and revolves around the types of behaviour and standards expected from those working in the services sector. The fourth generation is the one that is largely influenced by Malta's membership commitments within the European Union, from 2004 to date.

3.1 Professional and Institutional Dignity

The first generation is composed of two statutes: the Architects' Ordinance (Cap. 44) dating to 1920 and the Notarial Profession and Notarial Archives Act (Cap. 55). In this period between 1920 and 1927, three professions were regulated by ad hoc statutory enactments – the medical profession, notaries and architects. Although the Medical and Kindred Professions Ordinance was also enacted in 1901, it did not originally refer to the dignity of the profession or make use of synonyms such as decorum, respect, honour and professionalism.

The Architects' Ordinance was replaced by the Periti Act (Cap. 390) in 1999, but it still kept the original article 4 of the Ordinance, introduced in 1920, which referred to: 'professional practices of land surveyors and architects, whether or not belonging to the Chamber [of Architects], which are considered inconsistent with the dignity of their profession'. As Maltese was not yet the official language of Malta during the 1920s, this reference was originally made in Italian to conduct which was: '*considerata ripugnante al decoro della sua professione*' (Gov. Notice 202 in the Government Gazette of 12 June 1920 (Malta 1919–1920). This article is now listed as regulation 5(1) in SL390.01). The Notarial Act, promulgated 7 years later, introduced Art.142 (now re-numbered Art.143 of Cap.55), sanctioning: 'the notary who, by his conduct in the exercise of his profession, shall compromise in any way the honour and dignity of the notarial class'. The Italian version at the time read: '*decoro e dignità della classe notarile*' (Government Gazette Vol XXXVII of 26 April 1927 (Malta 1927)). Thus, in this period and according to this legislation, dignity was an attribute ascribed to particular professions and equiparated to decorum, ethical behaviour and upholding professional standards.

The Maltese courts have also been willing to extend this concept of professional dignity to encompass the dignity of state institutions. Historically, such references can be traced back at least as far as the eighteenth century, when Malta was ruled by the Hospitaller Knights of Saint John. In 1792, for example, Grandmaster de Rohan attached a *memoria* to a letter to Cardinal de Zelada, in which he observed, in the context of a jurisdictional dispute between his courts and those of the Inquisition, that: 'the prince of Malta has left for a more favourable time the remedy due to his insulted dignity' (Ciappara 2018, p. 177). In its decision of the 5 November 1970 in Mintoff vs. Borg Olivier, the Constitutional Court made clear that the powers of the

Maltese House of Representatives to regulate its own procedure are based on the important principle that the House collectively should enjoy the rights and prerogatives without which it could not preserve either its independence or 'the dignity of its position'. From this it was a short step to recognising and respecting the dignity of Local Councils, as the Civil Court declared in Attard vs. Hon. Prime Minister et. (22 March 2000) and again in Lombardo et. vs. Kunsill Lokali Fgura (7 October 2004).

This concept of institutional dignity has also been applied by the Court of Criminal Appeal to refer to the dignity of a judge when addressing a jury (Republic of Malta vs. Falzon; 22 September 2006) and also, by the Magistrates Court, to the need for law itself to: 'serve as a constructive social instrument in a manner consistent with its seriousness and dignity' (Vodafone Malta Limited vs. Darmanin: 29 May 2013). According to the Civil Court, the procedure of punishing persons for 'contempt of court' (Cap. 12, articles 988 up to 1003A) is meant to safeguard the Court's or the Judge's dignity within the context of the administration of justice (Il-Qorti vs. Camilleri, 9 November 1990, First Hall Civil Court). If a court official, such as a court-marshal, is duped by the accused and receives documents meant to put him at a disadvantage in executing his mandate, then the accused is also ridiculing the Court order and threatening the dignity of every other court official (Id-Direttur Qrati Civili et. vs. Busuttil, First Hall Civil Court: 17 June 2009). The Civil Court has even spoken of the need to give the building of the President's Palace in Valletta the dignity it deserves as a justification for allowing the expropriation of private property to provide office space for the Attorney General's office outside this Palace (Tagliaferro & Sons Limited vs. Commissioner of Lands et. 12 October 2012).

The focus on the dignity of professions and state institutions reflects the colonial context in which these express legislative references to dignity were originally made (Mangion 2015). At the time, conditions were not propitious for the insertion of a clause protecting the dignity of the individual to be inserted into the Maltese Constitution. Indeed, even if a new Constitution granting limited internal self-government had been granted to the Maltese in 1921, it was twice suspended before being finally revoked by the Governor and replaced by a non-self-governing Constitution in 1936 (Anonymous 1958). Furthermore, the Colonial Government proceeded in 1942 to deport 43 Maltese subjects of known pro-Italian sympathies to be interned in Uganda for the duration of the war. Since the persons concerned had not been convicted of a crime and since their appeal against the judgment allowing their deportation was still pending at the time when they were deported (Borg 2007), such measures are evidently incompatible with a legal system built upon human dignity as a foundational value.

Exclusively protecting the dignity of professions and institutions not only reflects the inability of Maltese colonial law to protect the dignity of the human being as such, but also points to the rather conservative and hierarchical social structure of Malta in colonial times. Yet it is important to note that this understanding of dignity has been retained into the present. Thus, the professional dignity of Maltese advocates is embodied in particular colonial-era ways of presenting themselves and

relating to clients which were observed by the primary author in the course of ethnographic fieldwork carried out in the 1990s (Zammit 2013). It has even occasionally been linked to a much more recent understanding of human dignity as an attribute of all human beings. Thus, in Registratur tal-Qorti vs. Chetcuti, decided on the 25 February 2003, the Magistrates Court held that: 'if a person assaults another within the precincts of Court, the effect of diminishing dignity is triplicate: the aggressor's, the victim's and the Court's dignities are all reduced'.

3.2 Blending the Maltese Constitution and the ECHR

The second generation is primarily governed by the 1964 Constitution, which marked the definitive end of the colonial period; as through this Constitution Malta became an independent self-governing democracy. Chapter ▶ "Human Dignity in Austria" of the Constitution lists enforceable Fundamental Rights and Freedoms of the Individual and constitutes: 'an extensive, entrenched and judicially enforceable bill of rights' (Cremona 1997, p. 80). It marks a shift towards a new human rights-based understanding of dignity as an attribute of all human beings. Although the term 'respect' rather than 'dignity' is invoked in the text of the Constitution, the latter term is prevalent in Constitutional Court judgements applying Art.36(1) dealing with inhuman or degrading treatment or punishment, with the dominant antonyms including deprivation, arbitrary treatment and 'cruel, inhuman and degrading'. Due to the absence of an express Constitutional reference and for other reasons which will be explained below, judgments interpreting the rights listed under Chapter ▶ "Human Dignity in Austria" tend to adopt a conservative understanding of the situations in which human dignity is violated. This is generally based on the reasoning employed in judgments of the European Court of Human Rights and usually restricted to cases which can be brought within the purview of Art.36 (1) of the Constitution and Art.3 of the European Convention of Human Rights (See also Sect. 3.1 of the chapter on ▶ "Human Dignity in Cyprus").

Apart from Chapter ▶ "Human Dignity in Austria", the Constitution also contains various other provisions which would appear to be highly relevant to human dignity. Article 1(1) of the Constitution, introduced in 1974, states: 'Malta is a democratic republic founded on work and on respect for the fundamental rights and freedoms of the individual'. This suggests a dual foundation for the Constitutional concept of dignity. More concretely, Chapter ▶ "Human Dignity in Albania" of the Constitution: 'provides a set of 'principles' which are held to be 'fundamental to the governance of the country' and it shall be the aim of the State to apply these principles in making laws' (De Gaetano 2012, p. 6). These principles include the right to work and the state's duty to promote such conditions as will make this right effective and various other rights of workers, including the rights of women workers to enjoy equal rights as males (Article 15). They also express the rights to maintenance, social assistance and education (Articles 17, 11 & 12). However, it is important to note that the Constitutional Court has tended to neglect the rights enunciated in Chapter ▶ "Human Dignity in Albania" of the Maltese Constitution;

once the Constitution itself states they are not directly enforceable judicially (Cremona 1997, p. 80). In at least one judgment, the Court has concluded from this that: 'the right to work is not an enforceable right' (Bonello 2018a). Thus albeit 'all ordinary legislation [. . .] has given effect to these principles' (De Gaetano 2012, p. 7), the manner in which they have been incorporated into a Constitution which 'arguably reflects the precision and detail of English statutory drafting' (Donlan et al. 2012, p. 194) has rather tended to weaken than to reinforce their juridical force. It has certainly not provided the Courts with the necessary tools through which they could infer a broad, judicially enforceable, concept of human dignity as underlying the Maltese Constitution as a whole.

A very important law that, together with the Constitution, has significantly contributed to the development of the concept of human dignity is the European Convention Act, Cap. 319. Enacted in 1987, the Act transposed articles 2 to 18 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols 1, 4, 6 and 7 thereto into Maltese legislation. By virtue of this Act, the substantive provisions of the European Convention on Human Rights and the above-mentioned protocols: 'have been made enforceable by the domestic courts in the same way that the Fundamental Rights and Freedoms of the Individual listed in Chapter ▶ "Human Dignity in Austria" of the Constitution are enforceable' (De Gaetano 2012, p. 11). Therefore, these Convention rights are generally invoked by the Maltese courts in order to complement and facilitate the interpretation of the Constitutional Rights and Freedoms. Moreover, a secondary aim of the European Convention Act is to: 'make judgements delivered by the European Court of Human Rights directly enforceable by the Constitutional Court of Malta' (Said-Pullicino 2001, p. 8). This gives a special privileged status to the judgements of the Strasbourg Court (Cremona 1997, p. 84) and reinforces the need for the Maltese Constitutional Court to interpret the Constitution in the light of the Convention, to avoid the dilemmas which a possible conflict in interpretations would produce.

These dilemmas arise from the status of the European Convention Act as a separate legal instrument from and nominally subject to the Constitution. Professor Cremona remarks that: '[i]ndeed in the matter of human rights provisions, the Act (Cap.319) has established a certain hierarchy of norms. In case of inconsistency the Convention provisions prevail over ordinary law provisions (these being -to the extent of their inconsistency void- Sect. 3); but ordinary law is defined (Sect. 2) as excluding the Constitution, so that the Constitution ultimately prevails over both the Convention and of course "ordinary law"' (Cremona 2001, p. 167). The prior status thus given to the Constitution is reflected in Articles 6 of the Act, by which: 'a judgment of the European Court of Human Rights requires the *exequatur* of the Malta Constitutional Court to be enforceable' (Mifsud 2015, p. 44), and 6A, by which: 'the determination of the supreme supra-national court of Europe and of Malta depends for its enforcement or otherwise on the discretion of the Prime Minister as to whether he wants to change the law or not' (Mifsud 2015, p. 44). The lingering emphasis on national sovereignty in these provisions is also reflected in Article 7 of the Act, which in line with the Dualist doctrine of International law makes the enforcement of the Convention in Malta date from 1987, when the Act was passed and not from 1967, when Malta ratified the Convention (Mifsud 2015, pp. 44–45).

In a context where neither the Maltese Constitutional Court nor the European Court of Human Rights can definitively settle any conflict of interpretation between them, Maltese constitutional jurisprudence has generally chosen to explore the concept of dignity in relation to human rights provisions and specifically through an interpretative filter combining Article 3 of the European Convention with Article 36 of the Maltese Constitution. Article 36 creates an enforceable right that: 'no person shall be subject to inhuman or degrading punishment or treatment'. An early judgement of the Constitutional Court which is often cited by the Maltese courts is Galea vs. Housing Secretary et. decided on the 20 July 1977. In that case, applicant had complained that the execution of a Requisition Order evicting her from her property had not only broken Article 37 of the Constitution, protecting her from deprivation from her property without compensation, but also violated her right under Article 36 not to be subjected to inhuman or degrading punishment or treatment. The Court held that Article 36 once it talks about 'treatment' was in principle susceptible to a 'nonpunitive' application even to a case such as Galea's. Furthermore, the Court distinguished the concepts of 'inhuman' and 'degrading' treatment, and although the European Convention Act had not yet been drafted, it referred to judgements of the European Court of Human Rights and to a report of the European Commission of Human Rights in order to explore the meaning of the latter. On this basis the Court held that the concept of degrading treatment includes inter alia the element of a 'serious violation of the dignity of the subject'. The Court stressed the importance that treatment, in order to be considered degrading, must reach a certain degree of gravity and concluded that this was not present in Galea's case, since: (1) applicant was not actually residing in her house when the eviction took place, (2) it was unclear whether she actually intended to go and reside there, (3) applicant was residing with her son in his house and incapable of living on her own in her house, and (4) the Housing Secretary had suspended the application of the Requisition Order for a period in order to test the waters before proceeding with the requisition.

Subsequent constitutional judgements have usually followed the approach of Galea vs. Housing Secretary and have insisted that the treatment must reach a certain degree of gravity, amounting to a 'serious violation of the dignity of the subject' in order to constitute 'degrading treatment'. This rather restrictive interpretation implies that a violation of the subject's dignity is not in itself sufficiently serious to constitute a violation of the relevant human right. Thus, in Tanti vs. Minister of Heath et. decided on the 18 July 2017, the Constitutional Court held that degrading treatment did not subsist simply because the applicant was transferred by his employers to an empty desk in another office and subsequently given permission to work from home. The court referred to previous decisions of the European Court of Human Rights to distinguish degrading treatment from that which is difficult, undoubtedly unpleasant or even irksome and cited previous Maltese judgments in which the court had found that this threshold of severity had been reached, namely: (a) cases in which a landowner was evicted from his property which was requisitioned in order to accommodate another, (b) cases where a criminal suspect was interrogated by Police without being informed of the charges against him or with

methods which were described as inhuman or degrading, and (c) a case where an employee was forced by his employer to sign a declaration that by absenting himself from work on one day in June 1982, he had threatened to undermine stability and democracy in the country.

Other cases where the courts have held that the minimum threshold of severity to constitute degrading treatment had *not* been attained include cases of deportation. In Chebab vs. Attorney General et., decided on the 29 November 2013, the Constitutional Court held that the issuing of a deportation order does not per se amount to inhuman or degrading treatment. For applicant to prove that she had suffered a serious violation of her dignity as a human being, she would have to prove that her suffering had reached a certain intensity which in turn affected her dignity. In Police vs. Fregapane, decided on the 16 January 2013, the Court of Criminal Appeal also held that deportation to over-crowded Italian prisons did not in itself constitute a serious violation of human dignity.

Furthermore, the Constitutional Court has held that degrading treatment did not subsist where: (1) a widow was not allowed to retain the surname of her first husband upon re-marrying (Federoff vs. Permanent Secretary in the Office of the Prime Minister et. decided on the 2 November 2001), (2) an employee was escorted away from his workplace in the airport by soldiers as he had refused to leave voluntarily to allow an inquiry to be carried out on his mental health (Galea vs. Hon. Prime Minister et. decided on the 18 November 2003), (3) a Third Country National was deprived of his right to enter and leave Malta without a visa and subjected to police interrogation after his marriage was declared to be one of convenience (Hasan et. vs. Principal Immigration Officer, decided on the 2 March 2010), (4) there was an alleged excessive delay in court proceedings (Gauci et. vs. A.G. et. decided on the 29 September 2009), and (5) an Asylum-seeker was detained upon entering Malta for a period of 12 months (Maneh et. noe. vs. Commissioner of Police et. decided on the 29 April 2013).

Cases in which, by contrast, the Constitutional court has found that the applicant did experience degrading treatment include one where a prisoner was placed in a special cell and subjected to other unjustified special restrictions not experienced by other prisoners, including removal for a period of his access to a shower and the refusal to grant him any access to reading material or television (Calleja vs. Commissioner of Police et. decided on the 19 February 2008). The Court held that the treatment given to the prisoner was not inhuman but degrading and this because the objective impact of these measures could not but be, in the words of the European Court of Human Rights in the Raninen v. Finland, judgment of 16 December 1997, to: 'humiliate and debase the person concerned and [. . .] as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3'.

This approach was further developed in a subsequent case, where the victim of the inhuman and degrading treatment had been arrested, imprisoned for a period of 3 years and subjected to repeated interrogations and periods of solitary confinement for a crime he had not committed (Mifsud vs. Bonello et. decided on the 18 September 2009). The Court held that the gravity of the degrading treatment must

not be measured in the abstract but subjectively, by making reference to the effect that treatment had *on the particular person* who was subjected to it. In Sahan et. vs. Minister of Justice and the Interior et. decided on the 22 February 2013, the Court extended the protective scope of Articles 3 and 36 to prevent the two applicants from being deported to Turkey and this even though the second applicant had not experienced any inhuman or degrading treatment. Applicant's ethnic and family background exposed him to the strong likelihood of being exposed to degrading treatment, involving his being arrested, beaten and threatened.

Once the concept of dignity had entered the Maltese constitutional order through the linkage between Article 36 and Article 3, it was occasionally applied to the interpretation of other human rights, which were judicially understood as aiming to protect human dignity. This approach was pioneered in a case where the daughter of a port worker alleged that Article 13 of the 1993 Regulations on Port Workers were discriminatory in her regard since they prevented her as a woman from applying to fill the vacancy created by the retirement of her father from his job, while she would have been eligible had she been male. The Constitutional Court held that this provision was indeed discriminatory against women in such a way as to amount to degrading treatment. By assuming that women did not have the physical and/or mental capacity to carry out this kind of work, it was undermining the dignity of all women (Cassar vs. Malta Maritime Authority et. decided on the 2 November 2001). In Cassar vs. Director of Public Registry et. decided on the 23 May 2011, the Constitutional Court highlighted the failure of the Maltese legislator to provide for a form of partnership distinct from marriage which could be accessed by persons in the position of the applicant. Applicant was a postoperative transsexual, whose change of gender from male to female had been recognised by an annotation to that effect on her birth certificate. The Court held that this failure amounted to a violation of Articles 8 and 12 of the Convention, implicitly agreeing with the First Court that this violation also failed to respect applicant's dignity.

Building upon this understanding of dignity as embedded within various human rights and freedoms, the Constitutional Court developed its most extensive reflections on human dignity in the case of Buckle et. vs. Friggieri et. decided on the 29 November 2012. In that case, applicant had alleged that a decision of the 'Film, Stage and Classification Office' to classify as 'banned' a theatrical production of the play 'Stitching' that he intended to present, violated his rights to Freedom of Expression as protected by Article 41 of the Constitution and Article 10 of the Convention. The Board had based its decision on its conclusion that the play was objectionable and offensive, blasphemous, disrespectful to Holocaust victims and an attack on human dignity. The Court held that the Board's decision could not be considered as a violation of freedom of expression because the play in its entirety placed into contempt: (1) the dignity of the human being in general and (2) the dignity of certain categories of human being, namely, women, children and other categories defined on the basis of nationality or religion. However, one construed the matter, the text of the play contradicted the inalienable dignity of the human being and the Court understood that this was the real basis for the decision of the Board.

The way the Court understood dignity in Buckle vs. Friggieri is particularly interesting because: (a) dignity was understood as a value which did not need to be restricted in its scope to a particular human right but which lies at the foundation of the entire Constitutional order, such that protecting freedom of expression could never be compatible with or justify conduct which violated human dignity; (b) dignity was understood as an inalienable human characteristic; and (c) the court recognised that human dignity could take different forms, ranging from the dignity of the human being in general to the dignity of particular categories of human beings, including those defined by cultural, religious and political attributes. This comprehensive recognition of human dignity as the fundamental *telos* of the Constitution and the Convention and susceptible of being judicially enforced as a value is unique in Maltese constitutional jurisprudence. At the same time, however, the Court's 'system building' efforts were somewhat undermined by its failure to trace a genealogical line of descent for dignity rooted in constitutional legal texts. This is understandable in view of the rather limited understanding of the scope of human dignity embraced by previous judgements. Thus, while the Court described dignity as a fundamental value underlying the Maltese Constitutional order, in practice it seemed to pluck it out of thin air without giving it a solid grounding in the Maltese Constitution.

While Buckle vs. Friggieri can be seen as the climactic point reached by dignity in Maltese constitutional jurisprudence, it also indicates a point of contrast between the Constitutional Court and the European Court of Human Rights. Six years later, in Unifaun Theatre Productions et. v. Malta, decided on the 15 May 2018, the European Court held that the complete ban on producing the play Stitching ran contrary to applicants' right to free expression guaranteed by Article 10 of the Convention. Article 10(2) only permits states to restrict the exercise of the freedom of expression where such restrictions are: 'prescribed by law' and 'necessary in a democratic society'. The Court found that the banning of the play by the Maltese authorities had been undertaken without an appropriate basis in domestic law authorising such actions. It held that there was thus no need for a substantive investigation into whether this restriction was 'necessary in a democratic society' – which would have required it to comment upon the Constitutional Court's invocation of human dignity – and that applicants' freedom of expression had been violated because the banning of the play had not been prescribed by a law. Since the European Court's judgement hinged on this point, it seems that it can neither be cited in support or in contradiction of the Constitutional Courts' statements regarding human dignity and its status within the Maltese constitutional order. However, thanks to the unstable and opaquely structured relationship between the Constitutional Court and the European Court of Human Rights, in practice these contrasting judgements tend to neuter on another.

Thus, following the 1964 Constitution the concept of human dignity as understood by the European Court of Human Rights came to be established in Maltese constitutional jurisprudence, although it took another 30 years for the word to find its way expressly into written legislation again. The only exception was the Diplomatic Immunities and Privileges Act (Cap. 191) which in 1966 spoke about the

'disturbance on the peace of the mission or impairment of its dignity' in the First Schedule, Art.22(2) as well as 'due respect and dignity' (First Schedule, Art.29) with reference to diplomatic agents and the treatment they should receive from the Maltese State.

3.3 Maltese Postcolonial Legislation

Thirty years after national independence was obtained from the United Kingdom and 20 years after Malta became a republic in 1974, the first cluster of 'home-grown' laws were enacted which incorporated express references to 'dignity'. This seems to have occurred largely in response to various human rights cases relating to the political violence of the late 1970s and 1980s and including cases of police torture that populated the Constitutional Court's caseload in the late 1980s and 1990s (Azzopardi 2004, pp. 25, 26, 115). Consequently, many of the most significant changes focused on the Criminal Code and the Prison Regulations. Thus, in 1995 the Prisons Regulations were amended to require that punishment had to be: 'according to law with the dignity and respect due to the human person' [SL 260.03, reg. 3(1)(a)]. Moreover, according to these amended regulations, strip searches have to be conducted in a manner respectful of the dignity of prisoners and prisoners cannot be removed in transport having inadequate ventilation or light, 'or which may in any way subject them to unnecessary physical hardship or indignity'.

These regulations played a role in Spiteri et. vs. the Director of Prisons et. decided by the Civil Court on the 29 May 2018. In this case, nine transgender prison inmates were found to have suffered a breach of various human rights, including their Constitutional rights not to be subjected to inhuman and degrading treatment under Articles 36 of the Constitution and 3 of the Convention, to have their privacy respected under Article 8 of the Convention and not to be discriminated against on grounds of their Gender identity. Even following gender reassignment surgery, these inmates had refused the offer to be reallocated to the female section of the prison, as they would have lost the opportunity to work and follow a training course which was only available in the male section. Remaining in the male section, they were taunted, sworn at and suffered various other indignities from guards and other prisoners (including cases of rape, when using the showers).

The court observed that the human dignity of prisoners must be respected, because they remained human beings and therefore retained all the rights which were not intrinsically inconsistent with a prison sentence. On this basis, it not only found that strip searches conducted by male guardians violated the Prison Regulations, but also, since these Regulations had to be interpreted as compatible with human dignity, that the simple unjustified refusal to allow these prisoners access to a hairdresser constituted part of the abuse inflicted upon their dignity. Furthermore, the court specifically awarded €1,000 separately from the €4,000 damages it awarded each prisoner for the violation of their human rights, to compensate for the existential damage caused by these infringements of their dignity. While this represents a clear acknowledgement of the need to protect human dignity separately from the

protection of particular human rights, it is significant that here too, as in Buckle vs. Friggieri, the Court failed to explain how and when this broad concept of human dignity had come to acquire such significance within the Maltese legal order. Indeed, the Civil Court did not even base its understanding of human dignity upon a broad interpretation of the values underlying the Prison Regulations. Instead it interpreted these Regulations compatibly with its understanding of the protection of human dignity as an anterior extra-legal value.

In 1996 the Criminal Code (Cap. 9) introduced 'dignity' to the territorial jurisdiction delimitation in Art. 5(3) (b), with: 'special protection from attack on the person, freedom or dignity of the representative of a State or official/agent of an international organisation'. This concept of dignity is still that of the State or Organisation being represented. However, subsequent amendments to the Criminal Code and associated legislation also expressly referred to the dignity of the human person. Thus, in 2002, the Criminal Code (Cap. 9) was further amended to include a new article, 54D, concerning war crimes. This stipulated the offence of: 'committing outrages against personal dignity, in particular humiliating and degrading treatment, as per war crimes during international armed conflict' and the same standard was also introduced with regards to violations of the four Geneva Conventions of 12 August 1949. And in 2003, the International Criminal Court Act (Cap. 453), in Art.8(2) of the First Schedule on war crimes, also sanctioned 'outrages upon personal dignity, in particular humiliating and degrading treatment', committed against persons not taking an active part in the hostilities including armed forces members who are sick, wounded, detained.

Furthermore, in 2002, Art.247A(2) was added to the Criminal Code, clarifying that the ill-treatment or neglect of a child under 12 years specifically includes: 'persistently offending the child's dignity and self-esteem in a serious manner'. In Police vs. Decelis, decided by the Court of Criminal Appeal on the 4 August 2006, the court explained that this provision covers a wide range of conduct including not only positive acts, but also omissions and observed how the element of persistence is emphasised in this provision. The court found a mother to be in breach of Art.247A (2), who: 'would move the children's chair close to the table with such rage and in such a way that the minors' legs would hit the table and become bruised. To be bruised by a hard object represents a certain amount of pain; the children would manifest this by crying and yet the parent still repeated her behaviour habitually'. The court further observed that the mother was also responsible for failing to intervene when her partner: 'repeatedly beat her own children'.

The introduction of these express legislative references to dignity was also accompanied by the development of an approach in Maltese criminal jurisprudence and police culture (Azzopardi 2004), which conceived the victim of certain criminal offences as a person whose dignity had been 'humiliated'. This trend can be observed in regard to persons who have been subjected to 'illegal private arrest, detention or confinement', which is an offence which is aggravated, in terms of Art.87 (1) (g) of the Code when 'committed as a means of compelling a person to do an act or to submit to treatment injurious to the modesty of that person's sex'. Dignity has also been considered as synonymous with modesty in the interpretation

of Art.531(1) of the Code, giving the court authority to hold sittings behind closed doors in cases where the content of the sittings is deemed: 'offensive to modesty or likely to create scandal'. Similarly, in Police vs. Hall et. decided on the 22 July 2004, the Magistrates Court defined human trafficking as occurring when: 'a person exercises absolute control over another in a way that completely deprives the latter of liberty and dignity for purposes of profit'. The 'lack of respect shown towards the dignity of the deceased (victim)' was also highlighted by the Criminal Court in the case of Republic vs. Mangion, decided on the 1 October 2012, where an elderly woman was murdered during an organised theft of her possessions and died 'crying in pain'.

During the timeframe between 1994 and 2002, various other legislative instruments introduced further examples of standards of behaviour based on 'dignity'. Some of these continued to promote the dignity of professions and institutions. Thus, the first statute that interlaced dignity with the protection of the ethics of the legal profession was the Commission for the Administration of Justice Act (Cap. 369) in 1994, through Art.2 which stipulates that a breach of ethics by members of the legal profession is: 'repugnant to the decorum, dignity or honour of one's office or profession'. This concept of dignity also found new expression in 1995, when the House of Representatives (Privileges and Powers) Ordinance (Cap. 113) incorporated the parliamentary members' Code of Ethics within its Schedule. Regulation 1 of this Code stipulates that a member shall: 'conduct himself in a manner which reflects the status and dignity of the House of Representatives'. Similarly, in 2002 the Cultural Heritage Act (Cap. 445) introduced the idea of 'integrated conservation' of the physical environment and of the social function of cultural heritage. The definition in Art.2 requires that such integrated conservation strategies be applied to cultural heritage in a manner compatible with: 'its dignity and its setting'. Thus, here too it is the dignity of cultural heritage and not that of the human beings who create it, which is being affirmed.

Yet coexisting with this emphasis on the dignity of nonhuman entities, the 'protection of morals and respect for the dignity of the human person' was in 2000 stated to be one of the purposes of the Malta Communications Authority by Art.4 (1) of the eponymous Act (Cap. 418). And in 2003, three other new Acts were introduced which all made references to human dignity. Subsidiary Regulations under the In Vitro Diagnostic Medical Devices Act (Cap. 427) specified that: 'the removal, collection and use of tissues, cells and substances of human origin shall be governed, in relation to ethics, by the principles laid down in the Convention of the Council of Europe for the protection of human rights and dignity of the human being' (SL 427.16, reg. 3.1.13). Subsequently the Sports Act (Cap. 455) established in Art.3(4) that: 'all sports activities shall respect the human dignity'. And in Art.5 (h), SportMalta's objective was stated as ensuring that 'all sport activities respect the human dignity, health and safety of all participants in sport'. Finally, the Commissioner for Children Act (Cap. 462) oblige this Commissioner in Art.10(b) to ensure that: 'all children are to be treated with dignity, respect and fairness'.

The other major development in this period is the 1994 amendment to the Press Act (Cap. 248), giving a right of reply to be published immediately and free of

charge in the same newspaper/broadcasting medium which originally gave offence, to a person whose actions or intentions had been misrepresented, or who had been attacked in his 'honour, *dignity* or reputation, or (suffered) an intrusion into his private life' (Art. 21(1) of Cap.248). Significant jurisprudential developments are associated with this amendment. The Magistrates' court described the kind of treatment that would amount to a verbal assault on the 'honour, dignity or reputation' of the person in Dom Mintoff vs. Victor Aquilina, decided on the 25 September 2003. In that case, plaintiff felt his dignity had been violated by an innuendo that diverted the real focus of a newspaper article from the legitimate issue raised in it to his personality. The Court held that any insinuation or invective, highly insulting, abusive or critical language, however subtle, still remained a verbal assault on the character that offends the honour and dignity of whoever happens to be in the firing range of the accuser.

The importance of appropriately balancing between freedom of expression and the 'subjective protection of one's reputation, dignity and personal image in society' (Zammit vs. Attard, decided on the 20 June 2008 by the Court of Civil Appeal) was stressed in various cases. Thus, in Police vs. Cuschieri, delivered on the 7 December 2006, the Court of Criminal Appeal held that: 'Freedom of expression is not a licence for any person to freely attack the reputation and honour of another without any proof and foundation, given that human rights are based on respect for human life and reputation. Actually the protection of one's reputation emanates from and at the same time is the culmination of that person's human dignity'. This same approach led the Court of Civil Appeal to see the protection of human dignity as 'a counter-weight to freedom of expression', in the case of Sammut vs. Caruana Galizia et. decided on the 9 January 2008. Here the Court proceeded to draw certain implications from the need of every person to have 'his/her honour, reputation and dignity' respected. Comparing them to an 'accumulation of moral weath', the Court insisted that the 'attacker' should substantially prove his/her allegations, if he or she desired to avoid the: 'legal responsibilities tied to this behaviour'. And in Buhagiar vs. Balzan et. decided on the 11 January 2006, the Court of Civil Appeal insisted that even the quantum of compensation should be commensurate to the dignity of the person libelled.

Increased judicial focus on human dignity as the value protected by the law of libel has also intersected with the focus on dignity as the ultimate value protected by human rights law. In Deguara vs. Binni, delivered on the 16 September 2009, the Magistrates' Court thus synthesised the dual role played by dignity as both foundation and counterpart to freedom of expression: 'At the core of human rights lies the respect for life and for human reputation; better still, one can say that the person's fame and reputation and its subsequent protection emanate from this and at the same time culminate in the dignity itself of the person'.

This approach which identifies human dignity as both the foundation of the law of libel and an intrinsic constraint on freedom of expression also motivated judicial pronouncements that legal persons could not sue for defamation. In Buttigieg et. vs. Camilleri, decided on the 20 January 2009, the Magistrates' Court held that since: 'fame and reputation appertain to the individual and not to the legal entity of which

the individual forms part, it is the individual, enriched by emotion and by the right to protect its own dignity when this is illegitimately attacked, who sues'. This was endorsed by the Court of Civil Appeal in Buttigieg et. vs. Naudi et. delivered on the 12 March 2010, as: 'the entity does not have any emotion and therefore cannot feel that its reputation was damaged with what had been said about it'.

These judgements reveal how, far from remaining an attribute which is exclusively associated with particular professions or institutions, the concept of dignity has come a full circle and is now sometimes only being linked to the reputation of individual human beings; so that dignity becomes an attribute which purely legal persons, such as the Hunting Association, cannot possess.

3.4 Aligning Maltese and EU Legislation

The cut-off point for this generation is based solely on the fact that Malta became a Member State of the European Union in 2004. Of course one cannot exclude the possibility that some of the laws listed as 'third generation' could form part of this grouping since they might also have been introduced in anticipation of Malta becoming a full member of the EU in the not-too-distant future. After 2004, the process of converging with European law still placed significant pressure on the Maltese legislature to upgrade existing legislation. Consequently under this heading we here review 29 legislative instruments amounting to 64% of the total of 45 reviewed in this chapter. Considering that these laws were enacted within the 13 year period between 2004 and 2017, it makes this fourth generation the most intensive in terms of the legislative commitment to developing the concept of dignity.

It is also interesting to note that much of this legislation took the shape of subsidiary legislation. While in Malta this kind of legislation has exactly the same force as an Act of Parliament, in practice it is much specific and detailed in terms of its form (Attard 2012, p. 58). Thus, the plethora of references to dignity in Maltese subsidiary legislation appear directly related to the absence of any express reference to dignity in the Maltese Constitution. Failing an equivalent to Article 1 of the German Basic Law (chapter on ▶ "Human Dignity in Germany"), the Maltese legislator does not expect the courts to be capable of developing a broad interpretation that sees the protection of human dignity as the fundamental value underlying all Maltese legislation. Once the courts cannot be relied upon to fill in the gaps, references to dignity needed to be inserted, in a capillary manner, throughout Maltese legislation (Suban and Zammit 2017).

The first cluster of laws within this fourth generation re-focuses on the dignity of particular professions, organisations, institutions and other nonhuman entities and broadens the list of entities that deserve to be treated with dignity. Thus, in 2005, the Maltese Language Act (Cap. 470) elevated Maltese 'to assert its merited dignity' through the official bodies regulating the development of the National Language. Two years later, the School Council Regulations established the standard of 'the dignity of an educational institution' in relation to fund-raising activities that should

be compatible with such dignity (SL 327.43, Second Schedule, reg. 2.2). In 2008, the Ethics of the Medical Profession Regulations (SL 464.17, reg. 6(c)) finally established the 'dignity of the (medical) profession', a lacuna that was addressed more than a hundred years after Cap. 31 was originally enacted. Furthermore, in 2009, professionals forming part of the commercial communications community became obliged to comply with professional rules 'which relate, in particular, to the independence, dignity and integrity of the profession' (Cap. 500, Art.5(7)). Seven years later, in 2016, 'the independence, dignity and honour of the profession' was affirmed in relation to professionals operating within the field of electronic commerce (Electronic Commerce Act, Cap 426 8E3(a)). Finally, in 2017 'the status and dignity of the House of Representatives' was re-asserted by means of the Standards in Public Life (Cap. 570, First Schedule, Code of Ethics of Members of the House of Representatives, reg. 1).

However, the other laws passed in this period again focus specifically on *human* dignity. Thus, in 2007, various Government Notices enacted under the Broadcasting Act (Cap. 350) create a duty upon broadcasters to respect human dignity in relation to: (1) the right of persons suffering from 'a terminal illness or from acute physical conditions (not) to participate in programmes' (SL 350.15, notice. 4.6.1); (2) the victims of tragedies, their relatives and friends (SL 350.16, notices 2.2, 2.3, 2.8 & 3.1); (3) persons with disabilities, where: 'overall, the guiding principle of broadcasters should be to deal with disabled persons without dwelling on their disability, unless the topic being presented is specifically that of disability; when the latter is the case to treat the subject with due dignity and fairness' (SL 350.17, notices 1.2 and 3.8); (4) the promotion of racial equality and the duty not to promote hate crimes (SL 350.26, notices 3.1, 7(1), 9.8). In 2010, the Broadcasting Act was further amended to require that audio-visual communications: 'shall not prejudice respect for human dignity' (Art.16K(c)(i)). Even the Electronic Commerce Act now obliges service providers to respect 'human dignity concerning individual persons' in their policies, fairness, professional secrecy, and data protection measures (Cap. 426, Art.8B and 8E).

The Code of Organisation and Civil Procedure was also amended in 2006 and again in 2009, to recognise the need of debtors and their families in an average household to live decently and preserve a level of human dignity by empowering the Court to allow them to retain and use necessary articles which their creditors are attempting to seize (Cap. 12, Art.289(1)). This followed the judgement in Marsaxlokk Sailing Club Company Ltd. vs. J & H Company Limited, delivered on the 25 November 2004, where the Civil Court (First Hall) had already concluded that it could allow the debtor to continue to use and possess those objects that are normally needed in an average household, to maintain a standard of living that sustains the human dignity of the debtor and his family. This applies only to furniture and basic equipment found in a residence.

Between 2012 and 2016, a series of legislative provisions acknowledged the dignity of persons in five particular situations: as disabled, as criminal law litigants, as patients and as 'older persons'. Thus, in 2012, the Equal Opportunities (Persons with Disability) Act (Cap. 413) was amended to include Article 22(q) stating that the

functions of the eponymous Commission aim to 'raise awareness and foster respect for the rights and dignity of persons with disabilities'. One of the primary aims of this law is to give dignity to disabled persons by making it possible for them to be placed on the same level playing field as other members of society in order to grant them access to equal opportunities that lead to their integration in society. Again in 2012, the Restorative Justice Act (Cap. 516, Art.37(e)) stated that the mediator is obliged to 'respect the dignity and sensitivity of the parties'. In 2013 the Mental Health Act (Cap. 525, Art. 3(1)(n)) and the Health Act (Cap. 528, Art.28) were both enacted, creating an obligation upon mental health carers to show their patients 'full respect for their dignity', as well as a general obligation to protect all patients' human dignity when they are being given health services. In 2016, the Commissioner for Older Persons Act [Cap. 553] was passed. Article 10(b) of this Act introduces the guiding principle that 'all older persons [. . .] be treated with dignity, respect and fairness'. This was followed up, in that same year, by another amendment to the Equal Opportunities (Persons with Disability) Act (Cap. 413), which now makes clear that every person: 'has an intrinsic right to life, dignity, respect and mental, reproductive and physical integrity, and the State shall guarantee this right to persons with disability, both before and after their birth' (Article 3(1)).

Sexual harassment is seen as a violation of human dignity and this understanding was reproduced in three separate pieces of legislation in 2004, 2008 and 2014. The wording, which is common to all these laws, recognises the violation of 'the dignity of the person [. . .] in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment for the person who is so subjected'. This is echoed in the Equal Treatment in Employment Regulations (SL 452.95, Reg. 3(3)(a)), the 2008 Access to Goods and Services and their Supply (Equal Treatment) Regulations (SL 456.01, reg. 4(4)). It is also echoed in the Istanbul Convention, incorporated into Maltese law in 2014 as a schedule to Cap. 532, the Council of Europe Convention on Prevention and Combating of Violence against Women and Domestic Violence (Ratification) Act and listing sexual harassment in Article 40. Article 17 of this Convention encourages the private sector and the communications/media sectors: 'to set guidelines and self-regulatory standards to prevent violence against women and to enhance respect for their dignity'. Furthermore, in that year the European Protection Order (Execution) Regulations (SL 9.21, reg. 2) were promulgated, which define a 'protection measure' also as safeguarding the protected person's dignity.

Finally this period also witnessed increasing references to dignity in legislation which caters for migrants and asylum seekers. In 2010, the Temporary Protection for Displaced Persons (Minimum Standards) Regulations (SL 420.05) were enacted. In terms of these Regulations, the voluntary return to their country of origin by persons enjoying temporary protection has to be carried out in a manner: 'that fully respects human dignity' (Reg.22(1)). The forced return of persons whose temporary protection has ended and who are not eligible for admission must also be carried out: 'with due respect for human dignity'. This was followed up in 2011 by the Common Standards and Procedures for Returning Illegally Staying Third-country Nationals Regulations (SL 217.12), which oblige the Principal Immigration Officer – in Malta's case the Commissioner of Police – to ensure that the removal of third-

country nationals who resist such removal is 'carried out with due respect for the [TCN's] dignity and physical integrity' (Reg. 5(3)(c)). In 2014 the Minimum Standards on Sanctions and Measures Against Employers of Illegally Staying Third-Country Nationals Regulations (SL 217.14) came into effect. Article 2 of these Regulations refers to the failure to protect 'health and safety which offend human dignity' in order to define 'particularly exploitative working conditions'. And in 2015, the Procedural Standards for Granting and Withdrawing International Protection Regulations (SL 420.07) were promulgated. Section 4(3)(e) of these Regulations requires that a medical examination conducted on the applicant's person must 'be carried out by a person of the same sex with full respect for the principles of human dignity'. A medical examination carried out on unaccompanied minors should also be 'performed with full respect for the individual's dignity' (Reg. 17(1)).

4 Developing Dignity Through Jurisprudence

Moving beyond express legislative references to dignity and related jurisprudence, it is highly instructive to explore the explicit and implicit references to human dignity made by Maltese jurisprudence which are not anchored in recent written legislation. These references highlight the heterogeneous sources tapped by the courts in developing Maltese law, while also hinting at inbuilt constraints which make it difficult to connect these sources together in a coherent and systematic manner.

In a suggestive paper on 'Human Rights in Maltese Legislation' (Mifsud-Bonnici 2008), a former President of the Republic of Malta has observed: 'Although Human Rights were first specifically safeguarded in a Constitution for Malta in 1961, there is no doubt that the concept of human rights was part of the legal culture and *jus commune* of these Islands long before that date' (Mifsud-Bonnici 2008, p. 99). He points out that Article 1 of the Constitution sees the Maltese state: 'respecting not creating, not even merely recognising, the clearly pre-existing rights and freedoms of the individual' (Mifsud-Bonnici 2008, p. 101). From this standpoint, he proceeds to list various pre-1961 sources of Human Rights in Malta; including the 1802 'Declaration of Rights of the Inhabitants of Malta', which in turn reflected: 'not only an acceptance of the ideals of the French Revolutionary Declaration of the Rights of Man and of the Citizen of 1789, but also a more profound attachment to the philosophical elaborations of Francisco Di Vitoria and Francisco Suarez, who in turn had developed themes first proposed by the scholastics, positing natural human rights as anterior and superior to the legislative rights of the state' (Mifsud-Bonnici 2008, pp. 99–100). He further observes that the decision of the Maltese courts in the 1942 'Deportation case' that: 'certain human rights could not be taken away by legislation' (Mifsud-Bonnici 2008, p. 100), also reflects this same understanding of human rights as founded in natural law and reproduced through Maltese legal culture even in the absence of an express anchorage in recent statutory legislation.

From this perspective, the concept of human dignity in Malta acquires a genealogy which is as long and varied as the complex historical sources and influences upon Maltese legal culture, whether they crystallised in written legislation or not (chapter on ▶ "Human Dignity in Austria" and Zammit 2008)). In a parallel vein, Professor Cremona, the drafter of Malta's Independence Constitution, has identified a number of pre-1964 documents promoting Human Rights in Malta, including the 1802 Declaration, which he sees as: 'reminiscent of both French revolutionary ideas and British constitutional principles' (Cremona 1996, p. 11). Other Common law sources of human rights in Malta identified by Cremona include the 'Costituzione della Corte Criminale' given by the British in 1814, which abolished torture, the introduction of the principles of the Independence of the Judiciary and of the Publicity of the Trial in the same period, Ordinance IV of 1839 which abolished censorship and promoted press freedom and the provisions safeguarding a fair trial and trial by Jury of the Criminal Code of 1854 (Cremona 2001; Harding 1980).

We here explore recent invocations of human dignity by the Maltese courts which cannot be traced back to the express legislative references identified in part two of this chapter. This jurisprudence reflects the complex genealogy outlined above and has been divided, for ease of reference, into three parts dealing, respectively, with: (a) the dignity of the worker, (b) the dignity of the victim in tort and (c) the equal dignity of the spouse.

4.1 The Worker's Dignity

In Il-Pulizija vs. Schembri, decided on the 5 December 2017, the Magistrates Court held that an employer who failed to pay wages to his employees was infringing their rights as: 'work gives dignity to the human person and therefore another person should not arbitrarily and unlawfully deprive the worker of his rightful income, which he would have earned through the sweat of his brow, in order to further enrich himself'. Less elaborate assertions of the dignity of the worker sporadically recur throughout Maltese employment-related jurisprudence. For example, in Zahra vs. Minister for Health et. decided on the 14 November 2000, the Tribunal for the Investigation of Injustices stated that: 'The human dignity of the employee requires that a transfer is made in writing and is signed by the Head of Department, listing the motives for making such a transfer'. As the Court of Appeal observed in Cavendish Hotels vs. Jesmond Beck, decided on the 23 November 2005: 'The worker has every right to have his honour and dignity respected by his employer'.

As these references to the worker's dignity are unsupported by any reference to ordinary legislation, one might assume that they are ultimately founded upon the Constitutional statements that Malta is a Republic founded on work (Art.1(1) of the Constitution) and acknowledging the right to work in Chapter ▶ "Human Dignity in Albania" of the Constitution. However, it has already been noted in Sect. 3.2 of this chapter that the Constitutional Court has tended to ignore the rights enunciated in Chapter ▶ "Human Dignity in Albania". This restrictive interpretation of the Constitutional right to work is reflected and exacerbated in

regard to the right to strike, which is unsupported by any Constitutional reference: 'legitimately one may question whether, in Malta, the right to strike, although safeguarded in law, is a human right' (Zammit and Brincat 2006, p. 198). Thus other sources must be relied upon to explain these judicial references.

These sources can be exemplified by Debono vs. Port Cottonera Hotel Dev. Co. Ltd., decided on the 6 February 2008 by the Inferior Court of Appeal. Here an employee sued her employer for damages as in allocating new duties to her, it effectively demoted her from an assistant bartender to a cleaner. The Court held that even if her employer was empowered by a contractually agreed *jus variandi* allowing it to vary the tasks performed by his employee, it had no right to attribute tasks to the employee which were inferior to those she was originally hired to perform. This reasoning was based partly upon the principle that contracts must be performed in good faith (Article 993 of Cap.16) and partly on a previous judgement of the Maltese Court of Appeal on the 3 February 1969 in Matrenza vs. Attard Kingswell nomine that: 'the principal had no right to attribute different roles to the employee than those which he had originally been hired to perform, if these same tasks undermined his prestige, decorum or dignity in regard to the workload performed, the status of the job and the income'. Furthermore, when the Maltese court came to determine whether the new roles offered to the employee were a legitimate exercise of the contractual *jus variandi*, it quoted a decision of the Italian Court of Cassation of the 17 May 1998, No. 7040, which had listed various factors which could serve as a guideline to the court when making such a decision.

This judgement indicates that the sources upon which the courts rely in developing the concept of the dignity of the worker include the general clauses of the Civil Code, previous Maltese and also Italian jurisprudence (cf. Borg vs. Perla Ltd., decided on the 12 June 2009 by the Inferior Civil Court of Appeal). This last point is critical, because it indicates a point of continuity – in citing foreign judgments as sources of Maltese law – with the Codice Municipale of Malta, *in vigore* before the Civil Code and which required Maltese courts in cases of doubt to align their judgments with those of the: 'supreme and most authoritative tribunals' (Andò 2011, pp. 258–259). This is an exogenous source for the concept of the dignity of the worker, through which developments in Italian jurisprudence and doctrine can be imported into Maltese law.

4.2 The Dignity of the Tort Victim

Tort law also serves as an important vehicle for introducing concepts of human dignity, expressly or implicitly, within Maltese private law. Since the Roman jurists held that a general action for damages for *iniuria* was available in cases where the subject's dignity was violated (Micallef Grimaud 2011b, p. 111) and since Roman law remains a direct source of Maltese civil law, the courts have not needed any express statutory basis in order to authorise them to refer to dignity in this context. Thus, in the 1965 case of Galea vs. Storace, the court held that *iniuria* damages must be commensurate to human dignity (Micallef Grimaud 2011b, p. 115).

The general Civil Code clauses on liability for fault and for abusive exercise of rights (Articles 1031/1032 & 1030 of Cap.16) have also served to authorise the courts to introduce a focus on the dignity of the tort victim. Thus, in Bonello noe. vs. Saliba, decided on the 8 October 2013, in order to determine whether the defendant headmaster was at fault for allowing plaintiff's child to be bullied at school, the Civil Court referred to internal policy guidelines developed by the Maltese Ministry of Education. These guidelines defined bullying as: 'any type of behaviour, verbal or physical, with the intention of injuring, intimidating or offending the integrity and dignity of the person'. And in Fenech vs. Keyland Co. Ltd. decided on the 19 May 2009, the Magistrates' Court was willing to consider defendant's: 'rude behaviour, bereft of any respect for human dignity', as a factor in determining its conduct to be abusive and engaging its liability in damages.

Notwithstanding the above, the most important Maltese developments in protecting the dignity of tort victims have been indirect and have evolved in response to Article 1045 of Cap.16, which appears at first sight to restrict the kinds of damages compensable to the victim to purely patrimonial ones (Micallef Grimaud 2011a). Since the 27 June 2014, when its decision in Busuttil vs. Muscat was delivered, the Court of Civil Appeal has moved away from its traditional position as reiterated in that case, that moral damages are not compensable under our law of tort albeit psychological damages, understood as a physical injury reducing the victim's income-earning capacity, were (Zammit and Grima 2014).

This shift was motivated by the pressure of the European Court of Human Rights, which less than a month later had held in Brincat vs. Malta that the failure of the Maltese courts to compensate for moral damage in tort cases was tantamount to: 'a failure to provide an effective ordinary remedy for a human rights violation' (Caruana Demajo et al. 2015, p. 405). This decision seems to have provoked a judicial rethink and in 2015 the Constitutional Court held that the prohibition of compensation of nonpatrimonial damage had to be understood as a judicial stance which: 'is not based upon any provision of positive legislation expressly prohibiting such compensation, but has emerged instead from Maltese jurisprudence' (Caruana Demajo et al. 2016, p. 393). The court further argued that, where possible, civil legislation had to be interpreted in a Constitutionally compatible way and on this basis held that nonpatrimonial damage could be compensated in cases where there was an: 'underlying relationship between the tortfeasor and the victim which, albeit not contractual, distinguished the present case from a "pure tort" situation' (Caruana Demajo et al. 2016, p. 393).

Thus, the evolution of Maltese tort jurisprudence to ensure the compensability of the emotional pain and suffering caused to certain categories of victim represents a step forward in respecting human dignity which seems to have been provoked by the intervention of the European Court of Human Rights. It should also be said that in 2018, a new proviso was introduced into Art. 1045 of the Civil Code so that moral and/or psychological damages could be awarded by the courts in cases where the damages arise from certain kinds of crimes; particularly those: 'affecting the dignity of persons under Title VII of Part II of Book First of the Criminal Code' (Art. 1045, Cap.16). This appears to be moving in the same direction, even though at the time of writing it still has to be seen how this proviso will be interpreted.

4.3 The Equal Dignity of the Spouse

The final set of cases in which the Maltese courts can be seen to invoke human dignity despite the absence of an express legislative reference relate to marriage breakdown litigation, particularly annulment and separation cases. The reasoning by which dignity is rendered applicable in such cases is rooted in understandings of marriage and was clearly expressed by the Civil Court (First Hall) in Catholic the case of Agius vs. Agius, decided on the 9 December 2003. Here the court held that the parties' marriage was null according to article 19(1)(f) of the Marriage Act (Cap.255 of the Laws of Malta), observing that:

> The marriage concept, especially in today's lifestyles, is a noble concept that above all exalts the respect and dignity of the participants themselves; what higher value can there be for spouses than to promise fidelity towards each other for the rest of their lives under every aspect and circumstance of their future life together? There is therefore no doubt that this has to be founded and built on respect towards the person, that has to be the basic element on which to construct a solid rapport between spouses that ultimately leads to two persons becoming one with love; one body that is called family when children join the union.

Thus, the courts have frequently understood the lack of respect towards one spouse's dignity, expressed through: 'acts that show disdain and are degrading towards the other party' (Agius vs. Agius), as clear evidence that the other spouse: 'never could have given a valid consent that included accepting all the essential elements of marriage, because human respect is fundamental to these elements and above all, respect to dignity' (Agius vs. Agius). Using similar reasoning, the Civil Court (First Hall) has annulled: (a) a marriage where the husband was cruel to his wife by not seeking her intimacy and where he did everything he could to demoralise her and make her lose her dignity, including boasting to her that he went elsewhere for sexual relief (Agius vs. Agius); (b) a marriage where the parties did not respect each other's humanity by choosing to live in undignified habitation (Milad vs. Milad: 27 June 2002); (c) a marriage where the husband consistently showed no commitment to respect the dignity of his wife as he showed no commitment towards her in terms of conjugal love and respect for family life in the context of matrimony (Trabelsi vs. Trabelsi: 30 October 2003); and (d) a marriage where the husband seemed to view his wife only as a sexual object instead of an equal partner in marriage (Grech vs. Stirling: 30 May 2004). Moreover, the Maltese courts have consistently understood disrespect to the equal dignity of the other spouse as a person, expressed through violence or other kinds of dominating behaviour, including the imposition of one spouse's religion on the other, humiliating or insulting this spouse, etc., as a good reason for annulling the marriage.

The ideological sources of this understanding of dignity are clearly Catholic canon law as codified in the grounds of annulment of the Marriage Act (Farrugia 2007), combined with a liberal focus on gender equality, reflected in the 1993 amendments to the Civil Code (Women's Anti-Discrimination Committee 2004). From the standpoint of the sources of Maltese law, it is important to note that until

the Marriage Act was promulgated in 1975, Malta lacked a written law on the capacity to marry and the form of marriage (Sadegh and Zammit 2018) and the Maltese law on marriage was the canon law (Ganado 1947). Professor Attard remarks that: 'It is noteworthy that in recent years canon law has re-emerged through the 1995 amendments made to the said enactment' (Attard 2012, p. 23). The ability of the Maltese courts to invoke the dignity of the spouse despite its absence from the written law of marriage points to the continued presence of canon law as a source of Maltese marriage law, which is also reflected in the courtroom success of litigant narratives which successfully invoke: 'the religious stories and metaphors embedded in the canonical rules of marriage annulment' (Zammit 2002, p. 14).

5 Constraints upon the Judicial Capacity to Generalise

This chapter has revealed how different concepts of dignity have entered Maltese law through various routes. These include colonial-era concepts of institutional and professional dignity and *Jus Commune* formulations of personal dignity; coexisting with more modern, human rights based, conceptualisations of human dignity. It is very rare for these various dignity concepts to be harmonised with one another and a broad concept of human dignity as such which is both independent of a specific legal-technical formulation and nevertheless rooted in Maltese legislation, has neither been incorporated in Maltese legislation nor applied by the courts.

Both the Maltese legislator and the courts have tended to steer clear of broad formulations of human dignity. The former, despite adopting a precise and detailed drafting style (Donlan et al. 2017, p. 194), avoided referring to dignity in the Constitution. Subsequently a marked preference was shown for a detailed ad hoc regulation of dignity – often through subsidiary legislation – which does not allow much scope for broad judicial interpretations. Usually the courts have responded by only being willing to invoke specific and disparate formulations of the dignity concept, both as reflected in particular statutory legislation and in the European Convention of Human Rights and as stemming from various non-statutory sources of Maltese law, including Roman law, Canon law and foreign judgments.

Only two recent judgements have been identified in which the Maltese courts have been prepared to expressly protect human dignity in general. This notwithstanding, neither in Buckle vs. Friggieri nor in Spiteri vs. Director of Prisons, did the courts construct a genealogy for the concept of human dignity rooting it within Maltese legislation. As a result they tended to construe dignity as a *moral* value instead of a *legal* one. Moreover, the Constitutional Court's system-building efforts in Buckle vs. Friggieri were effectually foiled by the European Court of Human Rights, clearly revealing the potential interpretative schisms to which Malta's continued adherence to Dualist doctrine despite granting the right of individual petition to the Strasbourg Court can give rise (Mifsud 2015, pp. 44–45).

5.1 Migrants as 'Lesser Humans'

A failure to harmonise different understandings of dignity is noticeable in certain fields of Maltese legislation and governance. For instance, in the Maltese Criminal Code: 'the crime of abortion is still on the statute book' (Borg 2016, p. 65). Yet the 2018 amendments to the Embryo Protection Act (Cap. 524, Laws of Malta) make embryo freezing widely available; and this although: 'a third of all embryos will not survive the freezing-thawing practice' (Reflections by 100 Academics 2018, p. 11). Neither is it easy to reconcile the Maltese Government's decision to arrest three migrant rescue ships and a search plane run by the Sea Watch NGO in July 2018, preventing them from over 3 months from rescuing drowning migrants, on the strength of an irregularity in the registration of one of the ships (ECRE 2018), with the contemporaneous debate in Parliament on a 'Good Samaritan Bill' intended to 'provide immunity to first aiders' (Anonymous 3 July 2018).

In 2013, an article on the detention of undocumented migrants in Malta had identified a deep divergence in perceptions between NGOs on the one hand and the Maltese Government and courts on the other, concerning the extent to which the (since discontinued) practice of detaining such migrants in overcrowded and squalid detention centres was compatible with respect to their human rights (De Bono 2013). The Maltese courts and Government tended to hold that it was compatible, basing this approach upon a literal interpretation of applicable legal safeguards. For instance, attempts to invoke Art.409A of the Criminal Code – allowing any detainee to apply to the Magistrate's Court to challenge the legality of his/her detention – were usually rejected by the courts. They reasoned that: 'since the Immigration Act authorises detention and imposes no limit upon the amount of time an immigrant may spend in detention, such detention is lawful [. . .] the scope of article 409A does not include an examination of circumstances of the (substantive) lawfulness of detention' (De Bono 2013, p. 68). While this approach respects the letter of the law, the author claimed that: 'government's policy on detention does not place human dignity at the centre of its efforts. This is because the government embraces a flawed understanding of human rights that is over-legalistic and positivistic' (De Bono 2013, p. 76). She concludes that these migrants are treated as: 'lesser humans'.

In the same vein, more recent research has also highlighted the incongruity of a Maltese judgment delivered by the Civil Court (First Hall) and affirming the compatibility with human rights of the Marriage Registrar's requirement that two parties must each possess a valid Maltese legal status in order to be allowed to marry in Malta (Ogunyemi Kehinde Olusegum et. vs. Director of the Public Registry et. decided on the 4 May 2010). The Parliamentary Ombudsman, whose function is to defend individuals against maladministration and injustice, had previously expressed his opinion that since the right to marry pertains to human beings not lawful residents, it cannot in principle be restricted to the latter. Nevertheless, the court held that: 'the right to marry of both parties was still substantively respected by Maltese laws and policy even if the parties could not exercise such right in Malta!' (Sadegh 2018).

Maltese administrative practices regarding Third Country Nationals thus appear to be characterised by a systematic avoidance to interpret human rights law from a broad perspective that extends beyond its narrow legislative wording to protect the fundamental underlying value of human dignity. This is confirmed by research on the way in which refugee law is in practice interpreted by the Maltese Government. This revealed that refugee law is interpreted from a standpoint which superimposes an exclusionary humanitarian logic upon international asylum law. The main effect is to transform asylum seekers and subsidiary status holders into recipients of Government charity instead of subjects of rights, converting their entitlements into benefits which may or may not be granted to them (Zammit 2016b; Gallagher et al. 2007). It also fits this logic that Malta is one of a select few EU states which: 'has transposed the [Qualifications] Directive very restrictively and has not granted any access to family reunification to Subsidiary Status holders' (Zammit 2018).

5.2 Structural Obstacles to Promoting Human Dignity

This analysis has identified an inability to develop a general concept of human dignity rooted in Maltese legislation, as the leitmotif of Maltese legal drafting, jurisprudence and administrative practice. This failure to generalise beyond a narrow literal application of human rights law appears to be produced by a specific legalistic hermeneutical approach. This applies a positivist and 'compartmentalised' logic that tends to confine itself to applying legislation narrowly and literally; often missing the wood for the trees and failing to address dignity holistically by looking at: 'the situation on the ground – how are people being treated?' (De Bono 2013, p. 76). Since it is so pervasive, the immediate causes of this interpretative stance must be sought in systemic features of Maltese law and court practice.

In 2018 a series of articles emerged in the Times of Malta newspaper under the suggestive general rubric 'Misunderstanding the Constitution'. Penned by Giovanni Bonello, a former Maltese Judge of the European Court of Human Rights, they contain a pungent critique of the *modus operandi* of the Maltese Constitutional Court in processing human rights claims. Bonello castigates the Constitutional Courts': 'unduly timid and restrictive understanding of what according to the Constitution is their "inherent power to grant ANY remedy they feel is appropriate"' (Bonello 2018c). He claims that this notwithstanding, for a period of 29 years: 'the constitutional courts claimed they had no power to redress pain and suffering', and simply refused to award moral damages (Bonello 2018c). Furthermore, Bonello particularly focuses on the exception that allows the Constitutional Court to refuse to take cognisance of an application to remedy a human rights violation pending the exhaustion of ordinary remedies. He observes that the Constitutional court has usually construed this so as to: 'turn the exception into the rule', (Bonello 2018b) and refused to take cognisance of such applications even where the ordinary remedies are: 'plainly ineffective' (Bonello 2018b).

A parallel critique, linking a restrictive approach to remedying human rights violations to a distant and dysfunctional relationship between the ordinary and

Constitutional courts, is made by other authors. In order to account for the failure of ordinary courts to see the protection of human rights as forming part of their mandate (Said Pullicino 2008, p. 122), former Chief Justice Joseph Said Pullicino attributes responsibility to the: 'single track, straight jacket *iter* that the right of individual petition (for a human rights violation) has to follow before specialised Courts with exclusive jurisdiction' (Said Pullicino 2008, p. 122). And a study of the remedies for court delays before the Maltese and Strasbourg courts concludes:

> that, in Malta, as the courts of constitutional jurisdiction consistently award sums of non-pecuniary compensation which are manifestly unreasonable by reference to the Strasbourg Court's case law and refer plaintiffs to ordinary remedies to recoup any pecuniary damages incurred as a result of the delay, and the ordinary civil courts do not award moral damages in practice, there is in the system no single effective compensatory remedy which satisfies Convention requirements, a situation which amounts to a structural failure. (Savvidis 2016, p. 98)

This implies that a deep divide exists between ordinary (Private) and human rights (Public) law in Malta, reflected in the difficult relationship between ordinary and human rights courts and in their common reluctance to construe ordinary legislation as protecting a Constitutionally embedded value of human dignity. This divide motivates the 'compartmentalised' approach to Maltese legal interpretation (Ganado 1996, p. 247) and functions such that: (a) the ordinary courts will not normally refer to human rights values to aid their interpretation of ordinary law and: (b) the Constitutional court will tend to intervene only exceptionally and in a limited way to protect human rights. In Said Pullicino's words: 'this pigeonholed approach to human rights protection has contributed in no small measure to the stunted growth of constitutional jurisprudence' (Said Pullicino 2008, p. 123).

In Malta, as in various other mixed jurisdictions, the Private law/Public law divide itself mirrors the distinction between Civilian and Common-law influenced compartments of national legislation (Andò et al. 2012, Bonello 2018d). Indeed, the existence of separate Maltese courts and procedures to deal with human rights claims tends to consolidate and entrench this deep, Continental-style, divide within court practice. Located as they are on the point of the Maltese legislative spectrum which has been most highly influenced by Common law (Said Pullicino 2008, pp. 124–125), the detailed drafting of the Maltese Constitutional provisions on human rights tends to discourage a broad purposive approach to legal interpretation. Indeed the Maltese experience with the principles contained in Chapter ▶ "Human Dignity in Albania" of the Constitution shows that it has positively militated against such an interpretative approach, making a broad and adventurous judicial application of the values underlying the Constitution almost unthinkable.

Other features of the Maltese legal system further reinforce this compartmentalisation. The Constitutional Court's refusal to adopt an expanded understanding of its powers to declare unconstitutional legislation ineffective means that such a declaration only affects the parties to the particular lawsuit before it (Attard 2015, p. 15). Together with the absence of a doctrine of precedent, Malta's embrace of legal dualism and the shifting and unstable balance of power and

authority between the Maltese Constitutional Court and the European Court of Human Rights, this means that the authority to unify the system on the basis of shared fundamental values is often weak or altogether absent. And the structure of Maltese law-teaching, which – unlike the 'trans-systematic approach to legal education' (Donlan et al. 2017, p. 196) – focuses on teaching different legal traditions through teaching different subjects side by side but never in the same class, also reflects and reproduces this compartmentalised understanding of law.

6 Conclusion

This chapter has argued that despite the proliferation of Maltese laws and judgements foregrounding various concepts of dignity, there exist structural constraints which make it very difficult for a harmonised general concept of human dignity to develop and to form a hermeneutical foundation from the standpoint of which both human rights and ordinary law could be read. While the role of jurisprudence in introducing the human dignity concept has been acknowledged, Andò's contention that the Maltese judges are 'system builders' is not very helpful here. This is not to claim that Maltese courts never aspire to be 'system builders'. Yet in practice such judicial aspirations are usually constrained by a literal compartmentalised understanding of Maltese law itself. This compartmentalised approach refuses on principle to generalise and to interpret legislation in terms of fundamental cross-cutting values. This both reflects and enables Maltese legal hybridity, making it possible for dignity to stem from an extraordinary variety of sources and for different understandings of dignity to coexist. Like Maltese legal hybridity itself, this approach appears to be embedded in Malta's 'colonial inheritance' (Zammit 1984).

7 Cross-References

- ▶ Human Dignity in Austria
- ▶ Human Dignity in Cyprus
- ▶ Human Dignity in Germany

References

Andò B (2011) The role of judges in the development of mixed legal systems: the case of Malta. J Civ Law Stud 4:237–260

Andò B, Aquilina K, Scerri-Diacono J, Zammit D (2012) Malta. In: Palmer V (ed) Mixed jurisdictions worldwide: the third legal family, 2nd edn. Cambridge University Press, Cambridge, pp 528–576

Anonymous (1958) Towards a Maltese Constitution: a long story of vicissitudes. Roundtable Commonw J Int Aff 48:345–354

Anonymous (2018) 'Good Samaritan' bill to protect first aiders to be discussed tomorrow in parliament. The Malta Independent, 3 July 2018

Aquilina K (2018) Constitutional Law in Malta. Kluwer Law International, Alphen aan den Rijn
Attard DJ (2012) The Maltese legal system, vol I. Malta University Press, Msida
Attard DJ (2015) The Maltese legal system, vol II. Malta University Press, Msida
Azzopardi J (2004) Police culture in Malta. Dissertation, University of Leicester. http://www.humanrightsmalta.org/uploads/1/2/3/3/12339284/police_culture_malta.pdf. Accessed 13 Aug 2018
Bonello G (2004) The Maltese Civil Code: a brief historical introduction. In: Bonello G (ed) Histories of Malta – reflections and rejections, vol 5. Fondazzjoni Patrimonju Malti, Valletta, pp 190–197
Bonello G (2018a) Misunderstanding the Constitution: a battery of pointless 'principles'? Sunday Times of Malta, 7 January 2018
Bonello G (2018b) Forget your human rights unless you exhaust other remedies? Sunday Times of Malta, 21 January 2018
Bonello G (2018c) Misunderstanding the Constitution – 11: are these the daft remedies the Constitution wants? Sunday Times of Malta, 1 April 2018
Bonello G (2018d) Misunderstanding the Constitution – 12: legal fictions? Lost in translation? Sunday Times of Malta, 8 April 2018
Borg T (2007) Exile of 43 Maltese 60 years ago: one of the most shameful episodes of Malta's history. http://www.maltamigration.com/news/times89353.shtml. Accessed 13 Aug 2018
Borg T (2016) Commentary on the Constitution of Malta. Kite Group, Birkirkara, Malta
Caruana Demajo G, Quintano L, Zammit D (2015) Malta. In: Karner E, Steininger B (eds) European Tort Law yearbook 2014. De Gruyter, Berlin
Caruana Demajo G, Quintano L, Zammit D (2016) Malta. In: Karner E, Steininger B (eds) European Tort Law yearbook 2015. De Gruyter, Berlin
Ciappara F (2018) Church-State relations in late eighteenth century Malta: Gio. Nicolo Muscat (1735–1803). Malta University Press, Msida
Cremona JJ (1996) Malta and Britain – the early constitutions. Publishers Enterprises Group, San Gwann, Malta
Cremona JJ (1997) The Maltese Constitution and constitutional history since 1813. Publishers Enterprises Group, San Gwann, Malta
Cremona JJ (2001) Human rights documentation in Malta. Mediterr J Hum Rights 5:153–168. Double Issue
De Bono D (2013) 'Less than human': the detention of irregular migrants in Malta. Race Class 55:60–81
De Gaetano VA (2012) Social rights. http://www.judiciarymalta.gov.mt/documents. Accessed 1 Aug 2018
Donlan SP, Andò B, Zammit D (2012) "A happy union?" Malta's legal hybridity. Tulane Eur Civ Law Forum 27:165–208
Donlan SP, Marrani D, Twomey M, Zammit DE (2017) Legal education and the profession in three mixed/micro jurisdictions: Malta, Jersey and Seychelles. In: Butler P, Morris C (eds) Small states in a legal world. Springer International Publishing, Cham, pp 191–212
European Council on Refugees and Exiles (ECRE) (2018) Malta intensifies crackdown on rescuing organisations, while deaths in the Mediterranean are on the rise. https://www.ecre.org/malta-intensifies-crackdown-on-rescuing-organisations-while-deaths-in-the-mediterranean-are-on-the-rise. Accessed 28 Aug 2018
Farrugia R (2007) The position in Malta juxtaposed to the principles of European Family Law: divorce and maintenance. In: Mair J, Orucu E (eds) Juxtaposing legal systems and the principles of European Family Law. Intersentia, Cambridge, pp 99–127
Gallagher A, Pistone M, Zammit D (2007) The subject of rights immersed in a "sea of troubles". Mediterr J Hum Rights 11:9–16
Ganado JM (1947) Maltese Law. J Comp Legis Int Law 29:32–39
Ganado JM (1950) British Public Law and the Civil Law in Malta. Curr Leg Probl 3(1):195–213

Ganado JM (1996) Malta: a microcosm of international influences. In: Örücü E, Attwooll E, Coyle S (eds) Studies in legal systems: mixed and mixing. Kluwer Law International, The Hague, pp 225–247
Government of Malta (1920) Government of Malta blue book 1919–1920. Government Printing Press, Valletta
Government of Malta (1927) Government of Malta blue book 1927. Government Printing Press, Valletta
Harding HW (1980) Maltese legal history under British rule (1801–1836). Malta University Press, Msida, Malta
Mangion R (2015) Aspects on forces of influence by persons and groups under Malta's first responsible government. In: Agius E, Scerri H (eds) The quest for authenticity and human dignity. Gutenberg Press, Tarxien, pp 303–337
Micallef Grimaud C (2011a) Article 1045 of the Maltese Civil Code: is compensation for moral damage compatible therewith? J Civ Law Stud 4(2):480–513
Micallef Grimaud C (2011b) Moral damages outside the ambit of the Maltese Civil Code. Id-Dritt 21:109–139
Mifsud I (2015) The Constitution: 50 years of proposals and counter proposals. University of Malta, Msida
Mifsud-Bonnici U (2008) Human rights in Maltese legislation. In: Zammit DE (ed) Maltese perspectives on human rights. University of Malta, Msida, pp 99–117
Reflections by 100 Academics (2018) Embryo Protection (Amendment) Bill: matters of concern. Report
Sadegh I (2018) Third country national. In: Bartolini A, Colcelli V, Cippitani R (eds) Dictionary of statuses within EU Law. Springer, Dordrecht (in press)
Sadegh I, Zammit DE (2018) Legitimising a Muslim marriage in Malta: navigating legal and normative structures. Oxf J Law Relig 7(3):1–21
Said-Pullicino J (2001) Malta. In: Blackburn R, Polakiewicz J (eds) Fundamental rights in Europe, the European Convention on Human Rights and its Member States 1950–2000. Oxford University Press, Oxford, pp 559–594
Said Pullicino J (2008) The ombudsman: his role in human rights protection and promotion. In: Zammit DE (ed) Maltese perspectives on human rights. University of Malta, Msida, pp 118–146
Savvidis C (2016) Court delay and human rights remedies. Routledge, Oxford/New York
Suban R, Zammit DE (2017) Promoting the integration of third-country nationals through the labour market: combating discrimination in employment: the case of third-country nationals in Malta. In: Mediterranean human rights review, vol 1. https://www.um.edu.mt/laws/?a=336450. Accessed 21 Oct 2018
Women's Anti-Discrimination Committee (2004) UN Women's Anti-Discrimination Committee experts urge Malta to incorporate convention into Domestic Law. https://www.un.org/press/en/2004/wom1456.doc.html. Accessed 19 Aug 2018
Zammit EL (1984) A colonial inheritance: Maltese perceptions of work, power and class structure with reference to the labour movement. University of Malta Press, Msida
Zammit DE (1998) Laws and stories: towards an ethnographic study of Maltese legal representation. Dissertation, University of Durham
Zammit DE (2002) The case of the 'Faithful Prostitute': judicial creativity and family values in a Southern European context. Tijdschrift voor Familie- en Jeugdrecht 1:10–15
Zammit DE (2008) Introduction. In: Zammit DE (ed) Maltese perspectives on human rights. University of Malta, Msida, pp 1–15
Zammit DE (2013) Balancing between patronage and professionalism: an ethnographic account of lawyering in Malta. In: Azzopardi J, Formosa S, Scicluna S, Willis A (eds) Key issues in criminology. University of Malta, Msida, pp 65–86
Zammit DE (2016a) Does the non cumul rule exist in our civil law? Dike kai nomos 10:55–94

Zammit DE (2016b) Vernacularizing Asylum Law in Malta. In: Arnold R, Colcelli V (eds) Europeanization through private law instruments. Universitätsverlag Regensburg, Regensburg, pp 73–107

Zammit DE (2018) Subsidiary status. In: Bartolini A, Colcelli V, Cippitani R (eds) Dictionary of statuses within EU Law. Springer International Publishing, New York

Zammit EL, Brincat M (2006) Malta. In: Blanpain R (ed) Labour Law and industrial relations international encyclopaedia of laws. Kluwer Law International, London & The Netherlands

Zammit DE, Grima C (2014) Medical liability and psychological damage in Maltese jurisprudence. In: Ferrari V, Tlokinski W, Zammit DE (eds) Responsabilita Medica ed Organizzazione Sanitaria. Aracne Editrice, Rome, pp 197–236

Zammit DE, Xerri K (2015) "Lease, Locazioni and Kera": merging legal concepts in postcolonial Malta. In: Farran S, Gallen J, Rautenbach C (eds) The diffusion of law: the movement of laws and norms around the world. Ashgate, London, pp 77–90

Human Dignity in Monaco

Régis Lanneau

Contents

Abstract

Monaco is the second smallest independent city-state. It is also a rich one. These specificities could be relevant to explain the peculiar position of human dignity in Monaco. Indeed, it does not appear to play a key role within the legal system despite its presence in the Constitution and in a myriad of legislations. What is probably the most striking fact is that courts rarely make use of the concept so that it is extremely difficult to speculate about its meaning.

Keywords

City-state · Expressive function · Constitutional provision · Human dignity

R. Lanneau (✉)
CRDP, FIDES, University of Paris Nanterre, Nanterre, France
e-mail: regis.lanneau@sciencespo.fr

P. Becchi, K. Mathis (eds.), *Handbook of Human Dignity in Europe*,
https://doi.org/10.1007/978-3-319-28082-0_28

1 Introduction

Located on the French Riviera, between Nice and the French Italian border, the city-state of Monaco is the second smallest independent state in the world with a territory of less than 2 km^2 and a population of approximately 37,308 people (including 8378 Monegasques).[1] It is also the richest when considering the growth national income per capita: no less than $183,150 for 2010 according to the World Bank.[2] The figures provided by the Government of Monaco for the growth domestic product per capita are 69,383€ for 2017.[3] It also has a very low unemployment rate (around 2%) and the lowest poverty rate in the world. Banking, gambling and tourism are the main sources of income of the city-state. The real estate sector is the major provider of employment in the state. Monaco also has a prison which was renovated in 1988 and 2000. In its 'general information' brochure, Monaco presents itself as a state that enjoys 'a peaceful society and stable institutions, offering unparalleled quality of life through the safety of its people and possessions' (p. 8).

These figures do not necessarily imply that the respect for human dignity is directly associated with the GDP per capita or any other measure of income[4] but that, due to the peculiar situation of the city-state, the violations of human dignity (and human rights) that could be expected – both in their type and magnitude – are not exactly the same as those of a 'big' state. The likelihood of an overcrowded and not well-maintained prison, which is a major source of claims involving violation of human dignity are, for example, expected to be lower than in France or Italy. The situation of the poor, which could also generate disputes involving human dignity, is also anticipated to be relatively infrequent. Besides, due to the small size of the population (and the likelihood of settling cases before they reach courts), case law is likely to be less developed than in any non-city-state.

The purpose of this chapter is to reflect upon the concept of human dignity in Monaco from a strictly national as well as a strictly legal point of view. The fact that Monaco ratified the European Convention of Human Rights (in 2005) will not be considered; it suffices to say at this point that in 2016 the European Court of Human Rights (ECtHR) dealt with five legal suits concerning Monaco, all of them were dismissed. Since 2005 very few judgements involving Monaco were passed, none of which involved human dignity.[5] I will not consider non-legal claims regarding violation of human dignity since these claims cannot be helpful to understand the

[1]The figures are available on http://www.imsee.mc/Publications/monaco-statistics-pocket.

[2]World Development Indicators database, World Bank, 15 December 2011. The surveys of the World Bank are not providing figures after 2011.

[3]The figures are available on http://www.imsee.mc/Actualites/monaco-en-chiffres-edition-2017. This difference could be explained by the fact that the GDP is taking into account people who are working in Monaco but living outside.

[4]It seems that there is a correlation between GDP per capita and democracy (which includes human rights) (Barro 1996).

[5]See http://www.echr.coe.int/Documents/CP_Monaco_ENG.pdf.

legal meaning of human dignity:[6] if a newspaper or an official (but not a judge) uses the words 'human dignity' and asserts that it was violated or needs protection, this use is not legal; it merely states a value judgement regarding a behaviour or a situation. When Prince Albert stated that Nelson Mandela is 'an example, a symbol of reconciliation, a great man who, through his courage, selflessness and generosity, was able to change the course of history and make his life a fight for justice and respect for human dignity',[7] this could not be considered to be the statement of a legal opinion. Likewise, when he affirmed in his statement relative to the ratification of the ECHR that Monaco cherishes the values of 'reason, justice and respect for human dignity' (Council of Europe: Parliamentary Assembly 2004: p. 983), it is also not a reference to human dignity in its legal meaning.

I will then only consider positive national law which offers both opportunities to use the argument of human dignity – because legal sources explicitly mention the term (2) – and give some insights about its meaning through the interpretation of judges in case law (3). This applies all the more so since the literature specifically targeting human dignity in Monaco, or even mentioning Monaco, is relatively scarce.

2 Human Dignity in Legal Sources

If the concept of human dignity is present in many legal sources in Monaco, some specificities can be noted when compared to other European states. Considering that Monaco's official language is French, a few comparisons will be made to the French legal system.

2.1 In the Constitution

In comparison with the French Constitution, the Constitution of Monaco explicitly mentions the concept of human dignity in its Chap. III. Indeed, the second paragraph of Article 20 of the 1962 Constitution of Monaco reads: 'Criminal law must ensure respect for individual personality and dignity. No one may be subjected to cruel, inhuman or degrading treatment.' This provision cannot be viewed as an all-encompassing norm when one considers that Article 20 only deals with criminal matters. This explains why some authors believe that Monaco's Constitution does not expressly refer to human dignity (Barak 2015: p. 59).

By just reading the first sentence of the Article, it is unclear whether the provision can be invoked by criminals as well as defendants or plaintiffs. Indeed, the respect of individual dignity seems to be addressed to the legislator when passing criminal law. However, the second sentence creates rights through the specification of the first

[6] Despite the fact that the everyday language is providing some bases for interpretation.

[7] http://www.palais.mc/en/news/h-s-h-prince-albert-ii/event/2013/december/press-release-3098.html.

sentence: 'cruel, inhuman or degrading' is used to define what respect of individual personality and dignity means. They are also the traditional words used to qualify the violation of human dignity. Criminals, defendants and plaintiffs should then have remedies when this occurs. Unlike the other Chapter of the Constitution of Monaco, the Supreme Tribunal of Monaco 'rules in sovereign fashion over [. . .] appeals on petitions for annulment, petitions to review validity and actions for damages arising from violations of these rights and freedoms prescribed in Chap. III of the Constitution' (Article 90-A-2).

No Supreme Tribunal decision (as of July 2017) has led to the recognition of the principle of human dignity applicable to all Monegasques. Nevertheless, the content of the freedoms and rights mentioned in Chap. III only leaves this possibility for cases involving bioethics (which also happened in France) or purely ethical questions (providing the respect of the procedural constraints), in other words in cases in which human dignity should not be considered as an individual right (invoked by the victim of the violation) but as a community standard which can restrict the individuals' freedom. Indeed, Article 17 recognizes the principle of equality before the law which is often considered as the cornerstone of human dignity, Article 19 guarantees individual freedom and security, Article 20 states that the 'death penalty is abolished', Article 22 grants a 'right for respect of private and family life and confidentiality of correspondence' and Article 23 protects freedom of religion and expression. Of course, it is required to distinguish between the law in books and law in action, these rights being purely formal when considered out of context, but it does not seem that these rights offer a lot of space for the emergence of a general principle of human dignity. Of course, it would be easy to interpret these articles together as a whole in order to derive a general principle of human dignity (either in its individualistic or collectivist meaning), but, in that case, the principle of human dignity will mostly be used in a purely expressive way or considered to be the 'inspiration' for the list of freedom and rights without any real autonomy.

2.2 In Legislation

In his statement regarding the ratification of the European Charter on Human Rights (ECHR), Prince Albert said that 'we are already consistently defending these values within the international community, at the United Nations, in the various United Nations organs, in the Organization for Security and Co-operation in Europe and at the different international conferences' (Council of Europe: Parliamentary Assembly 2004: p. 983). And indeed a '*legimetric*' approach of enacted law and ordinances in Monaco shows that most sub-constitutional legal texts mentioning and protecting human dignity and its different aspects are the result of enacting international conventions: of course the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (*Ordonnance* n. 10.542 of 14/05/1992), the Optional Protocol of the International Covenant on Civil and Political Rights (*Ordonnance* n. 14.529 of 17/07/2000), New York Convention on the Elimination of All Forms of Discrimination Against Women (*Ordonnance* n. 96 of 16/06/2005) and its Optional Protocol (*Ordonnance* n. 6.212 of 23/12/2016), Hague Protection of

Adults Convention (*Ordonnance* n. 6.009 of 28/07/2016) or the 13th Protocol of the ECHR (*Ordonnance* n. 412 of 15/02/2006). Of course, the integration of these conventions does not, per se, ensure their effectiveness, but they allow a potential plaintiff or accused to use the concepts present in these conventions and pacts.

Apart from another ordinance dealing with the administration of prisons (*Ordonnance* n. 3.782 of 16/05/2012) stating that prisoners are protected against the violation of their dignity and fundamental rights (Article 2), only two non-codified laws and three codified articles make reference to human dignity (mostly as echoes to the constitutional provision). Many mentions to the dignity of the public office could also be found in Monaco's legislation.

The first non-codified law covers extradition (*Loi* n. 1.222 of 28/12/1999). In its Article 4, it states that 'Extradition shall be refused where the offense is considered a political offense'[8] and adds that 'The offense is also considered to be a political offense where there is reason to believe that the extradition request for an offense under ordinary law has been made for the purpose of prosecuting or punishing an individual for reasons of race, ethnic origin, religion, nationality, political opinion and, more generally, considerations which undermine the dignity of that individual, or that the situation of that individual may be aggravated for one or other of these reasons.'[9] Human dignity appears as an 'umbrella' word which allows for some flexibility when considering extradition. It is not defined and, in the way the law is framed, it encompasses all the previous terms stated. As we are going to see, no case has made any use of the human dignity provision of that law.

The second law regulates digital economy (*Loi* n. 1.383 of 02/08/2011) as amended by the Law on National Security (*Loi* n° 1.430 of 13 July 2016). In Article 3, it mentions that 'Where the fundamental interests of the Principality, as defined in Article 1 of Law No. 1.430 of 13 July 2016, are violated, the respect and dignity of persons, the protection of minors or when the necessity of combating provocation to the preparation or commission of acts of terrorism or the apology of such acts falling within the scope of Articles 15 and 16 of Law No. 1.299 of 15 July 2005 on freedom of expression, the Minister of State may request the persons referred to in Sections 29 and 33 to withdraw the content that would infringe it.'[10] Once again, the

[8] '*L'extradition est refusée lorsque l'infraction est considérée comme une infraction politique*.'

[9] '*L'infraction est aussi considérée comme politique lorsqu'il y a des raisons de croire que la demande d'extradition motivée par une infraction de droit commun a été présentée aux fins de poursuivre ou de punir un individu pour des considérations de race ou d'origine ethnique, de religion, de nationalité, d'opinions politiques, et plus généralement de considérations portant atteinte à la dignité de cet individu, ou que la situation de cet individu risque d'être aggravée pour l'une ou l'autre de ces raisons*.'

[10] '*Lorsqu'il est porté atteinte aux intérêts fondamentaux de la Principauté, tels que définis à l'article premier de la loi n° 1.430 du 13 juillet 2016, au respect et à la dignité des personnes, à la protection des mineurs ou lorsque les nécessités de la lutte contre la provocation à la préparation ou à la commission d'actes de terrorisme ou l'apologie de tels actes relevant des articles 15 et 16 de la loi n° 1.299 du 15 juillet 2005 sur la liberté d'expression publique le justifient, le Ministre d'État peut demander aux personnes mentionnées aux articles 29 et 33 de retirer les contenus qui y porteraient atteinte*.'

provision does not define the meaning of human dignity, and this concept appears to offer a margin of appreciation to the minister or judges rather than being perfectly clear in its understanding.

The three articles all refer to penal law and penal procedure and echo the constitutional provision. In the Penal Procedure Code, Article 60-4 states that 'Police custody must be carried out in conditions ensuring respect for the dignity of the person.' In the Penal Code, Article 294-7 reads 'The act of making, producing, transporting, disseminating by any means and in any medium whatsoever a message of a violent or pornographic nature or of a nature that is likely to seriously undermine human dignity, trade in such a message shall be punished by imprisonment from six months to two years and by the fine provided for in Article 26, Paragraph 3, when this message is addressed to minors. The attempt is punished with the same penalties.'[11] What is surprising here is that the problem is not the violation of human dignity but the fact that it is likely to seriously undermine. Of course, it could be considered that if it is violating, it is likely to seriously undermine, but the subjectivity of the violation is not something to be considered here. It should then be considered that the concept of human dignity is used here as a 'community standard' which goes beyond what parties could agree to. However, used as a 'community standard', the violation of human dignity should be considered as sufficiently qualified. The last article is also issued from the Penal Code and has a specific connotation in the case of Monaco. Article 249-2 states 'Submitting a person whose vulnerability or state of dependence is apparent or known to the perpetrator to conditions of work or accommodation incompatible with human dignity shall be punished by five years imprisonment and double the fine provided for in Paragraph 4 of Article 26.'[12] It is difficult not to think about cases regarding 'modern slaves' working in big mansions and villas. However, none of these articles have led to a decision by a court.

3 Human Dignity in Case Law

Only 18 cases, amongst all the decisions rendered by the courts in Monaco, include the word 'dignity', and most of the time these cases deal with the dignity of the public office and not human dignity as such. This infrequent use of human dignity in

[11] '*Le fait soit de fabriquer, de produire, de transporter, de diffuser par quelque moyen que ce soit et quel qu'en soit le support un message à caractère violent ou pornographique ou de nature à porter gravement atteinte à la dignité humaine, soit de faire commerce d'un tel message, est puni d'un emprisonnement de six mois à deux ans et de l'amende prévue au chiffre 3 de l'article 26 lorsque ce message est adressé à des mineurs. La tentative est punie des mêmes peines*.'

[12] '*Le fait de soumettre une personne dont la vulnérabilité ou l'état de dépendance sont apparents ou connus de l'auteur, à des conditions de travail ou d'hébergement incompatibles avec la dignité humaine est puni de cinq ans d'emprisonnement et du double de l'amende prévue au chiffre 4 de l'article 26.*'

case law (Sect. 3.1) is in itself something noteworthy. Some ideas as to why this may be (Sect. 3.2) will be submitted in order to which function 'human dignity' serves in case law.

3.1 The Infrequent Use of Human Dignity in Case Law

Amongst the cases which make references to human dignity, some use human dignity as an argument in order to convince a judge; this type of argument is not necessarily considered by judges. However, the arguments are a rather unique interpretation of human dignity if not a completely twisted approach of the concept.

For example, in 1997, a plaintiff tried to convince a judge that since he was 'assigned to a job unrelated to his qualifications, he suffered an intolerable interference with his honour and dignity' (G against State of Monaco, Court of Appeal of Monaco, 8 April 1997). The plaintiff had been employed as a police officer in Monaco but the French and Monegasque Authorities terminated his contract by common agreement. The plaintiff claimed that due to the nature of his termination, the State held responsibility. However, the Court denied State responsibility and did not enter into the human dignity argument. The Court merely stated that 'no abnormal and irreparable violation of equality before the public spending [*charges publiques*] appears to be so marked in the circumstances of the present case.'

In 2001, a tenant association of Monaco sued in order to obtain the cancellation of an ordinance regarding the renting conditions of certain properties. In their complaint, the association alleged that the ordinance was illegal because it allowed the 'directorate of housing' to carry out investigations which were considered as 'prejudicial to human dignity and the inviolability of the home' (Supreme Tribunal of Monaco, 6 November 2001). This argument was not entered into by the judges.

Another example can be seen in the 2006 case, related to pedo-pornographic pictures and video downloading and sharing (J. against *Ministère Public*, Court of Appeal of Monaco, 6 March 2006). While the Penal Code already provided the means to sanction such acts, the expert noted that 'the investigations carried out in the sealed central unit revealed elements likely to be of interest to the investigation in progress, namely correspondence and notes concerning a morality case involving VJ, 284 child pornography and 5 images offending human dignity, 11 extracts of pedophilic videos, downloaded with KaZaA software and 1252 faces of adolescent saved in the folder "portraits"'.[13] The judge did not take into account the 'human dignity' argument provided by the expert when sanctioning Mr. J.

[13] '*les investigations réalisées dans l'unité centrale mise sous scellés ont révélé des éléments susceptibles d'intéresser l'instruction en cours, soit des correspondances et notes concernant une affaire de mœurs impliquant V. J., 284 images à caractère pédophile et 5 images portant atteinte à la dignité humaine, 11 extraits de vidéos à caractère pédophile, téléchargées avec le logiciel KaZaA et 1252 visages d'adolescent mémorisés dans le dossier portraits*.'

In only two cases, the qualification of a violation of human dignity was recognized by the judges.

The first one concerns the dignity of a patient in a hospital (Tribunal of First Instance of Monaco, Consorts P. against CHPG, D., H., A., 12 March 2009). A patient was transferred from one department of a hospital to another. However, the doctor in charge did not ensure that the patient's medical record was transmitted to this department or that the nurses were fully aware of the risks associated with the recent surgery that the patient had undergone. Even worse, one doctor under the supervision of the senior doctor in charge did nothing when he was informed of pain felt by the patient. Eventually, the patient died. According to the Court, this series of wrongful acts led to a violation of the dignity of the patient. In this case, the concept of dignity is used not for the application of a special legal disposition but for the qualification as a wrongful act of the behaviour of the doctor in charge which led to compensating the moral prejudice suffered, by ricochet, by the legal successors of the patient. If the court concluded that indeed a violation happened, it did not specifically explain why such qualification was made since the problem was merely to identify a personal wrongful act which could be attributed to the doctor in charge. In other words, not respecting human dignity is sufficient to qualify an action as a wrongful act.

The second case appeared in the field of labour law and is linked to the freedom of expression (Tribunal of First Instance of Monaco, SBM SAM against N., 9 June 2005). After receiving a message from management saying that on 11 September 2002, the company had decided to participate in a minute of silence of the Principality of Monaco scheduled at 3 pm, a worker answered: 'I do not have time to stop especially for the American and Jewish people.' The email was forwarded to all the employees of the company. The company fired the worker for serious misconduct. The judges considered that such behaviour characterized a violation of the 'universal dignity of persons' so that the layoff was justified. However, the company should have respected the period of notice stated in the employment contract. Indeed, the Tribunal considered that 'the immediate termination of the employment contract by the SBM does not appear to be legitimate since the fault committed was not so serious that the presence of the employee on the premises of the undertaking was rendered impossible during the relatively short notice period.'[14] Once again, human dignity was used to qualify a 'fault.' Using human dignity was not even required considering other provisions in Monaco's laws. Of course, it is difficult to identify what the judges are including within the concept of human dignity or universal dignity of persons. However, such a violation is not considered as sufficiently serious for immediately terminating an employment contract.

[14] '*Attendu en revanche que la rupture immédiate du contrat de travail par la SBM n'apparaît pas légitime, la faute commise ne présentant pas un degré de gravité tel que la présence du salarié dans les locaux de l'entreprise ait été rendue impossible pendant la durée limitée du préavis*.'

3.2 Speculation

Considering the number of cases involving the concept of human dignity, it is only possible to speculate (briefly) on the use, meaning, function and infrequent use of the concept by Monegasque jurisdiction.

Regarding the infrequent use, only few explanations can be provided. It could be that human dignity is rarely violated in Monaco either because the people living in Monaco are 'virtuous' or because the public enforcement of regulation is so powerful that it is sufficient to deter individuals to commit such violations. Another explanation could be that most disputes are settled before going to court so that plaintiffs rarely press charges. The fact that Monegasque laws provide plenty of means to protect equality and liberty could also mean that the concept of dignity is not useful to achieve certain results (human dignity being considered here in its individualistic understanding). The absence of cases regarding human dignity conceptualized as a community standard to forbid certain actions could be explained either by the homogeneity in preferences of the people living in Monaco so that nothing that could be considered as a violation is even thought of or by hypothesizing some powerful social norms which do not require any public enforcement to be effective.

Regarding the use, meaning and function of human dignity in Monaco, as already stated, it is not certain that a specific protection of human dignity is required considering the rights and freedom already protected by Monegasque law and the liberal tradition of this city-state (which favours an individualistic concept of dignity rather than a community standard which should be enforced). Of course, human dignity could be considered as the fundamental principle from which all the rights and freedom are derived, but from the point of view of positive law, such a hypothesis would not add much, except by 'expressing' the reason why such rights and freedom should be granted. It is even possible to consider that this 'expressivity' of the concept of human dignity could explain why it is infrequently used by courts: empty shell, the courts prefer to use less fuzzy concepts to justify their decisions. What is certain considering its use by parties in a dispute is that the concept of human dignity enjoys, at least, some rhetorical strength for their lawyers.

4 Conclusion

It appears for what was previously said that human dignity does not seem to have a significant role within the Monegasque legal system. This does not mean that the concept is not recognized or that Monaco does not pay attention to human dignity, it merely states that, as a legal tool, it is infrequently invoked by jurisdiction and that its introduction did not lead to a radical modification of the legal system of the city-state. As Prince Albert said during his statement relative to the ratification of the ECHR, this late ratification does not mean that Monaco was not already protecting human rights and human dignity.

Of course, the fact that Monaco is a 'rich' city-state could also have an influence in this infrequent use, but there are no data verifying this hypothesis.

5 Cross-References

► Human Dignity in Europe: Introduction
► Human Dignity in France
► Human Dignity in the EU

References

Academic Papers, Books, and Official Reports

Barak A (2015) Human dignity, the constitutional value and the constitutional right, translated from the Hebrew by Daniel Kayros. Cambridge University Press, Cambridge
Barro R (1996) Democracy and growth. J Econ Growth 1(1):1–27
Council of Europe: Parliamentary assembly (2004) 4–8 October 2004, vol 4: Sittings 25 to 32, pp 903–1236

Positive Law

Mentioned Legislations (By Date)

Ordonnance n. 10.542 du 14/05/1992 rendant exécutoire la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants
Loi n. 1.222 du 28/12/1999 relative à l'extradition
Ordonnance n. 14.529 du 17/07/2000 rendant exécutoire le deuxième protocole facultatif se rapportant au pacte international relatif aux droits civils et politiques visant à abolir la peine de mort
Ordonnance n. 96 du 16/06/2005 rendant exécutoire la Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes, adoptée à New York le 18 décembre 1979
Ordonnance n. 412 du 15/02/2006 rendant exécutoire le Protocole n° 13 à la Convention Européenne de sauvegarde des Droits de l'Homme et des Libertés fondamentales, relatif à l'abolition de la peine de mort en toutes circonstances ouvert à la signature le 3 mai 2002
Loi n. 1.383 du 02/08/2011 sur l'Économie Numérique
Ordonnance n. 3.782 du 16/05/2012 portant organisation de l'administration pénitentiaire et de la détention
Loi n° 1.430 du 13 juillet 2016 portant diverses mesures relatives à la préservation de la sécurité nationale
Ordonnance n. 6.009 du 28/07/2016 rendant exécutoire la Convention sur la protection internationale des adultes, conclue à La Haye le 13 janvier 2000 et entrée en vigueur le 1er janvier 2009
Ordonnance n. 6.212 du 23/12/2016 rendant exécutoire le Protocole facultatif à la Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes adopté le 6 octobre 1999 et entré en vigueur le 22 décembre 2000

Mentioned Cases (By Date)

Cour d'appel de Monaco, 08 April 1997, G. c/État de Monaco
Tribunal Suprême de Monaco, 06 November 2001, 2001/TS/0004
Tribunal de première instance de Monaco, 09 June 2005 SBM SAM c/N
Cour d'appel de Monaco, 06 March 2006 J. c/Ministère Public
Tribunal de première instance de Monaco, 12 March 2009 Consorts P. c/CHPG, D., H., A