

# EXPLORING THE USE OF THE CONCEPT OF HUMAN DIGNITY IN DISABILITY HUMAN RIGHTS LAW: FROM THE CRPD TO ECtHR

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**Abstract:** The UN Convention on the Rights of Persons with Disabilities (CRPD) accommodates the concept of human dignity more fully than does any other human rights treaty. The role and interpretation of dignity is thus particularly interesting from the perspective of disability human rights and case law. This study examines the role and significance of the concept of dignity in relation to the human rights disability discourse and jurisdiction through the guidance and impact of the CRPD. It examines the currently available jurisprudence of the CRPD Committee and the European Court of Human Rights (ECtHR) in light of the CRPD, seeking to identify the rights that are particularly related to the concept of dignity through the perspective of disability and to identify the requirements of the respect for dignity for persons with disabilities. While accepting the limitations of the sources in this examination due to the recent history of the CRPD, the study nevertheless locates some points where human dignity has particular relevance to the realisation of the rights protected in the CRPD.

**Keywords:** UN Convention on the Rights of Persons with Disabilities (CRPD), Human Dignity, CRPD Committee, European Court of Human Rights (ECtHR), Human Rights, European Convention on Human Rights (ECHR).

**Summary:** 1. INTRODUCTION. 2. HUMAN DIGNITY AS ACCOMMODATED IN THE CRPD. 3. HUMAN DIGNITY IN CRPD CASE LAW. 3.1 In Relation to Freedom From Torture, Inhuman and Degrading Treatment and From Exploitation, Violence and Abuse. 3.2 In Relation to Personal Integrity. 3.3 In Relation to Accessibility. 4. THE ROLE OF HUMAN DIGNITY IN POST-CRPD ECtHR CASE LAW. 4.1 In Relation to Prohibition of Torture, Inhuman and Degrading Treatment. 4.2 In Relation to the Right to Respect for Private and Family Life. 4.3 In Relation to Disability-based Discrimination and the Right to Education. 4.4 In Relation to Disability Hate Speech. 4.5 In relation to More Complex Cases: Right to Liberty v Right to Life. 5. CONCLUSION.

## 1. INTRODUCTION

Among the prominent contemporary notions in the human rights discourse is that of human dignity. There are now quite a number of publications on the philosophical, historical, ethical and legal dimensions of this concept, both from complimentary and critical perspectives.<sup>2</sup> Thus, notwithstanding the multiple ideas on the meaning and

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<sup>2</sup> See e.g., McCrudden (2008), 'Human Dignity and Judicial Interpretation of Human Rights', *European Journal of International Law*, 19(4); Dupre (2015), *The Age of Dignity: Human Rights and Constitutionalism in Europe*; Moyn (2014), 'The Secret History of Constitutional Dignity', *Yale Human Rights and Development Journal*, 17(1); Kateb (2011) *Human Dignity*; Rosen (2012) *Dignity its History and Meanings*.

implications of the idea of human dignity,<sup>3</sup> international human rights documents afford it considerable weight. Indeed, there seems to be a consensus that the ethical idea of human rights itself derives its justification through this concept (McCrudden, 2008, p. 677).

Tracing the history of the concept of human dignity demonstrates that while various usages and meanings have been employed (Rosen, 2012), references to the idea in relation to legal order only appeared in the first half of the twentieth century, through international law treaties and constitutions (Moyn, 2014, p. 40). In terms of human rights, the idea of human dignity owes its importance to the Universal Declaration of Human Rights (UDHR). Thus, it is reasonable to assert that the contemporary concept was introduced through the language and codification of international human rights (McCrudden, 2018, p. 662). The Declaration not only emphasises human dignity as an innate feature of every human being in the very first Clause of its preamble and first sentence of its first article ('Purpose') but also refers to it in relation to socio-economic rights, in Articles 22 and 23 (on 'Respect for privacy' and for 'home and family'). As it appears in the UDHR, therefore, dignity not only appears to stress the innate worth of human beings, operating thus as a reflection of an inherent value, but also stands as a threshold below which humankind should not fall. Since the Declaration, the concept of dignity has been repeated at the core of UN human rights treaties and other regional texts. The UN Convention on the Rights of Persons with Disabilities (CRPD) is the most recent international tool to emphasise human dignity, where it is more pronounced than ever.

Following the devoted advocacy of disability rights groups and activists worldwide, the CRPD was adopted by the General Assembly in 2006, entered into force in 2008 and soon became the most rapidly welcomed human rights treaty (Degener, 2017, p. 152). In the last decade, scholars have not only indicated the innovative aspects of the Convention, but also stressed the paradigm shift it offers by replacing the old charity- or medical-based model with a human rights one and noting how it tackles discrimination through key concepts (such as 'reasonable accommodation'), how it reconceptualises and guarantees the legal personhood and capacity of persons with disabilities and how it captures a holistic approach to human rights.<sup>4</sup> As a result, academic concern about the CRPD may now be said to have gone beyond promotion of the idea and have started to question its impact and interpretation in regional and national contexts. Rather than what CRPD is or ought to be, the question asked currently seems to be about more what it does (Waddington and Lawson, 2018, p. 5).

Motivated by the role of human dignity in the overall rights language and in disability human rights struggle, this study looks at the role and significance of the

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<sup>3</sup> A useful review of the debates can be found in McCrudden (ed.) (2013), *Understanding Human Dignity*, pp. 1-58.

<sup>4</sup> See Lawson (2007), 'The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn' *Syracuse Journal of International Law and Commerce*, 34; Quinn and Kerlake (2012), 'Restoring the 'human' in 'human rights': personhood and doctrinal innovation in the UN disability convention' in Douzinas and Gearty (eds.), *The Cambridge Companion to Human Rights Law*; Megret (2008) 'The Disabilities Convention: Towards a Holistic Concept of Rights' *The International Journal of Human Rights*, 12.

concept in relation to the disability human rights discourse and jurisdiction as guided by the CRPD. The importance of the concept in this context was already evident in the *travaux préparatoires* of the Convention since the word ‘dignity’ was included in the proposed title of the Convention and the Ad-hoc Committee spent considerable time until the last sessions deciding whether it should remain in the title or be placed elsewhere in the text (Kakoullis and Ikehara, 2018, pp. 42-44).<sup>5</sup> Because the idea as assumed appears in the preamble and various articles of the CRPD, one may wonder how it finds meaning in practice.

Luban (2015, p. 275) suggests that rather than relying on an already defined philosophical theory on dignity, a human rights pragmatic should reverse the order of explanation by clarifying the meaning of human dignity through human rights practice. Parallel to this suggestion, the exploration of dignity in disability rights in this study goes beyond any ethical justification of or moral reasoning for the hard-won rights of persons with disabilities. Dignity in this intrinsic sense has already played a ‘foundational’ or ‘debate ending’ role – as it did for the overall idea of human rights. Thus, the emphasis here is on the actual role and potential function of human dignity for disability human rights. This is applied through a focus on the language of the CRPD, on the CRPD Committee views regarding individual complaints and on post-CRPD European Court of Human Rights (ECtHR) disability-related case law. This study does not limit itself to just the prevalence of human dignity in case law but further links the role of the concept in those decisions to the overall aim of the CRPD. It is assumed that since we are guided by the primary goal and general principles of the CRPD concerning the potential interpretation of dignity, the spirit of the Convention should be the main guideline in assessing potential use and misuse of the concept.

An integrated approach to human rights is favoured in choosing the two protection mechanisms.<sup>6</sup> Regarded as a quasi-legal body, the CRPD Committee is the primary agent responsible for the implementation of the Convention. This body has developed the most recent standards concerning the rights of people with disabilities (Brems and Desment, 2017, p. 22). The universal characteristic of the rights that the Convention upholds is, therefore, best captured in the Committee’s comments, views and decisions. Furthermore, the Committee has thus far mostly consisted of actors and advocates of the CRPD and of persons themselves with disabilities (Guernsey, 2018, p. 1030). The motto ‘nothing about us without us’ is also upheld through the implementation of the Convention. It is assumed that the nature of the Committee in this regard plays a particular role in the interpretation and implementation of the concept of dignity.

With respect to the selection of the post-CRPD ECtHR cases in this review, there is a practical concern. The history of the CRPD spans little more than a decade, so its

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<sup>5</sup> The concept appeared in the title of the draft Convention until the seventh session of the drafting process. See UN Enable, ‘Daily summary of discussion at the seventh session 31 January 2006’ (31 January 2006). At [www.un.org/esa/socdev/enable/rights/ahc7sum31jan.htm](http://www.un.org/esa/socdev/enable/rights/ahc7sum31jan.htm)

<sup>6</sup> For this view see Brems (2014) ‘Should Pluriform Human Rights Become One? Exploring the Benefits of Human Rights Integration’, *European Journal of Human Rights*, 4.

interpretation and implications in national jurisdictions remain quite limited. The Council of Europe (CoE), on the other hand, as a regional organisation with the protection of human rights as one of its founding purposes, not only showed significant willingness in the negotiation process of the CRPD but has also adopted various disability action initiatives (Favalli, 2018, p. 517). Scholars have also praised the contributions of the European Committee on Social Rights in terms of disability human rights enhancement; in fact, it has been described as more advanced than the ECtHR in this regard (Lawson, 2009, pp. 90-91). The CRPD was ratified by 46 of the 47 CoE member states, which are also all required to comply with the European Convention on Human Rights (ECHR). One could therefore expect the significance of the CRPD as an international human rights tool to be much more visible in the ECtHR case law than in national jurisdictions and other regional protection mechanisms.<sup>7</sup>

This assumption has been affirmed by recent studies arguing that the ECHR and CRPD are strictly interconnected living instruments and that ECtHR protection has been advanced by the CRPD (Favalli, 2018, p. 522) Also, for those CoE member states that have ratified the Convention but not the Optional Protocol of the CRPD, the rulings of the ECtHR are the only legally binding international remedy in terms of disability human rights, and, moreover, the presence of the notion human dignity is much more visible in ECtHR jurisdictions. In fact, the Court has several times announced that the very essence of the Convention is to secure respect for human dignity.<sup>8</sup> Thus, the interplay between the normative standard-setting character of the CRPD and the judicial character of the ECtHR should facilitate the identification of a practical definition through extraction of the legal requirements of the concept of dignity through the lens of persons with disabilities.

## 2. HUMAN DIGNITY AS ACCOMMODATED IN THE CRPD

What it is that the respect for human dignity entitles from the perspective of persons with disabilities cannot be fully addressed within the limits of this study, but an outline, at least, should be offered. This requires various perspectives, given the complex definition of disability. As Basser (2011, p. 21) has noted, as we understand more about the nature of the differences experienced by persons with disabilities, so do we develop a better understanding of the meaning of human dignity. Among the approaches to the context and content of dignity in the philosophical and legal literature, we can identify dignity as status (Waldron, 2012), as the right to have rights (Feinberg, 1980), as autonomy (O'Mahony, 2012) and as capabilities (Nussbaum, 2006). Relatedly, in addressing justice for disabled persons, Barclay (2019, p. 19) has suggested applying dignity as a status approach to disability, which means that every member of the society enjoys equal status and respect in terms both of distribution and recognition. Others have indicated a need to approach

<sup>7</sup> Because the CoE lacks any specific treaty on the rights of persons with disabilities, the CRPD has become the main instrument for human rights interpretation regarding this group. Dignity is specifically protected in one of the CoE treaties (Treaty 164), with regard to Biomedicine. At <https://rm.coe.int/168007cf98>

<sup>8</sup> *Tyrer v UK* is the most often referred case as for the first use of human dignity in ECtHR case law. See Costa, 'Human Dignity in the Jurisprudence of the European Court of Human Rights' in McCrudden (ed.) *Understanding Human Dignity* (2013), p. 395.

the moral agent and her dignity by moving away from a conventional understanding of capacity (De Asis, 2009, p. 4) or by considering other dimensions of the moral subject, such as vulnerability (Celik, 2017). Of course, the actual acknowledgement and respect for dignity from the perspective of disability and justice have varied through the long history and ongoing practices of segregation, poverty, discrimination, non-recognition, civic death and humiliation. Here, we pragmatically draw from the spirit and text of the CPDR, what it aims to achieve and how it accommodates dignity, along with the interpretations of this in ECtHR case history.

Regarding the human rights protection of dignity, Clapham (2006, p. 538) has listed the following needs:

The prohibition of all types of inhuman treatment, humiliation, or degradation by one person over another; the assurance of the possibility for individual choice and the conditions for ‘each individual’s self-fulfilment’, autonomy, or self-realization; the recognition that the protection of group identity and culture may be essential for the protection of personal dignity; and the creation of the necessary conditions for each individual to have their essential needs satisfied.

Thus, the application of dignity in human rights law may be in the form of but not strictly limited to dignity as a respect for human worth and non-humiliation, as autonomy and self-realisation, as recognition and as equality. Clapham (2006, p. 538) also draws attention to an important feature in his formulation, noting that while the first item in the list might concern direct abuse by the state, the rest also involve non-state actors, such as the denial of opportunities for self-fulfilment or participation in social life. This seems particularly important when addressing the CRPD, which carries a clear reference to the state’s obligations to ensure that private actors comply with the standards of the Convention on issues of accessibility, access to information, health and employment.<sup>9</sup> Another essential point regarding the protection of dignity concerns the creation of necessary conditions and meeting essential needs. O’Cinneide (2009, p. 164) has underlined that the CRPD adopts an approach whereby the state is expected to play a serious part in the creation of the social conditions that are necessary for individuals to be treated with dignity.

The CRPD departs similarly from other human rights treaties in explicitly pronouncing dignity. In its preamble, in the first paragraph, it does this by recalling the principles in the UN Charter and UDHR. In this sense, ‘dignity’ refers to the inherent worth of all human beings, to an intrinsic feature that is shared equally. Quinn and Degener (2002, p. 14) affirmed this when stating that ‘people are to be valued not just because they are economically or otherwise useful but because of their inherent self-worth’, noting this to be particularly important in the human rights model of disability. Other scholars have also acknowledged that the concept of dignity played a crucial role in the paradigm shift

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<sup>9</sup> Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) A/RES/61/106 (CRPD), Articles 9(2), 21(c), 25(d) and 27(1).

offered by the Convention in terms of conceptualising disability and moving away from the old medical and charity models (Kakoullis and Ikehara, 2018, p. 51). It could thus be averred that the least contested role of human dignity in human rights law, parallel to the inherent worth argument, is its foundational role. The inherent dignity argument therefore provides an answer to why human beings have human rights, yet without its being the equivalent of human rights.

As McCrudden (2008, p. 681) notes, there are thicker and thinner versions of this approach, where the former not only regard human dignity as a unique value (on which human rights are built) but also applies it as an interpretive principle (to identify a catalogue of rights). Some of these rights, McCrudden observes, are best interpreted through the lens of dignity. It is this thicker version that the present study aims at. In this respect, one might claim that dignity also appears in the preamble of the CRPD through the notion of non-discrimination.<sup>10</sup> Fredman (2011, p. 25) notes the language of equality and the role it plays in the interpretation of dignity. While dignity is an intuitively appealing concept, she explains, it is also open to various interpretations and thus should be ‘considered as one facet of a multidimensional notion of equality, which also accommodates disadvantage, acceptance of difference and participation’. The relevant paragraph of the preamble here also stresses that ‘discrimination on the basis of disability is a violation of the principle inherent human dignity’.<sup>11</sup>

In the first article of the Convention, where its purpose is defined, dignity appears as an ideal to be upheld. The article notes that one of the purposes of the Convention is to promote respect for the inherent dignity of all persons with disabilities. Interesting debates occurred in the drafting process concerning the introduction of the concept into this article. Caution regarding the respect for dignity was particularly voiced by Liechtenstein, emphasising that rights and dignity were different concepts, and that while the states could provide for rights, they could only give respect to dignity, which is inherent to everyone (Kakoullis and Ikehara, 2018, p. 43). A similar concern is reflected in Article 8, which addresses the awareness-raising obligation of the states parties and mentions the fostering of ‘respect for the rights and dignity of persons with disabilities’. Although the acknowledgement of inherent dignity finds protection through this ‘respect’, it is also arguable that, through these articles, we come to an understanding that respect for dignity can be achieved through the empowerment of rights. Therefore, one might take a further step and argue that a denial of rights listed in the Convention is also a denial of the human dignity of persons with disabilities. Thus, even though it does not mention dignity by name, Article 12 of the CRPD, which guarantees the right to legal recognition before the law, is closely related to the concept since one dimension of dignity concerns equal recognition and legal personhood (as opposed to civil death).

After the preamble and first article, the next appearance of dignity in the CRPD comes in Article 3, where the general principles of the Convention are listed. Here, the

<sup>10</sup> CRPD, Preamble, paras 3, 4, 8 and 16 (with 4 and 16 referring to racial, sexual and other forms of discrimination).

<sup>11</sup> Para 16.

respect for dignity appears as the primary principle, along with some other key notions that the Convention relies on, namely, individual autonomy detailed as freedom of choice and independence. Although there are difficulties with viewing dignity merely as an equivalent of any of these abstract liberal ideals, it appears that the principles listed in this first paragraph must find a way to co-exist and that respect for dignity is somehow established in relation to them. There is obviously a background for the presence of such liberal notions in the Convention; the earlier models of disability, including the medical and charity, had long been criticised for not considering the autonomy and independence of disabled persons and their freedom of choice. The prevalence of the notions of care and dependence in those earlier models (Morris, 2001, p. 1) was thus minimised in the CRPD and replaced with the language of autonomy and empowerment. Even though such liberal ideals are raised as a subject of debate in critical literature and feminist ethics, the question in terms of people with disabilities is rather about their denial than their mere existence. Thus, when Article 16 of the Convention is read in this light, the particularly fragile position of dignity becomes more evident. Accordingly, the article addresses dignity in its fourth paragraph when providing for rehabilitation and recovery services for disabled persons as a ‘Freedom from exploitation, abuse and violence’. The Convention notes here that ‘Such recovery and reintegration shall take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender- and age-specific needs’.<sup>12</sup>

An interesting feature of dignity is present in Article 24 of the Convention concerning the right to education. While non-discrimination and equal access to education are the core principles of the article, it is noted that, through inclusive education, states parties shall provide ‘the full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity’.<sup>13</sup> While such concerns are applicable to the right to education generally, it is particularly pertinent to the purpose of education that the development aim of a sense of dignity and self-worth should be mentioned. Thus, the Convention directs that persons with disabilities should be equipped with a sense of self-worth through education, and states parties must further ensure that the purpose of the education is accordance with the fact that persons with disabilities are not a subject of economic concern of usefulness or any other pragmatic, but are treated as of equal worth (Degener, 2016, p. 3). The right to education is fixed to an ideal (dignity as right), not just utilitarian means. Finally, we may note the term ‘dignity’ in Article 25 concerning the right to health. Dignity in this article is pronounced with respect to autonomy.<sup>14</sup>

A commentary on dignity is not very prominent in the CRPD Committee General Comments. In this sense, General Comment 1 concerning Article 12 of the Convention (on equal recognition before law) notes that the ‘recognition of legal capacity restores autonomy and respects the human dignity of the person’.<sup>15</sup> It also notes that the ‘need for

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<sup>12</sup> Article 16(4).

<sup>13</sup> Article 24(1)(a).

<sup>14</sup> Article 25(c).

<sup>15</sup> CRPD Committee, ‘General Comment No 1’ (CRPD/C/GC/1), para 33.

support or reasonable accommodation' in facilitating decision-making is not an excuse for questioning the person's legal capacity.<sup>16</sup> This interpretation of the Committee indicates that even though the relevant article does not pronounce dignity, it does, in fact, play a role in building and securing it. General Comment 2 (on accessibility) refers to the 'equal access to all goods, products and services' with respect to dignity.<sup>17</sup> Furthermore, consideration of the 'full account of... dignity and diversity' is also mentioned in regard to the principle of universal design (for products, services, etc.).<sup>18</sup> One notable contribution is also evident through the linkage made between reasonable accommodation and dignity, autonomy and the individual choices of the individual.<sup>19</sup> Finally, it is General Comment 6 (on non-discrimination and equality) that perhaps makes the clearest statement on dignity among the comments. There, the Committee assigns dignity an important and innovative role in defining a 'new model of equality', which is named 'inclusive equality' and spelled out as a 'recognition dimension' aiming at a freedom from 'stigma, stereotyping, prejudice and violence' as well as to 'recognize the dignity of human beings and their intersectionality'.<sup>20</sup>

When dignity is mentioned in the Convention text and general comments, it tends to be accompanied by a stress on the principle of autonomy. Accordingly, it is most often pronounced along with the related, key concepts of accessibility and equal access (with specific emphasis on reasonable accommodation and independent living). Against this background, the question now to be addressed is that of how dignity is practically applied in CRPD-related jurisdictions and whether the Committee views demonstrate an understanding of dignity that reaches beyond a view of dignity as inherent (i.e., as generally pertaining to all persons qua persons).

### 3. HUMAN DIGNITY IN CRPD CASE LAW

Like most UN human rights treaties, the CRPD has created a monitoring mechanism through its Optional Protocol. This monitoring mechanism enables the Committee to receive individual and group complaints. The Convention further encourages the states parties to actively involve persons with disabilities in their national nominations for the committee membership and thus to secure their presence in the monitoring body.<sup>21</sup> This ideal has generally been reflected.<sup>22</sup> While the General Comments drafted by the Committee have been recognised, the Committee's views concerning individual communications are

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<sup>16</sup> Ibid.

<sup>17</sup> CRPD/C/GC/2, para 13.

<sup>18</sup> Ibid, para 15.

<sup>19</sup> Ibid, para 26.

<sup>20</sup> CRPD/C/GC/6, para 11(b).

<sup>21</sup> Stein and Lord note that the drafters of the CRPD did not consider the idea of an 'enhanced vetting process' or a review procedure regarding the states parties nominations in order to ensure that the members of the Committee had sufficient expertise in human rights and disability law and policy. In fact, the Committee had indeed mostly consisted of members with disabilities, but they were not at the time mostly experts in human rights or jurists. Stein and Lord (2010), 'Monitoring the Convention on the Rights of Persons with Disabilities: Innovation, Lost Opportunities and the Future Potential' *Human Rights Quarterly*, 32.

<sup>22</sup> For current Members of the Committee, see [www.ohchr.org/EN/HRBodies/CRPD/Pages/Membership.aspx](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Membership.aspx)



still only beginning to receive attention and become the subject of critical assessment (see Broderick and Ferri, 2019). The limited reference to Committee case law is not surprising given the fact that the earliest individual communication to the Committee only dates back a decade, and it has dealt with just a small number of communications since then. As of mid-2021, the Committee has received and processed 34 individual complaints, of which an adoption of views has been reached for a total of only 21.<sup>23</sup> The word ‘dignity’ is employed in the views adopted by the Committee in six of these cases, including the arguments brought by the applicants.<sup>24</sup>

Given this limitation of the available case law, it is difficult to trace the interpretation or elucidation of any specific notion through the Committee’s views. Nevertheless, this study takes an initial step toward addressing this question, which might be followed by further, in-depth analysis in the future. The six cases referred to are placed in five categories referring to general principles and relate to four articles on inhuman treatment, on exploitation, violence and abuse, on integrity and on equal access to goods and services (Articles 15, 16, 17, 21, respectively). Focussing on dignity, it is difficult to link each case to one issue, since the Committee usually finds multiple breaches that refer to more than one article. Here, therefore, the six cases involving the concept of dignity have been grouped into three categories.

### **3.1. In Relation to Freedom From Torture, Inhuman and Degrading Treatment and From Exploitation, Violence and Abuse**

Freedom from torture, inhuman and degrading treatment cases are typically those in which a reference to human dignity is most visible in the overall jurisdictions. The right to these freedoms is enshrined in CRPD’s Article 15 with a particular emphasis on the freedom from being subject to medical and scientific experimentation without consent.<sup>25</sup> As noted, however, two other articles in the Convention safeguard the freedom from torture for persons with disabilities: Article 16, concerning freedom from exploitation, violence and abuse, and Article 17, protecting the integrity of the person (Karsay and Lewis, 2012, p. 818).

A quite recent (2016) reference to the concept of human dignity in relation to these articles is found in *Al Adam v Saudi Arabia*.<sup>26</sup> This complaint concerned the worsening of the applicant’s mild hearing impairment due to the torture he was subjected to by the security forces during his detention. Whilst the Committee’s primary findings were in

<sup>23</sup> This number was reached through the OHCHR jurisprudence database. <<https://juris.ohchr.org/search/results>>

<sup>24</sup> All cases were considered when searching for the application of dignity through this protection mechanism, regardless of their admissibility or outcome. The cases located are as follows: in reference to General principles of the Convention: *Gröninger v Germany*; In reference to inhuman treatment by the applicant and the Committee: *X v Argentina*; In reference to right to integrity by the author and the Committee: *X v Tanzania* and *Y v Tanzania*; In reference to equal access to goods and services by the Committee: *Bacher v Austria*; in reference to exploitation violence and abuse by the Committee: *Al Adam v Saudi Arabia*.

<sup>25</sup> Article 15(1).

<sup>26</sup> *Al Adam v Saudi Arabia* (038/2016), Adoption of Views CRPD/C/20/D/38/2016.

favour of a breach of Article 13 of the Convention, which concerns access to justice, this article was found to be violated both alone and in conjunction with Articles 15 and 16, as well as in relation to the general obligations (Article 4) and the right to health (Article 25). In addressing the situation of persons deprived of their liberties, the Committee referred to the UN Standard Minimum Rules for the Treatment of Prisoners<sup>27</sup> and noted that the author's treatment during detention violated his right to be treated with humanity and with respect for the inherent dignity of the human person and amounted to violence and abuse, in violation of Article 16 of the Convention.

It would be an over-interpretation to claim that the dignity argument, in this case, reflects any particularity in terms of persons with disabilities, but the report drafted by the Special Rapporteur of the Human Rights Council on torture and other forms of ill-treatment does highlight the specific relationship between torture and disability, noting that persons with disabilities in institutions 'are frequently, subjected to unspeakable indignities, neglect, severe forms of restraint and seclusion, as well as physical, mental and sexual violence'.<sup>28</sup> Lack of reasonable accommodation, the report noted, increases the risk of being exposed to such treatments. The Concluding Observations of the Committee stated further that the torture and ill-treatment of persons with disabilities might include continuous practices, such as forcible medication and administration of neuroleptics, and poor material conditions in psychiatric institutions.<sup>29</sup> They also confirmed that states parties should ensure that measures for the living conditions of persons with disabilities in institutions and facilities – such as reception and detention centres – respect the dignity of persons with disabilities.<sup>30</sup>

In this respect, the specific role of dignity in thinking what counts as inhuman treatment from the perspective of persons with disabilities is more apparent in the case of *X v Argentina* (2012). This case concerns the issues of the dismissal of home arrest request, conditions of detention and access to adequate medical care and rehabilitation of disabled persons during detention. The applicant referred to dignity in line with inhuman treatment due to the conditions of detention and health care. The Committee accepted that an absence of a suitable infrastructure for persons with disabilities and the substandard conditions of detention gave affront to the applicant's dignity and constituted inhuman treatment.<sup>31</sup> Although referring to the role of dignity in the context of accessibility and inhuman treatment, the Committee did not find a violation of Article 15 concerning inhuman treatment. The violation determined was based on Articles 14(2), in relation to liberty and security of the person, Article 17, on integrity, and Article 9(1), on accessibility.<sup>32</sup>

<sup>27</sup> At <https://digitallibrary.un.org/record/57952?ln=en>

<sup>28</sup> Nowak, Report transmitted by note of the Secretary-General, U.N. Doc. A/63/175 (July 28, 2008).

<sup>29</sup> UN Committee on the Rights of Persons with Disabilities, Concluding Observations of the Committee: Peru, 9 May 2012, CRPD/C/PER/CO/1, para 30.

<sup>30</sup> Concluding observations of Greece, CRPD/C/GRC/CO/1, para 25.

<sup>31</sup> *X v Argentina*, CRPD /C/11/D/8/2012, para 8.4.

<sup>32</sup> Even though the violation concerned the relation between dignity and accessibility, it is worth recalling what Lawson (2012, p. 851) noted concerning reasonable accommodation on the individualised dimension of accessibility, in respect to the detention conditions of persons with disabilities; in certain cases, 'the

### 3.2. In Relation to Personal Integrity

The CRPD accommodates a distinct right as the right to integrity in its Article 17. Bruce (2014, p. 185) observed that the drafting target of this article mainly concerned the case of non-consensual medical intervention. Since not all types of interventions were protected under ‘torture or cruel, inhuman or degrading treatment or punishment’, she noted, it was deemed necessary to introduce the single sentence comprising Article 17: ‘Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others’.<sup>33</sup> In this vein, *Y v Tanzania* (2017) concerns inhuman treatment, torture and discrimination based on disability in the case of an albino applicant.<sup>34</sup>

In this case, the Committee referred to human dignity in line with Article 16 (on the freedom from exploitation, violence and abuse) but also with Article 17 (on the right to integrity).<sup>35</sup> In reference to the latter, the Committee had earlier noted the following on the meaning of being a person:

It is linked to the idea of human dignity and each person’s physical and mental space should be protected; it includes the prohibition of physical and mental torture, inhuman and degrading treatment and punishment, as well as a wide range of less grave forms of interference with a person’s body and mind.<sup>36</sup>

This comment had been made in an earlier communication, *X v Tanzania* (2014), where the applicant was also an albino. The Committee saw fit to confirm the admissibility of this case on the basis of discrimination due to albinism, thus highlighting the cultural context of the CRPD notion of disability.<sup>37</sup> Through this Comment, moreover, the Committee portrayed the close link between dignity and personal integrity, covering a broad range of interferences that were *not* specified in the CRPD article. This case also concerned Articles 5, 15 and 17 in conjunction with the general principles of the Convention.

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level of suffering endured by the disabled person as a result of the failure to provide them with reasonable accommodation will reach the minimum level of severity required to constitute a breach of substantive rights to be free from ill-treatment’. A lack of access, that is, may constitute ill-treatment, which involves a loss of dignity. Lawson (2012) ‘Disability equality, reasonable accommodation and the avoidance of ill-treatment in places of detention: the role of supranational monitoring and inspection bodies’, *The International Journal of Human Rights*, 16(6).

<sup>33</sup> The right to integrity is also found in the EU Charter of Fundamental Rights under the general theme of human dignity. The Charter provides a more detailed account of the right and lists its relation to medicine and biology.

<sup>34</sup> See also the Report of the Independent Expert on the enjoyment of human rights by persons with albinism; UN Doc A/72/131 (14 July 2017) and UN Doc A/HRC/RES/28/6 (10 April 2015).

<sup>35</sup> *Y v Tanzania* (023/2014), Adoption of Views CRPD/ C/20/D/23/2014.

<sup>36</sup> *X v Tanzania* (22/2014), Views CRPD/C/18/D/22/2014, para 8.7.

<sup>37</sup> Specifically, albinism carries a high vulnerability to skin cancer, an impairment that was considered in ‘interaction’ with ‘attitudinal and environmental barriers’ following the CRPD preamble on taking into account the ‘diversity of people with disabilities’. *Ibid*, para 7.6.

### 3.3. In Relation to Accessibility

As pointed out by Bassler (2011, p. 21), one could assume the principle of dignity to entail that persons with disabilities are not humiliated by any incapacities regarding access. Accordingly, an awareness of the diverse needs of disabled persons may indicate that which does indeed humiliate and undermine dignity. *Bacher v Austria* case is worthy of note in this sense, not only in terms of the reference to dignity but also because the remarks reveal the position of the Committee concerning the application of the Convention extending to relations between individuals.

In this case, the applicant, who was represented by his sister, was a person with autism and Down Syndrome and had occasional need of a wheelchair. The land dispute between the two parties (the applicant's family and the neighbour), had resulted in the destruction of a wooden roof that enabled the applicant to access to his home and engage in outside activities (it had served to protect the applicant and his caregiver's safety and facilitate accessibility to their home in bad weather conditions). The applicant claimed that articles concerning the general principles (3), accessibility (9) and liberty and security of the person (14) had been violated and, in relation to the general principles of the Convention, raised the concept of dignity.<sup>38</sup>

In its decision, the Committee referred to dignity in relation to the right to accessibility. Relying on General Comment 2, the Committee noted that 'Persons with disabilities should have equal access to all goods, products and services that are open or provided to the public in a manner that ensures their effective and equal access and respects their dignity'.<sup>39</sup> This is also a useful case to demonstrate the tension between the liberal right to property and other human rights with a particular reference to disability. The comments of the Committee reflect the judgement that the states parties are not only under an obligation to eliminate discrimination by any person or private enterprise but should also, where appropriate, interpret private property conflicts arising from contracts between individuals through the lens of the CRPD.

After over a decade, one might expect to find a deeper elucidation of the concept of human dignity in the Committee's comments and views. Apart from the views demonstrated in the study, the concept dignity is generally invoked in only a weak manner and when recalling relevant articles of the Convention in which dignity was part of the article text. In those cases where dignity has been specifically cited or invoked, it was mostly done so by the applicant and just repeated by the Committee. According to these few cases, dignity seems to be employed mostly in relation to the articles concerning freedom from torture and inhumane treatment and from violence and abuse and the right to integrity. The latter, in this sense, has particular importance for persons with disabilities because it targets not only the elimination of state interventions but also the actions of other parties, including

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<sup>38</sup> *Bacher v Austria* (026/2014), Views CRPD/C/19/D/26/2014, para 3.3.

<sup>39</sup> *Ibid.*, para 9.6.

legal guardians.<sup>40</sup> General Comment 2, on the other hand, appears to assist the Committee in addressing dignity for cases referring to accessibility.<sup>41</sup>

The entitlements to the respect for dignity in the various Concluding Observations also seem to appear under certain contexts. One of them involves the states party obligations concerning the general awareness-raising duty with respect to human rights and the worth of persons with disabilities. For some countries, this could mean taking specific steps, such as the elimination of negative terminology and promotion of positive messages related to persons with disabilities;<sup>42</sup> for others, meanwhile, the Committee draws attention to such awareness in respect to informative and dignifying portraits of persons with different disabilities.<sup>43</sup> The requirement to review legislation in order to secure equal legal recognition and eliminate substituted decision-making is another context in which the Committee has referred to dignity.<sup>44</sup> Reference to dignifying the practices in detention conditions of persons with disabilities is also evident in some remarks,<sup>45</sup> as is the medical examination of alleged torture victims.<sup>46</sup> Last but not least, respect for the dignity of girls and women with disabilities appears in the concluding observations of some countries.<sup>47</sup>

Even though there have been no significant attempts to reconceptualise or formulise the concept of dignity in the Convention text, General Comments or Concluding Observations or through the communicated views, closer inspection reveals dignity as typically entering the picture in relation to certain rights as indicated as well as, one would think, various potential topics that are yet to be addressed by the Committee. Because the concept of dignity plays a role as a general principle, and because there is no specific article in the CRPD text on the ‘right to dignity’, even though it is pronounced frequently, the meaning of the term remains subject to interpretation. It is to be hoped that the Committee, through the further application of case law over time, will extract the requirements of the principle more precisely.

#### 4. THE ROLE OF HUMAN DIGNITY IN POST-CRPD ECtHR CASE LAW

Departing from the CRPD Committee, another option in investigating the concept of dignity in relation to the human rights disability discourse and jurisdiction is to look at the case law of the Strasbourg Court. The ECHR does not contain any reference

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<sup>40</sup> The Concluding Observations of the Committee in this sense shows that in many countries, practices such as the forced sterilisations and involuntary treatments by the consent of the legal guardians are indeed contrary to the article concerning the right to integrity. See Fennell (2018), ‘Protection against torture and cruel or inhuman or degrading treatment of punishment’ in Bantekas, Stein and Anastasiou (eds.), p. 457.

<sup>41</sup> General Comment No 2 (2014) CRPD /C/GC/2.

<sup>42</sup> The Concluding Observations of Colombia, Spain, Iran, Turkey, Tunisia, Cyprus.

<sup>43</sup> The Concluding Observation of Sweden.

<sup>44</sup> The Concluding Observations of Spain, Turkey, Montenegro.

<sup>45</sup> The Concluding Observations of Kuwait, Costa Rica.

<sup>46</sup> The Concluding Observation of Hungary.

<sup>47</sup> The Concluding Observations of Oman, United Arab Emirates.

to disability, but references to disability have been made over the years through the protocols,<sup>48</sup> and it has been noted that European ideals were indeed predominant in the creation of the CRPD (Arnardóttir and Quinn, 2009, p. 7). At this point, then, the question evolves into that of how the CRPD has affected the ECtHR's approach to disability. While the Court's references to the CRPD are increasing, not all scholars find these to be satisfactory. For instance, in *Glor v Switzerland*, the Court declared that there is a European and worldwide consensus on the protection of persons with disabilities against discrimination with reference to the CRPD;<sup>49</sup> Fredman (2016, p. 29), however, noted that the Court still lags behind other jurisdictions in giving sufficient weight to the relationship between reasonable accommodation and discrimination in favour of persons with disabilities. In most cases, the appearance of the CRPD in Strasbourg case law either only remains under the 'relevant international law' section or is restricted by the arguments raised by the applicants. In this vein, Lewis (2018, p. 198) also argues that the Court has not yet fully embraced the CRPD. On the other hand, others have noted the ECtHR's adherence to the Convention as being quite evident and supported this argument by noting that the Court cited the CRPD in some cases even when the Convention was not even signed or ratified by the respondent state (Favalli, 2018, pp. 526-27). It should further be noted that the impact of the CRPD in local jurisdictions and regional mechanisms is still a work in progress, so its potential effect will be subject to constant re-evaluation in the years ahead.

One obstacle regarding the competence of the ECtHR in achieving the goals of the CRPD appears to concern the large margin of appreciation left to member states concerning the realisation of positive rights. As the CRPD is a document that relies on the interconnectedness of civil-political and socio-economic rights and thus imposes serious positive obligations on the states parties, it arguably poses a challenge to the ECtHR. As stated by O'Conneide (2009, p. 164), the CRPD holds a particular position in securing human rights, where the states are expected to create the requisite conditions to secure the social circumstances enabling people to live in dignity. While Broderick (2018, p. 206) admits that expecting a dynamic interpretative approach from the ECtHR in order to realise the progressive obligations imposed by the CRPD is likely to be unrealistic, she also argues for an approach that takes into account the substantive requirements of the CRPD as achievable within the interpretation of the ECtHR. In fact, along with the wide scope of positive obligations in terms of the protection of private life, there are increasing references to the reasonable accommodation duty in relation to the right to life and the prohibition of torture and ill-treatment, particularly in detention cases of persons with disabilities. These can all be seen as the reflection of a shift in the Court's reasoning regarding positive obligations in favour of persons with disabilities (Broderick and Ferri, 2019).

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<sup>48</sup> Notably, 'Health and disability' now specifies an 'other status' under 'discrimination by ground' under Article 14, according to Protocol 12, Article 1(1) and the listing in 'Guide on Article 14 of the Convention (prohibition of discrimination) and on Article 1 of Protocol No. 12 to the Convention (general prohibition of discrimination)', para 160.

<sup>49</sup> *Glor v Switzerland*, 13444/04, para 53.

On the other hand, even though there may be no specific reference to human dignity in the ECHR text, the concept has entered through the protocols.<sup>50</sup> Moreover, the Court has affirmed it to be at the heart of its jurisdiction,<sup>51</sup> and it has also been noted that there has been a significant increase in references to dignity in the Court's case law during the present century (Kuteynikov and Boyashov, 2017, p. 104). In the ECtHR general case law, the most prominent applications of dignity refer to Article 3 of the Convention (on torture, degrading and inhumane treatment) (McCrudden, 2008, p. 686). In the judgement of *Bouyid v Belgium*, for example, the Grand Chamber stated there to be a particularly strong link between the concepts of degrading treatment or punishment and respect for dignity.<sup>52</sup> Discrimination cases have also been prominent regarding dignity, in terms of hate crime and racial discrimination but also based on religion and on gender (Kuteynikov and Boyashov, 2017, p. 96). Other significant areas where dignity has been identified are the rights to a fair hearing, private life and not to be punished in the absence of a legal prohibition (McCrudden, 2008, p. 683).

It is also possible to observe references to dignity in the judges' separate opinions and independent publications. Writing specifically on human dignity and the ECtHR, for example, Judge Costa (2013, p. 401) argued that the increasing use of this concept in the jurisdiction of the Court has the purpose of maintaining a connection between the international instruments and the Convention, since the latter is silent on dignity. This statement is particularly attractive from the perspective of this study, given that the standards of the protection of human dignity in the CRPD require that some rights and duties be taken into account that are not secured by the ECHR. In this respect, the issue of whether an empowering interpretation of dignity will be useful in overcoming the shortcomings of the standard application to disability rights cases by the ECHR is worth considering. Thus, the cases addressed in this study have been selected from amongst those in which there is a reference to both the CRPD and the concept of dignity.<sup>53</sup>

#### 4.1. In Relation to Prohibition of Torture, Inhuman and Degrading Treatment

The cases in which the Court has referred to the concept of dignity and the CRPD jointly refer mostly to Article 3 of the ECHR and concern the detention conditions for persons with disabilities.<sup>54</sup> Detention conditions clearly raise the issue of the reasonable accommodation duty, which is also pertinent in relation to non-discrimination as defined

<sup>50</sup> Abolition of the death penalty in all circumstances (Protocol No. 13 to the ECHR), 3.v.2002.

<sup>51</sup> *Bouyid v Belgium*, Application No 23380/09, Merits and Just Satisfaction, 28 September 2015, para 40.; *Svinarenko and Slyadnev v Russia*, Application No 32541/08, Merits and Just Satisfaction, 17 July 2014, para 118.

<sup>52</sup> *Ibid.*, n 95, para 40.

<sup>53</sup> It should be stressed that, for the purpose of this analysis, the cases selected are limited to those that display the Court's reference and approach to dignity in the light of the CRPD.

<sup>54</sup> *Butrin v Russia* Application No 16179/14, Merits and Just Satisfaction, 22 March 2016; *Grimailovs v Latvia*, Application No 6087/03, Merits and Just Satisfaction, 25 June 2013; *Asalya v Turkey*, Application No 43875/09, Merits and Just Satisfaction, 15 April 2014; *Dordevic v Croatia*, Application No 41526/10, Merits and Just Satisfaction, 24 July 2012.

in the CRPD. In the case of *Butrin v Russia*,<sup>55</sup> the applicant was a blind person who complained about a breach of Article 3 of the ECHR regarding the conditions he was kept in at a correctional colony. The applicant also raised a breach of Article 13, as a consequence of the denial of his early release demand based on his disability. He had been placed in a specific unit for detainees with special needs, but the premise and facilities were unsuitable for persons with visual impairments, and the only assistance assigned to the applicant was the help of another detainee, who had cardiac problems himself. As a result, the applicant had also been diagnosed with a psychosocial disability.

The ECtHR cited Article 1 of the CRPD under the ‘relevant international law’ section in this case along with Articles 14, 15 and 20, regulating, respectively, the deprivation of liberty with a focus on reasonable accommodation, the freedom from torture, cruel and inhuman treatment, and the right to personal mobility. CRPD articles were also visible in the quoted report of the special rapporteur on torture. Yet, when addressing dignity, the Court relied on its previous case law and interpretation of dignity. In this respect, the Court recalled the *Pretty* case,<sup>56</sup> where it had noted that the treatment of a person should be characterised as ‘degrading’ if it humiliates them and arouses certain feelings, such as anger or of an incapacity, and thence diminishes their dignity. The Court further referred to an earlier link established between human dignity and degrading treatment by recalling *Engel v Hungary*.<sup>57</sup> Even though the CRPD was not specifically addressed in the Court’s reasoning, the previous case law references displayed a relation to human dignity from the perspectives of mobility, freedom of movement, accessibility and health and wellbeing.

In *Grimailovs v Latvia*,<sup>58</sup> the Court found that the lack of independent access to prison facilities for the paraplegic prisoner and of organised assistance regarding his mobility and daily routine constituted degrading treatment. It referred to the CRPD and its definition of ‘reasonable accommodation’ along with its Article 14, concerning the ‘liberty and security of persons with disabilities’ with a focus on deprived liberty. Dignity, in this case, played a role in demonstrating the inaccessible facilities of the prison cell as failing to accommodate the applicant and his needs. In *Asalya v Turkey*, the Court also referred to Article 14, determining that ‘the detention of the applicant in conditions where he was denied some of the minimal necessities for a civilised life, such as sleeping on a bed and being able to use the toilet as often as required without having to rely on the help of strangers, was not compatible with his human dignity’.<sup>59</sup> Thus, the Court decided that such acts constituted degrading treatment.

The infringement of dignity in detention conditions has further dimensions when considering persons with disabilities, in which sense the denial of reasonable accommodation is prominent. We may also recall that Lawson had warned about the limited scope of Article 3 for persons with disabilities, as its application is mostly restricted

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<sup>55</sup> *Supra*.

<sup>56</sup> *Pretty v UK* Application No 2346/02, Merits and Just Satisfaction, 29 April 2002.

<sup>57</sup> *Ibid.*, para 51.

<sup>58</sup> *Grimailovs v Latvia*, *supra* 102.

<sup>59</sup> *Asalya v Turkey*, *supra* 102, paras 47, 53.



to institutional contexts. She noted that the scope of the freedom from torture, inhuman and degrading treatment should reach beyond the prison and institutional care settings since disabled people experience such treatment in the wider context of everyday life. Therefore, Lawson (2005, p. 462) argued that a true commitment to the dignity and value of disabled people must allow Article 3 of the ECHR to play a role outside the prison gates and address ‘the unimaginable and unnecessary suffering and degradation experienced’. In this sense, CRPD Articles 16 (on freedom from exploitation, violence and abuse) and 17 (protecting the integrity of the person) come into play. It is assumed that finding room for the potential violations of these two articles under the rights listed in the ECHR may vary and bring further references to dignity.

#### 4.2. In Relation to the Right to Respect for Private and Family Life

The case of *McDonald v UK* involved the CRPD and human dignity in relation to Article 8 of the ECHR. The Court’s decision here has been considered to be equally a positive development and a missed opportunity. The disappointment mostly concerns the facts that the question of the state’s positive obligations was left unaddressed and that the Court failed to take the opportunity to address the intersectionality between age and disability (De Pauw and De Hurt, 2017, pp. 318-22). This case concerned the reduction of the care package of the applicant, who had suffered a stroke and had serious mobility problems due to her injuries at home. With an additional bladder condition, the applicant also made frequent visits to the toilet, particularly at night, and needed assistance for this. The local authority, however, reduced the amount of her weekly health care support, suggesting that the applicant could be provided with incontinence pads in lieu of night-time care. The applicant, in her domestic appeal, argued that the suggestion that she use pads at night instead of a support was, in fact, an infringement of her autonomy and dignity, which was incompatible with Article 8 of the ECHR. The same argument was continued at the ECtHR. The applicant emphasised that the suggested method would be an unjustified interference with her right to respect for her private life, that it ‘exposed her to considerable indignity’<sup>60</sup> and had a negative impact on her family life with her partner. The applicant also referred to CRPD Article 19, requiring state parties to meet obligations in providing the means for independent living in society. The state’s argument focused on the just distribution of resources (given the needs of other care beneficiaries and the limited resources) and on the safety of the applicant (in order to prevent a further injury).

In its determination, the Court agreed that the applicant’s complaint of the proposed measure would have an impact on her private life (based on her dignity argument) and would thus fall under Article 8 of the Convention, and it noted that the case fell under the interference to private life provisions without entering into the essential question of the positive obligations regarding the member state. Therefore, apart from a short period of time when Article 8 was admitted to be violated, the Court ruled that there was no violation (since the health care policies of the states arising from the Convention are

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<sup>60</sup> *McDonald v The United Kingdom*, Application No 4241/12, Merits and Just Satisfaction, 20 May 2014, para 38.

subject to a wide margin of appreciation and restricted by national resources). The Court did not further invoke any article of CRPD in its decision.

This has been regarded as a missed opportunity to integrate the CRPD's independent living right into ECtHR case law (De Pauw and De Hurt 2017, p. 318). The Court cited the *Pretty* case and its relation to dignity in terms of Article 8 from the perspective of the relationship between autonomy and dignity, but the argument based on the infringement of dignity – regarding one's own sense of personal integrity under the right to respect for private life – although admitted, was not enough to constitute a violation as long as the state party acted in accordance with national law (since this was the subject of an assessment of priorities within the limited resources of the particular state). Therefore, the Court's application of dignity has been criticised for falling short and not being clear enough to shed light on the specific disability- and age-related entitlements as well as for its potential impact on future cases (ibid., pp. 332-33). In this respect, even though a reference to the infringement of dignity can be considered a positive aspect of the case, the oversight of the Court in respect to positive obligation duties regarding the protection of private life and thus in relation to dignity seems unsatisfactory.

Waddington (2012, p. 330) argues that even though Article 8 of the ECHR has been invoked in some cases of persons with disabilities, particularly in respect to direct interferences by the states, the positive obligation requirements of the article have rarely been applied in disability cases. Waddington's remark may be observed in the case of *Stanev v Bulgaria*. This case deserves a profound discussion on multiple grounds concerning disability human rights; here, though, it is only invoked in relation to the role of dignity with respect to private life and disability.<sup>61</sup> The case involved an applicant who was placed in a social care home established for people with mental disabilities. The applicant's inability to obtain permission to leave the home was found to be in breach of Article 5 of the ECHR, which concerns the right to liberty and security. Also, the poor living conditions in the home – an issue also addressed in several reports, including that of the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) – was deemed to breach Articles 3 and 13 of the CRPD in conjunction with the Article 3 of the ECHR. The lack of access to a court to seek release from partial guardianship was further found as a violation of ECHR Article 6.

Following its most common method of reference, the Court referred to dignity in this case also through ECHR Article 3 concerning a person's detention conditions. In her partially dissenting opinion, however, Judge Kalaydjieva commented on the non-application of Article 8, stating that 'the lack of respect for the applicant's recognised personal autonomy violated Mr. Stanev's right to personal life and dignity as guaranteed by Article 8 and failed to meet contemporary standards for ensuring the necessary respect for the wishes and preferences he was capable of expressing'.<sup>62</sup> The link between the

<sup>61</sup> For an analysis of the case on other grounds, see Lewis (2012), 'Stanev v. Bulgaria: On the Pathway to Freedom' *Human Rights Brief*, 19(2).

<sup>62</sup> *Stanev v Bulgaria*, Application No 36760/06, Merits and Just Satisfaction, 17 January 2012.

restricted autonomy and dignity that Judge Kalaydjieva established in this sense echoes the spirit of the CRPD and also opens the way to an understanding of dignity that takes on a more emancipatory sense of human flourishing. In this context, Kalaydjieva noted that while Article 8 in respect to the deprivation of legal capacity was the primary issue in this case, the reference to dignity also helps to extend its application in disability cases beyond Article 3.

#### 4.3. In Relation to Disability-based Discrimination and the Right to Education

In *Sahin v Turkey*, also, the Court referred to human dignity in line with the CRPD.<sup>63</sup> This case was determined as a breach of Article 14, on discrimination on the basis of disability, in conjunction with Article 2 of Protocol 1, on the right to education.<sup>64</sup> Here, the applicant was a university student who had become paraplegic following an accident and wished to resume his higher education studies. The applicant requested that the university administration make the adjustments needed for him to be able to access his faculty in the following term. The university responded that the adjustments would take considerable time based on its economic constraints and offered instead to provide the applicant with human assistance, namely, another person carrying him up and down the stairs as needed. The applicant stated that he perceived the proposal as degrading and infringing his privacy.<sup>65</sup>

In this case, with reference to the lack of accessibility and reasonable accommodation, the Court noted the central importance of living autonomously with a fully developed sense of dignity and self-respect in light of the CRPD. It reiterated its previous position and noted that being able to make independent choices was, in fact, related to one's dignity and freedom and that these principles were at the core of the Convention.<sup>66</sup> Evaluating the university's suggestion of human aid, the Court concluded that the government had failed to provide evidence of a sincere consideration of the effect of this on the applicant's security, autonomy and dignity.<sup>67</sup> A similar disability discrimination case in relation to Article 14 in conjunction with the Article 2 of the Protocol 1 of ECHR was that of *Çam v Turkey*. While this case concerned the discriminative practices of a higher education institute towards a blind student in accessing the right to education, the Court quoted the CRPD but did not mention the concept dignity. However it could be argued that, by referring to the article concerning the right to education in the CRPD several times, the Court indirectly indicated the first clause of Article 22 of the CRPD, where dignity appears in relation to right to education.<sup>68</sup>

<sup>63</sup> *Enver Sahin v Turkey*, Application No 23065/12, Merits and Just Satisfaction, 30 January 2018.

<sup>64</sup> In a dissenting opinion, Judge Lemmens drew attention to the argument that the case was merely an issue of right to education and the accessibility obligations of the States party; quoting the CRPD and its General Comment 2, Judge Lemmens noted the distinction between reasonable accommodation and accessibility. *Ibid.*

<sup>65</sup> *Enver Sahin v Turkey*, para 7.

<sup>66</sup> *Ibid.*, para 63.

<sup>67</sup> *Ibid.*, para 64.

<sup>68</sup> *Çam v Turkey*, Application No 51500/08, Merits and Just satisfaction, 23 May 2016.

#### 4.4. In Relation to Disability Hate Speech

The case of *Dordevic v Croatia* is a case worthy of note since it covers more than one applicant and several rights related to the notion of human dignity.<sup>69</sup> This case concerns long-term verbal and physical harassment to the extent of ill-treatment towards a person with a cognitive and physical disability cared for by his mother. It is also important in terms of the rights abuses that the primary caregivers of persons with disabilities encounter and as a particular example of a disability hate crime and the failure of the state to tackle such acts. The applicant, Mr. Dordevic, was an adult with a mental and physical disability who was cared for by his mother, Mrs. Dordevic. Both were Croatian citizens of Serbian origin. Mr. Dordevic attended a workshop for adults in a nearby primary school, where he was harassed for three years by the other pupils, particularly on the journey between home and school. Attacks occurred in front of the applicant's balcony, including verbal harassment targeting the applicant's ethnic background and disability and other acts, such as spitting, making noises and drawing insulting messages on the pavement and causing damage to the applicants' place of residence. A medical report indicated that Mr. Dordevic was continually attacked. The complaint of the applicant at the domestic level resulted in dissatisfaction since the harassment was conducted by minors and did not constitute criminal liability – which introduced the issue of state responsibility.<sup>70</sup> Several CRPD articles were addressed in the relevant international law section, and the CRPD, in particular, was brought to the Court's attention by a third-party intervention in the case. In drawing attention to the notion of disability hate crime, the European Disability Forum, as the third party intervener, noted the relevant CRPD articles regarding the non-discrimination requirements and also the requirement of relevant effective measures regarding violence.

The violation of several articles of the ECHR were raised by the applicants, namely, breaches of Articles 2 and 3 (on the right to life and prohibition of torture) regarding Mr. Dordevic and of Article 8 (on respect for private and family life) regarding his mother and caregiver, Mrs. Dordevic. The Court found a violation of Articles 2 and 8 but also of Article 13. The Court several times noted that the case concerned the positive obligations of the state outside the sphere of criminal law and invoked dignity when addressing Article 8 in terms of private life and a person's psychological integrity. With reference to previous case law, it noted that states had a positive obligation to ensure respect for human dignity and the quality of life (in certain respects). Although not framed verbally as such, the idea of dignity was raised by the third-party intervener since, in relation to disability hate crimes, they noted that the vulnerability of persons with disabilities was used as the basis for attacks that were intended to humiliate and hurt the person.<sup>71</sup> This statement also displayed concern for the integrity of the psychological sphere and protection of dignity.

<sup>69</sup> *Dordevic v Croatia*, Application No 41526/10, Merits and Just satisfaction, 24 July 2012.

<sup>70</sup> *Ibid.*, para 103.

<sup>71</sup> *Ibid.*, para 133.

#### 4.5. In relation to More Complex Cases: Right to Liberty v Right to Life

One might argue that there is not much room for an argument of dignity in cases where there is a violation of the right to life. The question of dignity in such cases might then perhaps be assessed retrospectively. *Fernandes de Oliveira v Portugal* provides an opportunity to test this. The case concerned the suicide of the applicant's son while in the care of a psychiatric institution where he was a voluntary patient. It particularly concerned the state's obligations in terms of protecting the lives of people in psychiatric institutions, yet with a focus on the voluntariness dimension. Both the CRPD and its guidelines were invoked in the decision, particularly from the perspective of the personal liberty and security of psychiatric patients. The Court's reasoning gave a place to dignity in a paragraph stressing the role of the Court in protecting dignity along with human freedom.<sup>72</sup> The Court emphasised that the authorities, in line with ECHR Article 2, should diminish the possibilities of self-harm yet not by infringing autonomy.<sup>73</sup> Thus, by a majority, the Grand Chamber found no violation of the substantive part of Article 2 concerning the state's obligation to protect the life of the patient. The dissenting opinion of Judge Pinto De Albuquerque, joined by Judge Harutyunyan, however, is worth mentioning in order to revisit the role of vulnerability in the outcome.

One particular point in the opinion drafted by Judge Albuquerque is relevant here. Phrasing the stance of the Court regarding the liberty of psychiatric patients as in favour of the 'recent trend',<sup>74</sup> he noted that the Court had missed an opportunity to capture a greater concern, namely the right to life and the state's obligation to maintain this right, particularly in case of institutionalised psychiatric patients.<sup>75</sup> This particular point of the dissenting opinion may at first sight be perceived as a threat to CRPD standards regarding the restrictions of persons with psychosocial disabilities since the ambition of the Convention is to eliminate institutionalisation.<sup>76</sup> Yet, the comments could also be interpreted as a reference to dignity by adopting a negative freedom approach (against which the state defended), or rather, by targeting the fact that emphasising the liberty and autonomy of persons without addressing their extreme vulnerability may result in a reoccurrence of similar events. The dignity-autonomy relationship here seems quite different than in the *Sahin* case (above). While there, the non-interference, or the absence of the suitable application of the positive obligations of the state had resulted in an infringement of the applicant's autonomy and dignity, here, the non-interference of the state or application of an autonomy-based approach to dignity, as claimed, resulted in a vulnerable person's death. In the similar, previous case of *Hiller v. Austria*, where the Court had found no

<sup>72</sup> *Fernandes de Oliveira v Portugal*, Application No 78103/14, Merits and Just Satisfaction, 31 January 2019, para 112.

<sup>73</sup> *Ibid.*

<sup>74</sup> Judge Albuquerque refers here to the Dissenting opinion of Judge Motoc in *Hiller v Austria*, Application No 1967/14, Merits and Just Satisfaction, 22 November 2016.

<sup>75</sup> See Dissenting opinion of Judge Albuquerque in *Fernandes De Oliveira v Portugal*, *supra*.

<sup>76</sup> See Bartlett, 'The Right to Life and the Scope of Control: Fernandes de Oliveira v Portugal', *Strasbourg Observers*, 18 March 2019. At <https://strasbourgobservers.com/2019/03/18/the-right-to-life-and-the-scope-of-control-fernandes-de-oliveira-v-portugal/#more-4319>

violation of Article 2, Judge Sajo had alerted us to this point by noting that ‘precaution is not paternalism’.<sup>77</sup>

Departing from the mentioned ECtHR cases, a positive reading of the application of dignity in disability cases in terms of ECtHR might reveal further areas where dignity has had an impact in the interpretation of the Court, even if not the outcome. Apart from the established role of dignity in torture and degrading treatment in previous ECtHR cases, the idea of dignity has been helpful here in identifying what constitutes such treatment from the perspective of persons with disabilities. In this sense, the requirements of the CRPD, such as accessibility and reasonable accommodation, play an important role in linking indignity to the denial of these rights. Circumstances and events that may not be adequate to constitute such acts in the case of able persons are certainly different in the case of disabled persons under detention and imprisonment facilities. Therefore, denying the rights and basic principles of the CRPD is likely to infringe dignity, and recognition of their denial will definitely shape the borders of indignity and thus extend the scope of ECHR Article 3. Furthermore, dignity informs disability discrimination cases where the requirements of equal treatment are denied by the lack of accessibility and reasonable accommodation requirements. An emphasis on the relationship between dignity and self-esteem, or dignity and independence, is also becoming evident in the recent case law of the Court.<sup>78</sup> This raises the issue of the broader applicability of ECHR Article 8 in certain disability cases. Finally, the tension between dignity and autonomy is likely to continue in the case of persons with disabilities intersecting with further vulnerabilities, as was pointed out in the dissenting opinions of the *Hiller* and *De Oliviera* cases.

## 5. CONCLUSION

The primary focus of this study has been on identifying and characterising respect for dignity in relation to disability through the guidance of the CRPD. In this regard, the appearance and application of the concept has been addressed by focusing on the views of the Committee and the post-CRPD case law of the ECtHR. The greatest challenge was established by the limitations of the currently available case law. Therefore, this study takes into account the fact that it may be rather early to reach a pessimistic conclusion regarding the standards aimed at yet not achieved by the application of the concept of dignity in the domain of disability human rights.

There has still been no significant attempt to reconceptualise or elucidate the concept of dignity in the work of the CRPD Committee, yet the concept has become evident in a few new contexts, as was also the case, indeed, with the formulation of accessibility, non-discrimination and inclusive equality. In the context of the communications received by the Committee, certain rights, such as the freedom from torture and from exploitation, violence and abuse, and the right to integrity and accessibility, seem to have made room for an argument from human dignity. It is to be anticipated that the number of rights

<sup>77</sup> See the ‘Concurring opinion of Judge Sajo’ in *Hiller v Austria*.

<sup>78</sup> See *Enver Sahin v Turkey*, para 63.

referring to human dignity will increase in the coming years. Meanwhile, it is too early to argue that the concept has been very significant in the outcomes of the case law of the Committee.

Compared to that of the CRPD, the long-established case law of the ECtHR provides a greater quantity and range of examples with which to observe the impact and visibility of human dignity in cases of disability. In considering the holistic rights approach embraced by the CRPD, the ECtHR, I would argue, ought to place more emphasis on the positive obligations that are the substantive conditions of the respect for dignity. Have the standards provided by the CRPD advanced the Court's interpretation of dignity? While torture, degrading and ill-treatment cases usually allow for the concept of dignity, the core principle of accessibility and also the relationship between non-discrimination and reasonable accommodation, particularly in detention facilities, do seem to have advanced the Court's guarantee of dignity from the perspective of disability. Some cases have also demonstrated the relationship between dignity and non-discrimination with respect to reasonable accommodation and accessibility. Article 8 of the ECHR has the greatest potentiality for addressing dignity in an empowering connotation with disability. Unfortunately, the Court seems to have missed the few opportunities to establish such a link. Finally, one may expect the CRPD Committee to provide further guiding practices and robust examples of the application of dignity as one of its core principles and thereby contribute to the requirements of respect for and the legal construction of the concept. The ECtHR, meanwhile, should take advantage of its juridical position and interpret dignity by taking into account the full requirements of the CRPD. This will not only mean finding room to incorporate all the rights guaranteed in the CRPD but also require a focus on the positive obligations involved in securing human dignity.

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