Bulletin of the *Transilvania* University of Braşov
Series VII: Social Sciences • Law • Vol. 18(67) Special Issue – 2025
https://doi.org/10.31926/but.ssl.2025.18.67.3.3

THE NOTION OF "HUMAN DIGNITY" IN THE RECENT MIGRATION CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS: A TOOL TO EXTEND THE SCOPE OF ARTICLE 3 ECHR?

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Abstract: *The contribution discusses the migration-related case-law of the European Court of Human Rights in which a violation of the prohibition of torture, inhuman or degrading treatment has been found, with a view to verifying whether – and if so, to what extent – the concept of human dignity is used by the Court to expand the protection of migrants within the scope of Article 3 of the ECHR. It will be submitted that human dignity not only plays a crucial role in the assessment of living conditions under Article 3 of the European Convention of Human Rights but, at least in certain cases, also justifies an expansive function of migrants' rights, including access to a minimum level of social and economic rights.*

Key words: *human dignity; migration; European Court of Human Rights; prohibition of torture, inhuman and degrading treatment*

1. Introduction

The recognition of dignity as an essential "quality" of every human being lies at the core and foundation of the international protection of human rights (Gilabert, 2018; De Sena, 2017; Barak, 2015; Capps, 2009; Shultziner, 2004; Carbonari, 2002; Frowein, 2002; Zajadlo, 1999; Schachter, 1983). Human dignity is explicitly included in several international legal instruments ranging from the Preamble of the Charter of the United Nations and the Universal Declaration of Human Rights to international human rights treaties and regional agreements (Dicke, 2002), exception made for the European Convention on Human Rights (ECHR or the Convention), which does not actually mention the notion in question (Di Stasi, 2011).

Notwithstanding this, the "respect for human dignity" has acquired significant relevance in the case-law developed over time by the European Court of Human Rights (ECtHR or the Court) (Fikfak, Izvorova, 2022; Kuteynikov, Boyashov, 2017; Costa, 2013) to the point that this concept is considered to represent the very essence of the

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European Convention on Human Rights (ECtHR: judgment of 22.11.1995, application n. 20166/92, S.W. v. United Kingdom, para. 44; judgment of 22.11.1995, application n. 20190/92, C.R. v. United Kingdom, para. 42; judgment of 29.4.2002, application n. 2346/02, Pretty v. United Kingdom, para. 65). Therefore, human dignity can be considered as a foundational value that provides the rationale for the protection of the rights set out in the ECHR, as well as unites those rights around a common core (Bedford, 2020). In addition to this foundational role, human dignity has also been deployed in judicial reasoning in order to shape the scope and application of rights set out in the Convention (Di Stasi, 2024; Le Moli, 2021; McCrudden, 2008). Such an approach can be seen in relation to most of the rights in the Convention, but it is particularly evident when Article 3 of the ECHR is at stake (Webster, 2018). Indeed, as will be shown, the "interpretative link" between the idea of human dignity and the kind of harm that is perceived as torture, or inhuman or degrading treatment is well established in the case-law of the ECtHR and seems to emerge in particular when the Court is called upon to decide on the application of Article 3 of the ECHR in the context of migration (Ippolito, 2020).

In light of the above, the present contribution aims at discussing the migration-related practice of the ECtHR in which a violation of the prohibition of torture, inhuman or degrading treatment has been found, with a view to verifying whether – and if so, to what extent – the concept of human dignity is used by the Court as a legal tool to expand the protection of migrants within the scope of Article 3 of the ECHR. To do so, after providing an overview of the notion of "human dignity" in the ECtHR case-law concerning the prohibition of torture, inhuman or degrading treatment, the present contribution will focus on the key cases concerning migration where recourse to human dignity has been central to the finding of a violation of Article 3 of the ECHR.

2. The Notion of Human Dignity in the ECtHR Case-law on Article 3 ECHR

As anticipated, the text of the ECHR does not include a specific reference to human dignity. Nonetheless, such a lack has not prevented the ECtHR from using the notion in question within the reasoning leading to a violation of specific rights guaranteed by the Convention, such as the prohibition of torture, inhuman or degrading treatment enshrined in Article 3. In this regard, in 1978, the Court explicitly mentioned human dignity in the judgment in the case of Tyrer v. UK to determine whether the judicial corporal punishment of birching, administered to a 15-year-old for assault, amounted to degrading punishment in breach of Article 3 (ECtHR, judgment of 25.4.1978, application n. 5856/72, Tyrer v. United Kingdom). According to the Court, the fact that the applicant had been treated "as an object in the power of the authorities" represented "an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity" (Tyrer v. United Kingdom, para. 33). Again, in 2000, in the judgment in the case of Kudła v. Poland (ECtHR, judgment of 26.10.2000, application n. 30210/96, Kudła v. Poland), the Grand Chamber affirmed the right of every person in prison to conditions of detention consistent with respect for human dignity, clarifying that "[t]reatment is considered to be 'degrading' when it humiliates or

debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance" (Kudła v. Poland, para. 92).

More recently, the ECtHR has provided a thorough analysis of the relevance of human dignity in the judgment in the case of Bouyid v. Belgium (ECtHR, judgment of 28.9.2015, application n. 23380/09, Bouyid v. Belgium), where the Grand Chamber was asked to consider whether slapping in the face a minor and an adult in police custody constituted a violation of Article 3. After reminding the absolute character of the provision in question, which enshrines one of the most fundamental values of democratic societies, the ECtHR highlighted the importance of human dignity within the ECHR system and concluded that "[a]ny interference with human dignity strikes at the very essence of the Convention" (Bouyid v. Belgium, para. 101). Consequently, as observed by the Court, "any conduct by law-enforcement officers vis-à-vis an individual which diminishes human dignity constitutes a violation of Article 3 of the Convention. That applies in particular to their use of physical force against an individual where it is not made strictly necessary by his conduct, whatever the impact on the person in question" (ibidem).

Finally, the Court made several references to dignity in cases concerning persons deprived of their liberty generally considered to be in a vulnerable situation. Although measures depriving a person of his liberty may often entail an inevitable element of suffering and humiliation, it cannot be said that the execution of detention on remand in itself represents a violation of Article 3. According to the Court's established case-law on this provision, States must ensure that a person is detained in conditions "compatible with respect for human dignity", meaning that the manner and method of the execution of the measure must not expose them to distress or hardship of a degree exceeding the unavoidable level of suffering inherent in detention, and that their health and well-being are adequately safeguarded, having regard to the practical requirements of detention (Kudła v. Poland, paras. 92-94).

3. The Use of Human Dignity in the ECtHR Migration-related Case-law on Article 3 ECHR

The above-discussed conclusions reached by the European Court of Human Rights about the link between the issue of human dignity and the kind of harm that is perceived as torture or inhuman or degrading treatment under Article 3 of the ECHR have been recently used by the Court in its reasoning in several cases concerning different situations related to migration.

In this regard, a landmark case is represented by M.S.S. v Belgium and Greece (ECtHR, judgment of 21.1.2011, application n. 30696/09, M.S.S. v. Belgium), in which the ECtHR recognised that human dignity is relevant to establish that living conditions of migrants outside detention can raise an issue under Article 3. The Court examined the alleged violation of the provision in question regarding the applicant's standard of living in Greece, pointing out that Article 3 in no way can be interpreted as obliging a State to provide housing to everyone, and does not impose any obligation on the State to provide financial assistance to refugees in order to maintain a certain standard of living (M.S.S. v. Belgium, para. 249). Notwithstanding this, the Court considered the fact that

Greece had undertaken obligations towards the reception conditions of asylum seekers and transposed them into national law. Moreover, it attached "considerable importance to the applicant's status as an asylum-seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection" (M.S.S. v. Belgium, para. 251). In view of these considerations, the Court found a violation of Article 3 because the situation in which the applicant had "found himself for several months, living on the streets, with no resources or access to sanitary facilities, and without any means of providing for his essential needs" coupled with the lack of any likelihood of this situation improving, infringed the applicant's human dignity and amounted to inhuman and degrading treatment (M.S.S. v. Belgium, para. 263). The Court took the same stance nine years later, in N.H. and others v. France (ECtHR, judgment of 2.7.2020, applications nos. 28820/13, 75547/13 and 13114/15, N.H. and others v. France), a case concerning five asylum seekers who, due to administrative delays preventing them from receiving the support provided for by law pending their asylum application, were forced to live rough in the street for several months, without access to sanitary facilities, having no means of subsistence and constantly in fear of being attacked or robbed. The Court found that the authorities had failed to fulfil their duties towards the applicants under domestic law and had not provided an appropriate response upon being alerted to the applicants' precarious situation. Accordingly, the applicants had been victims of degrading treatment, with the authorities showing disrespect for their dignity, that had exceeded the threshold of severity for the purposes of Article 3 of the Convention.

In the time between M.S.S. and N.H. cases, the ECtHR made use of the notion of human dignity also in a few cases concerning the material conditions of migrants – in particular, migrant children – detained by State authorities. For instance, in 2011 in Rahimi v. Greece (ECtHR, judgment of 5.4.2011, application no. 8687/08, Rahimi v. Greece), the ECtHR ruled on the detention of a fifteen-year-old unaccompanied asylum-seeker from Afghanistan. The Court first emphasised the extremely vulnerable condition of the applicant due to his age and personal circumstances, and that the authorities had failed to take into account his individual situation when detaining him (Rahimi v. Greece, para. 86). It then pointed out that the conditions of detention in the centre, particularly the accommodation, hygiene and infrastructure, had been so bad as to undermine the very meaning of human dignity (ibidem). Accordingly, and notwithstanding the detention had lasted for only two days, such conditions had in themselves amounted to degrading treatment in violation of Article 3.

A similar approach was taken by the Court the following year in the case of Popov v. France (ECtHR, judgment of 19.1.2012, applications nos. 39472/07 and 39474/07, Popov v. France), concerning the detention of a married couple from Kazakhstan and their two young children in a centre authorised to accommodate families. The Court found a violation of Article 3 only in relation to the children (who were detained for two weeks, in an adult environment with automatic doors to the rooms, which was dangerous for them, as well as with a strong police presence, with no activities to keep them occupied, combined with their parents' distress), but not their parents, as the fact that they had not been separated from their children, must have somewhat alleviated the feelings of

helplessness, distress and frustration related to the detention.

Such a trend has been subsequently confirmed in the cases of M.D. and A.D. v. France (ECtHR, judgment of 22.7.2021, application no. 57035/18, M.D. and A.D. v. France), where the Court found that the competent authorities had subjected a mother of Malian origin and her four-month-old daughter to treatment exceeding the level of severity required for Article 3 having regard to the very young age of the child, the material conditions of detention contrary to human dignity and the length of the detention (11 days); M.H. and others v. Croatia (ECtHR, judgment of 18.11.2021, applications nos. 15670/18 and 43115/18, M.H. and others v. Croatia), in which a violation of Article 3 was identified because the child applicants had been kept in an immigration detention centre with prison-type elements for more than two months, but the conditions were not ill-suited to the adult applicants; and recently Darboe and Camara v. Italy (ECtHR, judgment of 21.7.2022, application no. 5797/17, Darboe and Camara v. Italy), in which a violation of Article 3 was found because the applicant – a Guinean national who, upon arrival on a makeshift vessel in Italy, declared that he was 17 years old – was transferred to an adult reception centre, overcrowded and lacking in facilities and healthcare.

In line with this approach is also the judgment delivered in 2016 in the case of Khlaifia and others v. Italy (ECtHR, judgment of 15.12.2016, application no. 16483/12, Khlaifia and others v. Italy), concerning the detention and expulsion of three nationals of Tunisia attempting to reach Italian shores during the Arab Spring. In the case in question, the Court did not find a violation of Article 3 on the basis of the situation in the reception centre because the applicants' stay in the Lampedusa detention centre was only for a short period of 3-4 days, they were not in a vulnerable position – as they "were not asylum-seekers, did not have the specific vulnerability inherent in that status", "did not claim to have endured traumatic experiences in their country of origin", "they belonged neither to the category of elderly persons nor to that of minors", and "did not claim to be suffering from any particular medical condition (Khlaifia and others v. Italy, para. 194) – and the conditions of detention were not so severe as to undermine the very essence of their human dignity.

The ECtHR has used the notion of human dignity also in a line of cases concerning *de facto* detention in a transit zone at the border as a criterion to conclude that, in order to comply with Article 3 of the ECHR, State authorities must ensure that the living conditions of migrants confined there include also the availability of food and medical care. Indeed, in the case of R.R. and others v. Hungary (ECtHR, judgment of 2.3.2021, application no. 36037/17, R.R. and others v. Hungary), the Court found a violation of Article 3 because the conditions of the transit zone at the border of Hungary and Serbia exceeded the threshold of severity for a dependent repeat asylum seeker (because of his situation of extreme poverty) and his vulnerable pregnant wife and minors, confined for nearly four months. Indeed, on account of R.R.'s (the father) lack of access to food and his condition of indigency, the Court emphasised that the applicant could not leave the transit zone and as a result, was fully dependent on the Hungarian authorities for his most basic human needs. In reference to S.H. (the mother) and the children's complaint under Article 3, the ECtHR pointed to the obligations under the Reception Conditions

Directive that require the specific situation of minors and pregnant women to be taken into account, along with any special reception needs linked to their status throughout the duration of the asylum procedure. In the case in question, according to the Court, the physical conditions of the container were inadequate, and the lack of proper ventilation made the family suffer from the heat. Moreover, the facilities were unsuitable for children in the isolation section with no organised activities, no playground and no contact with other families or NGO staff. The provision of medical services was also problematic in respect of the lack of vaccination for the youngest child and the presence of police officers during medical consultation appointments, in particular gynaecological examinations (R.R. and others v. Hungary, para. 60).

Such an approach has been confirmed the following year, in the case of H.M. and others v. Hungary (ECtHR, judgment of 2.6.2022, application no. 38967/17, H.M. and others v. Hungary), regarding confinement of an Iraqi asylum-seeker's family in the Tompa transit zone. The Court found a violation of Article 3 on account of the living conditions for over four months of a vulnerable pregnant woman and her children, which attained the threshold of severity required to engage Article 3. Indeed, as regards the first applicant (husband and father), the ECtHR concluded that handcuffing him and attaching him to a leash (not being imposed in connection with lawful arrest or detention, and in the absence of any security risk warranting the measure) when accompanying his pregnant wife to hospital, was unjustified and diminished his human dignity.

Finally, it is worth noting that, more recently, the Court has invoked human dignity also as a parameter to determine that the procedure by which migrants are required to undergo searches may entail treatment contrary to Article 3 of the ECHR. In 2022, in Safi and others v. Greece (ECtHR, judgment of 7.7.2022, application no. 5418/15, Safi and others v. Greece), the ECtHR held that the conditions of body searches imposed on some migrant survivors of a shipwreck amounted to a violation of Article 3, as they constituted an attack on human dignity. Indeed, the applicants were taken to an open-air basketball court, ordered to undress together as a group, and subjected to a body search in front of the other survivors and a group of soldiers. In addition, as noted by the Court, they were in an exceedingly vulnerable position, having just survived a sinking at sea and the loss of some of their loved ones (Safi and others v. Greece, para. 196). Finally, the Court observed that the Government did not explain why the strip-search had been necessary to ensure safety. Nor did they argue that there had been any other public-policy considerations requiring the search to be carried out (Safi and others v. Greece, para. 195).

4. Conclusions

The analysis of the migration-related case-law of the European Court of Human Rights in which a violation of Article 3 of the ECHR has been found has shown that the position of the Court is that exposure to certain situations of material deprivation can be incompatible with human dignity, particularly in the context of detention and outside detention of migrants, and raise an issue under Article 3 of the ECHR. But, whilst

necessary, the gravity of migrants' living conditions alone is not sufficient to lead to a violation finding. Indeed, a significant part of the Court's reasoning for finding a violation of Article 3 of the ECHR is that migrants – and asylum seekers in particular – are members of a particularly underprivileged and vulnerable population group in need of special protection, coupled with other criteria such as the existence of state obligations towards such individuals, the length of the situation of material deprivation or – when it comes to the detention of migrant children – the age of the child detained. Notwithstanding this, human dignity plays a crucial role when the Court is called to assess material conditions under Article 3 of the ECHR in the context of migration, as it seems to justify an expansive function of migrants' rights, including access to a minimum level of social and economic rights, such as accommodation and access to sanitary and cooking facilities. In so doing, the Court contributes to emphasizing the interrelation between and indivisibility of human rights and it "merges", at least to some extent, the right not to be subjected to torture or degrading and inhumane treatment with some embryonic forms of socio-economic rights.

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