

THE LEGAL DEVELOPMENT OF THE NOTION OF HUMAN DIGNITY IN THE CONSTITUTIONAL JURISPRUDENCE

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ABSTRACT

The present paper, based on a comparative method, aims to analyze the dimension given by the constitutional courts of the United States of America, Germany, South Africa, Israel, France, Canada and Brazil, as well as in the regional systems of protection of Human Rights With respect to the concept and extension of the principle of the dignity of the human person, establishing approximations and critical analyzes on philosophical aspects that permeate its birth and its cultural, individual and jurisprudential assimilations. Finally, it is concluded that while dignity-based reputation is a universal virtue, its content largely depends on the social, religious, and traditional values of certain communities. **Keywords:** Dignity. Judicial Interpretation. Concept.

1 INTRODUCTION

Dignity has become an important principle in the constitutional and human rights discourse during the last few decades. After being incorporated in the Universal Declaration of Human Rights (UDHR) as a central constitutive value, it formed the basis of fundamental rights in the national constitutions with an increasing frequency. However, UDHR left open the issue regarding the scope and precise contours of the term, which has lengthy social and religious history. Despite the consensus on the general and abstract notion of the inviolability and inner worth of human being, there is disagreement on the legal status of dignity in national jurisdictions. The amorphous and metaphysical nature of the concept of human

dignity opened the door for criticism in the sense that it fails to meet the standards of consistent and coherent legal practice as being a good source for judicial value imposition and unprincipled decision making.¹ The critics also argue that using the term dignity in the contexts of other fundamental rights makes the concept superfluous while trivializing dignity with every human right.²

While the legal practitioners focused on the scope and meaning of human dignity for the principled resolution of conflicting constitutional values, legal and political scholars attempted to conceptualize and find the universal common core of

1 GLENSY, Rex D. The right to dignity. *Columbia Human Rights Law Review*, v. 66, p. 65-142, 2011.

2 ADDIS, Adeno. The role of human dignity in a world of plural values and ethical Commitments. *Netherlands Quarterly of Human Rights*. v. 31, pp. 403-444, 2013.

this very broad and at times ambiguous notion. Thus, it has become a topic for ongoing academic debates whether human dignity is a basis for all human rights, whether it is general principle of law, whether it is directly applicable subjective right or it serves as an interpretive tool assisting judges in their endeavor to solve constitutional value conflicts. Apparently, it is implausible to provide a comprehensive definition of dignity outside the factual contexts. The wiser approach to determine the scope and meaning of the concept would be its case-by-case analysis. Furthermore, social, political and economic conditions exert significant influence on the judicial interpretation of dignity. The judges' understanding of the notion informs its interpretation in different legal and political systems.

This paper demonstrates the legal development of the notion of human dignity in the constitutional jurisprudence of various countries arguing that some aspects of the concept attained universal acceptance. Despite its inspirational value, the concept of human dignity serves significant legal functions encapsulating various dimensions of fundamental rights such as protection from humiliating treatment and anti-discrimination, personal integrity and freedom of choice, privacy and minimum conditions for decent life, etc. Therefore, this article turns to the analysis whether dignity is part of another concept or it has an independent legal standing, which applies in different contexts. The courts in the United States, Germany, South-African Republic and India used the term dignity in these contexts with different vigor and legal status. The use of the term dignity in different legal contexts implicates both private and public law issues creating confusion regarding the theoretical foundations and consistent application of the concept.

While the universal dimension of dignity generally refers to the intrinsic worth of all human beings, the culturally relative dimension relates to the external aspects of behavior. Thus, I distinguish between two dimensions of dignity focusing on its universal and culturally relative aspects, the one obtaining by birth as a human being and the other acquiring by certain behavior in diverse social environments. Furthermore, while it is not the purpose of this article to provide a comprehensive definition of human dignity, it aims to clarify the conceptual confusion regarding the complicated judicial function of dignity in modern constitutional law.

2 LEGAL FOUNDATIONS OF DIGNITY

The legal development of the concept paved its way in the beginning of the twentieth century and received its momentum after incorporation in the UDHR. The open-ended nature of the concept of human dignity allowed the people with different ideological backgrounds agree with the term without compromising their understanding of the theoretical basis of human rights whether its origins founded on religious or natural rights ground. According to Jacques Maritain, one of the drafters of the UDHR, the competing ideological camps of the time viewed human dignity as an underlying value for their preferred rights—collective control of the market and national resources versus free-market economy. Thus, human dignity became a life-jacket for a compromise between different ideological and political thoughts.

Additionally, the International Covenant on Civil and Political Rights (ICCPR) incorporates the inherent concept of dignity recognizing its universal nature. The ICCPR states that “rights derive from the inherent dignity of the human person.” From the language of the document one can see the function of dignity as a basis for all human rights. However, an unequivocal or implied meaning of inherent dignity in both international and national documents sheds little light on the scope of its application and legal status. Neomi argues that dignity linked closely with negative rights, which are incorporated by the ICCPR in the context of the earliest “first generation” rights.³ For example, the liberty based dignity respects individual freedom from the state interference or freedom of speech should be protected despite the fact whether the content of the speech is dignified or not.⁴ The next section will demonstrate how the constitutional courts invoke dignity relying on its multiple meanings and protecting different values.⁵

The modern constitutional law rests heavily on the Kantian vision of dignity making the inherent dignity for every individual a legal principle. Thus, the modern concept of dignity discards the traditional notion viewing dignity as a privilege

3 RAO, Neomi. Three Concepts of Dignity In Constitutional Law. *Notre Dame Law Review*, Indiana, v. 86, pp. 183-271, 2013. p. 203.

4 RAO, Neomi. Three Concepts of Dignity In Constitutional Law. *Notre Dame Law Review*, p. 205.

5 RAO, Neomi. Three Concepts of Dignity In Constitutional Law. *Notre Dame Law Review*, p. 189.

for nobles. Instead it requires the states to respect equal dignity of individuals.⁶ Abstract constitutional principles reflect the social and political developments of the time. The postwar world created convenient environment for the penetration of human dignity into the constitutional framework of a significant number of states, particularly those that were responsible for the atrocities and were defeated in the war, e.g. Germany, Italy and Japan. Unsurprisingly, human dignity became a fundamental value for those who undergone such an untenable trauma as a consequence of their authorities' nonhuman policies. These countries went further to fill the dignity rights with considerable substantive content.⁷

The German constitutional practice exerted a great influence not only on drafting the constitutions of central and Eastern Europe but also beyond the European continent, especially on drafting the South African constitution after apartheid and the Basic Law of Israel. This influence explains the prominent role of dignity in their respective constitutions.⁸ While the academic debate in Germany focused on the legal status of dignity in the Basic Law the Constitutional Court had little difficulty to apply it. The Court in all cases invoked the alleged violation of human dignity along with other fundamental rights so that the Court should not have to decide the admissibility of the case based on the status of human dignity as an individual right.⁹ Nevertheless, in German constitutional law dignity has the highest legal status with the power to limit other fundamental rights. In no case dignity may be balanced with other conflicting fundamental right. Some characteristic aspects of dignity in German constitutional law need particular consideration, e. g. the positive dimension of fundamental rights and the communitarian aspect of dignity. The positive dimension supposes affirmative action from the state in addition to its negative obligation not to intervene. The analysis of the jurisprudence of the Federal Constitutional Court in the next section

will show more clearly the prominent place of dignity in German constitutional law. Since modern concept of human dignity has deep roots in European cultural values the examination of the U.S. constitutional and some Latin American courts' jurisprudence would be useful to reveal whether there are significant differences in understanding of dignity in different continents or whether there are some characteristics that constitute a universal core of dignity.

Even the constitutional courts of countries such as United States, France and Canada, whose constitutions do not expressly incorporate dignity, invoked the term in relation to fundamental rights. In the United States the founding fathers of the constitution referred to dignity even long before the invocation of the term by the court. Thomas Jefferson said that arbitrary discrimination based on "birth or badge," may deprive persons of their dignity.¹⁰ Similarly, Alexander Hamilton held that a constitutional democracy was the "safest course for your liberty, your dignity, and your happiness."¹¹ However, it should be noted that the prevailing concept of dignity in the eighteenth and nineteenth centuries in the United States was limited only to white men and had a long way to pass to recognize the equal worth of all individuals.¹²

The role of human dignity in the U.S constitutional law is relatively limited because the Court failed to bestow it an independent weight. This practice could be explained both by the absence of specific constitutional provision of dignity and by reluctance of the Court "to create" a new fundamental right implicating controversial moral and political issues. Nevertheless, the use of dignity in the contexts of different constitutional amendments in the United States invoked criticism for application of the concept of human dignity in that it lacks a coherent rationale for fundamental rights in the U.S. Constitutional jurisprudence.¹³

Glensy rightly counters that "dignity is routinely invoked to make extremely foundational points that range from the notion that the right to dignity is the underlying source of some of the

6 RAO Neomi. On the use and abuse of dignity in constitutional law. *Columbia Journal of European Law*, New York, v. 2, n. 2, pp. 201-256, 2008.

7 GLENSY, Rex D. The right to dignity. *Columbia Human Rights Law Review*, p. 96.

8 MCCRUDDEN, Christopher. Human dignity and judicial interpretation of human rights. *The European Journal of International Law*, Firenze, v. 19, n. 4, p. 655-724, Sep.2008. p. 673.

9 MCCRUDDEN, Christopher. Human dignity and judicial interpretation of human rights. *The European Journal of International Law*, p. 681.

10 HENRY, Leslie Meltzer. The jurisprudence of dignity. *University of Pennsylvania Law Review*, p. 200.

11 HENRY, Leslie Meltzer. The jurisprudence of dignity. *University of Pennsylvania Law Review*, p. 200.

12 HENRY, Leslie Meltzer. The jurisprudence of dignity. *University of Pennsylvania Law Review*, p. 200.

13 GLENSY, Rex D. The right to dignity. *Columbia Human Rights Law Review*, p. 92.

most important rights in the Bill of Rights and the Reconstruction Amendments.”¹⁴ Yet, a number of U.S. Scholars argue that human dignity is inherent in the U.S. Constitutional law. Maxime Goodman considers human dignity as a core value underlying expressly written and un-enumerated U.S. constitutional rights based on his extensive analysis of the U.S. Supreme Court decisions. Furthermore, he argues that the court should apply it in a more consistent way.¹⁵ Gerald Neuman also comes to the same conclusion that human dignity is inherent in the U.S. Constitutional system, especially in the Fourteenth Amendment. Louis Henkin observes that even though the Framers’ conception of human dignity was “incomplete” it is implicit in the Constitution. Nevertheless, the U.S. conception of dignity falls behind the European standards of dignity.¹⁶ Henkin’s explanation is very convincing because the U.S Constitution is relatively old and human dignity didn’t have its current strength and vigor when the constitution was adopted.¹⁷

Furthermore, Leslie Meltzer Henry argues that the role of human dignity gradually increases in the U.S. constitutional jurisprudence. This is especially true for the Roberts Court. Even the more conservative Justices began to invoke dignity.¹⁸ He argues that the Court’s doctrinal approach of using dignity changed over time resulting in changing conceptions of dignity, e.g. in abortion jurisprudence.¹⁹

The Court’s use of dignity in more than hundred judicial opinions in just last two decades attests the increasing importance of dignity in the U.S constitutional law.²⁰ One may argue that the Court’s increasing use of the term does not necessarily indicate its legal importance. However, Leslie Meltzer Henry correctly states that “[t]he Court’s repeated appeals to dignity, particularly

in majority opinions, appear to parallel its greater willingness to proffer dignity as a substantive value animating our constitutional rights.”²¹

Doron Shultziner and Guy Carmi provide an interesting comparative analysis of the legal development of the concept at the national level after the adoption of the UDHR. According to their analysis, only five states incorporated human dignity in their constitutions in the period ranging from 1900 to 1944.²² Since then the number of countries reached 162. This fact alone indicates the increasing legal importance of human dignity. They argue that the increasing use of the term is not exclusively connected with the spread of democracy since one can find human dignity provision in the constitutions of nondemocratic countries as well. 97 countries out of 162, use the term in a broad-declarative way in the preambles or fundamental principles of their national constitutions.

The examination of the texts of the constitutions also reveals the important differences how the dignity is incorporated in the texts²³. While in some documents dignity is mentioned in the preamble or as a general principle, in others it is used as a subjective fundamental right.²⁴ McCrudden argues that these differences indicate the “moral viewpoint” that varies from region to region.²⁵ Generally, fundamental principles in the constitutions have an interpretive function for articulating specific rights or governmental policies. For example, in Brazil’s constitution a separate paragraph of an article declares the dignity of the individual as a foundation of the republic. Thus, human dignity, in preambles or general principles is mentioned with reference to justice, equality, liberty and solidarity serving moral justification for concrete rights.

An important distinction between the general principles and specific rights is the subject-

14 GLENSY, Rex D. The right to dignity. *Columbia Human Rights Law Review*, p. 93.

15 RAO Neomi. On the use and abuse of dignity in constitutional law. *Columbia Journal of European Law*. p. 213.

16 RAO Neomi. On the use and abuse of dignity in constitutional law. *Columbia Journal of European Law*. p. 213

17 RAO Neomi. On the use and abuse of dignity in constitutional law. *Columbia Journal of European Law*. p. 213

18 HENRY, Leslie Meltzer. The jurisprudence of dignity. *University of Pennsylvania Law Review*, p. 169.

19 HENRY, Leslie Meltzer. The jurisprudence of dignity. *University of Pennsylvania Law Review*, p. 170.

20 HENRY, Leslie Meltzer. The jurisprudence of dignity. *University of Pennsylvania Law Review*, p. 178.

21 HENRY, Leslie Meltzer. The jurisprudence of dignity. *University of Pennsylvania Law Review*, p. 181.

22 SHULTZINER, Doron; CARMI, Guy. Human dignity in national constitutions: functions, promises and dangers. *American Journal of Comparative Law*, Washington/DC, n. 62, p. 461-490, 2014. p. 464.

23 PELE, Antonio. La dignidad humana: modelo contemporáneo y modelos tradicionales. *Revista Brasileira de Direito*, [S.l.], v. 11, n. 2, p. 7-17, dez. 2015. Disponível em: <<https://seer.imed.edu.br/index.php/revistadedireito/article/view/892>>.

24 MCCRUDDEN, Christopher. Human dignity and judicial interpretation of human rights. *The European Journal of International Law*. p. 675.

25 MCCRUDDEN, Christopher. Human dignity and judicial interpretation of human rights. *The European Journal of International Law*. p. 722.

tive dimension of the concrete rights. Subjective rights are directly applicable legal norms as opposed to objective principles or constitutional values ingrained in the preambles or fundamental principles. However, Neomi Rao argues that there is significant difference between rights and principles, which do not have a specific content but serve as an interpretive tool. Specific rights set up concrete conditions protecting an individual from state interference.²⁶ A note of caution should be made regarding the use of dignity as a general principle since fundamental constitutional rights act as principles as well.

Dworkin argues that it would be a mistake to call the general clauses of the Constitution vague. It is vague if one looks at it as a specific conception. Dworkin's theory of constitutional interpretation is based on three main pillars: principles, rights, and values. He draws a line between specific conceptions and general concepts.²⁷ Specific conceptions evolve over time which should test their validity under more general principles.²⁸ For example, if the Supreme Court is to decide whether or not capital punishment is 'cruel and unusual' it should look at the Amendment as a general principle or concept rather than a specific conception. If the Court looks at the Eighth Amendment²⁹ as a specific conception it will say that when the amendment was adopted capital punishment was not challenged and therefore it is constitutional. But if the drafters view this constitutional amendment as a general concept they will argue that the values have changed over time and what was not cruel before might well become cruel under the standards of these days. On the other hand, if one interprets the clause as a specific conception and still argues that it should be adjusted to the present-day conditions, then the interpreter is changing the Constitution.³⁰

While the standard offered by Dworkin's is clear enough, his theory offers more than that. He provides a useful insight into the constitutional adjudication since he regards a constitution as a general framework in terms of principles

and moral values which enable the constitutional adjudicator to reach rationally sound decisions in hard cases. Axel Tschentscher further elaborated on the issue arguing that conceiving of most of the constitutional provisions as principles opens the door for balancing which creates a shield for the Federal Constitutional Court from the effective criticism of its decisions.³¹ Presenting most of the constitutional provisions as principles everything can become a subject for balancing.³² The theory that regards the fundamental rights as principles lacks any well-defined structure permitting a constitutional court to exercise jurisdiction over so many issues, and in so doing becoming a "constitutionalization trap."³³ However, the balancing is the only viable method that can solve the constitutional disputes between two competing rights.

As a theoretical basis and justification for the balancing method Alexy treats constitutional rights as principles rather than mere rules. Indeed, it's not hard to notice that Alexy is inspired by Dworkin's concept of fundamental rights who views fundamental rights as general principles. But the optimization of principles differs from Dworkin's theory.³⁴ Alexy argues that principles are distinguished from rules not by their level of generality but by their qualitative value. While the rules are norms requiring fulfillment of an action as precisely as prescribed by the rule the principles are norms requiring the fulfillment of an action to the greatest possible extent in view of the legal and factual possibilities.³⁵

Furthermore, dignity serves as a basis of all fundamental rights and moral justification for the courts' reasoning. While the courts attach different weight to constitutional principles in different jurisdictions, the general constitutional principles yield more specific rules in concrete cases in all jurisdictions. More generally, the

26 RAO Neomi. On the use and abuse of dignity in constitutional law. *Columbia Journal of European Law*. p. 223.

27 DWORKIN, Ronald. *Taking rights seriously*. Cambridge: Harvard University Press, 1977. P. 134-136.

28 DWORKIN, Ronald. *Taking rights seriously*. p. 134-136

29 U.S. CONST. amend. VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

30 DWORKIN, Ronald. *Taking rights seriously*. p. 136.

31 TSCHENTSCHER, Axel. Interpreting Fundamental Rights: Freedom versus Optimization. *Social Science Research Network*. 2012. Disponível em: <<http://ssrn.com/abstract=1630393>>. Access in: 05 may 2016.

32 TSCHENTSCHER, Axel. Interpreting Fundamental Rights: Freedom versus Optimization. *Social Science Research Network*. p. 7.

33 TSCHENTSCHER, Axel. Interpreting Fundamental Rights: Freedom versus Optimization. *Social Science Research Network*. p. 7.

34 TSCHENTSCHER, Axel. Interpreting Fundamental Rights: Freedom versus Optimization. *Social Science Research Network*. p. 4-6.

35 ALEXI, Robert. *A theory of constitutional interpretation*. Oxford: Oxford University Press, 2004, p.47.

courts invoke dignity as an interpretive tool in interpreting the catalogue of human rights through the lens of dignity.³⁶ One may argue that dignity constitutes the core of such fundamental rights as equality, liberty and integrity, which helps to define the meaning of those rights in concrete cases. Hence, dignity helps the courts to find solution especially in cases where there are gaps in the legal system or the conflicting fundamental rights lead to either direction.³⁷ Additionally, human dignity acts as a goal or supreme value for the entire constitution. These goals are concretized by reference to human dignity in specific articles in an effort to seek concrete instructions for their implementation and guide the authorities in all their actions.

The use of different language for incorporating dignity in the constitutions opens room for misunderstanding of the general legal function of human dignity. Employing dignity in different contexts such as personal integrity, labor-related and welfare issues is yet another source for confusion. While in many constitutions dignity relates to conditions of detention, some constitutions employ the term for organization of work in the conditions of dignity, e.g. the constitution of Portugal.³⁸ The constitutions of other states view dignity as a guarantee for provision of social benefits for dignified life, e.g. the constitution of Finland. For some countries dignity guides the implementation of welfare policies for people with special needs, e.g. the constitutions of Switzerland and Guatemala.³⁹

Doron Shultziner and Guy Carmi conclude that overall 141 states employ human dignity in articles other than preambles or general principles, 52 use the term in specific articles. 26 states use the term regarding the conditions of detention, 23 states for labor conditions and 21 for welfare issues. Doron Shultziner and Guy Carmi argue that most of the countries that use dignity in welfare context are developing states that lack

36 MCCRUDDEN, Christopher. Human dignity and judicial interpretation of human rights. *The European Journal of International Law*. p. 681.

37 BARROSO, Luis Roberto. *Here, there and everywhere: Human Dignity in contemporary law and in the transitional discourse*. Boston College International and Comparative Law Review. Boston, Vol. 35, pp. 331-393, 2012. p. 331.

38 The constitutions of 23 countries mention the term in labor-related context.

39 SHULTZINER, Doron; CARMI, Guy. Human dignity in national constitutions: functions, promises and dangers. *American Journal of Comparative Law*, p. 480.

sufficient resources for provision of social benefits and therefore the dignity provisions have declarative nature for them. Conversely, those countries that fail to view dignity in welfare context have social-welfare policies in place.⁴⁰

Hence, the social-welfare rights impose positive obligation on the state to guarantee decent conditions of work, housing, healthcare and environment. Despite the fact that most of these rights in national constitutions are not justiciable rights they guide the implementation of state social policies in most of the modern European constitutions. The modern constitutions go beyond the theory of political order and view individual rights in a broader social context. Neomi Reo argues that this tendency is deeply rooted in European philosophical tradition, especially in Germany.⁴¹

3 SELECTED CONCEPTS OF DIGNITY AND CRITICISM

Political theorists and legal scholars have long debated on the various concepts of human dignity. However, the scholars could not reach agreement on any plausible meaning or a predominant definition of the term in either practical or theoretical contexts.⁴² However, the nature of human dignity is best explained by the relationship of an individual with society or the state in different cultural, social and political settings. Adeno Addis argues that any defensible notion of human dignity should reflect different social relationships in the sense what it means to human beings in different cultures.⁴³ He states that any plausible notion of dignity should be independent from any particular philosophical or religious concept of dignity in order to represent all cultural and social views reflecting cultural differences and systems. This notion of dignity will solve the conflict between universalism and

40 SHULTZINER, Doron; CARMI, Guy. Human dignity in national constitutions: functions, promises and dangers. *American Journal of Comparative Law*, p. 480.

41 RAO Neomi. On the use and abuse of dignity in constitutional law. *Columbia Journal of European Law*. p. 221.

42 SHULTZINER, Doron; CARMI, Guy. Human dignity in national constitutions: functions, promises and dangers. *American Journal of Comparative Law*, p. 471.

43 ADDIS, Adeno. The role of human dignity in a world of plural values and ethical Commitments. *Netherlands Quarterly of Human Rights*. p. 428.

relativism in the sense that human beings' own dignity for the sole fact of being humans. Instead of prescribing any comprehensive religious or philosophical doctrine, the overlapping consensus across various cultures can be reached by defining human dignity with the most fundamental rights, which are necessary for the minimal respectable relationship between individuals and states.⁴⁴ The consensus may not only be a product of actual practice but also reflect the declared commitments of the states because actual practice not always complies with public statements⁴⁵. A good example of this is the gap between public statements and actual practice regarding torture. Governments that exercise torture nevertheless condemn or deny such practice.

Most of the theories associate dignity with physical, social and mental integrity of an individual that supplies the core element of dignity in terms of freedom of choice and individuals' capacity to shape their own environment. Matthias Mahlmann claims that the attractive pathos of dignity may create "normative danger."⁴⁶ Justice Scalia echoes this criticism arguing that the use of dignity language does nothing but to decorate and conceal the value choices of judges. For the critics the broad nature of dignity serves as "an empty rhetorical shell" affected by the change of local cultures and traditions.⁴⁷

Despite the apparent differences in understanding dignity, McCrudden identifies at least a common core to the idea of dignity. According to McCrudden, the minimum core of dignity contains three elements—1) the intrinsic worth of all human beings, 2) the recognition and respect of the intrinsic worth by others, and 3) the states' duty to protect human rights.⁴⁸ McCrudden argues that despite the existing consensus on the minimum core, there are significant political and philosophical differences in understanding any of the three elements of the core of the concept.⁴⁹

44 ADDIS, Adeno. The role of human dignity in a world of plural values and ethical Commitments. *Netherlands Quarterly of Human Rights*. p. 428.

45 RODRIGUEZ-BLANCO, Veronica. Law Actually: Practical Reason, Anarchism and the Legal Rule-Compliance Phenomenon. *Revista Brasileira de Direito*, vol. 11, n.º. 1, pp. 7-19, 2015.

46 GLENSY, Rex D. The right to dignity. *Columbia Human Rights Law Review*, p. 138.

47 GLENSY, Rex D. The right to dignity. *Columbia Human Rights Law Review*, p. 138.

48 MCCRUDDEN, Christopher. Human dignity and judicial interpretation of human rights. *The European Journal of International Law*, p. 679.

49 MCCRUDDEN, Christopher. Human dignity and

In particular, they differ as to what the intrinsic worth consists in and in their understanding about the kinds of treatment that offend the intrinsic worth.⁵⁰

The lack of consensus reflects the ideological differences in more general discourse of human rights regarding its universal or culturally relative nature. One may even go further to argue that inclusion of such broad principles as dignity in international or domestic legal texts "camouflages profound disagreement" on their judicial application and ideological basis.⁵¹ Supporting this claim McCrudden refers to Lord Hoffman who held: "of course we share a common humanity. [...] Nevertheless [...] the specific answers, the degree to which weight is given to one desirable objective rather than another, will be culturally determined. Different communities will, through their legislature and judges, adopt the answers which they think suit them."⁵² Thus, McCrudden concludes that the practical application of human dignity along with other human rights largely depends on its culturally relative nature, local politics and values, which result in differing and at times conflicting conceptions.⁵³

Neomi offers another concept of dignity consisting of three specific conceptions. First, inherent dignity requires protection from arbitrary interference by the state.⁵⁴ Whereas, the positive conception includes welfare or social protection component demanding some affirmative action and progressive regulations by the state.⁵⁵ The third conception in this scheme is the dignity of recognition that differs radically from the first and second conceptions. The recognition de-

judicial interpretation of human rights. *The European Journal of International Law*, p. 680.

50 MCCRUDDEN, Christopher. Human dignity and judicial interpretation of human rights. *The European Journal of International Law*, p. 680.

51 MCCRUDDEN, Christopher. Human dignity and judicial interpretation of human rights. *The European Journal of International Law*, p. 698.

52 MCCRUDDEN, Christopher. Human dignity and judicial interpretation of human rights. *The European Journal of International Law*, p. 698. See HOFFMANN, Lord. Human rights and the house of lords. *The Modern Law Review*, Oxford, v.. 62 , pp. 159-167, 1999.

53 MCCRUDDEN, Christopher. Human dignity and judicial interpretation of human rights. *The European Journal of International Law*, p. 698

54 RAO Neomi. On the use and abuse of dignity in constitutional law. *Columbia Journal of European Law*, p. 202.

55 RAO Neomi. On the use and abuse of dignity in constitutional law. *Columbia Journal of European Law*, p. 222.

mands respect from the society and the state for “the unique identity of this individual or group, their distinctness from everyone else.”⁵⁶ According to Neomi, the third conception of recognition is closely connected to the idea of the important role of community for the development of individual identity.⁵⁷

Leslie Meltzer Henry identifies five categories where the Court applies institutional based dignity to protect “heightened respect” of the U.S. states, equality based dignity to support its anti-discrimination arguments, liberty based dignity to protect privacy in terms of individual choices and intimate sexual relationships, integrity based dignity to defend both reputation and bodily integrity from humiliating treatment and “collective virtue” as dignity to protect decent society in the context of death penalty and partial-birth abortion.⁵⁸ *Equality as dignity conception*, in turn consists of three elements.⁵⁹ First element presents the universal intrinsic worth of all human beings regardless of social status. Second, she distinguishes between *institutional status as dignity* and *equality as dignity*. As opposed to institutional status as dignity, equality as dignity is permanent and an individual can never be deprived of it. The third element relates to the relationship between individuals requiring equal respect for all people.⁶⁰

The judicial invocation of the concept of human dignity raises two important questions—the failure to provide a specific guidance because of the variety of existing concepts about the meaning and scope of human dignity, and the connection of dignity with two sides of the equally important conflicting rights, e.g. liberty and equality, freedom of speech and privacy, etc. Critics argue that dignity alone cannot resolve such a conflicting situation. In practice the conflict is solved by balancing based on the concrete factual situation and particular cultural values.⁶¹

56 RAO Neomi. On the use and abuse of dignity in constitutional law. *Columbia Journal of European Law*, p. 244-245.

57 RAO Neomi. On the use and abuse of dignity in constitutional law. *Columbia Journal of European Law*, p. 244-245

58 RAO Neomi. On the use and abuse of dignity in constitutional law. *Columbia Journal of European Law*, p.190.

59 HENRY, Leslie Meltzer. The jurisprudence of dignity. *University of Pennsylvania Law Review*, p. 202.

60 HENRY, Leslie Meltzer. The jurisprudence of dignity. *University of Pennsylvania Law Review*, p. 202-203.

61 RAO Neomi. On the use and abuse of dignity in

The critics ask what is role of dignity if not just a rhetorical gloss?⁶² Some scholars, such as Robert Post, join this criticism and warn against the inevitable confusion by linking dignity with other rights. For example, in the context of dignity’s connection with equality, he argues that the objective of anti-discrimination law should be eliminating harmful social injustice than the protection of human dignity.⁶³ Glensy counters that the link between dignity and other rights helps to draw the legal framework of dignity outside the factual setting because dignity can be linked in any factual situation. In this context, dignity functions as an interpretive tool the philosophical foundations of which can be found in the Kantian theory where the autonomy served the theoretical basis for dignity connecting it with the modern concept of liberty.⁶⁴ The next section will turn to the analysis of judicial interpretation of human dignity to explore the use of the term in legal practice.

4 JUDICIAL INTERPRETATION

The content of human dignity in the constitutions varies from country to country. The widespread incorporation of dignity in national constitutions, however, conceals the disagreement over scope and meaning and government programs for implementation of human dignity.⁶⁵ As with other broad constitutional principles the judiciary decides the meaning of human dignity by challenging or approving specific governmental policies in relation to human dignity. Yet, this is another source for disagreement as to whether the judiciary or the elected representatives of people are in a better position to decide on the validity of governmental programs based on the constitutional value of human dignity, especially programs concerning socioeconomic issues. Doron Shulztiner and Guy Carmi doubt that human dignity may guide the activities of the three

constitutional law. *Columbia Journal of European Law*, p. 211.

62 RAO Neomi. On the use and abuse of dignity in constitutional law. *Columbia Journal of European Law*, p. 211.

63 GLENSY, Rex D. The right to dignity. *Columbia Human Rights Law Review*, p. 133.

64 GLENSY, Rex D. The right to dignity. *Columbia Human Rights Law Review*, p. 133

65 BOTHA, Henk. Human dignity in comparative perspective. *Stellenbosch Law Review*, v. 20, pp. 171-220, 2009.

branches of government to determine the validity of complex socioeconomic policies based on concrete standards.⁶⁶ They argue that incorporating human dignity as general value and individual right in constitutions put the judiciary in a difficult situation⁶⁷. The very broad nature of human dignity will enable judges to interpret the “omnipotent” right without limits implicating complex political issues and competing claims.⁶⁸ This question turns upon the legitimacy of judicial review. It is not the purpose of this article to dwell at length on the validity of judicial review. Yet, it would be sufficient to mention Justice Marshall’s words that “it is emphatically the province and duty of the judicial department to say what the law is.”⁶⁹ Judges have been deciding on complicated issues based on similar broad constitutional values and principles such as liberty and equality for a long time. German constitutional practice responds to the skepticism concerning the legal functions of human dignity by solving complex legal issues without any hesitation and reference to conflicting ideological debates about the role of human dignity.

The legal evolution of the meaning of human dignity depends on several factors such as the political and legal system, the power of judicial review and legal tradition. The courts in some countries may even step back from their previous practices arguing that “human dignity is an abstract and subjective notion that [...] cannot only become confusing and difficult to apply; it has also proven to be an additional burden on equality claimants, rather than the philosophical enhancement it was intended to be.”⁷⁰ However, these few examples could not affect the further evolution of the concept of human dignity and its application in concrete cases by the judiciary.

Christopher McCrudden observes that the examination of the decisions concerning human dignity by the courts of different countries

demonstrates that human dignity is culturally relative. Dignity is informed by the local customs, politics and traditions resulting at times in conflicting conceptions.⁷¹ While this observation could similarly apply to liberty, equality, or due process, Glency rightly counters that McCrudden fails to explore the related contours of human dignity despite the differing application of the concept by the courts of various legal systems.⁷² Instead, comparative analysis should focus on whether a coherent theory could be developed though the synthesis of the courts’ decisions. The comparative analysis of this section will focus on those aspects of dignity that found universal acceptance in the jurisprudence of the most prominent constitutional courts across the world.

A. THE UNITED STATES

The U.S. Supreme Court referred to the concept of human dignity in many occasions especially in areas of personal integrity, privacy and sexual relationship. The Court invoked dignity in cases involving the First, Fourth, Fifth, Sixth, Eighth, Ninth, Eleventh and Fourteenth Amendments even in the absence of express wording of the concept.⁷³ According to some studies the Court invoked the term in more than nine hundred cases over the 220 years.⁷⁴ The references to dignity embraced the idea of dignity in its meaning of intrinsic worth for all human beings regardless of their mental capacity or achievements connoting that every human being possess equal human dignity.⁷⁵ However, these references were inconsistent enough to develop a firm constitutional doctrine of human dignity.

Apparently, the Kantian concept of dignity exerted much influence on those Justices who invoked dignity in connection with constitutional provisions that embrace the idea of autonomy and personal integrity.⁷⁶ While the Supreme

66 SHULTZINER, Doron; CARMI, Guy. Human dignity in national constitutions: functions, promises and dangers. *American Journal of Comparative Law*, p. 480.

67 STAFFEN, Márcio Ricardo. Direito global: humanismo e direitos humanos. *Revista do Mestrado em Direito da Universidade Católica de Brasília*, vol. 10, nº. 1 Jan/jun, p. 178-208, 2016.

68 SHULTZINER, Doron; CARMI, Guy. Human dignity in national constitutions: functions, promises and dangers. *American Journal of Comparative Law*, p. 480.

69 *Marbury v. Madison*, 5 U.S. 137 (1803).

70 *Canadian Supreme Court R v. Kapp* (2008).

71 MCCRUDDEN, Christopher. Human dignity and judicial interpretation of human rights. *The European Journal of International Law*, p. 719.

72 GLENSY, Rex D. The right to dignity. *Columbia Human Rights Law Review*, p. 85.

73 HENRY, Leslie Meltzer. The jurisprudence of dignity. *University of Pennsylvania Law Review*, p. 172.

74 HENRY, Leslie Meltzer. The jurisprudence of dignity. *University of Pennsylvania Law Review*, p. 178.

75 RAO Neomi. On the use and abuse of dignity in constitutional law. *Columbia Journal of European Law*, p. 187.

76 GLENSY, Rex D. The right to dignity. *Columbia Human Rights Law Review*, p. 86.

Court hesitated to provide a definition of human dignity, it linked dignity to those constitutional amendments that were deemed fundamental. Leslie Meltzer Henry argues that the content of dignity is not static and it changes over time based on cultural, technological, political and societal changes. The meaning of dignity reflects the evolving attitudes and beliefs.⁷⁷ For example, in the 1940th, the U.S Supreme Court changed its focus from almost only institutional based dignity protection to personal or collective types of dignity.⁷⁸ According to Leslie Meltzer Henry, another example regarding the shift of Court's policies concerned the partial-birth abortion case where the Court in *Gonzales v. Carhart* upheld the constitutionality of the law prohibiting late abortions on the ground that the law expresses "respect for the dignity of human life."⁷⁹ Leslie Meltzer Henry echoes Daron Shultziner who explains the change in the content of human dignity due to political or constitutional evolution over time.⁸⁰

In its First Amendment jurisprudence the Court linked dignity with autonomy of the individual.⁸⁶ In *Cohen* the Court reasoned that "[d]ignity is about choice, speaking is an aspect of choice, and restrictions on speaking are therefore deprivations of dignity."⁸¹ The Court invoking dignity under the Sixth Amendment argued that the personal choices of self-representation of defendants with some mental incapacity would demean their dignity.⁸² The case concerned a defendant who suffered from schizophrenia and asked to represent himself in the trial. Like in cases related to physician-assisted ending of life the Court adopted positive protecting approach of dignity.⁸³

The U.S. Supreme Court invoked dignity under the search and seizure protection of the Fourth Amendment related to *individual integrity based dignity*. Justifying the rationale of "the knock-and-announce rule" Justice Scalia linked dignity with

privacy. He observed that: "[t]he knock-and-announce rule protects those elements of privacy and dignity that can be destroyed by a sudden entrance [...] The brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed."⁸⁴ Similarly, Justice Frankfurter writing the majority opinion in *Rochin v. California* regarding forcibly pumping evidence from a narcotics dealer's stomach described the police conduct "so brutal and so offensive to human dignity."⁸⁵ The Court's Fourth Amendment jurisprudence demonstrates the Court's use of dignity in light of intrinsic worth of every human being where the privacy equally applies to each individual.⁸⁶

In its Eighth Amendment's jurisprudence related to *individual integrity based dignity* in terms of prison overcrowding the Court reasoned that prisoners "retain the essence of human dignity inherent in all persons [...] [that] animates the Eighth Amendment prohibition against cruel and unusual punishment" despite of their deprivation of liberty.⁸⁷ The Court held that lack of basic subsistence and minimum conditions for decent life in a state facility contradicts the concept of human dignity in a civilized society.⁸⁸ The remarkable example under the Eighth Amendment occurred in *Hope v. Pelzer*,⁸⁹ where the Court argued that tying a prisoner to a hitching post without giving him water for certain period of time and not allowing him to go to the toilet was a violation of the Eighth Amendment. The Court opined that degrading treatment offends human dignity focusing on the humiliating nature of the punishment. One may argue if human dignity is the underlying value of the Eighth Amendment then why the Court's reference to dignity in relation to cruel and unusual punishment is so inconsistent and random.⁹⁰ The same question relates to the Fourth Amendment prohibiting unreasonable search and seizure. However, the reference to human dignity in connection to unreasonable search and seizure is somewhat more frequent where the Court reasoned that the Amendment's

77 HENRY, Leslie Meltzer. The jurisprudence of dignity. *University of Pennsylvania Law Review*, p. 189.

78 HENRY, Leslie Meltzer. The jurisprudence of dignity. *University of Pennsylvania Law Review*, p. 203.

79 *Gonzales v. Carhart*, 550 U.S. 124 (2007).

80 SHULTZINER, Doron. Human Dignity-Functions and Meanings. *Global Jurist ToPics*, a. 1, v. 5, 2003.

81 SCHAUER, Frederick. Speaking of dignity. MAYER, Michel J.; PARENT, William A. (org). *The Constitution of Rights*. Cambridge: Harvard University Press, 1992, p.187.

82 *Indiana v. Edwards*, 554 U.S. 164 (2008).

83 RAO Neomi. On the use and abuse of dignity in constitutional law. *Columbia Journal of European Law*, p. 208.

84 *Richards v. Wisconsin*, 520 U.S. 385, 393 n. 5 (1997).

85 *Rochin v. California*, 342 U.S. 165 (1952).

86 RAO Neomi. On the use and abuse of dignity in constitutional law. *Columbia Journal of European Law*, p. 207.

87 *Brown v. Plata*, 563 U.S. (2011).

88 *Brown v. Plata*, 563 U.S. (2011).

89 *Hope v. Pelzer*, 536 U.S. 730 (2002).

90 GLENSY, Rex D. The right to dignity. *Columbia Human Rights Law Review*, p. 89.

main function is “to protect privacy and dignity against unwarranted intrusion by the State.”⁹¹

The noteworthy examples of the Court’s reasoning about human dignity relate to its substantive due process jurisprudence under the Fourteenth Amendment. The section one of the Amendment reads: [...] [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.⁹²

The abortion and intimate personal relationships are the core of *liberty based dignity* cases. The most prominent of those cases were *Casey* and *Lawrence*. The Court in *Casey* preferred the liberty interests of a pregnant woman to terminate pregnancy to the right to life of an unborn child and ruled that the reproductive choices of women are “central to personal dignity and autonomy.”⁹³ In particular, Justice O’Connor writing for plurality held:

[t]hese matters, involving the most intimate and personal choices a person may make a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.⁹⁴

Furthermore, Justice Stevens in his concurring opinion argued that “[t]he authority to make such [...] decisions is an element of basic human dignity.”⁹⁵

In the landmark case of *Lawrence v. Texas*⁹⁶ the Court invalidated the Texas anti-sodomy law criminalizing sodomy. The majority relied on a broader liberty interest than on narrower aspects of privacy to protect individual’s due process liberty rights. In *Lawrence* the Court confirmed its position regarding constitutional protection of intimate personal relationships such as marriage, procreation, contraception, family relationships, child rearing. Invalidating the anti-sodomy law of the state under the substantive due process the Court held that: “choices central to personal dignity [...] the right to define one’s own concept of

existence, of meaning, of the universe, and of the mystery of human life.”⁹⁷

Apparently, in *Lawrence* reiterating its reasoning of *Casey* the Court elevated the concept of dignity at a doctrinal level extending protection to any activity of core personal choices or “the right to define one’s own concept of existence” based on dignity as liberty.⁹⁸ It is worthy to mention Justice Scalia’s concerns in *Lawrence* when he said that the Court’s reasoning “will have far-reaching implications.”⁹⁹ In this context, one may wonder whether or not the liberty based dignity protection should extend to a physician-assisted ending of life as well.

The Civil Rights Era marked the beginning of *equality based dignity* protection in anti-discrimination cases under the Fourteenth Amendment holding that exclusion from public accommodations on racial grounds leads to the violation of individuals’ equal dignity.¹⁰⁰ Similarly, in *Parents Involved in Community Schools v. Seattle School Dist. No. 1*,¹⁰¹ the U.S. Supreme Court applied human dignity in the equal protection context. Invalidating the school’s anti-segregation policy the Court argued that it regards the race as a suspect classification because “it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.”¹⁰² Justice Kennedy concurred noting that “[t]o be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society.”¹⁰³ Deciding on the constitutionality of the Civil Rights Act, the Court in *Heart of Atlanta Motel* case explained that discrimination inevitably produces humiliation, frustration and embarrassment when a person learns that he is excluded from public because

97 *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

98 *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

99 *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

100 See *Heart of Atlanta Motel, Inc. v. United States* (in the case the motel operator refused to provide services for African Americans violating Title II of the Civil Rights Act. The Court held that the Act aimed to “vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments”); See also *Rice v. Cayetano*, 528 U.S. 495, 517 (2000) where the Court invoked dignity because the voting laws discriminated on racial grounds.

101 *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007).

102 *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007).

103 *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007).

91 *Schmerber v. California*, 384 U.S. 757, 767, 769–70 (1966).

92 The Section 1 of the Fourteenth Amendment to the U.S. Constitution.

93 *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

94 *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

95 *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

96 *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

of his membership to a certain race.¹⁰⁴ Jack Balkin and Reva Siegel explicate the meaning of equality saying that it “is not just the Aristotelian insistence that like cases be treated alike. It is about the struggle against subordination in societies with entrenched social hierarchies.”¹⁰⁵

The Court extended the equality based dignity protection to gender discrimination cases. In *Roberts v. United States Jaycees* Justice Brennan opined that gender discrimination offends human dignity as well.¹⁰⁶ In *J.E.B. v. Alabama* Justice Kennedy argued that excluding women from jury service harms “personal dignity and [...] the individual’s right to participate in the political process.”¹⁰⁷

The examples above illustrate how the Court attaches different meanings to human dignity in the contexts of the First, Fourth, Sixth, Eighth and Fourteenth Amendments. The Supreme Court applied dignity arguments in decisions involving gender and racial equality, content-based restrictions on freedom of speech¹⁰⁸ and laws regulating pregnancy termination,¹⁰⁹ forcibly pumping a drug from defendant’s stomach,¹¹⁰ privacy and other rights. Leslie Meltzer Henry rhetorically asks what exactly the Court protects when it invokes dignity in the context of different rights.¹¹¹ It is also interesting to see how Justices with different ideological and religious background response to these diverse issues in terms of dignity, e.g.¹¹² where the Court applies *equality based dignity* to support its anti-discrimination arguments, *liberty based dignity* to protect privacy in terms of individual choices and intimate sexual relationships, *integrity based dignity* to defend from humiliating treatment. The reputation and society valued dignity is another aspect of dignity that

applies in interpersonal relationship, which I will discuss in the next section.

B. GERMANY

The very abstract nature of the concept of human dignity did not preclude its widespread judicial application. In countries where the courts apply human dignity in social-welfare context as well indicate both the extension of modern dimension of the concept and its influence on the political life. Prominent examples are Germany and those countries influenced by German constitutional practice. There seems to be less difficulty for the German Constitutional Court for extending the scope of protection of value oriented nature of the German Basic Law, particularly human dignity. One should not view the human dignity in isolation in German constitutional law but in broader communitarian aspect calling for social solidarity and responsibility towards the other member of society.¹¹³

The communitarian aspects of dignity were elucidated in the *Lifetime Imprisonment Case* where the law was invalidated by the Constitutional Court for preventing the possibility of parole for a prisoner. The Court reasoned that depriving a prisoner a realistic chance of life in freedom “strikes at the very heart of human dignity.”¹¹⁴ The Court held that: “[t]he constitutional principles of the Basic Law embrace the respect and protection of human dignity. The free person and his dignity are the highest values of the constitutional order. The state in all of its forms is obliged to respect and defend it. This is based on the conception of man as a spiritual-moral being endowed with the freedom to determine and develop him. This freedom within the meaning of the Basic Law is not that of an isolated and self-regarding individual but rather of a person related to and bound by the community. In the light of this community-boundedness it cannot be “in principle unlimited.”¹¹⁵ Thus, the community interests may necessitate some limitations on individual’s freedom of action.

The Federal Constitutional Court had to decide on the constitutionality of the Aviation Security Act which authorized shooting of a civilian

104 *Heart of Atlanta Motel, Inc. v. United States* (The Court held that the Congress had power under the commerce clause of the Constitution to adopt the Civil Rights Act).

105 BALKIN, Jack M.; SIEGEL, Reva B. *The American Civil Rights Tradition: Anticlassification or Antisubordination*. Issues In Legal Scholarship. 2003, art. 11, at 2.

106 See *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

107 *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127 (1994).

108 See *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

109 See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

110 See *Rochin v. California*, 342 U.S. 165, 174 (1952).

111 HENRY, Leslie Meltzer. The jurisprudence of dignity. *University of Pennsylvania Law Review*, p. 181.

112 HENRY, Leslie Meltzer. The jurisprudence of dignity. *University of Pennsylvania Law Review*, p. 188.

113 See, EBERLE, Edward J. *Dignity and liberty: constitutional values in germany and the united states*. Praeger, 2002. p. 45.

114 See BVerfGE 45, 187 (Lifetime imprisonment case).

115 See BVerfGE 45, 187 (Lifetime imprisonment case).

aircraft hijacked by terrorists and intended to use as weapons similar to one in the United States in 9/11. The Court invalidated the law based on its incompatibility with right to life and dignity of those on the board of aircraft who were not involved in the crime. While trying to save others, the state treated the innocent people on the board as objects denying their inner worth of human beings.¹¹⁶

The abortion cases of German Constitutional Court and the U.S. Supreme Court reveal the different social, political and cultural dimensions of human dignity in two countries in the 1970s. Both courts invoked dignity for two sides of conflicting rights—for the liberty of pregnant mother to make reproductive choices and for the right to life of an unborn child. Neomi Rao argues that the different conceptions of dignity led to different outcomes. While it is true that dignity tipped more the balance in favor of fetus in Germany than in in the United States, the issue concerned more political and social choices than the scope and meaning of dignity. Dignity was just a convenient interpretive tool for judges to reach the desired outcome in such controversial cases. This argument alone fails to elucidate the culturally relative framework of dignity. However, it is relevant for imposition of judicial value choices. But imposition of judicial value choices could be equally relevant for other broad constitutional principles such as liberty and equality. Furthermore, the relative convergence of approaches on the same issue during the second round of abortion cases in Germany and the United States during the 1990s proves that the issue was more about social and political developments and their impact on the courts than the cultural understanding of the meaning of human dignity.

Neomi Rao argues that the abortion cases show that dignity cannot solve the conflict between two rights alone protecting one and compromising another. He claims that the cultural or conventional understanding of dignity will inform the judgment in different contexts. Neomi concludes that dignity in constitutional jurisprudence has more connotations with moral value judgments giving different weights to different dignities than real legal meaning. Instead, the social, historical, and cultural factors determine the outcome of the case that informs the national values.¹¹⁷

The states also restrict individual autonomy based on moral concerns for dignity. In the *Peep Show Case* the German Federal Administrative
116 See BVerfGE 115, 118 (Aviation security act case).
117 See BVerfGE 115, 118 (Aviation security act case).

Court justified the denial of a license to a show woman performing a striptease in a booth. While the patron who pays for the show could see the woman, the woman could not see him.¹¹⁸ The justification for denial was the violation of good morals. The court reasoned that such performance violated the human dignity of the woman by treating her as an object.

C. SOUTH-AFRICAN REPUBLIC, ISRAEL, FRANCE, CANADA AND BRAZIL

The dignity provision of the South-African constitution and its interpretation by the Court is an interesting example for comparison. Section 10 of the Constitution reads “everyone has inherent dignity and the right to have their dignity respected and protected.”¹¹⁹ Human dignity is one of the most fundamental principles and justiciable rights in the South African constitutional law. The importance of the principle is confirmed by the South African Constitutional Court when it declared that human dignity cannot be subordinated to another right.¹²⁰ The Court’s reference to dignity also marked the concept’s central role for all human rights arguing that “a right to dignity is an acknowledgment of the intrinsic worth of human beings [...] and the foundation of many of the other rights,” which is incorporated in the South African Bill of Rights.¹²¹ Dignity in the section 39 of the Constitution serves as a foundational value for promoting open and democratic society instructing the Constitutional Court how to interpret fundamental rights.¹²² The Constitutional Court drew the scope of interpretive function of human dignity for balancing the conflicting rights:

Human dignity [...] informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This court has already acknowledged that importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis [...] [and] is not

118 Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court] Dec. 15, 1981, 4 BVerwGE 274.

119 Section 10 of the South African Constitution.

120 See *South Africa v. Makwanyane* 1995 (3) SA 391 (CC) (S. Afr.).

121 See *South Africa v. Makwanyane* 1995 (3) SA 391 (CC) (S. Afr.).

122 Section 39 of the South African Constitution.

only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected. In many cases [...] where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.¹²³

The court's analysis demonstrates how human dignity is connected with other constitutional rights. The Court invoked human dignity in different contexts including gay marriage, juvenile beating and gender equality.¹²⁴ Human dignity was invoked to invalidate death penalty, anti-sodomy laws and the state duty to provide minimum conditions for life etc. Yet, the Court's reference to dignity for protection of socioeconomic rights is a remarkable example of extending the scope of protection of dignity.

A short excursus into the constitutional practices of other countries would be useful to depict the universal framework of human dignity. For example, in France the fundamental nature of human dignity was recognized by judiciary despite the absence of explicit constitutional provision. In 1994, the Constitutional Council combined the different pieces of the preamble and elevated human dignity to the level of constitutional principle.¹²⁵ The Constitutional Council referred to dignity while supporting decent housing for everyone¹²⁶ and the liberty of pregnant mother to do abortion within the first trimester.¹²⁶ Similarly, the Hungarian Constitutional Court invoked dignity to secure minimum livelihood.¹²⁷

123 Dawood v. Minister of Home Affairs 2000 (3) SA 936 (CC) at 961.-62 para. 35 (S. Afr.).

124 RAO Neomi. On the use and abuse of dignity in constitutional law. *Columbia Journal of European Law*, p. 217.

125 BARROSO, Luis Roberto. *Here, there and everywhere: Human Dignity in contemporary law and in the transitional discourse*. *Boston College International and Comparative Law Review*, p. 339.

126 Conseil constitutionnel [CC] [Constitutional Court] decision No. 2001-446DC, June 27, 2001, J.O. 10828 (Fr.); Conseil constitutionnel [CC] [Constitutional Court] decision No. 74-54DC, Jan. 15, 1975, J.O. 671 (Fr.) (affirming the constitutionality of the Voluntary Interruption of Pregnancy Act), as cited by BARROSO, Luis Roberto. *Here, there and everywhere: Human Dignity in contemporary law and in the transitional discourse*. *Boston College International and Comparative Law Review*.

127 Decision 32/1998 (VI. 25) AB, ABH 1998, 251, at 254. as cited by Christopher McCrudden in Human Dignity And Judicial Interpretation of Human Rights, 19 EJIL (2008) at 693 n.270.

The Canadian Court treats the dignity as part of legal system even though the Canadian Charter of Rights and Freedoms is silent about human dignity.¹²⁸ Thus, human dignity has become an important constitutional principle even in the absence of its formal enactment in some national constitutions. The Courts not only elaborated the meaning of dignity in specific cases but also revealed the concept's connection with other fundamental rights. The Canadian Supreme Court invoked dignity to prohibit stereotyping under the equal protection clause as well.¹²⁹ Apparently, dignity is invoked to support equality argument across many different jurisdictions.¹³⁰

As opposed to absolute nature of dignity in German constitutional law the Israeli Supreme Court argued that human dignity can be balanced against other competing rights and societal interests. The Court said:

The rights of a person to his dignity, his liberty and his property are not absolute rights. They are relative rights. They may be restricted in order to uphold the rights of others, or the goals of society. Indeed, human rights are not the rights of a person on a desert island. They are the rights of a person as a part of society. [...] [H]uman rights and the restriction thereof derive from a common source, which concerns the rights of a person in a democracy.¹³¹

The Supreme Court of Brazil invoked dignity in cases related to torture, equality and minimum conditions of life. In *Herbert Fernando de Carvalho*¹³² the Court argued that obtaining evidence from an adolescent by means of torture violates the person's human dignity. In *Rio Grande do Sul State Prosecutor*¹³³ the Court invoked dignity for lack of sanitation and overcrowding of

128 RAO Neomi. On the use and abuse of dignity in constitutional law. *Columbia Journal of European Law*, p. 217.

129 See, e.g., McKinney v. University of Guelph, [1995] 3 S.C.R. 229 (Can.) as cited by Glensy.

130 GLENSY, Rex D. The right to dignity. *Columbia Human Rights Law Review*, p. 132.

131 HCJ 7015/02 Ajuri v. IDF Commander in West Bank [2002] Is. L. Rep. 1.

132 Herbert Fernando de Carvalho and another v. Superior Court of Justice (STF/ HC 70389/SP/1994)

133 MORAIS, Fausto Santos de; DELLAGERISI, Bruno; SANTOS, José Paulo. Crítica ao ativismo judicial brasileiro: do conceito à constatação prática. In: Salette Oro Boff; Vinícius Borges Fortes; Luiz Otávio Pimentel. (Org.). *Propriedade intelectual, gestão da inovação e desenvolvimento*. 1ed. Erechim: Editora Deviant, 2016, v. 1, p. 179-198.

the prisons. The Court reasoned that the government bears positive obligation to provide minimum conditions for prisoners to preserve their mental and physical integrity stemming from dignity. In *José Antônio Gomes Pinheiro Machado* the Court argued that forcing the defendant to undergo a DNA test against his will to prove his fatherhood violates the constitutional right to dignity.¹³⁴ Thus, the Court protected the personal integrity based dignity of a defendant despite the child's interest in the case to know his father.

Furthermore, the Court in *Antônio Sérgio da Silva*¹³⁵ argued that putting handcuffs on defendant during the jury trial without strong justifications violates the defendant's human dignity in terms of his mental and physical integrity. The Court in *São Paulo Municipal Government*¹³⁶ invoked dignity with regard to socioeconomic rights arguing that the state must provide minimum conditions of daycare services for children. In all cases the Court applied dignity argument as a basis of all human rights and as an interpretive tool to define the scope of protection of fundamental constitutional rights. In the *Transsexual Bathroom*¹³⁷ case the Brazilian Justice Luis Roberto Barroso invoked dignity to protect sexual autonomy of transsexual person who was forbidden to use the female bathroom in a shopping mall. Justice Luis Roberto Barroso held that human dignity demands equal treatment of biological and transsexual females for using public facilities.

Generally, all actions across these jurisdictions violating the privacy, equality and integrity will trigger the protective scope of dignity¹³⁸. Thus, dignity is a barrier to a state action that fails to protect autonomy, liberty and decent conditions for livelihood.

D. INTER-AMERICAN COURT OF HUMAN RIGHTS

The Inter-American Court of Human Rights invoked dignity in connection with several fundamental rights. For example, in an anti-dis-

134 José Antônio Gomes Pinheiro Machado v. Rio Grande do Sul Court of Justice (STF/ HC 71373 RS/1994).

135 Antônio Sérgio da Silva v. Superior Court of Justice (STF/HC 91.952-9/SP/2008).

136 MORAIS, Fausto Santos de. *Ponderação e Arbitrariedade: a inadequada recepção de Alexy pelo STF*. Salvador: Juspodivm, 2016.

137 Transsexual Bathroom case (STF/RE 845.779/SC, 2015).

138 See in Supreme Court of Brazil the Arguição de Descumprimento de Preceito Fundamental 132/ Rio de Janeiro State (STF/ADPF 132/RJ, 2011).

crimination case the Court argued that not all differences in treatment may breach the principle of equality and be offensive to human dignity. In this context, the Court held that the "notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual."¹³⁹ Thus, for the Court dignity serves as a yardstick to determine the viability of treatment under the equality principle. The Court also linked dignity with right to life in the context of lack of care for Guatemala's street children extending its protection to socioeconomic rights. The Court held that right to life embraces "not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence."¹⁴⁰

The Court in *Velasquez Rodriguez v. Honduras* reasoned that prolonged isolation and lack of communication harm psychological and moral integrity of the individual and thereby violate the detainee's inherent dignity.¹⁴¹ The Court held that this kind of inhuman treatment violates Article 5 of the Convention on personal integrity. The Court also regarded dignity as a basis of all human rights arguing that "the exercise of public authority has certain limits which derive from the fact that human rights are inherent attributes of human dignity, therefore, superior to the power of the State."¹⁴² The Court reiterated its position in *Neira Alegria et al v. Peru*, and argued that any cruel and inhuman treatment or punishment violates the inherent dignity of the human person under Article 5 of the Convention.¹⁴³ Similarly, the Court in *Criminal Castro Prison v. Peru* held that forced nudity and not allowing to clean themselves or to go to restroom violated the dignity of six female inmates.¹⁴⁴

139 Inter-American Court of Human Rights, Advisory Opinion OC-4/84 of 19 Jan. 1986 (Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica requested by the Government of Costa Rica), at paras 55 – 56 as cited by McCrudden in Human Dignity And Judicial Interpretation of Human Rights, 19 EJIL (2008) at 690 n.244.

140 Inter-American Court of Human Rights, Case of the 'Street Children' (Villagran-Morales v. Guatemala, Judgment of Nov. 1999 (Merits), at para. 144 as cited by Christopher McCrudden at 693 n.268.

141 IACHR, Velasquez Rodriguez vs. Honduras, 1988.

142 IACHR, Velasquez Rodriguez vs. Honduras, 1988.

143 IACHR, Neira Alegria et al vs. Peru, 1995a.

144 IACHR, Criminal Castro Prison vs. Peru, 2006.

E. THE EUROPEAN COURT OF HUMAN RIGHTS

The European Convention on Human Rights (ECHR) does not incorporate a dignity provision. However, the Court considers human dignity as a basis of all rights in the Convention.¹⁴⁵ In *Ireland v. United Kingdom* the Court invoked dignity to protect from degrading treatment under Article 3 of the ECHR, e.g. in cases “like having one’s head shaved, being tarred and feathered, smeared with filth, pelted with muck, paraded naked in front of strangers, forced to eat excreta, deface the portrait of one’s sovereign or head of State, or dress up in a way calculated to provoke ridicule or contempt [...]”.¹⁴⁶

The Court invoked dignity also in the context of anti-discrimination and equality guarantees. For example, in *East African Asians v. United Kingdom* the Court held that “publicly to single out a group of persons for differential treatment on the basis of race might, in certain circumstances, constitute a special form of affront to human dignity.”¹⁴⁷ Unfair treatment based on personal traits instead of individual needs, merits or capacities, harms human dignity. Similarly, isolation or marginalization of individuals or groups may harm their dignity.¹⁴⁸ Any differential treatment must be premised on objective and justifiable grounds taking into account personal circumstances.

7 CONCLUSION

The analysis of jurisprudence of different courts reveal significant variations on the legal status and weight of human dignity. However, the different interpretations are not based merely on the judicial value judgments but on the language of dignity in legal texts both in the domestic and international documents.¹⁴⁹ At an interpretive level it would be more accurate to spot differences when judges deal with relatively similar legal wording

and status of dignity. Thus, McCrudden argues that different interpretations of dignity may not necessarily lead to the exclusion of a universal concept of dignity, but imply a misunderstanding of the concept.¹⁵⁰ He rhetorically asks whether there is a universal concept of human dignity taking into account that “very different outcomes are derived from the application of dignity arguments” especially in cases with very similar factual situations such as abortion or incitement to racial hatred where dignity argument could be found on both sides of conflicting rights while supporting opposite results.¹⁵¹ Another argument relates to the legal status of dignity. For example, in Germany, dignity has the highest legal status where no balancing is allowed with dignity whether the interests at stake are individual or community. As opposed to German constitutional practice, in South Africa dignity can be balanced with other rights having the same legal status.¹⁵²

Some scholars also distinguish between two aspects of dignity—the communitarian and individual autonomy. Generally, this difference reflects the ideological approaches of the countries. While the United States values autonomy based on liberal individualistic approach, Germany inclines to communitarian ideals based on Kantian concept of dignity. In the United States, *Casey* and *Lawrence* cases represent such individualistic approach. However, there is no rigid division between the two approaches, and some countries such as South-African republic may split on the issue.¹⁵³

A common concern regarding the judicial application of dignity is that judges may impose their values through the application of such a broad metaphysical concept. While this problem is common to all broad constitutional principles, the judicial practice has shown that the most viable method of application of the concept of dignity is the proportionality principle. Wherever any state action touches upon the core of fundamental rights that tips close to the dignity is a violation of a fundamental right. Deciding claims on competing fundamental rights courts generally

145 MCCRUDDEN, Christopher. Human dignity and judicial interpretation of human rights. *The European Journal of International Law*, p. 683.

146 *Ireland v. United Kingdom* (ECtHR) (1978).

147 *East African Asians v. United Kingdom* (ECtHR) (1973).

148 MCCRUDDEN, Christopher. Human dignity and judicial interpretation of human rights. *The European Journal of International Law*, p. 691.

149 MCCRUDDEN, Christopher. Human dignity and judicial interpretation of human rights. *The European Journal of International Law*, p. 711.

150 MCCRUDDEN, Christopher. Human dignity and judicial interpretation of human rights. *The European Journal of International Law*, p. 711.

151 MCCRUDDEN, Christopher. Human dignity and judicial interpretation of human rights. *The European Journal of International Law*, p. 698.

152 See for example the African Makwanyane case.

153 MCCRUDDEN, Christopher. Human dignity and judicial interpretation of human rights. *The European Journal of International Law*, p. 699.

give more weight to those rights that embrace a dignity argument. However, it is not clear how the court can distribute weight when competing rights both invoke dignity argument. Then, the court is to find solution where on both sides the core of dignity would not be violated.

Yet, there is another aspect of dignity based on social virtue that reveals the contours of culturally relative dimension of the concept. The socially valued conduct and treatment varies from country to country based on local traditions and social relationship. The culturally relative aspect of dignity is also exposed in interpersonal relationships. Individual identity and worth in many occasions depends how the individual members of community regard and value an individual personality. While the *reputation based dignity* has universal virtue, its content largely depends on social, religious and traditional values of certain communities.

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O desenvolvimento legal da noção de dignidade humana na jurisprudência constitucional

RESUMO

O presente artigo científico, partindo de método comparado, objetiva analisar a dimensão dada pelas cortes constitucionais dos Estados Unidos da América, Alemanha, África do Sul, Israel, França, Canadá e Brasil, bem como nos sistemas regionais de tutela dos Direitos Humanos no que diz respeito ao conceito e à extensão do princípio da dignidade da pessoa humana, estabelecendo aproximações e análises críticas sobre aspectos filosóficos que permeiam seu nascedouro e suas assimilações culturais, individuais e jurisprudenciais. Por fim, conclui-se que enquanto a reputação baseada na dignidade for uma virtude universal, seu conteúdo depende largamente de valores sociais, religiosos e tradicionais de certas comunidades.

Palavras-chave: Dignidade. Interpretação Judicial. Conceito.

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