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# Realization of Human Dignity under the Constitution of India: An Analysis

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## ABSTRACT

*Human dignity is an ethereal concept. Its intrinsic meaning has been left to the intuitive understanding. It is claimed that it is an abstract concept, allowing flexibility of implementation. However, the precise concept of human dignity is not clearly defined in international and national legal documents. This has facilitated an overlapping consensus on these rights. However, it is expected that the fate of human dignity in the modern world is enlightened by the process of social learning. It is inherent in current socio-legal issues like clinical trial, internet vigilance, surrogacy, abortion, euthanasia, UID card scheme, LGBT rights and maintenance to name a few. However, these issues are universal and the underlying issue pertains to dignity of an individual. The Constitutions of various countries like India, Canada, Israel and Germany and exhibit a cross-cultural vision of demands and possibilities of moral nature, a vision that has universal validity. The application of this concept gets restricted to facts of each case, despite a common thread of ideas running across the legal documents and Constitutional regime. The theme of this research project is to find out answers for a clearer version of human dignity in the light of judicial interpretation in the abovementioned jurisdictions.*

**Keywords:** Comparative Constitution, Human Dignity, Indian Constitution, UDHR, ECHR

## I. INTRODUCTION

Human dignity is a concept that has captured the attention of philosophers, scholars, and jurists alike.<sup>2</sup> Since the ancient era, thinkers from a wide variety of non legal disciplines have explored the notion of human dignity, its ramifications, and its effect on civilized society.<sup>3</sup> Even though legal scholars have also participated in this discourse, with increased attention in recent times,

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<sup>2</sup> David A. Hyman, *Does Technology Spell Trouble with a Capital T?: Human Dignity and Public Policy*, 27 HARV. J.L. & PUB. POLY. 3, 3 (2003).

<sup>3</sup> Denise G. Réaume, *Indignities: Making a Place for Dignity in Modern Legal Thought*, 28 QUEENS L.J. 61, 62 (2002); John D. Castiglione, *Human Dignity Under the Fourth Amendment*, 2008 WIS. L. REV. 655, 710.

the notion of the role of human dignity within law is still an underexplored topic.<sup>4</sup>

The first definition of “dignity” in the Oxford English Dictionary, which goes back to the early thirteenth century, is “The quality of being worthy or honourable; worthiness, worth, nobleness, excellence.” Other ethically and politically relevant senses include “honourable or high estate, position, or estimation; honour; degree of estimation, rank;” “collect, “persons of high estate or rank;” “An honourable office, rank, or title; a high official or titular position;”. A person holding a high office or position; a dignitary;” and “Nobility or befitting elevation of aspect, manner, or style; ... stateliness, gravity.” Dignity, in other words, indicates worth that demands respect.

Dignity is “admittedly an ethereal concept”<sup>5</sup> which “can mean many things”<sup>6</sup> and therefore suffers from an inherent vagueness at its core.<sup>7</sup> In fact, “since human dignity is a capacious concept, it is difficult to determine precisely what it means outside the context of a factual setting.”<sup>8</sup> The basis of dignity can be said to lie in the autonomy of self and a self worth that is reflected in every human being’s right to individual self determination.<sup>9</sup> It is thus universal and unfringeable by the state or private parties.<sup>10</sup> Consequently, the “dignity of the human person as a basic ideal is so generally recognized as to require no independent support.”<sup>11</sup>

The centrality of dignity in a democratic society cannot be underestimated.<sup>12</sup> In fact, “human dignity is . . . bound up with forms of governance,”<sup>13</sup> and is a central feature in a significant amount of modern constitutional states. Indeed, “democracy serves as a core value of state formation because it accords with fundamental notions of fair governance and gives expression to the values of human dignity and equality.”<sup>14</sup> One of the key facets of twenty first century

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<sup>4</sup> George W. HARRIS, DIGNITY AND VULNERABILITY, 1 (1997).

<sup>5</sup> Ibid.

<sup>6</sup> R. George Wright, *Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection*, 43 SAN DIEGO L. REV. 527, 528 (2006).

<sup>7</sup> *Siliadin v. France*, (no. 73316/01), Eur. Ct. H.R. 30 (2005).

<sup>8</sup> Edward Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 Utah L. Rev. 963, 975 (1997).

<sup>9</sup> Matthias Mahlmann, *THE BASIC LAW AT 60 — HUMAN DIGNITY AND THE CULTURE OF REPUBLICANISM*, 11 GERMAN L.J. 9, 30 (2010); Avishai Margalit, *The Decent Society* 51—53 (Naomi Goldblum trans., 1996) (stating that dignity inheres in personhood); Gerald L. Neuman, *HUMAN DIGNITY IN UNITED STATES CONSTITUTIONAL LAW*, IN *ZUR AUTONOMIE DES INDIVIDUUMS* 249 (2000).

<sup>10</sup> *Figueroa Ferrer v. Commonwealth*, 7 P.R. Offic. Trans. 278, 301 (1978).

<sup>11</sup> Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT’L L. 848 (1983).

<sup>12</sup> See *McNabb v. U.S.*, 318 U.S. 332, 343 (1943) (stating that in “democratic society . . . respect for the dignity of man is central”).

<sup>13</sup> Larry Catá Backer, *Theocratic Constitutionalism: An Introduction to a New Global Legal Ordering*, 16 IND. J. GLOBAL LEGAL STUD. 85, 101 (2009).

<sup>14</sup> Larry Catá Backer, *God(s) Over Constitutions: International and Religious Transnational Constitutionalism in the 21st Century*, 27 MISS. C.L. REV. 11, 57 (2008); Pope Benedict XVI, Address to the U.N. General Assembly

democracies is the primary importance they give to the protection of human rights. From this perspective, dignity is the “expression of a basic value accepted in a broad sense by all peoples,” and thus “constitutes the first cornerstone in the edifice of human rights.”<sup>15</sup> Therefore, there is a certain fundamental value to the notion of human dignity, which some would consider a “pivotal right” deeply rooted in any notion of justice, fairness, and a society based on basic rights.<sup>16</sup>

Some nations and international organizations have elevated human dignity to the foundational right underpinning all other rights.<sup>17</sup> Other nations have paired dignity with other fundamental rights, such as liberty and equality, in their jurisprudential treatment.<sup>18</sup>

This research project will analyze the different definitions of human dignity along with its history and development. One cannot cull out a comprehensive view of this issue unless its development is traced in juxtaposition to drafted legal documents. Moreover, the researcher has also made a comparative analysis between the Constitutions of India, Canada, Israel and Germany to study the judicial trend on human dignity. In the last section of this project, the researcher has presented consolidated and tentative solutions to approach towards topic for further clarity.

## II. DEFINING DIGNITY

*Dignity is the heart of Human Rights*

*-Kindler v. Canada (Minister of Justice)*<sup>19</sup>

‘Dignity’ as a concept has references in various international instruments,<sup>20</sup> yet we are hard pressed to find an explicit definition of the expressions ‘human dignity’ or ‘dignity of the human person in international instruments or in national law.’<sup>21</sup> ‘Dignity’ is an abstract concept,

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(Apr.18,2008),availableat[http://www.vatican.va/holy\\_father/benedict\\_xvi/speeches/2008/april/documents/hf\\_ben-xvi\\_spe\\_20080418\\_un\\_visit\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/speeches/2008/april/documents/hf_ben-xvi_spe_20080418_un_visit_en.html) (Last visited 12 August, 2013).

<sup>15</sup> Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT’L L. 38, 46 (2003).

<sup>16</sup> Guy E. Carmi, *Dignity-The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification*, 9 U. PA. J. CONST. L. 957, 966 (2007).

<sup>17</sup> D. Kretzmer & E. Klein, *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE* (2002).

<sup>18</sup> Izhak Englard, *Human Dignity: From Antiquity to Modern Israel’s Constitutional Framework*, 21 Cardozo L. Rev. 1903, 1925 (2000).

<sup>19</sup> (1991) 2 S.C.R. 779.

<sup>20</sup> UN Standard Minimum Rules for the Treatment of Prisoners (1955) (Rule 60); UN Declaration on the Elimination of Discrimination against Women (1967); UN Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind (1975).

<sup>21</sup> Oscar Schachter, ‘Human Dignity as a Normative Concept’, (1983) AM. J. INT. L. 848, 849.

still, it serves as a fundamental source of the respect for every human being.<sup>22</sup> Dignity may be briefly defined as:

*“The common denominator in the interpretation and application of human rights.”<sup>23</sup>*

Both the International Covenant on Civil and Political Rights, 1966 (ICCPR)<sup>24</sup> and the International Covenant on Economic Social and Cultural Rights, 1966 (ICESCR)<sup>25</sup> proclaim that the rights they seek to protect, ‘derive from the inherent dignity of the human person’. Thus, Human Dignity is connected to a set of human rights that must be afforded to all human beings and human rights are universal in this sense.<sup>26</sup> The ‘dignity of the human person’ and ‘human dignity’ are phrases that have come to be used as an expression of a basic value inherent in human beings.<sup>27</sup> A majority of the human civilization has in a broad sense, accepted these expressions.<sup>28</sup>

### **2.1 DEFINITION OF HUMAN DIGNITY IN INTERNATIONAL LEGAL DOCUMENTS**

The term, before appearing in international law, after the year 1945, as a reaction to the dramatic

Events of the Second World War, was the object of philosophical and theological reflections. Thus, the Greeks and the Romans didn't know other dignities than those which resulted from the social class or from the positions occupied.<sup>29</sup> The notion of dignity, of laic origin in Antiquity, would acquire a religious connotation through the Christian theologians. According to Ph. I. André-Vincent “The human dignity is, from an historical point of view, a Christian concept. It is the result of reflections which were originated in the doctrine of Caledonia.” The first major reference to dignity is assigned either to Laitance, or to Gregory of Nyssa<sup>30</sup>.

As France Quéré rightfully states:

*“Before Auschwitz, man presented himself through the sculptural beauty of the*

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<sup>22</sup> Janelle M. Diller, *Securing Dignity and Freedom through Human Rights: Article 22 of the Universal Declaration of Human Rights* (1<sup>st</sup>, Martinus Nijhoff Publishers, Boston, 2012), p.25

<sup>23</sup> Danilo Turk, ‘THE UNITED NATIONS AND THE REALIZATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS’ IN THE IMPLEMENTATION OF ECONOMIC AND SOCIAL RIGHTS: NATIONAL, INTERNATIONAL AND COMPARATIVE ASPECTS, 95, 105 (1991).

<sup>24</sup> 999 U.N.T.S 173.

<sup>25</sup> 999 U.N.T.S. 3.

<sup>26</sup> Patrick Capps, *Human Dignity and the Foundations of Election Law* (2009), 114.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Izabela Bratiloveanu, *Human Dignity in International Law: Issues and Challenges*, 7<sup>th</sup> Edition of the International Conference on European Integration Realities and Perspectives,(2012) available at [www.proceedings.univ-danubius.ro/index.php](http://www.proceedings.univ-danubius.ro/index.php) (Last visited 12 August, 2013).

<sup>30</sup> Ibid.

*body, through his power to work, by his conflicts of honour and interests, by his natural but conscious limits, by the nobility of the “I think”, by the struggle of the soul, torn between misery and grandeur. Dignity always made him appear above nature and stated his automatic supremacy. After Auschwitz, we know that man is also something that we can trample on until he is entirely disbanded, that we can reduce man to a matter, to a consumable good by volatilizing him or we can reduce him to nothing: that we can deny until refusing him the honour of an individual death, treating him like magma, as a whole, mostly with one shot in order to burn him like pieces of wood”<sup>31</sup>.*

The notion appears neither in the Declaration of Independence of the USA nor in the French Declaration of 1789. However, in the foreign literature, there are authors which state that Article 1 of the Declaration of 1789 contains an implicit reference to dignity; therefore the concept would be absent just as a legal norm which would not exclude it for this reason from the category of moral rules on which the text is based<sup>32</sup>). The first explicit mention of the notion in the international legal order was related to the social rights. Therefore, the Declaration of Philadelphia of 17 May 1944, the founding declaration of the International about Organization, states that: “All human beings (...) have the right to pursue both their material well-being and heir spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.” The first Convention on Slavery, that took place on the 26th of September 1926 in Geneva, made no reference to dignity; after the Second World War, the New York Convention of the 2nd of December 1949, the Supplementary Convention of the 7th of September 1956 and the Convention of the 25th of July 1951, all three of them on the issue of slavery, state this notion only in the Preamble.

The U.N. Charter of the 26th of June 1945 states in the Preamble the decision of the members of the United Nations to restate their faith in the fundamental human rights, in the dignity and value of the human being.

In 1948, the notion appears in the American Declaration of Human Rights according to which “All humans are born free and equal, in dignity and in rights” and “while rights exalt individual liberty, duties express the dignity of that liberty”. The Universal Declaration of Human Rights passed on the 10th of December 1948 states in the Preamble that: “the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is

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<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

the foundation of freedom, justice and peace in the world” and “the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human being and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.”<sup>33</sup> In the same text, Article 1 states that all human beings are born free and equal in dignity and rights.

Starting with the Universal Declaration of Human Rights, the number of international instruments which refer to this concept greatly multiplies, dignity becoming the “solid idea of the human rights system”, the expression of an universal, fundamental consensus and the justification of the human rights, “the common basis acceptable to all, the basis so general that can serve as a common denominator for the general aspirations of all the peoples and of all the human beings, a solid base for an universal code of conduct of a modern humanism<sup>34</sup>. For example, at Article 11 of the American Convention on Human Rights (1969) it is stated that: “Everyone has the right to have his honour respected and his dignity recognized. No one may be the object of arbitrary or abusive interference with his private life, his family, his home or his Correspondence, or of unlawful attacks on his honour or reputation. Everyone has the right to the protection of the law against such interference or attacks.” The African Charter on Human and Peoples` Rights states that “freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples”<sup>35</sup>. We also have to mention the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly of the United Nations on the 9th of December 1975<sup>36</sup>. Human dignity was also stated by the international instruments which belong to the humanitarian law; for example, Article 3, common to the four Geneva Conventions, stated for the first time in 1949, at paragraph 1 forbids “outrages upon personal dignity, in particular, humiliating and degrading treatment”. Three of the grounds of the Preambles of the International Convention on the Elimination of All Forms of Racial Discrimination adopted on the 21st of December 1965 and of the Convention on the Elimination of All Forms of Discrimination against Women adopted on the 18th of December 1979 refer to human dignity. In parallel, the Preamble of the

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<sup>33</sup> (Năstase et al., 2007, 124).

<sup>34</sup> Benchikh, *Health in Prisons: A WHO Guide to the Essentials in Prison Health*, (1999) 43 available at [http://www.euro.who.int/\\_\\_data/assets/pdf\\_file/0009/99018/E90174.pdf](http://www.euro.who.int/__data/assets/pdf_file/0009/99018/E90174.pdf) (Last visited on 12 August, 2013).

<sup>35</sup> Benchikh, *Health in Prisons: A WHO Guide to the Essentials in Prison Health*, (1999) 43 available at [http://www.euro.who.int/\\_\\_data/assets/pdf\\_file/0009/99018/E90174.pdf](http://www.euro.who.int/__data/assets/pdf_file/0009/99018/E90174.pdf) (Last visited on 12 August, 2013).

<sup>36</sup> (Resolution 3452, where it is stated that: “Considering that... the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”) (Muraru & Vlădoiu, p. 3)

International Convention on the Suppression and Punishment of the Crime of Apartheid of the 30th of November 1973 and of the International Convention against Apartheid in Sports of the 10th of December 1985 come back to the issue of human dignity.

In terms of bioethics, we mention the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine of the 21st of November 1996, which states from the first Article: “the parties to this Convention shall protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine.”

The Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity of the 26th of November 1969 adopted by the General Assembly of the United Nations and which came into force on the 11th of November 1970 or the European Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity signed at Strasbourg on the 25th of January 1974 remind that the requirement to respect and protect the dignity of the individual would be infringed by the acknowledgment of the applicability of statutory limitations of crimes against humanity<sup>37</sup>. The International Covenant on the Civil and Political Rights and The International Covenant on Economic, Social and Cultural Rights recognize in the Preamble that “the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world” and that “these rights derive from the inherent dignity of the human being”. Article 10 of the ICCPR invokes the respect of dignity in a restrictive manner, namely not for all human beings, just for “all persons deprived of their liberty”. The Convention on the Rights of the Child of the 20th of November 1989 refers in the Preamble to the inherent dignity of all members of the human family and Article 39 specifically aims the dignity of the child. The concept of human dignity is also present in other international legal instruments like the Standard Minimum Rules for the Treatment of Prisoners adopted within the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Geneva in 1955. The Basic Principles for the Treatment of Prisoners adopted by Resolution no. 45/111 on the 14th of December 1990 state that “all prisoners shall be treated with the respect due to their inherent dignity and value as human beings”, phrases that tend to indicate that prisoners are indeed one of the categories which are exposed to infringements of their

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<sup>37</sup>Benchikh, *Health in Prisons: A WHO Guide to the Essentials in Prison Health*, (1999) 43 available at [http://www.euro.who.int/\\_\\_data/assets/pdf\\_file/0009/99018/E90174.pdf](http://www.euro.who.int/__data/assets/pdf_file/0009/99018/E90174.pdf) (Last visited on 12 August, 2013).

dignity<sup>38</sup>.

### III. CONCEPTUALIZING HUMAN DIGNITY IN LEGAL REGIME

#### 3.1 Human Dignity in Various National Legal Texts

Despite its relative prominence in the history of ideas, it was not until the first half of the 20<sup>th</sup> Century, however, that dignity began to enter legal, and particularly constitutional and international legal discourse, in any particularly sustained way.<sup>39</sup> The use of dignity in legal texts, in the sense of referring to human dignity as inherent in man, comes in the first three decades of the Twentieth Century. Several countries in Europe and the Americas incorporated the concept of dignity in their constitutions:<sup>40</sup> in 1917 Mexico;<sup>41</sup> in 1919 Weimar Germany<sup>42</sup> and Finland;<sup>43</sup> in 1933 Portugal;<sup>44</sup> in 1937 Ireland;<sup>45</sup> and in 1940 Cuba.<sup>46</sup> It seems clear that the combination of the Enlightenment, republican, socialist/social democratic, and Catholic uses of dignity together contributed significantly to these developments, with each being more or less influential in different countries. So, for example, in Finland the socialist influence was clear. In the Irish context the Catholic influence was dominant, as it was in Portugal<sup>47</sup> and Spain -- in 1945 the Basic Law of Spain included a reference to dignity.<sup>48</sup> In the Central and South American context, the social democratic/socialist and Catholic influences were both significantly present.<sup>49</sup>

The movement to incorporate dignity into new constitutions was, however, by no means confined to European and Latin American states. When Israel declared independence in

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<sup>38</sup> Benchikh, *Health in Prisons: A WHO Guide to the Essentials in Prison Health*, (1999) 43 available at [http://www.euro.who.int/\\_\\_data/assets/pdf\\_file/0009/99018/E90174.pdf](http://www.euro.who.int/__data/assets/pdf_file/0009/99018/E90174.pdf) (Last visited on 12 August, 2013).

<sup>39</sup> But see Decree of April 27, 1848 of the French Republic abolishing slavery in all French colonies and possessions, referring to slavery as an "affront to human dignity".

<sup>40</sup> Teresa Iglesias, *Bedrock Truths and the Dignity of the Individual*, LOGOS: A JOURNAL OF CATHOLIC THOUGHT AND CULTURE 4.1 (2001) 114-134.

<sup>41</sup> Article 3(c).

<sup>42</sup> Reich Constitution of August 11<sup>th</sup> 1919, Article 151.

<sup>43</sup> Part I; General Provisions.

<sup>44</sup> Constitution of Portugal, 1933, Article 45.

<sup>45</sup> Preamble.

<sup>46</sup> Article 32.

<sup>47</sup> "Salazar used *Quadragesimo Anno* as a blueprint for his government." Paul Christopher Manuel and Margaret Mott, "Une Messe est Possible": *The Imbroglia of the Catholic Church in Contemporary Latin Europe* (CES Working Papers Series, No. 113, 2004,10, available at: <<http://www.ces.fas.harvard.edu/publications/docs/pdfs/ManuelMott.pdf>>

<sup>48</sup> "The Spanish State proclaims as a guiding principle of its acts, respect for the dignity, integrity and freedom of the human person. . . ."

<sup>49</sup> CONSTITUTION OF THE REPUBLIC OF COSTA RICA, 1949, Article 33, Article 56.

1948, the Declaration of Independence referred to how “survivors of the Nazi holocaust in Europe, as well as Jews from other parts of the world, continued to migrate to *Eretz-Israel*, undaunted by difficulties, restrictions and dangers, and never ceased to assert their right to a life of dignity, freedom and honest toil in their national homeland.”<sup>50</sup> In 1950 the Constitution of India did likewise.<sup>51</sup> In his 1950 assessment of post-War constitutionalism, Carl Friedrich identified “the stress laid upon the dignity of man” as its core value.<sup>52</sup>

### 3.2 International and Regional Human Rights Texts and Proposals

At the regional level, dignity was included in the American Declaration of the Rights and Duties of Man, the first international human rights instrument of a general nature, predating the Universal Declaration of Human Rights by more than six months.<sup>53</sup> The Preamble provided: “All men are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience, they should conduct themselves as brothers one to another.” The first chapter established a catalogue of rights, whilst the second chapter contained a list of corresponding duties. Dignity played an important role in both. As explained in the preamble: “The fulfillment of duty by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty.” The treaty establishing the Organization of American States referred in chapter VII to the importance of dignity as a basis for social legislation. The text of the Bill of Rights of the European Movement of May 1948, by which time the UN draft declaration of human rights was available, provided in Article 1: “All men are born free and equal in dignity,”<sup>54</sup> and in Article 29 that “every one has a right that his dignity and health shall be preserved through the provision of a diet, of clothing, of housing and of medical requirements up to a standard corresponding to the resources of the European Union in relation to vital necessities.”

### 3.3 Human dignity in UN Charter and UDHR

Much of the inspiration for the use of dignity in international and regional human rights texts derives not, however, from these constitutional developments but from the use of dignity in

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<sup>50</sup> The Declaration of the Establishment of the State of Israel, 1948.

<sup>51</sup> Preamble.

<sup>52</sup> C.J. Friedrich, *The Political Theory of the New Democratic Constitutions*, 12 REVIEW OF POLITICS 215 at 217 (1950).

<sup>53</sup> It was adopted by the nations of the Americas at the Ninth International Conference of American States in Bogotá, Colombia, in April 1948, the same meeting that adopted the Charter of the Organization of American States and thereby created the OAS.

<sup>54</sup> Text of Bill of Rights of European Movement, 4 May 1948

the Universal Declaration of Human Rights (UDHR). The Preamble mentions dignity in two places: “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world ...”, and a little later: “Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedoms ...”. Article 1 takes up this theme and provides: “*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*” There are also several more specific uses of dignity in the remainder of the text. Article 22, on the right to social security, provides: “*Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.*” Article 23(3), set in the context of right to work, provides, that “Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.”

### **3.4 Human Dignity in International Humanitarian Law Texts**

Apart from some scattered references during the 19<sup>th</sup> Century to dignity in national provisions relating to the treatment of prisoners,<sup>55</sup> and in a draft treaty provisions prior to the Second World War relating to the treatment of civilian populations,<sup>56</sup> the major boost in international humanitarian law to the use of dignity also came after the Second World War in the drafting of the Geneva Conventions. The importance of dignity as the basis for the approach adopted was clear from the outset.

The International Committee of the Red Cross proposed to the Powers assembled in Geneva the text of a Preamble, which was to be identical in each of the four Conventions:

*“Respect for the personality and dignity of human beings constitutes a universal principle which is binding even in the absence of any contractual*

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<sup>55</sup> Instructions for the Government of Armies of the United States in the Field (Lieber Code). 24 April 1863, Art. 75.

<sup>56</sup> First draft Convention adopted in Monaco (Sanitary cities and localities), 27 July 1934, Art.3.

*undertaking. Such a principle demands that, in time of war, all those not actively engaged in the hostilities and all those placed 'hors de combat' by reason of sickness, wounds, capture, or any other circumstance, shall be given due respect and have protection from the effects of war, and that those among them who are in suffering shall be succored and tended without distinction of race, nationality, religious belief, political opinion or any other quality ...*"<sup>57</sup>  
*The text of the Conventions, as adopted, incorporated "dignity" most prominently in Common Article 3 of the Conventions, which prohibits inter alia "outrages upon personal dignity, in particular humiliating and degrading treatment."*<sup>58</sup>

Such acts "are and shall remain prohibited at any time and in any place whatsoever" with respect to persons protected by the Conventions.

Subsequently, Additional Protocol I of the Conventions relating to the protection of victims of international armed conflicts prohibited "outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault" in Article 75 (relating to "fundamental guarantees").<sup>59</sup> Article 85 provided that certain acts "shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol" including "(c) practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination". Article 4 of the Second Additional Protocol prohibited "(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault."<sup>60</sup> Since then, the statutes of ad hoc international criminal tribunals, and the Rome Statute establishing the International Criminal Court have incorporated similar references to "outrages upon personal dignity".<sup>61</sup>

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<sup>57</sup> See "Remarks and Proposals submitted by the International Committee of the Red Cross". Document for the consideration of Governments invited by the Swiss Federal Council to attend the Diplomatic Conference of Geneva (April 21, 1949), Geneva, February 1949.

<sup>58</sup> Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, Article 3.

<sup>59</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

<sup>60</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

<sup>61</sup> See, The Agreement for and Statute of the Special Court for Sierra Leone, 16 January 2002, Article 3, prohibiting "Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault"; Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide

### 3.5 EUROPEAN COURT OF HUMAN RIGHTS AND THE EUROPEAN COURT OF JUSTICE

In the European context, an apparent exception to the incorporation of dignity in human rights texts after the Second World War is to be found in the European Convention on Human Rights. Subsequently, however, interpretations of the European Commission and Court of Human Rights, particularly the Article 3 ECHR prohibition of torture and inhuman and degrading treatment and punishment, have drawn extensively on the concept of human dignity as a basis for their decisions. The first references to human dignity appeared in the decision of the Commission in the *East African Asian* case where the racial discrimination the applicants were subjected to constituted an infringement of their human dignity,<sup>62</sup> which in the particular circumstances of the case amounted to degrading treatment. The first reference by the Court to human dignity was in *Tyrer v. UK* in which corporal punishment, administered as part of a judicial sentence, was held to be contrary to Article 3 on the grounds that it was 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.”<sup>63</sup> Since then, it has been drawn on in the context of the right to a fair hearing,<sup>64</sup> the right not to be punished in the absence of a legal prohibition,<sup>65</sup> the prohibition of torture,<sup>66</sup> and the right to private life.<sup>67</sup> The Court now regards human dignity as underpinning all of the rights protected by the Convention.<sup>68</sup>

Human dignity has also been incorporated judicially as a general principle of European Community law, deriving from the constitutional traditions common the Member States. Advocate General Jacobs stated in 1993: “the constitutional traditions of the Member States in general allow for the conclusion that there exists a principle according to which the State must respect not only the individual’s physical well-being, but also his dignity, moral integrity and sense of personal identity.”<sup>69</sup> In a second case, interpreting the Community Directive prohibiting sex discrimination in employment, in which it was held that the Directive prohibited a dismissal from employment on the basis of that person’s trans-sexuality, the

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and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, Article 4; Rome Statute of the International Criminal Court, 17 July 1998, Article 8, prohibiting “outrages upon personal dignity, in particular humiliating and degrading treatment”.

<sup>62</sup> *East African Asians v. United Kingdom* (1981) 3 EHRR 76.

<sup>63</sup> *Tyrer v United Kingdom*, 2 EHRR 1.

<sup>64</sup> *Bock v. Germany*, (1990) 12 EHRR 247.

<sup>65</sup> *SW v. UK; CR v. UK* (1995) 21 EHRR 363.

<sup>66</sup> *Ribitsch v. Austria* (1995) 21 EHRR 573.

<sup>67</sup> *Goodwin v. United Kingdom* (2002) 35 EHRR 447.

<sup>68</sup> *Pretty v. United Kingdom* (1997) 24 EHRR 423.

<sup>69</sup> *Christos Konstantinidis v. Stadt Allensteig* Case C-168/91, 1993 ECR I-1191.

Court stated that “to tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard.”<sup>70</sup> In *Omega*, the Court held that “the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law.”<sup>71</sup>

#### IV. HISTORY AND DEVELOPMENT OF THE CONCEPT OF HUMAN DIGNITY

Serena Parekh recalls how questions about ‘natural dignity’ arose among the members of the committee that drafted the Universal Declaration of Human Rights:

*“The question of whether human rights should be grounded in something that was considered ‘natural’ or essential to human beings was at the heart of the debate on the first international human rights document, the Universal Declaration of Human Rights (UDHR). The tension between the desire for a truly universal theory and the fear of relying on metaphysical concepts can be seen in these debates.”*<sup>72</sup>

Although the concept of *dignitas hominis* was dealt with in philosophical essays and was a key term in Kant’s philosophy of freedom,<sup>73</sup> the Universal Declaration of Human Rights, 1948 was the first document in the history of declaration of human rights, which referred to dignity as the foundation of human rights.<sup>74</sup> Its reference to ‘dignity’ was one of the significant differences between Universal Declaration of Human Rights and the other declarations of the late 18<sup>th</sup> Century.<sup>75</sup> Since the adoption of this declaration, where the term ‘dignity’ occurs in Article I, the concept of dignity has assumed an important place in human rights jurisprudence.<sup>76</sup>

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<sup>70</sup> P v. S and Cornwall County Council, Case 13/94, 1996 ECR I-2143; *Coleman v. Law*, Case C-303/06, 31 January (2008).

<sup>71</sup> *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, Case C-36/02, 2004 ECR I-9609, para 34; *Case C-377/98, Netherlands v. European Parliament and Council*, 2001 ECR I-7079.

<sup>72</sup> Serena Parekh, “Resisting Dull and Torpid’ Assent : Returning to the Debate over the foundations of Human Rights”, (2007) 29 HUMAN RIGHTS QUARTERLY, 763.

<sup>73</sup> Michael J. Meyer, ‘Kant’s Concept of Dignity and Modern Political Thought’, (1987) 8 History of European Ideas, 319, 319

<sup>74</sup> Klaus Dicke, ‘THE FOUNDING FUNCTION OF HUMAN DIGNITY IN UNIVERSAL DECLARATION OF HUMAN RIGHTS’ in David Kretzmer & Eckhart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (2002).

<sup>75</sup> *Ibid.*

<sup>76</sup> David Kretzmer & Eckhart Klein (eds), *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE* (2002).

In Hindu Mythology Human Dignity has an importance. “Amritasya Putrah Vayam” - “We are all begotten of the immortal.” This is how Hinduism introduces human being. It finds its place in the Manusmriti as well.

Prof. S.D. Sharma in his book Administration of Justice in Ancient Bharat, (1988) observes: “Consistent with the depth of Indian metaphysics, the human personality was also given a metaphysical interpretation. This is not unknown to the modern occidental philosophy. The concept of human personality in Kant’s philosophy of law is metaphysical entity but Kant was not able to reach the subtler unobserved element of personality, which was the basic theme of the concept of personality in Indian legal philosophy”.

“Ajyesthaaso Akanisthaasa Yete Sam Bhraataro Vaavrudhuh Soubhagaya”

- RigVeda, Mandala-5, Sukta-60, Mantra-5

‘No one is superior or inferior; all are brothers; all should strive for the interest of all and progress collectively’.

As Gandhi’s deity Ram says in Ramcharitmanas, the most popular religious text in modern times:

“Nirmal Man Jan So Mohi Pawa Mohi Kapat Chhal Chhidra Na Bhava”

(The Pure of Heart can find me in them. I do not come to Pretenders, Deceivers and Vicious persons.)

Human dignity is a central consideration of Protestantism and Catholicism. The Church insists the "dignity of the human person is rooted in his or her creation in the image and likeness of God." "All human beings, in as much as they are created in the image of God, have the dignity of a person."

## V. INTERNATIONAL ISSUES AND CHALLENGES TO CONCRETIZE HUMAN DIGNITY

*“Despite its prominent status in international law and many domestic constitutions, it does not have a concrete meaning or a consistent way of being defined. This lack of precision often leads judges to introduce their own moral standards amid competing claims of rights each of which has a plausible case of human dignity violation. The elusive nature of human dignity spells even greater challenges when it is evaluated across cultures.”<sup>77</sup>*

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<sup>77</sup> Karen Lee, ‘Universal Human Dignity: Some Reflections in the Asian Context’, (2008) 3 ASIAN JOURNAL OF COMPARATIVE LAW, 1, 1.

A conceptualisation of the human dignity faces at least three contradictions.<sup>78</sup> Firstly, whether human dignity is a natural quality of human beings or is it a created by political will and state legislation. Secondly, is it an abstract value or is it possible to define it in relation to palpable aspects of human life. Lastly, whether human dignity is absolute and universal or does it depend on case to case contexts. Three issues of Human Dignity have been identified and explained in this section. The format is as follows. First, one side of the issue will be given, then the second side and lastly a synthesis of both sides will be presented.

### 5.1 Natural v. Consensual character of dignity

Dignity is a ‘natural’ characteristic with which all human beings are born.<sup>79</sup> This means that human are naturally attributed with dignity.<sup>80</sup> In this way, dignity assumes the role of being the defining element of human nature, and thus characterizes the whole human species regardless of their distinguishing features.<sup>81</sup>

This concept faces opposition in the idea of human dignity as a characteristic attributed consensually to all human beings because it is useful.<sup>82</sup> The consequent connotation from this is that human dignity is not inherent in human beings.<sup>83</sup> Rather, it is a moral, political and especially legal fiction which is proclaimed on all members of the human civilization.<sup>84</sup> Therefore, it is the States, especially the constitutional States, that are respectful of rights and liberties, which create the juridical-political principle of human dignity.<sup>85</sup> This belief is created largely as a way of trying to secure peace and peaceful human coexistence.<sup>86</sup>

The problem with this argument is that utilitarian principles can be used to justify anything, for e.g. some members of the human society cannot be bearers of the fiction of ‘dignity. In summary, this issue is based on the very foundation of the concept of human dignity as a justification of human rights, and is closely related to the discussions between *jusnaturalism* and *juspositivism*.

### 5.2 Abstract v. Concrete character of dignity

The second conflict is regarding the abstract notion of dignity on one hand and on the other,

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<sup>78</sup> F. Torralba, *Que es la dignidad humana? Ensayo sobre Peter Singer* (1st, Herder, Barcelona 2005)

<sup>79</sup> Kendall Soulen & L. Woodhead, *GOD AND HUMAN DIGNITY* (2006).

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*

<sup>82</sup> N. Hoerster, ‘ACERCA DEL SIGNIFICADO DEL PRINCIPIO DE LA DIGNIDAD HUMANA’ in: J. Sena (ed.) *EN DEFENSA DEL POSITIVISMO JURIDICO* (1992), 91-103.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

concreteness possessed by the idea of human dignity.<sup>87</sup> Since the Enlightenment led by Kantian practical philosophy, human dignity has been considered as a moral maxim according to which every rational human being should treat himself and all human beings who share this "attribute" as an end in itself and never as a means.<sup>88</sup> Kant tried to develop an alternative to utilitarian ethics based on the idea that every human being is endowed with a "self-legislating" ability due to his innate freedom, as well as to his rationality and some sense of duty towards all humankind.<sup>89</sup> In this sense, for Kant, every human being who has the freedom to follow reason and moral imperatives is endowed, by this very fact, with universal human dignity.<sup>90</sup>

The problem with this definition is its vagueness. Such abstract ideas of dignity lack practical content. Disagreements start to appear when this idea is translated into more practical aspects of social-political life as, for example, having certain rights and possibilities (certain employment, education, social relations, etc.).

The opposition to this concept emphasizes the necessity to define dignity more specifically so that it can be easily verified.<sup>91</sup> Among the aspects of the definition of Human Dignity, one would find, *inter alia*, fundamental rights, freedom to choose a profession etc.<sup>92</sup>

This second issue thus consists of the need for any definition of human dignity to be clearly related to specific aspects of human life itself. In this sense, if human dignity is defined, for example, as "always being treated as an end and not as a means", such a definition generates the need to clarify in which cases there is one (being treated as a means) and in which cases there is the other (being treated as an end). However, the risk with this logic is that the idea of dignity would be converted into convention and maybe even irrelevant issues.

### **5.3 Universal v. Individual character of dignity**

In this third case, the first idea is the existence of an absolute and universal value, as human dignity would be, which would belong to every human being at all times and places. In this respect, human dignity would be one only, applicable to every individual of the human species.<sup>93</sup> On the other hand is the individual nature of dignity, which says that a multitude of

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<sup>87</sup> R. Asis, *Sobre el concepto & el fundamento de los Derechos: Una aproximación dualista*, (1st, Dykinson, Madrid 2001), 37.

<sup>88</sup> Immanuel Kant, *CRITIQUE OF PRACTICAL REASON*.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

<sup>91</sup> Peces Barba, *Curso de derechos fundamentales, teoría general* (1st, Universidad Carlos III de Madrid, BOE, Madrid 1995), 77.

<sup>92</sup> *Ibid.*

<sup>93</sup> G. Pico Mirandola, 'Biblioteca de la Literatura y el Pensamiento Universal' in L. Martínez Gómez (ed), *De la Dignidad del Hombre* (1st, Editora Nacional, Madrid 1984), 50.

dignity ideas exist, each one having a separate location in separate groups.<sup>94</sup> Thus one could speak of dignity of human beings as a Westerner or an Easterner.<sup>95</sup>

The character of Universal Value is faulty in the fact that as far as dignity is related to the idea of a good life, it is hardly plausible to say that this could be prevalent everywhere. In contrast, the idea that each culture has developed, in different times and places, an idea of "living well" and, in this sense, an idea of dignity seems to be more sensible.

According to Karen Lee, "Human dignity becomes a value behind different ways of life as societies describe their own conceptions about how humans should relate to one another. When people in Western-style democracies in general regard liberalism as the cornerstone of worthy human existence, in many Asian cultures, the rights and freedoms of individuals are intertwined with their duties and roles as determined by religion or convention."<sup>96</sup>

#### 5.4 Malleability

This indeterminacy poses a further consequence, in that human dignity is malleable and may be used to serve an impressive variety of situations. Dignity may be adapted to serve liberal and individualist conceptions of human rights, or it may be invoked to emphasize self-determination of peoples and communitarian values.<sup>97</sup> In relation, dignity may be a value that celebrates pluralism, or it may refer to an overarching conception of right that transcends national and cultural boundaries.<sup>98</sup> Robust respect for the inherent dignity of persons may entail teaching tolerance of other races, ethnic groups, or religions,<sup>99</sup> non-discrimination,<sup>100</sup> awareness-raising to combat stereotyping,<sup>101</sup> providing opportunities for maintaining family life and familial connections,<sup>102</sup> educational and employment opportunities,<sup>103</sup> democratic self-governance,<sup>104</sup> ensuring basic humane living conditions even in disasters,<sup>105</sup> "informed

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<sup>94</sup> E. Fernandez, *Dignidad Humana Y Ciudadania Cosomopolita* (1st, Dykinson, Madrid, 2001), 53.

<sup>95</sup> *Ibid.*

<sup>96</sup> J. Benton Heath, 'Human Dignity at Trial: Hard Cases and Broad Concepts in International Criminal Law' [2012] *GEO. WASH. INT'L L. REV.*, 317, 343.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.* at 852.

<sup>100</sup> South West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.), 1966 I.C.J. 6, 306, 313 (July 18) (Tanaka, J., dissenting).

<sup>101</sup> Convention on the Rights of Persons with Disabilities, (Dec. 13, 2006), 2515 U.N.T.S. 3, Art. 8

<sup>102</sup> Jean De Preux, *Commentary: III Geneva Convention Relative to War* (1st, Geneva, 1950)

<sup>103</sup> Article 13, Universal Declaration of Human Rights, (Dec. 10, 1948), Article 23; International Covenant on Economic, Social and Cultural Rights Preamble, (Dec. 16, 1966), 993 U.N.T.S. 3,

<sup>104</sup> William J. Brennan, 'The Constitution of the United States: Contemporary Ratification', [1985] *U.C. DAVIS L. REV.*, 2, 8

<sup>105</sup> International Law Commission, 3<sup>rd</sup> *Report on Protection of Persons in the Event of Disasters*, 51-62.

consent" in medical treatment,<sup>106</sup> respect for human remains,<sup>107</sup> proportionality in criminal punishment,<sup>108</sup> protection of civilian lives in armed conflict and defence against terrorism,<sup>109</sup> and, of course, prohibitions on hate speech. It will also appear on both sides of debates in bioethics,<sup>110</sup> abortion,<sup>111</sup> physician-assisted suicide,<sup>112</sup> and prostitution.<sup>113</sup>

The most remarkable aspect of this list is not its breadth, but the fact that all of these applications of dignity seem to make intuitive sense, in light of the "minimum core" identified by Gerald Neuman and McCrudden and in light of colloquial uses of the term. This indicates that dignity's adaptability is somehow central to its meaning and linguistic utility. The issue of malleability has two faces.

### 5.4.1 Contestability

The principle of dignity takes various shapes in various legal systems. Dignity is important across cultures, yet the non-western conceptions of human dignity are arguably much less likely to give much importance to human rights in the liberal sense of the term.<sup>114</sup>

Even in the European nations, which are generally thought to be extremely protective of human dignity,<sup>115</sup> there remains a substantial disagreement about the content of dignity.<sup>116</sup> Jurisdictions differ with regard to the extent which human dignity is perceived as a principle emphasizing individualism and autonomy versus communitarian ties.<sup>117</sup> At ground level, in Europe, there is a debate regarding the role which dignity plays in abortion, bioethics, privacy and social assistance programs.<sup>118</sup> However, in the United States, the extent of such contestation increases manifold. This because of the fact that U.S. Courts have been reluctant

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<sup>106</sup> World Medical Association, *World Medical Association Declaration of Helsinki: Ethical Principles for Medical Research Involving Human Subjects*, (June 1964), p. 11-30

<sup>107</sup> *Elements of Crimes of the International Criminal Court* in Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court (1<sup>st</sup> Session, New York, September, 2002), 3-10.

<sup>108</sup> *Trop v. Dulles*, 356 U.S. 86, 100, (1958).

<sup>109</sup> See *Aerial Security Law*, Bundesverfassungsgericht (Federal Constitutional Court of Germany) Feb. 15, 2006, 115 Entscheidungen des Bundesverfassungsgerichts (Decisions of the Constitutional Court) 118 (Ger.).

<sup>110</sup> Generally *Human Dignity and Bioethics*, President's Council on Bioethics (2008).

<sup>111</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992); *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007)

<sup>112</sup> Ronald Dworkin, *LIFE'S DOMINION*, (1993), 238-40.

<sup>113</sup> *Jordan & Others v. State*, 2002 (6) SA 642 (S. Afr).

<sup>114</sup> Jack Donnelly, *Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights*, [1982] 76 AM. POL. SCI. REV. 303, 306-11.

<sup>115</sup> Georg Nolte, "European and U.S. Constitutionalism: Comparing Essential Elements" in G. Nolte (ed.), *European and U.S. Constitutionalism*, (2005) 3, 13 (Hereinafter *Constitutionalism*)

<sup>116</sup> See Giovanni Boggetti, "The Concept of Human Dignity in European and U.S. Constitutionalism", in *Constitutionalism*.

<sup>117</sup> Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, (2008) 19 EUR. J. INT'L L., 655, 699-701.

<sup>118</sup> *Supra* note 115 at 92-99.

to place dignity at the centre of debates over privacy, free expression etc.<sup>119</sup> The differing approaches with regard to hate speeches in Europe and the U.S. is a good example.<sup>120</sup>

Such disagreements show that there is little consensus as to the content and scope of human dignity.

#### 5.4.2 Indeterminacy in International Law

At the international level, human dignity remains deeply indeterminate in the major human rights instruments. Historically, while the concept occasionally appears in the international legal thought of the early modern period,<sup>121</sup> its use in contemporary legal practice and jurisprudence can be traced to its inclusion in the 1948 Universal Declaration of Human Rights.<sup>122</sup> But, as Christopher McCrudden details, the concept operated as something of a “placeholder” in the Universal Declaration of Human Rights.<sup>123</sup> “Dignity was included in that part of any discussion or text where the absence of a theory of human rights would have been embarrassing,” McCrudden writes. “Everyone could agree that human dignity was central, but not why or how.”<sup>124</sup>

Where human dignity is included in a specific provision of human rights or humanitarian law instrument, its implications and contours have since been elaborated by cases and commentary.<sup>125</sup> This is most common with dignity provisions relating to torture and cruel treatment.<sup>126</sup> But, it is difficult to identify any particular content of human dignity writ large, beyond the minimum core discussed in the contexts of torture and detention.

#### 5.5 Dignity against Legality

There are cases where everyone would agree that a person’s dignity was grossly violated, for e.g. torture. Then, there are instances where it would appear that a person’s dignity is violated, from insults to hate speech and from shoving in the street to murder. In cases involving speech,

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<sup>119</sup> Ibid.

<sup>120</sup> Compare *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 with *Human Rights Comm.*, *Faurisson v. France*, Comm. No. 550/1993, ¶ 2.3.

<sup>121</sup> Samuel Pufendorf, *OF THE LAW OF NATURE AND NATIONS*, Book. 2, chapter 1, § 5 (1672).

<sup>122</sup> The term dignity appears five times in that document. See Universal Declaration of Human Rights, (Dec. 10, 1948). (It arises twice in the preamble, recognizing the “inherent dignity and ... equal and inalienable rights” of all persons, and recalling the U.N. Charter’s affirmation of this dignity. Article 1 holds that “all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”; The provisions concerning economic and social rights, as well as just remuneration, also reference the concept. Arts. 22-23.

<sup>123</sup> *Supra* note 64 at 678.

<sup>124</sup> Ibid.

<sup>125</sup> Ibid.

<sup>126</sup> Ibid.

biology or sex, dignity often appears. Yet, it cannot be said for sure that any of these exists at the ‘core’ of human dignity.

Secondly, this problem is compounded by the fact that dignity, while remaining indeterminate, also serves as a general principle that demands a creative interpretation. Protection of Human Dignity has been identified as the *raison d’etre* of International Criminal Law (ICL) and related disciplines.<sup>127</sup> Also, under the legality framework developed by the international criminal tribunals, expansive adaptation must actualize the purposes of the regime.<sup>128</sup> Together, these propositions recall the compulsion in human rights law to maximize the protection of human dignity by expansively interpreting the relevant legal provisions.<sup>129</sup> Thus, when a court feels that a lacuna in the law threatens human dignity, it may feel compelled to adapt old criminal norms to fit this new situation.

In such a scenario, human dignity, even in its indeterminacy plays both a motivating and a juris-generative role in shaping the outcomes of cases, and it does so in a way that presses against legality. Dignity motivates the expansion of criminal norms by demanding that the law develop to meet the perceived indignities. At the same time, the concept is used to generate new legal content to cover the particular case. Courts tend to do so without an effort to elucidate the meaning of human dignity or explain its contours and limits.

One of the underlying purposes of legality is to ensure that potential defendants have ‘notice’ of the criminal nature of their actions.<sup>130</sup> However, in the abovementioned scenarios, dignity frustrates this purpose as potential defendants do not have notice or knowledge of the ‘criminal nature’ of their actions. Human dignity is capable of pulling ICL into contested areas where morally reprehensible meets fundamental freedom and where a defendant might have had no ‘notice’ of the criminal nature of her conduct.<sup>131</sup>

Thus, it will not be incorrect to say that human dignity in this manner adds an element of Nuremburg substantive justice to International Criminal Jurisprudence. Human dignity thus pulls courts into new legal terrain where existing norms are vague, conflicted, or non-existent and judges must decide cases according to ethical theories or moral intuition.

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<sup>127</sup> Prosecutor v. Hadhihasanovic, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, p. 64 (International Criminal Tribunal For the Former Yugoslavia); Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Trial Judgment, p. 54 (International Criminal Tribunal For the Former Yugoslavia).

<sup>128</sup> Antonio Cassese, INTERNATIONAL CRIMINAL LAW, (2nd ed. 2008) 46; Prosecutor v. Delali, Case No. IT-96-21-T, Trial Judgment, 412 (International Criminal Tribunal for the Former Yugoslavia).

<sup>129</sup> Daryl Robinson, “*The Identity Crisis of International Criminal Law*” [2008] 21 LEIDEN J. INT’L L., 925.

<sup>130</sup> M. Cherif Bassiouni, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW (2<sup>nd</sup> ed., 2011), 300.

<sup>131</sup> Nahimana v. Prosecutor, Case No. ICTR-99-52-A, Appeal Judgment, P 983 (Nov. 28, 2007).

## VI. JUDICIAL INTERPRETATION UNDER THE CONSTITUTION OF INDIA

Under Article 21 of the Constitution of India, the right to life does not merely mean the continuance of a person's animal existence, but a quality of life. It means the fullest opportunity to develop one's personality and potentiality to the highest level possible in the existing stage of our civilization. The right implies a reasonable standard of comfort and decency.<sup>132</sup>

The Courts have given an elaborated connotation to the concept of right to life. One of the primary features of the concept is right to live with human dignity.

In the case of *Francis Coralie v. Union Territory of Delhi*<sup>133</sup>, the Supreme Court struck down Section 3 of Conservation of Foreign Exchange and Prevention of Smuggling Act, 1974, as violative of Article 14 and 21. The impugned Section provided that a detenu could have interview with his legal adviser only once a month. Moreover, a prior permission of the District Magistrate as well as the customs officer was required. The Supreme Court explained the scope of Article 21 as inclusive of the right to live with human dignity and all that goes along with it, namely the bare necessities of life such as shelter over the head, adequate nutrition, clothing and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.

The CBI was directed by the Court to investigate any other offence, if committed by a person, without a prima facie case, has been held to be contrary to the concept of the right to life.<sup>134</sup>

The non-payment of minimum wages to the workers has been held by the Supreme Court as violative of the fundamental right of the workers to live with human dignity. The Court expounded that the Inter-State Migrants Labour (Regulation, Employment and Conditions of Service) Act, 1979 and the Contract (Regulation and Prevention) Act, 1970 conferred rights and benefits on the workmen employed by the contractor. These legislations clearly intended to bring basic human dignity to workmen.

Justice Bhagwati furthered the above taken view in the case of *Bandhua Mukrti Morcha v. Union of India*<sup>135</sup>. According to him, it is the fundamental right of everyone in this country to live with human dignity free from exploitation. This right to live with human dignity derives its birth from the Directive Principles of State Policy. It therefore must include protection of

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<sup>132</sup> Confd. of Ex-Servicemen Association v. Union of India 2006 (8) SCC 399; Francis Coralie v. Union Territory of Delhi AIR 1981 SC 746.

<sup>133</sup> Francis Coralie v. Union Territory of Delhi AIR 1981 SC 746.

<sup>134</sup> M.I & R.E Services, U.P v. S.R. Arya, AIR 2002 SC 2257.

<sup>135</sup> Bandhua Mukrti Morcha v. Union of India 1984 AIR 802.

health and strength of workers, men and women and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief.

In another case, the Hon'ble Court emphasized on the right to live with human dignity by demonstrating that every person was entitled to have a quality of life consistent with human personality. Hence, the right to life has been held to include right to decent environment, right of a couple to adopt a son, to make their life more meaningful.<sup>136</sup>

Reiterating the line of thought in the Maneka Gandhi<sup>137</sup> case, the Courts have held that right to live is not merely confined to physical existence but it includes within its ambit the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing, shelter, facilities for reading, writing and expressing ourselves in diverse forms, freely moving about and mixing with fellow human beings.

#### **6.1 Mohd. Ahmed Khan v. Shah Bano Begum and Ors.: Protecting Dignity of a woman**

Shah Bano, a 62 year old Muslim woman and mother of five from Indore, Madhya Pradesh, was driven out of her "matrimonial home" by her husband in 1975. In April 1978 she filed a case against her husband, Mohammed Ahmad Khan, asking him for a maintenance amount of ₹ 500. On November 1978 her husband gave an irrevocable talaq (divorce) to her which is his prerogative under Islamic Law.<sup>138</sup> Mr. Khan then filed a case against Shah Bano in the Supreme court claiming that Shah Bano is not his responsibility anymore because Mr. Khan had a second marriage which is also permitted under Islamic Law.<sup>139</sup>

Shah Bano, because she had no means to support herself and her children, approached the courts for securing maintenance from her husband. When the case reached the Supreme Court of India, seven years had elapsed. The Supreme Court invoked Section 125 of Code of Criminal Procedure, which applies to everyone regardless of caste, creed, or religion. It ruled that Shah Bano be given maintenance money, similar to alimony.<sup>140</sup> Hence, in this case, the Supreme Court fostered the dignity of the woman who had been abandoned by everyone.

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<sup>136</sup> Philips Alfred Malvin v. Y.J Gonsalvis AIR 2004 NOC 169 (Kant.)

<sup>137</sup> Maneka Gandhi v. Union of India (1978) AIR 597.

<sup>138</sup> Noorani, Abdul Gafoor Abdul Majeed, THE MUSLIMS OF INDIA: A DOCUMENTARY RECORD (2003).

<sup>139</sup> Mohd. Ahmed Khan v. Shah Bano Begum and Ors. (1985) 2 SCC 556.

<sup>140</sup> Ibid.

However, in 1986, the Congress (I) party, which had an absolute majority in Parliament at the time, passed an act The Muslim Women (Protection of Rights on Divorce) Act 1986 that nullified the Supreme Court's judgment in the Shah Bano case. This act upheld the Muslim Personal Law and writ as excerpted below:

*“Every application by a divorced woman under section 125... of the Code of Criminal Procedure, 1973, pending before a magistrate on the commencement of this Act shall, notwithstanding anything contained in that code... be disposed of by such magistrate in accordance with the provisions of this Act.”*

The Statement of Objects and Reasons of this Act (the objective of the Act) needs a mention. According to the stated objects of the Act, when a Muslim divorced woman is unable to support herself after the period that she must observe after the death of her spouse or after a divorce, during which she may not marry another man, the magistrate is empowered to make an order for the payment of maintenance by her relatives who would be entitled to inherit her property on her death according to Muslim Law. But when a divorced woman has no such relatives, and does not have enough means to pay the maintenance, the magistrate would order the State Waqf Board to pay the maintenance. The 'liability' of husband to pay the maintenance was thus restricted to the period of the iddat only.

More recently the Supreme Court in *Danial Latifi v. Union of India*<sup>141</sup> read the Act with Art 14 and 15 of the constitution which prevent discrimination on the basis of sex and held that the intention of the framers could not have been to deprive Muslim women of their rights. Further the Supreme Court construed the statutory provision in such a manner that it does not fall foul of Articles 14 and 15. The provision in question is Section 3(1)(a) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 which states that "a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband". The Court held this provision means that reasonable and fair provision and maintenance is not limited for the iddat period (as evidenced by the use of word "within" and not "for"). It extends for the entire life of the divorced wife until she remarries.

## **6.2 Suresh Kumar v. NAZ Foundation<sup>142</sup>: Freedom of choice and action in an Inclusive Society**

According to the Hon'ble Court, dignity as observed by J. L'Heureux-Dube, is a difficult

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<sup>141</sup> Danial Latifi & Anr. v. Union of India AIR2001SC3958.

<sup>142</sup> Suresh Kumar Kaushal v. Naz Foundation SLP(C) No.15436/2009.

concept to capture in precise terms.<sup>143</sup> At its least, it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society. It recognises a person as a free being who develops his or her body and mind as he or she sees fit. At the root of the dignity is the autonomy of the private will and a person's freedom of choice and of action. Human dignity rests on recognition of the physical and spiritual integrity of the human being, his or her humanity, and his value as a person, irrespective of the utility he can provide to others. The expression “dignity of the individual” finds specific mention in the Preamble to the Constitution of India. V.R. Krishna Iyer, J. observed that the guarantee of human dignity forms part of our constitutional culture.<sup>144</sup>

Harassment constitutes discrimination when unwanted conduct related to any prohibited ground takes place with the purpose or effect of violating the dignity of a person or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

Hence, applying the above rationale, the Supreme Court held that the impugned provision in Section 377 IPC criminalises the acts of sexual minorities particularly men who have sex with men and gay men. It disproportionately impacts them solely on the basis of their sexual orientation. The provision runs counter to the constitutional values and the notion of human dignity which is considered to be the cornerstone of our Constitution. Section 377 IPC in its application to sexual acts of consenting adults in privacy discriminates a section of people solely on the ground of their sexual orientation which is analogous to prohibited ground of sex. A provision of law branding one section of people as criminal based wholly on the State's moral disapproval of that class goes counter to the equality guaranteed under Articles 14 and 15 under any standard of review.

If there is one constitutional tenet that can be said to be underlying theme of the Indian Constitution, it is that of 'inclusiveness'. The Court affirmed that Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognising a role in society for everyone. Those perceived by the majority as “deviants' or 'different' are not on that score excluded or ostracised. Where society can display inclusiveness and understanding, such persons can be assured of a life of dignity and nondiscrimination. This was the 'spirit behind the Resolution' of which Nehru spoke so passionately.

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<sup>143</sup> *Egan v. Canada*, (1995) 29 CRR (2nd) 79, 106.

<sup>144</sup> *Prem Shankar Shukla v. Delhi Administration* AIR 1980 SC 535.

## **6.2 UID Scheme: Restricting the Identity of an Individual to a mere number**

The Unique Identification Number Scheme initiated by the UIDIA, is a government scheme to combat the incessant threat of terrorism. It is also claimed as the face of India's development. It is based on the biometric analysis of an individual. However, this number does not ensure any specific government benefits, specially to the economically and educationally backward section of the society.

This process of assigning a mere number to an individual somewhere transgresses the private sphere of an individual that is guaranteed under Article 19 of the Constitution of India. Article 19 envisages protection of freedom, privacy and dignity.

## **6.4 Aruna Ramchandra Shaunbaug v. Union of India and Ors.: Right to die with dignity**

According to the Hon'ble Supreme Court, euthanasia is one of the most perplexing issues which the courts and legislatures all over the world are facing today. The Court, in this case, faced the same issue, and compared itself to a ship in an uncharted sea, seeking some guidance by the light thrown by the legislations and judicial pronouncements of foreign countries, as well as the submissions of learned counsels. The petitioner in this case was Pinky Virani,<sup>145</sup> a renowned journalist, who pleaded passive euthanasia be legalized, as in the case of one Aruna Shanbaug. The latter was a nurse suffering in persistent vegetative state, in the aftermath of a rape incident to which she was a victim. She was taken care of by the hospital staff of the KEM Hospital in Mumbai, where the victim had worked. The Hon'ble Court analyzed the issue of right to life extending it to the right to die with dignity. Taking into consideration the moral and social fabric of Indian society, and a lack of legislation on this issue, the Hon'ble Supreme Court refrained from giving a sweeping statement on legalizing euthanasia in India. Since the petitioner was not having locus standi in this case, the demand of the petitioner was not given effect to. However, the ambit of dignity in this case has been stretched to a greater extent including a right to die with dignity and respect.

## **VII. INCORPORATION OF HUMAN DIGNITY IN OTHER CONSTITUTIONS**

### **7.1 The Constitution of Canada**

Although human dignity is not explicitly found in any of Canada's constitutional texts, the Supreme Court of Canada refers to the term on a regular basis when interpreting the rights enumerated in the Charter, and it is found in the preamble of the quasi-constitutional *Canadian*

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<sup>145</sup> Aruna Ramchandra Shanbaug v. Union Of India And Ors. 2011 (3) SCALE 298.

*Bill of Rights*, which states in the first paragraph:<sup>146</sup>

The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions. While the preamble of the Charter does not refer to human dignity, it does refer to the supremacy of God – as does the preamble of the Canadian Bill of Rights. The preamble of the Charter reads as follows:<sup>147</sup>

“Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law.”

Interestingly, it has been argued that this reference to the Supremacy of God in the Charter represents human dignity, which is the theory “upon which the Charter is based”.<sup>148</sup> It has also been suggested that if human dignity was linked to the supremacy of God there would be “a more coherent and robust elaboration of the Charter’s moral architecture”. More importantly, the Supreme Court of Canada has referred to human dignity as the basis for the substantive rights and as lying “at the heart of the Charter”.<sup>149</sup> In *R. v. Morgentaler*<sup>150</sup> Justice Wilson held that “the idea of human dignity is expressed in every Charter provision and stands as the basic theory underlying the Charter”. Thus, human dignity is not a single substantive right itself, but rather a theoretical basis upon which the substantive rights are anchored.<sup>151</sup>

The Canadian Supreme Court in *Law v. Canada (Ministry of Employment and Immigration)*,<sup>152</sup> attempts to capture the concept of dignity in these words :

*“Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when*

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<sup>146</sup> John Helis, *Hannah Arendt and Human Dignity: Theoretical Foundations and Constitutional Protection of Human Rights*, JOURNAL OF POLITICS AND LAW, 1 (3), September (2008).

<sup>147</sup> Ibid.

<sup>148</sup> Penny, J.W. & Danay, R. (2006). *The Embarrassing Preamble? Understanding the “Supremacy of God” and the Charter*, UNIVERSITY OF BRITISH COLUMBIA LAW REVIEW, 39, 287-331.

<sup>149</sup> *R. v. O’Connor*, (1995) 4 S.C.R. 411, 130 D.L.R. (4th) 235.

<sup>150</sup> *R. v. Morgentaler*, (1986) 2 S.C.R. 284, 31 D.L.R. (4th) 569.

<sup>151</sup> Ibid.

<sup>152</sup> *Law v. Canada (Ministry of Employment and Immigration)*, (1999) 1 S.C.R. 497.

*laws recognise the full place of all individuals and groups within Canadian society.”*

In *R. v. Oaks*,<sup>153</sup> the leading decision from the Supreme Court on section 1, Chief Justice Dickson made a crucial link between the idea of human dignity and participation in political community by stating that:

*“The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society”.*<sup>154</sup>

This view was subsequently approved unanimously by the Supreme Court in the *Quebec Succession Reference*<sup>155</sup> case when analysing the unwritten constitutional principle of democracy (1998: para. 64). The Supreme Court of Canada has in fact been criticised for “failing to develop a coherent approach to” its use of the term human dignity.<sup>156</sup>

In many cases, the term human dignity has been used as a justification for a specific right. For example, the Supreme Court of Canada has often relied on the term human dignity when analysing the right to life, liberty and the security of the person in section 7 of the Charter. The provision reads as follows:

Everyone has the right to life, liberty, and security of the person, and the right not be deprived thereof except in accordance with the principles of fundamental justice.

In addition to endorsing the idea that human dignity underlies the entire Charter, Justice Wilson in the *Morgentaler*<sup>157</sup> case also relied on the term when interpreting section 7, and held that it provides “a degree of personal autonomy over important decisions intimately affecting their private lives”.

In the case of *F.C.W., Local 1518 v. K-Mart Canada Ltd.*,<sup>158</sup> the court linked the notion of human dignity to the freedom of expression guaranteed in section 2(b) of the Charter (1999). While this case concerns the freedom of expression within the context of a labour dispute, the case on the whole does serve to underscore the importance of “free expression as a means to

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<sup>153</sup> *R. v. Oaks*, (1986) 1 S.C.R. 103, 26 D.L.R. (4th) 200.

<sup>154</sup> *Ibid.*

<sup>155</sup> *Reference Re Secession of Quebec*, (1998) 2 S.C.R. 217, 161 D.L.R. (4th) 385.

<sup>156</sup> J.R. Fyfe, *Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada*, SASKATCHEWAN LAW REVIEW, 70, 1-26 (2007).

<sup>157</sup> *R. v. Morgentaler*, (1986) 2 S.C.R. 284, 31 D.L.R. (4th) 569.

<sup>158</sup> *F.C.W., Local 1518 v. K-Mart Canada Ltd.*, (1999) 2 S.C.R. 1083, 176 D.L.R. (4th) 607.

social and political empowerment”.<sup>159</sup>

## 7.2 The Constitution of Germany

The term human dignity has served a practical function in contemporary human rights regimes worldwide, and has been incorporated into the constitutions of a number of states as the basis for human rights protection. The first time that human dignity was incorporated into a legal text was in Germany after the Second World War. The German constitution, which is referred to as the Basic Law for the Federal Republic of Germany, states in Article 1 that “Human dignity shall be inviolable.” This reference to human dignity in the German Basic Law has been interpreted by a majority of legal scholars as representing the objective basis for all the rights protected in the German constitution rather than serving as an independent civil right in itself.<sup>160</sup>

Substantially, “human dignity” in the constitutional jurisprudence today is considered to be the only value beyond any weighing of interests, to be absolute and paramount.<sup>161</sup> While all other basic rights interests are subject to restrictions in order to further aspects of the public good, “human dignity” may not be infringed upon for any reason. In recent times, this proposition was most notably called into question by some authors with regard to torture used to force a criminal to give information urgently needed to save innocent human lives however, it was confirmed by the federal constitutional court holding that a law allowing for the shooting down of an airplane with innocent passengers in situations like September 11th was in violation of the guarantee of human dignity, regardless of the fact that it would save more human lives.

Hence, the Court puts into questions the priority of human beings and their dignity over the state as such, as it is symbolized in “human dignity” being the very first words of the German Constitution.

In another rather recent case<sup>162</sup> acoustic and optic surveillance of people’s homes by technical means was made possible by an amendment of the constitutions Art. 13, the inviolability of the home. Even constitutional amendments may not touch the principles of Art. 1 if the Basic Law, among them the respect for and the protection of human dignity, The Court held, that not all such surveillance infringes upon human dignity, but that generally only the personal basic right

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<sup>159</sup> J.R. Fyfe, *Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada*, SASKATCHEWAN LAW, 70, 1-26(2007).

<sup>160</sup> Erdman, J., Essert C. & Yachnin M. (2003). An Interview with Justice Frank Iacobucci and Professor Dieter Grimm. *University of Toronto Journal of Law and Equality*, 2, 197-209.

<sup>161</sup> BVerfGE 5, 85 (204); BVerfGE 93, 266 (293); 107, 275 (284).

<sup>162</sup> BVerfGE 109, 279 (310 et seqq.).

to privacy of the home was touched upon, which is subject to constitutional restrictions clauses. But the Court held, that there is a human dignity core to the inviolability of the home, as far as strictly personal affairs are concerned. It accepted the constitutional amendment but stipulated, that the new possibilities of surveillance had to stop short of this strictly personal core of privacy; informations attained out of prohibited surveillance are to be destroyed and may under no circumstances be used against the persons involved.

### **7.3 The Constitution of Israel**

Human Dignity and Liberty is a Basic Law, intended to protect main human rights in Israel. The view of most Supreme Court judges, is that the enactment of this law and of Basic Law: Freedom of Occupation began the Constitutional Revolution, due to the fact the Knesset gave these two laws super-legal status, giving the courts the authority to disqualify any law contradicting them. It declares basic human rights in Israel are based on the recognition of the value of man, the sanctity of his life and the fact that he is free. It defines human freedom as the right to leave and enter the country, privacy (including speech, writings and notes), intimacy and protection from unlawful searches of one's person or property.

The rights protected by this law are detailed in several clauses:

Section 1: The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law tile values of the State of Israel as a Jewish and democratic state.

Section 2: There shall be no violation of the life, body or dignity of any person as such.

Section 3: There shall be no violation of the property of a person.

Section 4: All persons are entitled to protection of their life, body and dignity.

Section 5: There shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or otherwise.

Section 6:

(a) All persons are free to leave Israel.

(b) Every Israeli national has the right of entry into Israel from abroad.

Section 7:

(a) All persons have the right to privacy and to intimacy.

(b) There shall be no entry into the private premises of a person who has not consented thereto.

(c) No search shall be conducted on the private premises of a person, nor in the body or personal effects.

(d) There shall be no violation of the confidentiality of conversation, or of the writings or records of a person.

However, several cardinal human rights are missing from this document, such as the Right for Equality, Freedom of Speech, Freedom of Religion, Freedom of Protest, and others. These rights were given to the residents of Israel by general principles which existed before this Basic Law. Although these rights were not included in the law, some jurists, such as former President of The Supreme Court of Israel Aharon Barak, see these rights are directly derived from the "right to dignity".

It is to be noted that, under Article 39(D) of Basic Law: The Government, "Emergency regulations may not ... permit violations of human dignity". There is an absolute prohibition to violate human dignity in its essential sense through emergency regulations (such as by the use of torture), it is permitted to violate human dignity in the wider sense, such as by denying freedom of expression, on condition that such a violation abides by the demands of the limitation clause in Basic Law: Human Dignity and Liberty.<sup>163</sup>

In Israel, as in Germany, the right for human dignity has a double function. As stated earlier, this is an individual right that is anchored in two articles of Basic Law: Human Dignity and Liberty. Article 2 ("dignity of a human being must not be injured") gives it a "negative" protection, while Article 4 ("Every person is entitled to the protection of his ...dignity") imposes upon the State a "positive" duty to protect it. The right was interpreted elaborately by the Israeli Supreme Court as including broad aspects, such as the right to equality, freedom of expression, and even the right to a minimal maintenance of existence with dignity.<sup>164</sup>

## VIII. CONCLUSION

Taking into account those mentioned above, the researcher agrees with the expressed and well-grounded opinion of J. L. E. Pettit who states that, taking into account the term in international law, it is predominantly a jurisprudential creation, human dignity developing in a few years from a philosophical reference to a compliance criteria of the protection of human right texts<sup>165</sup>.

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<sup>163</sup> BVerfGE 15, 283 (286).

<sup>164</sup> 9 H CJ 366/03 *Commitment to Peace and Social Justice Society v. Minister of Finance*, Tak-Al 2005 (4) 2605 (Isr.).

<sup>165</sup> Jack Donnelly, *Human Dignity and Human Right* (June 2009) available at [http://www.udhr60.ch/report/donnelly-HumanDignity\\_0609.pdf](http://www.udhr60.ch/report/donnelly-HumanDignity_0609.pdf).

It is worthy to note that its presence in the legal texts is today in a permanent expansion. Its polysemantic fundamental nature, the difficulty in defining it and limiting its protection domain, the controversies regarding its legal status, its presence in the jurisprudence, its role in the conventional space as an interpretative concept, make human dignity a captivating challenge for the new millennium.

The notion of equality in the Indian Constitution flows from the ‘Objective Resolution’ moved by Pandit Jawaharlal Nehru on December 13, 1946. Nehru, in his speech, moving this Resolution wished that the House should consider the Resolution not in a spirit of narrow legal wording, but rather look at the spirit behind that Resolution. He said, *”Words are magic things often enough, but even the magic of words sometimes cannot convey the magic of the human spirit and of a Nation’s passion...(The Resolution) seeks very feebly to tell the world of what we have thought or dreamt of so long, and what we now hope to achieve in the near future”*.

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In *M. Nagraj v. Union of India*,<sup>167</sup> the Constitution Bench noted that:

“Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crisis of human affairs. Therefore, a purposive rather than a strict literal approach to the interpretation should be adopted. A Constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that constitutional provision does not get fossilized but remains flexible enough to meet the newly emerging problems and challenges”.

One of the suggestions in giving force to human dignity can be adopted from the approach taken by the judiciary in Germany. During the 1950ies, the so called “object formula” was developed<sup>168</sup>, which sees human dignity violated if a human being is degraded by being treated like a mere object.<sup>169</sup> This formula has been used by the Constitutional Court on some occasions,<sup>170</sup> but on others the court has held that people are not rarely mere objects of the

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<sup>166</sup> Constituent Assembly Debates: Lok Sabha Secretariat, New Delhi: 1999, Vol. I, 57-65.

<sup>167</sup> *M. Nagraj v. Union of India*, (2006) 8 SCC 212.

<sup>168</sup> Dürig in: Maunz/Dürig, Grundgesetz, Article 1 (1953) marg. no. 28.

<sup>169</sup> BVerfGE 27, 1 (6).

<sup>170</sup> BVerfG, NJW 2006, 751 (757 et seq.).

laws.<sup>171</sup> In these cases, the notion of “degrading” treatment has been seen as an additional facet necessary to constitute a violation of human dignity rather than a qualification of any instance of a person being treated like a mere object. A modified object formula most recently used by the Constitutional Court sees human dignity violated by any treatment of a human being by the public authorities, which principally puts into question his quality or status as a person, by not respecting the value, which every human being has by virtue of its being a person.

This modified formula, unfortunately, still leaves a lot of room for diverging application to specific situations. The Constitutional Court quite honestly conceded in this case, that the matter has to be decided on the merits of the situation to be decided in any given case.<sup>172</sup>

To resolve this uncertainty, certain human interests were singled out, the infringements of which are held to be typically relevant for human dignity, namely:

- integrity of the human body,
- psychic integrity of the human personality,
- elementary equality,
- living conditions worthy of human beings.<sup>173</sup>

One of the issues that human dignity has to confront in near future is the fear of dehumanization (genecism). A major element in the human genetic engineering debate is the concept of human dignity. And, in order to safeguard human dignity, we may acquire the wisdom to minimize the risks not to maximize the benefits. People tend to have equivalent feelings: that human life has sanctity, but that many other things, such as love, justice, liberty of conscience and loyalty to a belief, etc., have been valued above human life; that human life must not be destroyed, but that it need not be always preserved, for example, in the abortion or euthanasia context.

As like, some say that the genetic intervention in human life is consistent with human dignity, but others maintain to prevent human life from becoming an object of genetic engineering in order to protect human dignity. Both of them are on the basis of human dignity, and each also does its best to promote the sanctity of life. So we discover that it is not easy to draw a clear line of separation between our two feelings.

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<sup>171</sup> BVerfGE 30, 1 (25 et seq.); 109, 279 (312).

<sup>172</sup> BVerfGE 30, 1 (25); 109, 279 (311).

<sup>173</sup> Höfling in: Sachs (ed.), Grundgesetz, 4th edn., 2007, Article 1 marg. no. 19; as well Stern, Das Staatsrecht der Bundesrepublik Deutschland, vol. III/1, 1988, 23.

Then, why is human dignity concept so important in genetics? In answer to the question, the reason is that while general scientific technologies only change the environmental conditions surrounding human lives, biotechnology changes the very human lives itself so that their impacts on the natural and social conditions would be tremendous. Biotechnology implies the questions of meaning and identity of human beings. And the very tiny genetic variations will shake our basis of human beings. That is why bioethics is urgently needed in the areas of genetics/genetic engineering, especially in gene research, gene testing, gene counseling, gene selection and gene therapy, so on.

Now we live in the 'responsible society'. We have to be responsible for what we have done.

In this sense, A Universal Declaration on the Human Genome and Human Rights insists that "the responsibilities inherent to the activities of researchers, including *meticulousness, caution, intellectual honesty and integrity* in carrying out their research as well as in the presentation and utilization of their findings, should be the subject of particular attention in the framework of research on the human genome, because of the ethical and social implications"[Article 13, our emphasis]. Furthermore, this document also adds that "no research or its applications concerning the human genome, in particular in the fields of biology, genetics and medicine, should prevail over the respect for human rights, fundamental freedoms and human dignity of individuals or, where applicable, of groups of people"[Article 10]. Here we see still human dignity is main issue in every aspect of scientific activities.

One thing we need to consider seriously is whether we have a right to alter our genetic structure. As a Universal Declaration proclaims, "the human genome underlies the fundamental unity of all members of the human family, as well as the recognition of their inherent dignity and diversity. In a symbolic sense, it is the heritage of humanity"[Article 1]. That means the contemporaries have no right to deal with human genome arbitrarily. Rather, it is a call for very careful intervention in any cases, if acceptable, that should be based on a concern for future outcomes. Hence, our future generations have the right to inherent an unmanipulated genome. They have a right to decide for themselves as to what is normal and what is aberration.

For this, we may need to train ourselves to act "value-rationally" not "goal-rationally" as Max Weber suggested<sup>174</sup>. Goal-rational conduct involves reasoning about means to ends. It is a form of 'instrumental rationality', involving the choice of effective and efficient means to given ends. It has been dominant in technology. And it is not difficult to think what will take place

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<sup>174</sup> Callahan, Daniel Callahan, SCIENCE: LIMITS AND PROHIBITIONS, Stephen E. Lammers and Allen Berhey (eds.), On Moral Medicine, Michigan: William B. Eerdmans Publishing Company, 1987.

tomorrow if we continue to act in accordance with goal-rationality. While, value-rational conduct involves a conscious belief in the absolute value of some ethical, aesthetic, religious, or other form of behavior, entirely for its own sake and independently of any prospects of external success. Now we have to choose policies toward technologies or new technologies themselves not because they achieve certain goals, but because they express certain values, especially in respect of human dignity.

Obviously, human beings had evolved and are on the way to evolve. But this process is very slow and responsive to a wide variety of the environment surrounding human beings. After all, prudence and wisdom must be joined with biotechnological discoveries and their applications to preserve the value of human dignity. For this, the practice of solidarity should be encouraged so that scientists have time to ponder on the meaning of human dignity in the process of every single scientific activity.

Hence, human dignity encompasses the abovementioned intrinsic features, which can be applied to every fact-situation presented by the dynamic society. These could act as guiding factors for the purpose of better understanding in determination of an individual's right to human dignity. It does not require explicit and precise terms to implement itself, rather an approach which tries to sieve the underlying thread of moral value imbibed in it.

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