

THE POLYSEMY OF THE CONCEPT OF HUMAN DIGNITY IN THE JURISPRUDENCE OF EUROPEAN CONSTITUTIONAL COURTS: A POTENTIAL THREAT TO HUMAN RIGHTS PROTECTION?

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BAUDOIN, Marie-Élisabeth. The Polysemy of the Concept of Human Dignity in the Jurisprudence of European Constitutional Courts: A Potential Threat to Human Rights Protection? *International and Comparative Law Review*, 2024, vol. 24, no. 1, pp. 120–138. DOI: 10.2478/iclr-2024-0008

Summary: The concept of human dignity is often invoked by constitutional courts in Europe and worldwide, especially in sensitive issues like protecting unborn life, end-of-life decisions, and prisoners' conditions. However, its interpretation varies significantly across national and supranational bodies, such as the European Court of Human Rights and the European Court of Justice, leading to potential confusion and threats to common European standards. This paper explores whether a universal “language” of rights exists or if current interpretations create a “legal Babel.” Through a comparative analysis of France, Germany, and Hungary, the study illustrates how diverse uses of human dignity affect fundamental rights protection. It argues that while pluralistic interpretations are not inherently dangerous, certain judicial uses of the concept could undermine the coherence of the European legal order and weaken human rights. The paper emphasizes the need for a balanced approach to ensure that human dignity strengthens rather than compromises human rights.

Keywords: Human Dignity, Constitutional Courts, Constitutions, Functions of a concept, Interpretation, Human Rights, Right to rights, Europe, France, Germany, Hungary.

1 Introduction

Human Dignity is routinely invoked by Constitutional Courts in Europe and all over the world, as well as by International or Regional Courts¹, and in most instances, the matters at hand are highly sensitive and occasionally controversial. Examples include issues surrounding the protection of unborn human life,

1 Various conferences have already addressed this issue, see for example in France: BURGORGUE-LARSEN, Laurence (ed.), *La dignité saisie par les juges en Europe*. Bruxelles : Bruylant, (Col. “Droit et justice” n°95), 2010, 262 pages. See also : FIKFAK, Veronika, IZVOROVA, Lora. Language and Persuasion: Human Dignity at the European Court of Human Rights. *Human Rights Law Review*, 2022, vol. 22, no. 3, pp. 1–24.

end-of-life considerations, and the living conditions of prisoners. This list is by no means exhaustive.

One of the primary challenges lies in the fact that the interpretation or understanding of what constitutes human dignity varies among states and at the supranational level, exemplified, for instance, at the European Court of Human Rights (ECtHR) in Strasbourg or the European Court of Justice (ECJ) in Luxembourg. Consequently, this divergence may result in confusion, and the associated discrepancies could be perceived as a potential threat to European common standards.

The following two examples serve to illustrate this convincingly. How can we account for the divergence in legal perspectives between the Constitutional Court of Germany and the European Court of Human Rights regarding the rights of the unborn? The German legal framework asserts that unborn human life inherently possesses rights, a stance grounded in the protection of human dignity². In contrast, the Strasbourg Court, in its ruling on 8 July 2004, *Vo v. France*³, recognizes only the harm suffered by the pregnant woman in cases of inadvertent abortion as being amenable to claims under human rights law, omitting consideration of the unborn child. Similar conflicts might be observed between National Constitutional Courts and the European Court of Justice (ECJ). Particularly the well-known Omega case of 2004⁴ provides a great example of completely opposed interpretations of the legality of “kill games”. In its decision of 24 October 2001, the German federal administrative court (*Bundesverwaltungsgericht*) has held that such games may be banned because they convey a message that human life can be freely disposed of, thus promoting dehumanizing behaviour among participants⁵. On the other hand, the Luxembourg Court views this interpretation as a contingent, specifically German perspective, not a universal stance, suggesting that the interpretation of such matters can vary significantly.

This paper intends to explore the concept of human dignity within the context of European legal frameworks, questioning whether a universal “language” of rights and principles exists across national and supranational jurisdictions—comparable to an Esperanto for law. Alternatively, this exploration considers

2 Constitutional Court of Germany, *Decision on Abortion*, 25 February 1975, BVerfGE 39, p.1.

3 ECtHR Judgment of 8 July 2004 – 53,924/00 – *Vo v. France* – para. 84.

4 ECJ Judgment of 14 October 2004 – case C-36/02, para. 31 – *Omega*.

5 The reasoning of the Federal Court is reproduced in the decision of the First Chamber of the Court of Justice of the European Union of 14 October 2004, seized by the Federal Administrative Court on the basis of a reference for a preliminary ruling (Case C-36/02). See paragraph 12: “The referring court states that human dignity is a constitutional principle which may be infringed either by the degrading treatment of an adversary, which is not the case here, or by the awakening or strengthening in the player of an attitude denying the fundamental right of each person to be acknowledged and respected, such as the representation, as in this case, of fictitious acts of violence for the purposes of a game. It states that a cardinal constitutional principle such as human dignity cannot be waived in the context of an entertainment.”

whether the current landscape might be better characterized as a legal Babel⁶, replete with discordant voices and diverse methodologies, thereby posing a significant risk to the protection of fundamental rights in Europe.

To address the question, we have selected three European case studies: France, Germany, and Hungary. The choice of these countries is grounded on three criteria: the authority of the Constitutional Court within the domestic institutional framework, the historical context of each state, and its influence on the legal recognition of human dignity as a constitutional norm. The comparison of these scenarios is particularly enlightening as it allows for an assessment of the role human dignity plays in the discourse of constitutional courts. At first glance, one might assume that the German and Hungarian legal frameworks, having closely related histories both in terms of the bodies responsible for constitutional review and their approaches to human dignity, would exhibit similar uses of the dignity argument, thereby differing from the pattern observed in France. Notably, France does not have a Constitutional Court but a Constitutional Council. Beyond mere nomenclature, the French Constitutional Council was not conceived by the drafters of the 1958 Constitution as a true judicial body. Despite significant developments during the Fifth Republic, the authority of the Council is sometimes still perceived as weakened due to the appointment conditions of its members, which do not require legal qualifications. The status of the Constitutional Council thus markedly differs from that of the German Constitutional Court, which has been held in high regard among public institutions since its establishment in 1949. Similarly, the Hungarian Constitutional Court gained considerable prestige during the 1990s under the presidency of László Sólyom, a proponent of the “invisible constitution”. Moreover, regarding human dignity, the similarity between the German and Hungarian models can be attributed to the fact that both states underwent transitional periods in 1949 and 1989, respectively, following the end of World War II and the collapse of the Nazi regime in Germany, and the fall of the socialist regime in Hungary. In these contexts, human dignity was enshrined in the new or amended constitutions as a response to past atrocities. In the 1990s, the Hungarian Constitutional Court also tended to align its jurisprudential approach to human dignity with that of the German Constitutional Court.

However, an examination of the jurisprudence from these three constitutional courts reveals a different outcome: the interpretation of human dignity varies from one state to another and over time, and the applications by the constitutional courts are also diverse, with the invocation of human dignity being in fact random, non-systematic, and unpredictable. More broadly, these examples are indicative of the situation across Europe, where there is no unified approach or

6 The expression “legal Babel” draws from the biblical story of the Tower of Babel in Genesis, where the construction of a tower intended to reach heaven resulted in God confusing the language of the people, causing them to speak different languages and thus fail in their project. See the Book of Genesis (Gn, 11, 1–9).

consensus regarding the definition or essence of human dignity⁷. The pluralistic interpretation of human dignity is not inherently threatening; however, certain uses of the concept by the courts could potentially weaken the protection of human rights.

In this paper, I argue that from a legal perspective, a Babel-like situation—characterized by a multiplicity of meanings of what constitutes human dignity—is not inherently dangerous. However, specific applications of the concept by constitutional courts may engender conflicts of values and potentially destabilize legal frameworks. In the first section, I will explore the varied conceptions of human dignity within the constitutional frameworks of France, Germany, and Hungary, and examine the reasons for such diversity. In the subsequent section, I will analyse the diverse ways in which constitutional courts articulate and apply the notion of human dignity in their jurisprudence, highlighting practices that may pose risks to the protection of human rights.

2 Varied Conceptions of Human Dignity in French, German, and Hungarian Constitutional Law: Causes and Implications

The concept of human dignity does not carry the same meaning for the French Constitutional Council, the Constitutional Court of Germany, or the Constitutional Court of Hungary. This divergence can be explained by several factors: one is legal, relating to the explicit recognition or lack thereof of human dignity in the Constitution; the other is philosophical, as human dignity inherently refers to a particular system of values.

2.1 A Normative Reason: The Variable Textual Enshrinement of Dignity Across States

Human dignity, as a concept, does not uniformly appear across constitutional texts. Consequently, its legal value varies among states and can evolve over time depending on the actions of national judges. Constitutional courts, therefore, possess a varying degree of discretion in the legal characterization of human dignity. Indeed, the movement toward constitutionalising accelerated after World War II and in the context of decolonization. While before 1945 only five states had constitutionalized human dignity, by the 2000s, the term “dignity” was enshrined in the constitutions of 162 states, or 84% of United Nations member

7 For insights into the contributions of comparative analysis and the essential consideration of historical and societal contexts that shape how legal systems approach the normative characteristics of human dignity (particularly as a constitutional value or a constitutional right), see BARAK, Aharon. Human Dignity: The Constitutional Value and the Constitutional Right. In MCCRUDDEN, Christopher (ed.). *Understanding Human Dignity*, British Academy, 2013, pp. 361–380.

states⁸, including Germany and Hungary. In this international context, the French Constitution is an exception, as it does not explicitly reference human dignity.

Following the collapse of the Nazi and socialist regimes, Germany and Hungary explicitly incorporated the principle of human dignity into their constitutions.

In Germany, the significance of human dignity is underscored by its primacy within the constitution, as it is enshrined in Article 1, Paragraph 1 of Section 1, dedicated to “Fundamental Rights” in the Basic Law of 1949. The repudiation of the Nazi regime and its atrocities against human beings is encapsulated in the following provision: “Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority” (Basic Law, Article 1.1).⁹ The German formulation is succinct, emphasizing the inviolability of human dignity. No other references to dignity are present in the text. Positioned at the forefront of the Basic Law, dignity forms the foundation of the new German constitutional order, emerging from the ashes of Nazi dictatorship. However, the term “dignity” is not explicitly defined within the constitutional text.

In Hungary, the constitutionalising of human dignity similarly emerged as a response to the crimes against individuals perpetrated by the socialist regime. The Hungarian constitution, through an amendment adopted in 1989¹⁰ amidst the transition to democracy, incorporated dignity within Article 54(1). This provision significantly differed from the German counterpart by establishing a “right to human dignity” intimately linked with the “right to life.”¹¹ Additionally, a subsequent paragraph within Article 54 established that: “No one shall be subject to torture or to cruel, inhuman or humiliating treatment or punishment”. Furthermore, the insertion of dignity into the constitution was somewhat constrained, as it had to be accommodated within the existing 1949 constitutional framework. Thus, Chapter XII, entitled “Fundamental Rights and Duties”, which encompasses Articles 54 to 70, was added subsequent to the sections detailing state institutions.

A significant evolution occurred with the adoption of the new Hungarian Fundamental Law in 2011 under the Orbán government. At first glance, the constitutionalisation of human dignity in Hungary appears to align more closely with European standards. Human dignity is now enshrined at the beginning of the Fundamental Law in Article II, within the chapter entitled “Freedom and Responsibility.” Additionally, the new formulation partly adopts the German model by stating: “Human dignity shall be inviolable.” However, it diverges

8 SHULTZINER, Doron, CARMI, Guy E. Human Dignity in National Constitutions: Functions, Promises and Dangers. *The American Journal of Comparative Law*, 2014, vol. 62, no. 2, p. 461.

9 “Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlicher Gewalt” (Basic Law, Article 1 Section 1).

10 The socialist constitution was profoundly amended by Act XXXI of 1989 on the Amendment of the Constitution, which entered into force on October 23, 1989.

11 According to article 54.1 of the Hungarian Constitution (in 1989), “In the Republic of Hungary everyone has the inherent right to life and to human dignity. No one shall be arbitrarily denied of these rights”.

significantly by retaining the 1989 phrasing: “Every human being shall have the right to life and human dignity”, and by offering a precise interpretation of the concept of human dignity, linking it to the “protection of the foetal life from the moment of conception”. This replaces the open-ended nature of the German provision with a much narrower textual framework. Furthermore, the prominent placement of dignity at the beginning of the Fundamental Law should be viewed with caution when considering the overall structure of the document. The section on Freedom is preceded by two other sections: the “National Avowal” and the “Foundation”, which contain the core values that guide the interpretation of the Fundamental Law.¹² Consequently, the legal principle of human dignity in the 2011 Fundamental Law is not the foundational principle of the Hungarian constitutional order. Moreover, it is worth noting that the term “dignity” appears in several other provisions: in Articles IX (4)¹³ and IX (5)¹⁴, which establish “human dignity” and the “dignity of the Hungarian nation” as well as “of any national, ethnic, racial or religious community” as limits on freedom of expression; in Article XVII (3), which protects “dignity” against workplace conditions¹⁵; in Article 5 (7), which refers to the “dignity of the National Assembly”; and in Article 37 (4), which grants the Constitutional Court the authority to review and invalidate budget laws that infringe on human dignity when public debt exceeds half of the gross domestic product. Finally, the National Avowal declares: “We hold that human existence is based on human dignity”, marking a significant philosophical shift from the 1989 perspective. Rather than human existence being the basis for human dignity, it posits that human existence itself is founded on human dignity. This reversal represents a major departure from earlier views and sets up a new philosophical agenda, which will be further explored below.

Unlike the German and Hungarian cases, the French Constitution of 1958 does not explicitly refer to human dignity. However, the notion is implicitly present in the Preamble of the 1946 Constitution, which mentions “the victory achieved by the free peoples over the regimes that had sought to enslave and degrade humanity.” It is precisely by relying on the 1946 Preamble, which is referenced in the Preamble to the Constitution of the Fifth Republic, that the Constitutional Council recognized the principle of dignity as having constitutional value in 1994. In its decision 94-343/344 DC on July 27, 1994, regarding Bioethics, the Council

12 According to Art. R (3) of the Fundamental Law, “*The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historic constitution.*”

13 According to Art. IX (4), “*The right to freedom of expression may not be exercised with the aim of violating the human dignity of others.*”

14 According to Art. IX (5), “*The right to freedom of expression may not be exercised with the aim of violating the dignity of the Hungarian nation or of any national, ethnic, racial or religious community. Persons belonging to such communities shall be entitled to enforce their claims in court against the expression of an opinion which violates their community, invoking the violation of their human dignity, as provided for by an Act.*”

15 According to Art. XVII (3), “*Every employee shall have the right to working conditions which ensure respect for his or her health, safety and dignity.*”

stated that “the protection of human dignity against all forms of enslavement or degradation is a principle of constitutional status”.¹⁶ The Council did not define the concept but noted that certain principles included in the bills (the primacy of the human person, respect for the human being from the beginning of life, the inviolability, integrity, and non-commercial nature of the human body, as well as the integrity of the human species) are intended to ensure the principle of human dignity. However, it immediately set limits by adding that it must, like all other constitutional principles, be reconciled with other principles, notably the principle of individual freedom. Following this decision by the Constitutional Council, the administrative court also engaged with the concept of human dignity, characterizing it in 1995 as “a component of public order” in the famous *Morsang-sur-Orge* case, also known as the dwarf tossing case¹⁷.

The explicit inclusion of human dignity in the Constitution is a recurring issue in France. It surfaced again during the 2018 constitutional revision debates but did not result in any amendments. Although there was broad political support, ranging from *La France Insoumise* to the *Rassemblement National*, for enshrining it constitutionally, divergent objectives prevented a consensus on the precise wording to be adopted. Already in 2008, the Veil Committee, tasked with reflecting on the Constitution’s Preamble, identified significant divergences within its membership. The committee recommended adopting the principle of ‘equal dignity’ rather than ‘human dignity’. They argued that ‘equal dignity’ was uniquely capable of balancing individual autonomy with the state’s authority to regulate interpersonal relations and impose societal constraints. This approach aimed to offer the most liberal interpretation of dignity, intentionally chosen to prevent the “re-emergence of severe antagonisms” concerning the state’s role and “its legitimacy to govern minds”.¹⁸

Three States, three constitutional approaches to human dignity: Germany’s general proclamation allows for multiple interpretations, the 2011 Hungarian Constitution’s precise enshrinement excludes opposing ideologies, and France’s silence aims to avoid potential conflicts of values. Such legal diversity may be precisely explained by the fact that human dignity is, first and foremost, a philosophical concept with pluralistic content.

2.2 A Philosophical Reason: Human Dignity as a Reflection of Value Systems

Indeed, the roots of dignity are highly diverse and they “emerge from traditions of thought that represent deeply divergent ideas about why human persons have any inherent value that demands the respect of others (the status of dignity), and

16 Decision N°94-343/344 DC, 27 July 1994, para. 2, *Official Journal of the French Republic*, 29 July 1994, p. 11024.

17 Council of State, Plenary Assembly, 27 October 1995, *Commune de Morsang-sur-Orge*, N°136727.

18 Reflection Committee on the Preamble of the Constitution, Report to the President of the Republic, December 2008, p.134.

what it entails to respect the moral worth of another (the principle of dignity).¹⁹ Human dignity, thus, encompasses a range of divergent philosophical and ideological perspectives²⁰. This paragraph does not aim to provide an exhaustive presentation of dignity within the history of ideas; rather, it seeks to consider the most significant philosophical or ideological approaches in the three countries under study.

The first name that comes to mind when discussing dignity is that of Immanuel Kant, who is considered by some as ‘the father of the modern concept of human dignity’.²¹ In the 18th century, in the *Groundwork of the Metaphysics of Morals*, Kant views dignity as an absolute value that cannot be subject to any form of trade or exchange. He asserts, “everything has either a price or a dignity. What has a price can be replaced by something else as its equivalent; what on the other hand is raised above all price and therefore admits of no equivalent has a dignity.”²² Hence, the concept of dignity implies the moral injunction to treat every individual as an end in themselves. Kant perceived human dignity as a last resort and an absolute that forbids any form of instrumentalization; thus, everyone is to be treated as a subject and not an object. In a similar vein to Saint Thomas Aquinas, dignity is linked to the possession of reason. Thus, dignity is an intrinsic value of the being who possesses reason, namely an intrinsic property that confers upon him a distinguished moral status: that of a person.²³ Moreover, dignity is a categorical imperative in the Kantian sense of the term and cannot be reconciled with other rights, unlike fundamental rights (*Grundrechte*).

Although Immanuel Kant was not explicitly mentioned by the drafters of the German Basic Law, the influence of his philosophy, particularly the concept of human dignity as an ‘intangible’ right, is evident in Article 1. As Olivier Jouanjan notes, “the characterization of dignity as non-disposable implies a moral prohibition against its relinquishment—effectively preventing an individual from reducing himself to the mere instrument of another’s will, which he argues would constitute a form of voluntary dehumanization.”²⁴ This interpretation of dignity, as articulated by Günther Dürig in his seminal 1958 commentary on the Basic Law,

19 CAROZZA, Paolo G. Human Dignity in Constitutional Adjudication. In GINSBURG, Tom, DIXON, Rosalind (eds). *Research Handbook in Comparative Constitutional Law*. Edward Elgar Publishing Ltd, 2011, p. 462.

20 See the doctoral study by: MBALA MBALA, Félicité. *La notion philosophique de dignité à l’épreuve de sa consécration juridique*. PhD. Sciences de l’Homme et Société. Université du Droit et de la Santé – Lille II, 2007.

21 BOGNETTI, Giovanni. The Concept of Human Dignity in European and U.S. Constitutionalism. In NOLTE Georg (ed.). *European and US Constitutionalism*, Science and Technique of Democracy, 2005, no. 37, p. 75, 79.

22 KANT, Immanuel. *Groundwork of the Metaphysics of Morals* (1785). Edited and translated by Mary J. GREGOR. Cambridge: Cambridge University Press, 1998, p. 42.

23 See BAERTSCHI, Bernard. Dignité (A). In KRISTANEK, Maxime (dir.). *Encyclopédie philosophique*, 2017. <https://encyclo-philo.fr/diginite-a>

24 JOUANJAN, Olivier. La dignité de la personne humaine dans la jurisprudence de la Cour constitutionnelle de Karlsruhe. *Revue générale du droit*, Études et réflexions, 2014, no. 2 (www.revuegeneraledudroit.eu), p. 3.

posits dignity not as a fundamental right itself but as the foundational principle underlying other fundamental rights outlined in Articles 2 and 3, concerning individual development and equality, respectively.²⁵ Dürig described it as the 'supreme constitutive principle of objective law as a whole,' situating dignity as the cornerstone upon which the broader system of fundamental rights is constructed, establishing it as 'the value of all values'²⁶.

In Hungary, during the 1990s and 2000s, the impact of Immanuel Kant's philosophy was complemented by the influential theory of Ronald Dworkin. In his seminal work, *Taking Rights Seriously*²⁷, the American philosopher lays the groundwork for his subsequent, more nuanced discussions on dignity²⁸. Dworkin establishes a robust framework wherein individual rights and the intrinsic value of each person are central to both legal and moral philosophy. He asserts that the law must invariably treat each individual with equal concern and respect. This principle is not merely procedural; it stems from his deep-seated belief in the intrinsic worth of every person, which he regards as a core element of human dignity. According to Dworkin, such equal treatment by the government is tantamount to recognizing and affirming the equal dignity of all its citizens, thereby ensuring that justice is both individualized and universal. This dual influence of Kant and Dworkin notably shaped Hungarian legal reforms and philosophical discourse during this transformative period.

However, with the enactment of the new Fundamental Law in 2012, a shift has been observed in the underlying philosophy of human dignity in Hungary. Whereas in 1989, human dignity was conceived in the Constitution as indeterminate and inviolable, now the National Avowal and the Foundation seem to define specific substantive elements on human dignity. As Gergely Deli and István Kukorelli point out, "in the new paradigm, human dignity means being valuable in some way, and certain values are to be inferred from the Fundamental Law, which have to be the minimal substantive elements of the concept. In its practical consequences, this paradigm actually requires that human persons seek to achieve certain values. In other words, it formulates certain duties for them at the first and most simple level of human existence"²⁹. Before 2012, human dignity was meant at ensuring equality; with the new Fundamental Law, dignity means being valuable, which requires that human persons seek to achieve these values, to be deferred from the constitutional provisions. Human dignity is no more understood as an intangible essence, but it implies duties for the human persons.

25 *Ibid.*, pp. 5–6.

26 *Ibid.* p. 8.

27 DWORKIN, Ronald. *Taking rights seriously*. (First published 1977). Bloomsbury Revelations, 2013, 444 pages.

28 Dworkin further developed his thoughts on human dignity, particularly in *Is Democracy Possible Here? Principles for a new political debate* (Princeton University Press, 2006) and *Justice for Hedgehogs* (Harvard University Press, 2011).

29 DELI, Gergely, KUKORELLI, István. Human Dignity in Hungary. In BECCHI, Paolo, MATHIS, Klaus (eds). *Handbook of Human Dignity in Europe*. Springer, 2019, p. 412.

In France, the term ‘dignity’ was long overshadowed by the prevailing eighteenth-century human rights philosophy, deeply rooted in the natural law framework that unequivocally recognized the intrinsic worth and rights of the human as a person. Such rights were considered inherent and undeniable, rendering the concept of dignity seemingly redundant. However, the resurgence of complex bioethical issues in the 20th and 21st centuries rekindled debates on dignity within political philosophy and theory³⁰.

As an intrinsic yet formally abstract value, dignity lacks specific definitional content, allowing it to be shaped significantly by political discourse, often detached from its philosophical underpinnings. This flexibility has enabled its use both in defending social and human interests against the inequitable impacts of economic liberalism and in contentious bioethical debates. For example, opposing ideological factions invoke dignity to argue either against or in favor of practices like abortion and euthanasia, framing their arguments around Kantian imperatives or the autonomy of personal choice. This dual application highlights the complex role dignity plays in contemporary French legal and ethical discussions.

By nature, the contents and conceptions of the concept of dignity are plural. Such pluralism is a defining feature of the European legal landscape, reflecting the varied cultural, philosophical, and legal traditions across the continent. This diversity is not inherently a risk or danger. However, the jurisprudence of constitutional courts reveals various uses of the concept of dignity, which, for some, potentially undermine the coherence of the European legal order and affect the protection of human rights.

3 The Application of Human Dignity in Constitutional Jurisprudence: Risks and Challenges for Human Rights Protection

Beyond the question of the substantive content of the principle of ‘human dignity,’ it is crucial to examine how constitutional judges apply this concept within their case-law. The patterns of its application vary significantly across jurisdictions. For instance, the Constitutional Court of Germany has attributed various legal qualifications and functions to dignity over time: from a foundational principle to a subjective right³¹. In France, the Constitutional Council consistently uses it as a supplementary argument to strengthen the reasoning behind its decisions. In Hungary, a notable shift in constitutional philosophy poses potential challenges to

30 See, for example: FABRE-MAGNAN, Muriel. Le statut juridique du principe de dignité. *Droits*, 2013, vol. 58, no. 2, pp. 167–196 ; FELDMAN, Jean-Philippe. Faut-il protéger l’homme contre lui-même ? La dignité, l’individu et la personne humaine. *Droits*, 2008, vol. 48, no. 2, pp. 87–108; HABERMAS, Jürgen. The Concept of Human Dignity and the Realistic Utopia of Human Rights. *Metaphilosophy*, 2010, vol. 41, no. 4, pp. 464–80; HENNETTE-VAUCHEZ, Stéphanie. Une *dignitas* humaine ? Vieilles outres, vin nouveau. *Droits*, 2008, vol. 48, no. 2, pp. 59–86.

31 For an analysis of the dual nature of human dignity as both a subjective right and an objective principle, see: MATHIEU, Bertrand. Chapitre 6. La dignité, principe fondateur du droit. *Journal International de Bioéthique*, 2010, vol. 21, no. 3, p. 80.

the Constitutional Court's future jurisprudence, possibly affecting how dignity is interpreted and applied. Consequently, depending on the judicial use or even the legal instrumentalization of the concept, dignity can introduce varying degrees of risk to the protection of human rights. It is essential to distinguish three specific applications by constitutional courts, each of which could potentially jeopardize human rights.

3.1 Human dignity as a structure-giving guiding principle

One of the functions attributed to dignity, especially in Germany and Hungary, is to consider it as a 'right to rights,' that is a primordial right of Humans.³² Without dignity, there are no rights and conversely, without rights there is no dignity.

Indeed, aligning with Kant's philosophy, the German Constitutional Court has regarded human dignity as the basis, the "root," or "foundation" of all fundamental rights.³³ This Kantian philosophical conception of dignity underpins the 2001 decision of the aforementioned Federal Administrative Court regarding the "kill games." The court's decision was rooted in concerns that these games might trivialize violence and dehumanize participants by reducing human targets to mere objects within a playful context. It was argued that such trivialization could desensitize individuals to violence and undermine the respect for human life, principles foundational to the concept of human dignity upheld by German law. Upholding these constitutional values, the court ruled that municipalities had the authority to prohibit these Laserdrome games to safeguard human dignity and prevent the erosion of societal norms concerning violence and respect for life. This judgment reflects the profound influence of Kantian ethics on German legal philosophy, where human dignity is considered the cornerstone of all fundamental rights.

In this approach, as Enders argues, "the legal capacity of humans, their "primordial right", which is identified axiomatically with the constitutional proposition of human dignity, is not conceived as a directly applicable legal proposition".³⁴ Consequently, the principle of human dignity itself cannot be directly claimed as it does not establish a concrete right. It provides a general framework; State authorities have the obligation to respect human dignity and to protect it. This reasoning was applied by the Federal Constitutional Court of Karlsruhe in its decision of February 15, 2006, on the Aviation Security Act³⁵. In a post-9/11 context, while the Parliament intended to authorize the armed forces to shoot down an aircraft repurposed as a weapon of destruction by terrorists,

32 ENDERS, Christoph. Human Dignity in Germany. In BECCHI, Paolo, MATHIS, Klaus (eds). *Handbook of Human Dignity in Europe*. Springer, 2019, pp. 288–293.

33 Federal Constitutional Court of Germany, 10 October 1995; 11 March 2003.

34 ENDERS, Christoph. Human Dignity in Germany. In BECCHI, Paolo, MATHIS, Klaus (eds). *Handbook of Human Dignity in Europe*. Springer, 2019, p. 288.

35 BVerfG, Judgment of the First Senate of 15 February 2006 – 1 BvR 357/05 –, paras. 1–156, https://www.bverfg.de/e/rs20060215_1bvr035705en.html

the Constitutional Court prevented this and declared the provisions unconstitutional. The Court stated: “A qualification of the passengers’ right to life also cannot be substantiated by arguing that they are regarded as part of the weapon that the plane has become. Whoever argues in this manner makes them mere objects of state action and deprives them of their human quality and dignity”.³⁶ It also noted that “Human life is the vital basis of human dignity as the essential constitutive principle, and as the supreme value, of the constitution”.³⁷ Furthermore, it held that the state’s duty to protect the lives of potential victims of a terrorist attack was secondary to the duty to protect the human dignity of the passengers. According to the Court, “with their lives being disposed of unilaterally by the state, the persons on board the aircraft, who, as victims, are themselves in need of protection, are denied the value which is due to a human being for his or her own sake.”³⁸ The German Federal Constitutional Court here echoes Kant’s categorical imperative: the State does not have the right to dispose of any individual as a means to save the lives of other people.

In the 1990s, the Hungarian Constitutional Court developed its doctrine on human dignity, drawing significantly on the German model. This influence – and indeed importation – can be attributed to the prestige of the German Constitutional Court, as well as a deep familiarity with its jurisprudence, which aligned well with Hungary’s needs to expand its catalogue of fundamental rights.³⁹ The adoption of this model was first evident in one of the court’s initial decisions in 1990 (case 8/1990), concerning the representation powers of trade unions. This case set a precedent, and the court subsequently integrated the concept of human dignity into many other decisions. Human dignity was characterized as a ‘mother-right’ (*anyajog*). According to Gergely Deli and István Kukorelli, the Hungarian paradigm of human dignity was at the time a “three-level system,”⁴⁰ where the first level is human dignity itself, considered by the Court as legally intangible. At this level, human dignity was noted for its intangibility and indeterminacy, without the Court defining its substantive features.

Such use of dignity by both constitutional courts is not inherently dangerous, neither an “empty formula” nor an “empty placeholder,” but rather, in the words of Jürgen Habermas, the “moral source from which all basic rights derive their meaning”.⁴¹ However, there is a potential risk, as seen in certain cases, of

36 *Ibid.* par. n°39

37 *Ibid.* par. 119.

38 *Ibid.* par. 124.

39 See DUPRÉ, Catherine. *Importing the Law in Post-Communist Transitions. The Hungarian Constitutional Court and the Right to Human Dignity*. Oxford – Portland Oregon: Hart Publishing, 2003, 217 pages.

40 DELI, Gergely, KUKORELLI, István. Human Dignity in Hungary. In BECCHI, Paolo, MATHIS, Klaus (eds). *Handbook of Human Dignity in Europe*. Springer, 2019, p. 401–402.

41 HABERMAS, Jürgen. The Concept of Human Dignity and the Realistic Utopia of Human Rights. *Metaphilosophy*, 2010, vol. 41, no. 4, p. 466.

“perceiving dignity everywhere”.⁴² The February 2006 decision of the German court illustrates this well by linking the right to life with human dignity, placing the court before an intractable dilemma: whose lives are more precious, those of the passengers and crew or those of the populations on the ground? The reasoning based on human dignity precludes the Constitutional Court from making any compromises since human dignity is intangible, regardless of the individual concerned, potentially undermining the protection of the right to life.

3.2 Human Dignity as a complementary argument

Contrary to the application of the principle of human dignity in German law, human dignity in France does not legally enjoy the same prestige, nor does it hold the status of a structuring principle or foundation of the constitutional order. As mentioned above, the legal concept of human dignity in France operates within a specific context, as it is not explicitly enshrined in the 1958 Constitution. Starting with the decision of July 27, 1994, the Council indicated that as a principle of constitutional value, it must be reconciled with other constitutional principles. It is therefore, by nature, a constitutional principle with limited transforming power on the constitutional order.

Consequently, the Constitutional Council has employed the concept of human dignity sparingly in its jurisprudence and always as a last resort⁴³. Indeed, the principle has been invoked in various domains such as bioethics⁴⁴, abortion⁴⁵, cessation of life-sustaining treatment⁴⁶, involuntary hospitalization⁴⁷, criminal law or criminal procedure⁴⁸, and deprivation of liberty.⁴⁹ However, thus far, the Constitutional Council has never declared a legislative provision to be contrary to the principle of human dignity. Moreover, the Council does not regard it as a fully autonomous principle. Most often, the Constitutional Council has used it in conjunction with other principles. For instance, in its decision 94-359 DC (January 19, 1995) concerning decent housing, it refrained from deriving a right to decent housing directly from the principle of human dignity. Instead, it elevated it

42 JOUANJAN, Olivier. La dignité de la personne humaine dans la jurisprudence de la Cour constitutionnelle de Karlsruhe. *Revue générale du droit*, Études et réflexions 2014, no. 2 (www.revuegeneraledudroit.eu), p. 10.

43 COSSALTER, Philippe. La dignité humaine en droit public français : l'ultime recours. Conférence-débat du CDPC sur la dignité de la personne humaine, Cycle « Les valeurs du droit public », 30 octobre 2014, <https://centre-droit-public-compare.assas-universite.fr/sites/default/files/cdpc/fichiers/cossalter-dignite-humaine-france.pdf>

44 Decisions n°94-343/344 DC of July 27, 1994, 2004-498 DC of July 29, 2004 and 2013-674 DC of August 1st 2013.

45 Decisions n°2001-446 DC of June 27, 2001, and 2015-727 DC of January 21, 2016.

46 Decision n°2017-632 QPC of June 2, 2017.

47 Decision n°2010-71 QPC of November 26, 2010.

48 Notably, decisions n°2010-25 QPC of September 16, 2010, and 2015-485 QPC of September 25, 2015.

49 See decisions n°2010-14/22 QPC of July 30, 2010, 2010-80 QPC of December 17, 2010, and 2015-485 QPC of September 25, 2015.

to the status of a mere objective of constitutional value by referring to the principle of dignity in combination with the 10th⁵⁰ and 11th⁵¹ paragraphs of the Preamble of the 1946 Constitution. Thus, the French Constitutional Council is very cautious about the normative effects of the principle of human dignity. It does not directly derive rights from it, as is the case in Germany or Hungary. The primary function of human dignity is therefore to legitimize or strengthen the legal reasoning of the Constitutional Council, giving it a largely symbolic role.

With such a subsidiary role, one might question whether such a use of the concept of human dignity is not useless.⁵² Indeed, the French legal system already possessed most of the tools needed to achieve the results obtained using the principle of human dignity: an existing catalogue of human rights and principles such as equality, liberty, or decency, and public morality. Nevertheless, the concept of human dignity still retains a valuable function. We agree with R. Lanneau's perspective: "what matters is the 'value/connotation' expressed and not the (illusory) precise content of the fuzzy concept of human dignity."⁵³ More than the protection it offers, it is the ethical principle underlying the constitutional judge's decision that lends it an enhanced symbolic strength.

3.3 Human dignity as a subjective right or as a fixed ideological content

One final usage must be mentioned: when constitutional courts treat dignity as a subjective right or when the substantive content of dignity is defined in a fixed manner. These two usages can be analyzed ambivalently, both serving and potentially undermining fundamental rights. They reveal the "Janus-faced" nature inherent to human dignity.

In the first case, elevating human dignity to the status of a subjective right might appear to be a legal advancement, as it expands the list of fundamental rights. This is particularly evident in the decisions of the German Constitutional Court during the 2010s. For example, in the *Hartz IV* case (a program aimed at reducing the costs of the country's social welfare system), the Court held that Hartz IV failed to guarantee a subsistence minimum in line with human dignity as required under Article 1.1 (on the inviolability of human dignity and state duty to "respect and

50 "The Nation shall provide the individual and the family with the conditions necessary to their development."

51 "It shall guarantee to all, notably to children, mothers and elderly workers, protection of their health, material security, rest and leisure. All people who, by virtue of their age, physical or mental condition, or economic situation, are incapable of working, shall have to the right to receive suitable means of existence from society".

52 MACKLIN, Ruth. Dignity Is A Useless Concept: It Means No More Than Respect For Persons Or Their Autonomy. *BMJ: British Medical Journal*, 2003, vol. 327, no. 7429, pp. 1419–20. For an opposing approach, see: KILLMISTER, Suzy. Dignity: Not Such a Useless Concept. *Journal of Medical Ethics*, 2010, vol. 36, no. 3, pp. 160–64.

53 LANNEAU, Régis. Human dignity in France. In BECCHI, Paolo, MATHIS, Klaus (eds). *Handbook of Human Dignity in Europe*. Springer, 2019, p. 276.

protect it”) and Article 20.1 (on Germany’s status as a “democratic and social federal state”) of the Basic Law.⁵⁴ From these two articles, the Court derived a fundamental right that applies to everyone (i.e., a human right), namely, the guarantee of a dignified minimum existence. The Hungarian Constitutional Court has also followed a similar path, within the framework of its “three-level system.” At the second level, dignity is considered a “general right of personhood” (including elements such as the right to self-determination, the general freedom of action, and related rights such as the right to privacy, the free development of one’s personality, and the right to identity), endowed with the character of an objective norm. It is at the third level that human dignity is recognized as a subjective right with specific substantive content derived from level two, namely, “specific fundamental rights” such as the freedom of marriage (CCDec. 22/1992. (IV. 10.)), the litigant’s right of disposition (CCDec. 19/1992. (I. 30.)), and the right to refuse medical treatment (CCDec. 4/1998. (III. 1.)).⁵⁵

From a humanistic perspective, one might welcome the strengthening of social protection and the enhancement of personal rights more broadly. Concerns arise regarding the function attributed to the principle of human dignity. From a legal standpoint, this results in dignity becoming just another right, a constitutional norm among others. In cases of conflict with another subjective right, it could therefore be downgraded. Human dignity thus becomes an ordinary norm that faces conflicting interests. This poses the risk of banalizing and relativizing human dignity, despite it being a foundational principle of human rights, metajuridical in nature, and not merely a human right, as demonstrated by Muriel Fabre-Magnan.⁵⁶ Certainly, the function of a seismograph attributed to human dignity by Jürgen Habermas presents a real interest—the ability to register “what is constitutive for a democratic legal order, namely, just those rights that the citizens of a political community must grant themselves if they are to be able to *respect* one another as members of a voluntary association of free and equal persons”.⁵⁷ But from a strictly legal perspective, the risk of confusion is significant, potentially leading to paradoxes and dysfunctions in the very protection of the human person.

The second scenario pertains to the Hungarian constitutional situation since the adoption of the new Fundamental Law in 2011 and the paradigm shift it engendered regarding human dignity. This shift could have significant impacts on the jurisprudence of the Constitutional Court. One of the most notable illustrations is the issue of loitering in public spaces. In a first decision adopted on November

54 BVerfG, Judgment of the First Senate of 9 February 2010 – 1 BvL 1/09 –, paras. 1–220, https://www.bverfg.de/e/ls20100209_1bvl000109en.html

55 DELI, Gergely, KUKORELLI, István. Human Dignity in Hungary. In BECCHI, Paolo, MATHIS, Klaus (eds). *Handbook of Human Dignity in Europe*. Springer, 2019, p. 401–402.

56 FABRE-MAGNAN, Muriel. Le statut juridique du principe de dignité. *Droits*, 2013, vol. 58, no. 2, p. 170.

57 HABERMAS, Jürgen. The Concept of Human Dignity and the Realistic Utopia of Human Rights. *Metaphilosophy*, 2010, vol. 41, no. 4, p. 469.

12, 2012, the Constitutional Court was asked to review the constitutionality of the Administrative Criminal Act, which had been amended to include a provision declaring the use of public spaces for loitering an administrative offense. In practice, this new rule was penalizing homelessness. The Court maintained the old paradigm and ruled that the new provision failed to meet the requirement of protecting human dignity.⁵⁸ Nevertheless, one dissenting opinion argued that the regulation served the obvious interests of the homeless and protected their dignity. This perspective tended to define specific substantive elements of human dignity, interpreting dignity as a value to be achieved rather than merely a natural condition.

To reverse the Court's decision, the Fourth Amendment to the Fundamental Law was enacted in 2013, authorizing public authorities to declare homelessness unlawful to protect "public order, public security, public health, and cultural values." Later, in 2018, the Seventh Amendment introduced paragraph 3 to Article XXII of the Fundamental Law, stating: "Using a public space as a habitual dwelling shall be prohibited." Consequently, Parliament was able to amend the Administrative Criminal Act, introducing the new offense of habitual dwelling in a public space. Punishments for this offense include imprisonment, community service, and the destruction of the individual's possessions. In its decision of June 4, 2019⁵⁹, the Hungarian Constitutional Court declared the new provision constitutional, which could have been expected due to the new constitutional provision. However, what is striking is the reasoning developed by the majority of the judges and their new conception of human dignity. The Court states that "according to the Fundamental Law, human dignity is the dignity of an individual living in a society and bearing the responsibility of social co-existence." This interpretation significantly departs from the earlier view held by László Sólyom's Court, which considered that a person's dignity is inviolable irrespective of development, conditions, or the fulfillment of human potential. As Nóra Chronowski and Gábor Halmai highlighted, "The recent case law of the Hungarian Constitutional Court reaffirms the initial concerns, that solidarity supported by human dignity got lost in illiberal transition."⁶⁰

By transforming human dignity into a principle aimed at protecting individuals from themselves, there is a risk of developing a paternalistic or even moralistic conception of human dignity that could conflict with other rights and liberties. Constitutional judges, by following the political agenda set by the governing bodies (Parliament and the executive), might become the arbiters of what constitutes

58 Decision of the Constitutional Court of Hungary, n°38/2012 (XI. 14.).

59 Decision of the Constitutional Court of Hungary, n°19/2019 (VI. 18.).

60 CHRONOWSKI, Nóra; HALMAI, Gábor. Human Dignity for Good Hungarians Only: The Constitutional Court's Decision on the Criminalization of Homelessness. *VerfBlog*, 2019/6/11, <https://verfassungsblog.de/human-dignity-for-good-hungarians-only/>, DOI: 10.17176/20190611-165803-0.

‘true’ human dignity.⁶¹ Consequently, the law could be used to promote moral values rather than serving as a legal safeguard. Such a perspective opposes the universalist interpretation of the principle of dignity, which simultaneously serves as a barrier to the collective use of human beings and as a safeguard against any attempt to infringe upon individual autonomy.⁶²

4 Conclusions

Originally a philosophical principle pondered by Saint Thomas Aquinas, Pico della Mirandola, and Immanuel Kant, human dignity has evolved significantly to become a legal principle that permeates the international system and constitutional frameworks worldwide in the 21st century. Nevertheless, it poses numerous challenges. Indeed, its inherent indeterminacy makes it a battleground for political and ideological disputes. Constitutional courts, as authentic interpreters of the Constitution, face a heightened responsibility because they have the discretion to either preserve the indeterminacy of human dignity to maintain its function as a formal and symbolic tool or to endow it with substantial content, thereby transforming it into an instrument of a specific ideology. In either scenario, there is no “zero risk” for fundamental rights. Human dignity can sometimes lead to limitations on certain rights and freedoms. However, assigning specific substantive content to human dignity and choosing particular values carries a significant risk of transforming the constitutional system into one that is exclusionary and breeds constitutional intolerance.

The analysis of jurisprudence from the constitutional courts of Germany, France, and Hungary demonstrates that both the content and the functions assigned to the concept of human dignity vary from one state to another and sometimes over time. Observing this through the lens of constitutional discourse reveals a nuanced landscape: on one hand, human dignity as a structuring principle can fortify and legitimize judicial decisions. On the other, it risks becoming a subjective right or a pretext for ideologically driven rulings. The main risk of a “Babel-like” situation in Europe is therefore not so much about a cacophony between legal orders but about the erosion of the “right to rights.” Fortunately, the European system for the protection of human rights offers the advantage of providing a supranational safety net. Its role is not to define what human dignity should be, but to ensure that its invocation by national constitutional courts serves to protect human rights or, conversely, does not harm them. The polyphony

61 MELO EGÍDIO, Mariana. The Argument from Human Dignity. Legal paternalism and Restrictions on Fundamental Rights. DE BRITO, Miguel Nogueira, HERDY, Rachel, DAMELE, Giovanni, MONIZ LOPES, Pedro, SILVA SAMPAIO, Jorge (eds). *The Role of Legal Argumentation and Human Dignity in Constitutional Courts*. Stuttgart: Franz Steiner Verlag, Nomos, 2019, pp. 213–235.

62 MATHIEU, Bertrand. Chapitre 2. Le principe de dignité : un principe universel de portée limitée. *Journal international de bioéthique et d'éthique des sciences*, 2020, vol. 31, no. 4, p.39.

surrounding human dignity is not, inherently, a threat to the protection of rights and freedoms, but the melody of human rights must remain harmonious...

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