

About the Principle of Dignity: philosophical foundations and Legal Aspects

Sobre o Princípio da Dignidade: fundamentos filosóficos e aspectos jurídicos

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Abstract: This paper, starting from deductive method, aims to analyze the coexistence mechanisms of the philosophical foundations of the principle of human dignity by the legal practice, both in legislative documents as judicial decisions. On the metaphysical aspects that keeps in its wake, the principle of human dignity opens spaces for criticism of the consistency and coherence of that principle in legislative works, notably, in judicial decisions. Finally, it is concluded that while the reputation based on dignity is a universal virtue, its content depends largely on social, religious and traditional of certain communities.

Keywords: Dignity. Philosophical Foundations. Legal Aspects.

Resumo: O presente artigo científico, partindo de método dedutivo, pretende analisar os mecanismos de coabitação dos fundamentos filosóficos do princípio da dignidade humana pela prática jurídica, tanto em documentos legislativos quanto em decisões judiciais. Diante dos aspectos metafísicos que guarda em seu bojo, o princípio da dignidade humana abre espaços para críticas sobre a consistência e a coerência do referido princípio no plano legislativo e, notadamente, nos cenários jurisdicionais. Por fim, conclui-se que, enquanto a reputação baseada na dignidade for uma virtude universal, seu conteúdo depende largamente de valores sociais, religiosos e tradicionais de certas comunidades.

Palavras-chave: Dignidade. Fundamentos Filosóficos. Aspectos Legais.

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1 Introduction

Dignity has become an important principle in the constitutional and human rights discourse during the last few decades. After being incorporated in the Universal Declaration of Human Rights (UDHR) as a central constitutive value, it formed the basis of fundamental rights in the national constitutions with an increasing frequency. However, UDHR left open the issue regarding the scope and precise contours of the term, which has lengthy social and religious history. Despite the consensus on the general and abstract notion of the inviolability and inner worth of human being, there is disagreement on the legal status of dignity in national jurisdictions. The amorphous and metaphysical nature of the concept of human dignity opened the door for criticism in the sense that it fails to meet the standards of consistent and coherent legal practice as being a good source for judicial value imposition and unprincipled decision making (GLENSY, 2011, p. 65). The critics also argue that using the term dignity in the contexts of other fundamental rights makes the concept superfluous while trivializing dignity with every human right (ADDIS, 2013, p. 403-444).

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

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

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

2 Historical Overview

The content of human dignity in the constitutions varies from country to country, age to age. The widespread incorporation of dignity in national constitutions, however, conceals the disagreement over scope and meaning and government programs for implementation of human dignity, insert philosophical foundations and legal aspects. As with other broad constitutional principles the judiciary decides the meaning

of human dignity by challenging or approving specific governmental policies in relation to human dignity.

2.1 Philosophical Foundations of Dignity

The sources and origins of theoretical concept of human dignity can be found in antiquity. The word “dignity” derives its original meaning from the Latin word *dignitas* conveying honor and respect. In ancient Rome those who held high social and political status could possess *dignitas* (HENRY, 2011, p 169-233). Likewise, in ancient Rome only the man could have *dignitas* as opposed to women (HENRY, 2011, p. 190). Thus, a person’s dignity was associated with its function of social status. However, Cicero believed that all human beings have *dignitas* because of their inherent capacity to reason (HENRY, 2011, p. 190). This universal attribute bestows all human beings equal respect. Their superior minds enable them to think and shape their environment. Nevertheless, the prevailing concept of that time didn’t share Cicero’s concept of inherent quality. They believed that *dignitas* was an acquired trait based on high social or political status (GLENSY, 2011, p. 74).

The rationality aspect can also be found in Immanuel Kant’s concept of dignity. In addition to rationality, autonomy constitutes the core of Kant’s theory (CLAPHAM, 2006). Kant (2005, p. 75) wrote “humanity so far as it is capable of morality, is the only thing which has dignity.” Kant believes that this moral dimension makes people ends in themselves but not means and requires a dignified treatment. Kantian notion of dignity calls for respect the individual choices of persons as well as not to treat them as objects that disregard their free will. While inherent dignity connotes individuality, rationality and autonomy, it does not judge the merits of individual choices or reasoning. According to the concept of inherent worth, every individual has self-worth just because of being human regardless of the choices he makes. Furthermore, the universal nature of inherent worth and the Kantian autonomy in the period of enlightenment gave a new spirit to the modern concept of dignity. The Kantian theory is important for understanding the modern concept of dignity in the sense that it enables people to pursue life projects while

respecting the dignity of other members of the community. Thus, one's dignity is closely connected to the recognition of others' dignity. For example, one exercising torture not only violates the dignity of the victim but also morally demeans his own dignity by that same action (ADDIS, 2013, p. 421).

While philosophers agree that universal human dignity warrants respect because human beings possess a common trait, they may disagree on the specific trait whether it is the unique ability to reason, feel pain or make life projects based on rational choices (HENRY, 2011, p. 201). The danger in associating dignity with one of those traits would deprive some people of dignity who lack the capacity of reasonable choice, e.g. people with mental disabilities. Yet, the concept of universal human dignity's basic characteristic is the human worth regardless of the material aspects of his critical thinking and capacity whether a person is a newborn child or a person with mental incapacity. As such dignity cannot be granted or withheld. Furthermore, human dignity should not be seen as a competing concept with the growing tendency of attaching dignity to the nature and non-rational animals (NUSSBAUM, 2008, p. 351).

2.2 Current Developments: legal aspects

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

Additionally, the International Covenant on Civil and Political Rights (ICCPR) incorporates the inherent concept of dignity recognizing

its universal nature. The ICCPR states that “rights derive from the inherent dignity of the human person”. From the language of the document one can see the function of dignity as a basis for all human rights. However, an unequivocal or implied meaning of inherent dignity in both international and national documents sheds little light on the scope of its application and legal status. Neomi argues that dignity linked closely with negative rights, which are incorporated by the ICCPR in the context of the earliest “first generation” rights (RAO, 2013, p. 203). For example, the liberty based dignity respects individual freedom from the state interference or freedom of speech should be protected despite the fact whether the content of the speech is dignified or not (RAO, 2013, p. 205). The next section will demonstrate how the constitutional courts invoke dignity relying on its multiple meanings and protecting different values.

The modern constitutional law rests heavily on the Kantian vision of dignity making the inherent dignity for every individual a legal principle. Thus, the modern concept of dignity discards the traditional notion viewing dignity as a privilege for nobles. Instead it requires the states to respect equal dignity of individuals (RAO, 2008, p. 201). Abstract constitutional principles reflect the social and political developments of the time. The postwar world created convenient environment for the penetration of human dignity into the constitutional framework of a significant number of states, particularly those that were responsible for the atrocities and were defeated in the war, e.g. Germany, Italy and Japan. Unsurprisingly, human dignity became a fundamental value for those who undergone such an untenable trauma as a consequence of their authorities’ nonhuman policies. These countries went further to fill the dignity rights with considerable substantive content (GLENSY, 2011, p. 96).

The German constitutional practice exerted a great influence not only on drafting the constitutions of central and Eastern Europe but also beyond the European continent, especially on drafting the South African constitution after apartheid and the Basic Law of Israel. This influence explains the prominent role of dignity in their respective constitutions (MCCRUDDEN, 2008, p. 673). While the academic debate in Germany focused on the legal status of dignity in the Basic Law the Constitutional

Court had little difficulty to apply it. The Court in all cases invoked the alleged violation of human dignity along with other fundamental rights so that the Court should not have to decide the admissibility of the case based on the status of human dignity as an individual right (MCCRUDDEN, 2008, p. 681). Nevertheless, in German constitutional law dignity has the highest legal status with the power to limit other fundamental rights. In no case dignity may be balanced with other conflicting fundamental right. Some characteristic aspects of dignity in German constitutional law need particular consideration, e. g. the positive dimension of fundamental rights and the communitarian aspect of dignity. The positive dimension supposes affirmative action from the state in addition to its negative obligation not to intervene. The analysis of the jurisprudence of the Federal Constitutional Court in the next section will show more clearly the prominent place of dignity in German constitutional law. Since modern concept of human dignity has deep roots in European cultural values the examination of the U.S. constitutional and some Latin American courts' jurisprudence would be useful to reveal whether there are significant differences in understanding of dignity in different continents or whether there are some characteristics that constitute a universal core of dignity.

Even the constitutional courts of countries such as United States, France and Canada, whose constitutions do not expressly incorporate dignity, invoked the term in relation to fundamental rights. In the United States the founding fathers of the constitution referred to dignity even long before the invocation of the term by the court. Thomas Jefferson said that arbitrary discrimination based on “[...] birth or badge,” may deprive persons of their dignity (HENRY, 2011, p. 200). Similarly, Alexander Hamilton held that a constitutional democracy was the “[...] safest course for your liberty, your dignity, and your happiness.” (HENRY, 2011, p. 200). However, it should be noted that the prevailing concept of dignity in the eighteenth and nineteenth centuries in the United States was limited only to white men and had a long way to pass to recognize the equal worth of all individuals.

The role of human dignity in the U.S constitutional law is relatively limited because the Court failed to bestow it an independent weight. This practice could be explained both by the absence of specific constitutional

provision of dignity and by reluctance of the Court “to create” a new fundamental right implicating controversial moral and political issues. Nevertheless, the use of dignity in the contexts of different constitutional amendments in the United States invoked criticism for application of the concept of human dignity in that it lacks a coherent rationale for fundamental rights in the U.S. Constitutional jurisprudence (GLENSY, 2011, p. 92).

Glensy (2011, p. 93) rightly counters that “dignity is routinely invoked to make extremely foundational points that range from the notion that the right to dignity is the underlying source of some of the most important rights in the Bill of Rights and the Reconstruction Amendments.” Yet, a number of U.S. Scholars argue that human dignity is inherent in the U.S. Constitutional law. Maxime Goodman considers human dignity as a core value underlying expressly written and un-enumerated U.S. constitutional rights based on his extensive analysis of the U.S. Supreme Court decisions. Furthermore, he argues that the court should apply it in a more consistent way (RAO, 2008, p. 213). Gerald Neuman also comes to the same conclusion that human dignity is inherent in the U.S. Constitutional system, especially in the Fourteenth Amendment. Louis Henkin observes that even though the Framers’ conception of human dignity was “incomplete” it is implicit in the Constitution. Nevertheless, the U.S. conception of dignity falls behind the European standards of dignity (RAO, 2008, p. 213). Henkin’s explanation is very convincing because the U.S Constitution is relatively old and human dignity didn’t have its current strength and vigor when the constitution was adopted (RAO, 2008, p. 213).

Furthermore, Leslie Meltzer Henry (2011, p. 169-170) argues that the role of human dignity gradually increases in the U.S. constitutional jurisprudence. This is especially true for the Roberts Court. Even the more conservative Justices began to invoke dignity. He argues that the Court’s doctrinal approach of using dignity changed over time resulting in changing conceptions of dignity, e.g. in abortion jurisprudence.

The Court’s use of dignity in more than hundred judicial opinions in just last two decades attests the increasing importance of dignity in

the U.S constitutional law (HENRY, 2011, p. 178). One may argue that the Court's increasing use of the term does not necessarily indicate its legal importance. However, Leslie Meltzer Henry (2011, p. 181) correctly states that “[t]he Court's repeated appeals to dignity, particularly in majority opinions, appear to parallel its greater willingness to proffer dignity as a substantive value animating our constitutional rights.”

Doron Shulztiner and Guy Carmi (2014, p. 464) provide an interesting comparative analysis of the legal development of the concept at the national level after the adoption of the UDHR. According to their analysis, only five states incorporated human dignity in their constitutions in the period ranging from 1900 to 1944. Since then the number of countries reached 162. This fact alone indicates the increasing legal importance of human dignity. They argue that the increasing use of the term is not exclusively connected with the spread of democracy since one can find human dignity provision in the constitutions of nondemocratic countries as well. 97 countries out of 162, use the term in a broad-declarative way in the preambles or fundamental principles of their national constitutions.

The examination of the texts of the constitutions also reveals the important differences how the dignity is incorporated in the texts. While in some documents dignity is mentioned in the preamble or as a general principle, in others it is used as a subjective fundamental right (MCCRUDDEN, 2008, p. 675). McCrudden (2008, p. 722) argues that these differences indicate the “moral viewpoint” that varies from region to region. Generally, fundamental principles in the constitutions have an interpretive function for articulating specific rights or governmental policies. For example, in Brazil's constitution a separate paragraph of an article declares the dignity of the individual as a foundation of the republic. Thus, human dignity, in preambles or general principles is mentioned with reference to justice, equality, liberty and solidarity serving moral justification for concrete rights.

An important distinction between the general principles and specific rights is the subjective dimension of the concrete rights. Subjective rights are directly applicable legal norms as opposed to objective principles

or constitutional values ingrained in the preambles or fundamental principles. However, Neomi Rao (2008, p. 223) argues that there is significant difference between rights and principles, which do not have a specific content but serve as an interpretive tool. Specific rights set up concrete conditions protecting an individual from state interference. A note of caution should be made regarding the use of dignity as a general principle since fundamental constitutional rights act as principles as well.

Dworkin (1977, p. 134-136) argues that it would be a mistake to call the general clauses of the Constitution vague. It is vague if one looks at it as a specific conception. Dworkin's theory of constitutional interpretation is based on three main pillars: principles, rights, and values. He draws a line between specific conceptions and general concepts. Specific conceptions evolve over time which should test their validity under more general principles. For example, if the Supreme Court is to decide whether or not capital punishment is 'cruel and unusual' it should look at the Amendment as a general principle or concept rather than a specific conception. If the Court looks at the Eighth Amendment as a specific conception it will say that when the amendment was adopted capital punishment was not challenged and therefore it is constitutional. But if the drafters view this constitutional amendment as a general concept they will argue that the values have changed over time and what was not cruel before might well become cruel under the standards of these days. On the other hand, if one interprets the clause as a specific conception and still argues that it should be adjusted to the present-day conditions, then the interpreter is changing the Constitution (DWORKIN, 1977, p. 136).

While the standard offered by Dworkin's is clear enough, his theory offers more than that. He provides a useful insight into the constitutional adjudication since he regards a constitution as a general framework in terms of principles and moral values which enable the constitutional adjudicator to reach rationally sound decisions in hard cases. Axel Tschentscher (2016) further elaborated on the issue arguing that conceiving of most of the constitutional provisions as principles opens the door for balancing which creates a shield for the Federal Constitutional Court from the effective criticism of its decisions. Presenting most of the constitutional provisions as principles everything can become a subject

for balancing. The theory that regards the fundamental rights as principles lacks any well-defined structure permitting a constitutional court to exercise jurisdiction over so many issues, and in so doing becoming a “constitutionalization trap” (TSCHENTSCHER, 2016, p. 7) However, the balancing is the only viable method that can solve the constitutional disputes between two competing rights.

As a theoretical basis and justification for the balancing method Alexy treats constitutional rights as principles rather than mere rules. Indeed, it’s not hard to notice that Alexy is inspired by Dworkin’s concept of fundamental rights who views fundamental rights as general principles. But the optimization of principles differs from Dworkin’s theory (TSCHENTSCHER, 2016, p. 4-6). Alexy (2004, p. 47) argues that principles are distinguished from rules not by their level of generality but by their qualitative value. While the rules are norms requiring fulfillment of an action as precisely as prescribed by the rule the principles are norms requiring the fulfillment of an action to the greatest possible extent in view of the legal and factual possibilities.

Furthermore, dignity serves as a basis of all fundamental rights and moral justification for the courts’ reasoning. While the courts attach different weight to constitutional principles in different jurisdictions, the general constitutional principles yield more specific rules in concrete cases in all jurisdictions. More generally, the courts invoke dignity as an interpretive tool interpreting the catalogue of human rights through the lens of dignity (STAFFEN, 2016, p. 178-208). One may argue that dignity constitutes the core of such fundamental rights as equality, liberty and integrity, which helps to define the meaning of those rights in concrete cases. Hence, dignity helps the courts to find solution especially in cases where there are gaps in the legal system or the conflicting fundamental rights lead to either direction (BARROSO, 2012, p. 331). Additionally, human dignity acts as a goal or supreme value for the entire constitution. These goals are concretized by reference to human dignity in specific articles in an effort to seek concrete instructions for their implementation and guide the authorities in all their actions.

The use of different language for incorporating dignity in the constitutions opens room for misunderstanding of the general legal function of human dignity. Employing dignity in different contexts such as personal integrity, labor-related and welfare issues is yet another source for confusion. While in many constitutions dignity relates to conditions of detention, some constitutions employ the term for organization of work in the conditions of dignity, e.g. the constitution of Portugal¹. The constitutions of other states view dignity as a guarantee for provision of social benefits for dignified life, e.g. the constitution of Finland. For some countries dignity guides the implementation of welfare policies for people with special needs, e.g. the constitutions of Switzerland and Guatemala (SHULZTINER; CARMI, 2014, p. 480).

Doron Shulztiner and Guy Carmi (2014, p. 480) conclude that overall 141 states employ human dignity in articles other than preambles or general principles, 52 use the term in specific articles. 26 states use the term regarding the conditions of detention, 23 states for labor conditions and 21 for welfare issues. Doron Shulztiner and Guy Carmi (2014, p. 480) argue that most of the countries that use dignity in welfare context are developing states that lack sufficient resources for provision of social benefits and therefore the dignity provisions have declarative nature for them. Conversely, those countries that fail to view dignity in welfare context have social-welfare policies in place.

Hence, the social-welfare rights impose positive obligation on the state to guarantee decent conditions of work, housing, healthcare and environment. Despite the fact that most of these rights in national constitutions are not justiciable rights they guide the implementation of state social policies in most of the modern European constitutions. The modern constitutions go beyond the theory of political order and view individual rights in a broader social context. Neomi Rao (2008, p. 221) argues that this tendency is deeply rooted in European philosophical tradition, especially in Germany.

¹ The constitutions of 23 countries mention the term in labor-related context.

3 Selected Concepts of Dignity and Criticism

Political theorists and legal scholars have long debated on the various concepts of human dignity. However, the scholars could not reach agreement on any plausible meaning or a predominant definition of the term in either practical or theoretical contexts (SHULZTINER; CARMI, 2014, p. 471). However, the nature of human dignity is best explained by the relationship of an individual with society or the state in different cultural, social and political settings. Adeno Addis argues that any defensible notion of human dignity should reflect different social relationships in the sense what it means to human beings in different cultures (ADDIS, 2013, p. 428). He states that any plausible notion of dignity should be independent from any particular philosophical or religious concept of dignity in order to represent all cultural and social views reflecting cultural differences and systems. This notion of dignity will solve the conflict between universalism and relativism in the sense that human beings' own dignity for the sole fact of being humans. Instead of prescribing any comprehensive religious or philosophical doctrine, the overlapping consensus across various cultures can be reached by defining human dignity with the most fundamental rights, which are necessary for the minimal respectable relationship between individuals and states (ADDIS, 2013, p. 428). The consensus may not only be a product of actual practice but also reflect the declared commitments of the states because actual practice not always complies with public statements (RODRIGUEZ-BLANCO, 2015). A good example of this is the gap between public statements and actual practice regarding torture. Governments that exercise torture nevertheless condemn or deny such practice.

Most of the theories associate dignity with physical, social and mental integrity of an individual that supplies the core element of dignity in terms of freedom of choice and individuals' capacity to shape their own environment. Matthias Mahlmann claims that the attractive pathos of dignity may create "normative danger." (GLENSY, 2011, p. 138). Justice Scalia echoes this criticism arguing that the use of dignity language does nothing but to decorate and conceal the value choices of

judges. For the critics the broad nature of dignity serves as “an empty rhetorical shell” affected by the change of local cultures and traditions (GLENSY, 2011, p. 138).

Despite the apparent differences in understanding dignity, McCrudden identifies at least a common core to the idea of dignity. According to McCrudden (2008, p. 679), the minimum core of dignity contains three elements—1) the intrinsic worth of all human beings, 2) the recognition and respect of the intrinsic worth by others, and 3) the states’ duty to protect human rights. McCrudden (2008, p. 680) argues that despite the existing consensus on the minimum core, there are significant political and philosophical differences in understanding any of the three elements of the core of the concept. In particular, they differ as to what the intrinsic worth consists in and in their understanding about the kinds of treatment that offend the intrinsic worth.

The lack of consensus reflects the ideological differences in more general discourse of human rights regarding its universal or culturally relative nature. One may even go further to argue that inclusion of such broad principles as dignity in international or domestic legal texts “camouflages profound disagreement” on their judicial application and ideological basis (MCCRUDDEN, 2008, p. 698). Supporting this claim McCrudden refers to Lord Hoffman (1999, p. 159-167) who held: “of course we share a common humanity. [...] Nevertheless [...] the specific answers, the degree to which weight is given to one desirable objective rather than another, will be culturally determined. Different communities will, through their legislature and judges, adopt the answers which they think suit them.” Thus, McCrudden (2008, p. 698) concludes that the practical application of human dignity along with other human rights largely depends on its culturally relative nature, local politics and values, which result in differing and at times conflicting conceptions.

Neomi Rao (2008, p. 202) offers another concept of dignity consisting of three specific conceptions. First, inherent dignity requires protection from arbitrary interference by the state. Whereas, the positive conception includes welfare or social protection component demanding some affirmative action and progressive regulations by the state. The

third conception in this scheme is the dignity of recognition that differs radically from the first and second conceptions. The recognition demands respect from the society and the state for “the unique identity of this individual or group, their distinctness from everyone else” (RAO, 2008, p. 244-245). According to Neomi Rao (2008, p. 244-245), the third conception of recognition is closely connected to the idea of the important role of community for the development of individual identity.

Leslie Meltzer Henry (2011) identifies five categories where the Court applies institutional based dignity to protect “heightened respect” of the U.S. states, equality based dignity to support its anti-discrimination arguments, liberty based dignity to protect privacy in terms of individual choices and intimate sexual relationships, integrity based dignity to defend both reputation and bodily integrity from humiliating treatment and “collective virtue” as dignity to protect decent society in the context of death penalty and partial-birth abortion. *Equality as dignity conception*, in turn consists of three elements (HENRY, 2011, p. 202). First element presents the universal intrinsic worth of all human beings regardless of social status. Second, she distinguishes between *institutional status as dignity* and *equality as dignity*. As opposed to institutional status as dignity, equality as dignity is permanent and an individual can never be deprived of it. The third element relates to the relationship between individuals requiring equal respect for all people (HENRY, 2011, p. 203).

The judicial invocation of the concept of human dignity raises two important questions– the failure to provide a specific guidance because of the variety of existing concepts about the meaning and scope of human dignity, and the connection of dignity with two sides of the equally important conflicting rights, e.g. liberty and equality, freedom of speech and privacy, etc. Critics argue that dignity alone cannot resolve such a conflicting situation. In practice the conflict is solved by balancing based on the concrete factual situation and particular cultural values (RAO, 2013, p. 211). The critics ask what is role of dignity if not just a rhetorical gloss? Some scholars, such as Robert Post, join this criticism and warn against the inevitable confusion by linking dignity with other rights. For example, in the context of dignity’s connection with equality, he argues that the objective of anti-discrimination law should be eliminating harmful

social injustice than the protection of human dignity (GLENSY, 2011, p. 133). Glensy counters that the link between dignity and other rights helps to draw the legal framework of dignity outside the factual setting because dignity can be linked in any factual situation. In this context, dignity functions as an interpretive tool the philosophical foundations of which can be found in the Kantian theory where the autonomy served the theoretical basis for dignity connecting it with the modern concept of liberty (GLENSY, 2011, p. 133).

4 Conclusion

The analysis of philosophical foundations and legal aspects demonstrates the different weight attached to human dignity. However, there is a tacit agreement on the universal application of the concept related to autonomy and liberty, integrity and privacy, equality and social minimum conditions of dignified life. Dignity is characterized as a *fundamental value* and foundation of all human rights that protects the core of fundamental rights and functions as an interpretive tool to feel the gaps and resolve conflicts between conflicting fundamental rights and find moral justifications in hard cases. Dignity is justice that protects an individual from psychological harm, unjust treatment both in personal and public relations.

A common concern regarding the judicial application of dignity is that judges may impose their values through the application of such a broad metaphysical concept. While this problem is common to all broad constitutional principles, the judicial practice has shown that the most viable method of application of the concept of dignity is the proportionality principle. Wherever any state action touches upon the core of fundamental rights that tips close to the dignity is a violation of a fundamental right. Deciding claims on competing fundamental rights courts generally give more weight to those rights that embrace a dignity argument. However, it is not clear how the court can distribute weight when competing rights both invoke dignity argument. Then, the court

is to find solution where on both sides the core of dignity would not be violated.

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

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