

COMMENTS ON THE APPROACH TO HUMAN DIGNITY IN CASE LAW

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Abstract: *The article ‘Comments on the approach to human dignity in case law’ deals with some approaches to the interpretation of human dignity by international and constitutional courts including Czech Constitutional Court. It is the wide-ranging and extensive use of human dignity that certainly is a success of the post-war concept of human dignity as a basis for the protection of rights. On the other hand, the universal applicability of human dignity and it being ambivalently used is criticised for leading to vagueness and relativisation of the basic concept of dignity. However, given that the post-war conception is based on human dignity being the grounds for the human rights granted to all people, the universality of human dignity and its extensive use are the typical attributes thereof. The article describes fields of judicial interpretation of human dignity expressing diverse worlds of constitutional values.*

Keywords: *human dignity, judicial interpretation, hard cases, minimal core of human dignity, ethical consensus, legal concept of human dignity, the prohibition of torture and other cruel, inhuman, and degrading treatment, the prohibition of capital punishment, basic living conditions, right to life, crimes against humanity, the protection of personal freedom, the protection of group identity and culture, the prohibition of discrimination, the universality of human dignity*

INTRODUCTION

I found inspiration for the introduction of this paper in an article by Prof. Barroso concerning the issue of human dignity in contemporary law that is aptly entitled “Here, There and Everywhere”.¹ I will pose the similar question as he does: What do the case of dwarf-tossing (i.e., a competition where contestants compete to toss a man with dwarfism the farthest), the case of a man persecuted by a totalitarian regime, and the case of an offender convicted of the kidnapping and murder of a child who complains that humiliating methods were used during his interrogations at the investigation stage so as to find and rescue the child, have in common with the case of a woman who wishes to terminate her life, or with the situation of homosexual partners who want to adopt a child together? The unifying element of all these cases, which have been considered by constitutional or international courts, is the advertence to the value of human dignity.

The protection of human dignity combines both a public and a private element. In case law, human dignity is seen as the public good and a public interest. At the same time, it is also a reflection of very private values and interests; as the US Supreme Court puts it, issues comprising the most private and personal choices that a person can make during his/her life.² The primary concern is the connection between human dignity and the right to protection of personality rights, honour, reputation, and/or private and family life. This is why human dignity is such a widespread concept, although a highly controversial one.

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¹ BAROSSO, L. R. Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse. *Boston College International and Comparative Law Review*. Vol. 35, Issue 2, 2012, pp. 331–393.

² *Planned Parenthood v. Casey*, 505 U. S. 833, 851 (1992).

THE NATURE OF HUMAN DIGNITY: A RIGHT OR A MORAL VALUE?

Contemporary law stems from the concept of human dignity that was adopted by the international community in reaction to the constant and mass-scale humiliation of human dignity during World War II. The key documents incorporating the post-war concept of human dignity were the Charter of the United Nations and the Universal Declaration of Human Rights, according to which all human beings have worth that follows solely from the substance of their existence as such. This concept was later included in numerous other international human-rights treaties of both a universal and regional nature, as well as in the constitutions of individual states, and it has become a commonplace of the protection of human rights. The ethical consensus on human dignity led to it becoming one of the key principles in the development of the international protection of human rights. However, the legal concept of human dignity is the subject of controversy and rudimentary theoretical conflicts related primarily to its interpretation, which varies significantly depending on the values it is intended to advocate. Furthermore, when interpreting human dignity there are often basic constitutional values that oppose one another, such as the right to life or the liberty of an individual.

Now, with the hindsight of almost 65 years, it can be said that the interpretation of human dignity is still developing and broadening, and that it comprises many aspects ranging from the prohibition of torture and other cruel, inhuman, and degrading treatment, to issues of capital punishment, poverty, and living conditions, the prohibition of discrimination, the rights of the disabled, the rights of indigenous populations, the rights of detained and incarcerated persons, to the regulation of biomedical research, the right to control how one's personal data is used, and to other specific issues associated with the protection of individual freedom and an individual's autonomy.

Human dignity is an abstract notion encompassing a variety of elements; the question is whether or not there are any common features unifying various approaches to human dignity. A consensus on a certain minimum content of human dignity follows from professional discussions and case law.³ This core of human dignity is based on three key elements:

1. The recognition of the fact that any human being has his/her own worth as such which follows from the fact that he/she is a human being.
2. Certain forms of treatment and conduct are in contradiction of the recognition and respect for human dignity.
3. The principle that a state is here for human beings, in the interest of human beings, and not vice versa.

When interpreting human dignity, these core elements are linked to numerous conceptual issues. They concern primarily the nature of human dignity itself, or rather the issue as to whether it is an independent right or a legal principle, and if the latter, whether it is an absolute principle or a comparable principle. The nature of human dignity as an

³ McCrudden, Ch. Human Dignity and Judicial Interpretation of Human Rights. *The European Journal of International Law*. Vol. 19, No. 4, 2008, p. 679 and fol.

absolute legal principle is relativised with reference to the case of an individual on whom a sentence of imprisonment is imposed in a duly conducted proceeding. His/her dignity in the form of freedom of movement is restricted; however, such a restriction is legitimate in relation to the protection of other values.⁴

A major part of theory regards human dignity not as an individual right but as a constitutional principle which operates as moral and normative basis for human rights, such as the prohibition of torture or discrimination in cases where they are not discretely enshrined in legal instruments. However, whether human dignity is a legal principle or merely an ethical consensus is also disputed. An argument against the conception of human dignity as a legal principle is, for example, that human dignity does not have its own content and manifests itself only through other fundamental rights. An even more persuasive argument is that the value of human dignity is, in the case of a conflict of two fundamental rights, contained in both these rights, such as in the case of a conflict between the right to life and the right to personal autonomy.

A different approach is reflected in the interpretation of a so-called minimum content of human dignity. According to L. R. Barroso, the minimalist concept of human dignity is composed of three principles: (1) the worth of each human being that follows from the mere existence of that being, as well as (2) the autonomy of each individual (3) that is restricted by certain legitimate limitations in the name of public values or a state's interests.⁵ He analyses these three elements in detail from the philosophical perspective as secularism, neutrality, and universalism. Secularism, put simply, represents the principle of separation of church and state, as well as the principle that faith is a private matter of each individual, and a humanistic rational approach must prevail over religious concepts in public and political matters. Neutrality, with reference to J. Rawls, is a central concept of contemporary liberal thinking according to which a state cannot be biased in favour of anyone as far as various approaches to public interests are concerned. Universalism, accompanied by multiculturalism, denotes respect for ethnic and religious or cultural diversity. According to Barroso, human dignity, at its core, has a universalist ambition that binds the entire human community and is "a battle of ideas to be won with patience and perseverance".⁶

AREAS OF INTERPRETATION OF HUMAN DIGNITY

To make the idea of the content of human dignity even clearer, we may list the areas in which the interpretation thereof is most frequent. These areas can be divided into four groups.⁷ The first comprises the prohibition of torture and other cruel, inhuman, and de-

⁴ BARROSSO, L. R. *Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse*. p. 354.

⁵ *Ibid.*, p. 360.

⁶ *Ibid.*, pp. 361–362.

⁷ These areas are summarised in the cited work by, for example, McCRUDDEN, Ch. *Human Dignity and Judicial Interpretation of Human Rights*. p. 685 and fol. See also the work by CLAPHAM, A. Human rights obligations of non-state actors in conflict situations. *International Review of Red Cross*, Vol. 88, No. 863, 2006. Available also at: https://www.icrc.org/eng/assets/files/other/irrc_863_clapham.pdf.

grading treatment. This approach is typical, for example, of the European Court of Human Rights when interpreting Article 3 of the Convention on the Protection of Human Rights and Fundamental Freedoms because the Convention itself does not enshrine the protection of human dignity, which in fact makes it an exception among human-rights instruments.⁸ What also falls into this group is the connection between human dignity and the prohibition of capital punishment as it is used by, for example, the Supreme Court of the USA,⁹ the Supreme Court of Canada,¹⁰ the Constitutional Court of South Africa,¹¹ or the Hungarian Constitutional Court.¹²

The second group covers issues related to the availability of basic living conditions for a human being, or rather their connection to the right to life. Associating human dignity with ensuring the basic needs of life is more typical of the European approach than that of the Supreme Court of the USA. These needs include living conditions, such as food, hygiene, housing, availability of healthcare and education, and the possibility of getting employment. This approach associates human dignity with social rights and with the right to life. It also appears in judgments of the Inter-American Court, which held that the right to life does not only mean not to be arbitrarily deprived of life, but also the right to live in conditions that ensure dignified living.¹³ The Indian Supreme Court also interprets the guarantee of the right to life in connection with the right to dignified living, which covers basic living conditions, such as food, clothing, shelter, implements for writing, reading,

⁸ In *Ireland v. United Kingdom* from 1978, Judge Sir Gerald Fitzmaurice and Judge Evrigenis in their dissenting opinions defined human dignity as a central idea of that what represents humiliating treatment in the sense of Article 3 of the Convention (*Ireland v. United Kingdom*, 5310/71, of 18. 2. 1978). Later, the European Court of Human Rights (ECHR) frequently relied on human dignity when interpreting Article 3, even in relation to equality and the prohibition of discrimination. To illustrate, in *Selmouni v. France*, the Court held that in a case of a person deprived of freedom, resorting to unnecessary mental coercion when conducting the investigation humiliates human dignity, and such coercion was found to be an encroachment on rights under Article 3 of the Convention (*Selmouni v. France*, 25803/94, of 28. 7. 1999). The ECHR applied the same approach in the dramatic case of *Gäfgen v. Germany*, 22978/05, 30. 6. 2008.

⁹ To illustrate, in *Furman v. Georgia*, 408 U. S. 238 (1972), in which the Supreme Court of the USA dealt with the issue of capital punishment in the context of human dignity from the point of view of the 8th Amendment of the Constitution, which prohibits cruel punishments, the Court emphasised an obligation of states to treat their citizens with respect for their dignity when imposing punishments. This decision brought about a temporary suspension of capital punishment in the USA (until 1976). In *Gregg v. Georgia*, 428 US 153 (1976), the Supreme Court held that the capital punishment is not in contravention of the guaranteed human dignity protected by the 8th Amendment, and that its use as a punishment for crime is adequate with respect to its retributory function. At the same time, the Court tightened the conditions for the imposition thereof. In *Roper v. Simmons*, 543 U. S. 551 (2005), the Supreme Court held that capital punishments imposed on juveniles represent cruel treatment within the meaning of the 8th Amendment and are thus in contravention of the Constitution. In *Atkins v. Virginia*, 536 U. S. 304 (2002), the Supreme Court observed that imposing a death penalty on mentally retarded persons is in contravention of the 8th Amendment.

¹⁰ In *Kindler v. Canada*, [1991] 2 SCR 779, the Canadian Supreme Court arrived at a conclusion that capital punishment in a serious encroachment on human dignity.

¹¹ In *State v. Makwanyane*, 1995 (6) BCLR 665 (CC), human dignity was important in a decision about the unconstitutionality of the capital punishment. For more details, see McCRUDDEN, Ch. *Human Dignity and Judicial Interpretation of Human Rights*. p. 688

¹² McCRUDDEN, Ch. *Human Dignity and Judicial Interpretation of Human Rights*. p. 693 and p. 688.

¹³ Inter-American Court of Human Rights, *Case of the "Street Children" (Villagran-Morales v. Guatemala, judgment of 19. 11. 1999)*

and expression, as well as free movement and being in contact with other human beings.¹⁴ Linking human dignity to social and economic rights is also an approach of, for example, the Hungarian and South African Constitutional Courts in connection with the duty of a state to help ensure basic living conditions.¹⁵

This area also encompasses human dignity connected with the right to life when armed forces are used in cases of protection against crimes against humanity. One of the best known cases is the German *Aviation Security Act Case*. The Federal Constitutional Court of the Federal Republic of Germany found a provision allowing armed forces to shoot down an aircraft intended to be used as a weapon against human lives incompatible with the right to life, as well as with the guarantee of human dignity. The Court held that using an aircraft with passengers as a means of protecting other people will make the persons on board victims who have been denied the value of human dignity.¹⁶ In *Israel v. Government of Israel*, the Supreme Court of Israel held that unlawful combatants are not beyond the law: they are not outlaws; God created them in his image like other people and their human dignity is worthy of protection.¹⁷

The third area of interpretation of human dignity covers the wide range from the protection of personal freedom to the autonomy of an individual. This association originally prevailed in the United States, but it has also become increasingly frequent in the case law of European courts. It usually concerns a diverse area of so-called ‘hard cases’ ranging from different approaches to the issue of abortion,¹⁸ to issues of choosing when and how one dies,¹⁹ to the protection of privacy or the control of the use of personal data.²⁰

¹⁴ *Mullin v. The Administrator, Union Territory of Delphi*, AIR 1981 SCR (2) 516, cited from McCrudden, Ch. *Human Dignity and Judicial Interpretation of Human Rights*. p. 693.

¹⁵ McCrudden, Ch. *Human Dignity and Judicial Interpretation of Human Rights*. p. 693.

¹⁶ *Aviation Security Act Case*, see also BENDOR, L. A., SACHS, M. Human dignity as a constitutional concept in Germany and Israel. In: *Hebrew University of Jerusalem* [online]. [2018]. Available at: <<http://law.huji.ac.il/upload/ILR44BendorSachsCRC.pdf>>. A contribution presented at the German-Israeli colloquium on human dignity and criminal law, conducted between 2007–2009 in Germany and Israel, p. 10.

¹⁷ Public Committee against Torture in Israel v. Government of Israel. HCJ 769/02. In: *Cardozo Israeli Supreme Court Project* [online]. 11. 12. 2005 [2018-06-24]. Available at:

<<http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Public%20Committee%20Against%20Torture%20in%20Israel%20v.%20Government%20of%20Israel.pdf>>. See also BENDOR, L. A., SACHS, M. *Human dignity as a constitutional concept in Germany and Israel*. p. 11

¹⁸ See, for example, the decision of the Supreme Court of the USA in *Roe v. Wade*, 410 U. S. 113, 153, 93 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), *Planned Parenthood of Southern Pennsylvania v. Casey*, 505 U. S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992); the decision of the Federal Constitutional Court of the Federal Republic of Germany in *Schwangerschaftsabbruch I*, BVerfG 39, 1 BvF 1, 2, 3, 4, 5, 6/74 (1975) – the so-called first abortion case, and *Schwangerschaftsabbruch II*, BVerfG 88, 203, BvF 2/90 (1993) – the so-called second abortion case; the decision of Polish Constitutional Tribunal K26/96, 28.5.1997; and the decision of the ECHR in *Tysiack v. Poland*, 5410/03 of 20. 3. 2007.

¹⁹ See, for example, the decisions of the Supreme Court of the USA in *Cruzan v. Missouri Department of Health*, 497 U. S. 261 (1990); *Washington v. Glucksberg*, 521 U. S. (1997), in which the Court was concerned with the issue of whether the law of the State of Washington prohibiting assisted suicide contravenes the 14th Amendment of the Constitution; or the decision of the ECHR in *Pretty v. Great Britain*, 2346/02 of 29. 3. 2002, in which the Court held that although case law has not defined the right to self-determination as part of Article 8 of the Convention, the concept of personal autonomy is an important principle forming the grounds for the guarantee thereof. The imposition of obligatory or punitive measures by the state is considered an encroachment on private life under Article 8 (1) and requires justification under Article 8 (2). The ECHR also affirmed that an individual's right to a good and dignified life, as well as the right to make decisions about it, falls under Article 8.

The fourth group includes the protection of group identity and culture, as well as the prohibition of discrimination. It is a quite general approach. It covers issues of race, gender, and other types of discrimination, or more precisely issues of equality, and the rights of indigenous populations and of national, ethnic, or religious minorities. Human dignity as grounds for anti-discrimination regulations is commonly used on all continents.²¹

INTERPRETATION OF HUMAN DIGNITY IN THE CASE LAW OF THE CONSTITUTIONAL COURT OF THE CZECH REPUBLIC

It is interesting to compare how the above-mentioned principles of the interpretation of human dignity manifest themselves in the case law of the Constitutional Court of the Czech Republic. Originally, i.e., at the time of a so-called first Constitutional Court, the issues related to the conception of human dignity were not a principal concern of the case law. Although the Constitutional Court has frequently given its opinion on the conflict between the right to human dignity and freedom of expression since the 1990s, it has not focused on the interpretation of the term of human dignity but rather on the possibility of resolving the conflict by way of a proportionality test.²² The main principles of the approach to human dignity were originally based on dissenting opinions.²³

A change came about at the time of the so-called second Constitutional Court, whose case law gradually began to deal with the interpretation of human dignity itself. The change was brought about by a decision, File Ref. No. IV. ÚS 412/04 (restriction of legal capacity), the conclusions of which were later developed in Decision Ref. No. II. ÚS 2268/07 (the case of the priest Jan Šimsa, a signatory of Charta 77, who was convicted of assaulting a public officer – a member of the police – in 1978). In the former decision, the

²⁰ In April 2016, the European Parliament adopted a regulation on the protection of data which deals with the guarantees of human dignity of data subjects. For more details, see FLORIDI, L. *On Human Dignity as a Foundation for the Right to Privacy*. Published online at <http://www.chefuturo.it/category/digital-life/>

²¹ The European Commission first referred to human dignity in a decision in *East African Asians v. United Kingdom*, 3 EHHR (1981) in connection with racial discrimination. Human dignity in connection with the prohibition of discrimination is also used by the European Court of Justice, for example, when interpreting the directive prohibiting gender discrimination at work (Case C-13/94, *P v. S and Cornwall County Council* (1996), ECR I-2143).

²² For example, the decision of the Constitutional Court, File Ref. No. II. ÚS 357/96 (on freedom of expression and limits of the protection of personal rights); decision of the Constitutional Court, File Ref. No. IV. ÚS 154/97 (on the relationship between the right to the protection of personality rights and the right to disseminate information); resolution of the Constitutional Court, File Ref. No. I. ÚS 282/99; and many others. The Constitutional Court expressly held that “the fundamental right under Art. 17 of the Charter is in principle equal to the right under Art. 10 of the Charter” (Decision Ref. No. II. ÚS 357/96); while at the same time, “it is up to the general courts to decide, taking into account particular circumstances, whether one of the rights was given preference over the other” (Decision Ref. No. IV. ÚS 154/97).

²³ See, for example, the dissenting opinion of E. Wagnerová in the decision with Ref. No. Pl. ÚS 16/04 (Compensation for non-financial losses (emotional harm) in the case of a loss of a close person). E. Wagnerová said that human dignity “represents the highest value that is at the core of both the entire Czech legal system and constitutional law. Human dignity may be regarded as the ultimate purpose of the two systems, which are thereby made legitimate (see the Preamble of the Constitution of the Czech Republic). ... Human dignity thus becomes an objective constitutional value that is superior to other, non-hierarchically arranged, basic rights (both classical and political).”

Constitutional Court interpreted human dignity for the first time; it did so in relation to the restriction of legal capacity to bind oneself through one's own acts, and defined said dignity as the foundation on which the interpretation of all fundamental rights is based. Respect for and protection of human dignity and freedom thus represents the ultimate and most general purpose of law. The Constitutional Court found inspiration in the German object theory and defined a concept of human dignity that excludes that a person be treated as an object. According to the Constitutional Court, the issues of human dignity are "in this approach regarded as a part of individual's value, a part of humanness. Guaranteeing the inviolability of human dignity makes it possible for a person to fully enjoy his/her personality rights. These thoughts are affirmed in the preamble of the Constitution that declares human dignity as an inviolable value constituting the foundation of the constitutional system of the Czech Republic."²⁴

In the cited decision, human dignity is defined as an objective, inviolable, public value that represents the foundation of constitutional law (Article 1 of the Charter), and at the same time as the right to have one's dignity preserved (Article 10 (1) of the Charter). These reflections served as the basis of further Constitutional Court case law, in which it primarily worked with object theory,²⁵ applying the theory not only to cases of restricted legal capacity but also to cases regarding the amount of financial compensation for non-financial losses. In its case law, the Constitutional Court also determined its sources of inspiration; it is particularly a reference to the United Nations Charter and the Universal Declaration of Human Rights. Another key source of inspiration is the case law of the Federal Constitutional Court of German Federal Republic. The Court also refers to the Convention on the Protection of Human Rights and Fundamental Freedoms, which recognises human dignity as a value crucial to the entire system of the protection of rights under the Convention, although human dignity is not expressly mentioned.

As for the individual areas associated with human dignity, we can observe that the conception of human dignity in the Constitutional Court's case law is weaker in the social context, i.e., in connection with social rights and the principle of solidarity. The emphasis on the social aspect of human dignity may be mainly found in some dissenting opinions. Said conception can be seen, for example, during the consideration of an application to repeal some parts of Act No. 261/2007 Sb., on the stabilisation of public budgets.²⁶ It is in the dissenting opinions where the connection between human dignity and

²⁴ Decision of the Constitutional Court, File Ref. No. IV. ÚS 412/04, decision of the Constitutional Court, File Ref. No. I. ÚS 557/09, Assessment of the restriction of legal capacity.

²⁵ See, for example, decision of the Constitutional Court, File Ref. No. II. ÚS 2268/07: "Human dignity is enshrined in the very basis of fundamental rights contained in constitutional law. It is connected with the right of each person to be respected and recognised as a human being, from which it further follows that it is prohibited to treat a person as a mere object of the state's will and/or to expose a person to such practice which challenges his/her value as a person."

²⁶ Decision of the Constitutional court, File Ref. No. Pl. ÚS 1/08, application to repeal part of Act No. 261/2007, on the stabilisation of public budgets – the part concerning healthcare (Point 119): "It is possible to conclude that from the point of view of Art. 31 and Art. 4 (4) of the Charter, regulatory fees prescribed by law are within the limits complying with the substance and purpose of the access to dignified healthcare funded from national healthcare insurance, and these fees do not represent a barrier hindering access thereto (there is no 'suppressing' effect), also because of benefits from the national social security system."

dignified healthcare occurs; human dignity is further connected with social rights, as well as with humanistic ideals, such as the protection of the weak and the principle of social cohesion.²⁷

Despite these approaches in dissenting opinions, the social aspect of human dignity is not strong in the Constitutional Court's case law. There is an exception, however in a decision from 2010 regarding the issues of pension insurance and reduction brackets for the determination of the percentage assessment part of a pension, in which the Court was concerned with a question of the relationship between adequate material welfare in retirement and the principle of solidarity.²⁸ The social aspect of human dignity is also found in the decision of the Constitutional Court from 2011 by which the Court repealed s. 33 (3) of the Code of Administrative Justice, which stipulated that "a party to proceedings is qualified to make legal acts autonomously only if he/she has full legal capacity".²⁹ The Constitutional Court repealed the said provision for its contravention of the protection of human dignity and the United Nations Convention on Rights of Persons with Disabilities (which came into effect in the Czech Republic in 2009). Said Convention puts emphasis on the integration of persons with disabilities into society and on the access of persons with disabilities to justice; persons with long-term disability are also considered persons with disabilities.

Despite said exceptions, the Constitutional Court remains rather restrained in terms of associating dignity with social rights. This fact also follows from its interpretation of the nature and enforceability of social rights. In its recent case law, the Constitutional Court emphasised the interpretative importance of human dignity for the determination of a minimum standard of individual fundamental rights when dealing with the constitutionality of the shortening of the period relevant for the assessment of a claim for unemployment benefits. The Court referred to the Federal Constitutional Court, which infers, from the value of human dignity, a constitutional right to a guaranteed dignified existence minimum that comprises "the physical existence of an individual, i.e., food, clothing, household equipment, shelter, heating, hygiene and health, as well as ensuring the possibility to develop interpersonal relationships and a minimum level of participation in social, cultural, and political life, because a human being as a person necessarily exists in social relation."³⁰ The Court also made reference to dissenting opinions in its decision with Ref. No. Pl. ÚS 8/07, and to human dignity operating as a safeguard of the minimum level of rights. It concluded that: "The constitutional system represents an interconnected structural complex that intends to protect the utmost values of human dignity and dignified human life; the choice of a particular system to preserve dignity is up to a legislator."³¹

²⁷ For example, the dissenting opinion of Justice J. Musil: "A welfare state is based on such humanist notions as the protection of the weak and support of those suffering hardship. An important benefit of a welfare state is seen in the reinforcement of social cohesion that is necessary so as to be able to face the threats of civilisation."

²⁸ Decision of the Constitutional Court, Ref. No. 8/07, regarding reduction brackets for the purpose of determination of the percentage assessment part of a pension.

²⁹ Decision of the Constitutional Court, Ref. No. Pl. ÚS 43/10, on the capacity of persons with restricted legal capacity to act before courts on their own.

³⁰ Decision of the Constitutional Court, Ref. No. Pl. ÚS 55/13, regarding the periods of time relevant for the assessment of claims for unemployment benefits, Point 47.

³¹ Decision of the Constitutional Court, Ref. No. Pl. ÚS 55/13, Point 84.

An area where the concept of human dignity manifests itself in the Constitutional Court's case law even more strongly than in the social context is in the individualist approach, particularly in the protection of an individual as a legal person and in connection with the right to the protection of personality rights. In this approach, an individual is the focus and basis of a state, and all state bodies are bound to protect his/her rights. However, according to the Constitutional Court, constitutionality does not only lie in the protection of individuals' fundamental rights, but all rights must be interpreted within the limits of human dignity. The Constitutional Court works on the assumption that only a state all of whose acts are made with respect for and recognition of human dignity is a democratic state respecting the rule of law. An interest in preserving such quality of a state is undoubtedly a public interest.³²

POSITION OF HUMAN DIGNITY IN THE CONSTITUTIONAL SYSTEM OF THE CZECH REPUBLIC

The Constitutional Court was also concerned with the position of human dignity in the system of human rights and constitutional values. However, its approach in these areas is not unambiguous. On the one hand, the Constitutional Court sees human dignity as the utmost, inalienable value that makes the entire legal system legitimate.³³ Again, the Constitutional Court proceeds from the German constitutional doctrine and case law. According to this doctrine, human dignity is a value that is superior to other fundamental rights, it is above them, and in the case of a conflict between human dignity and another fundamental right, it would not even be possible to use the proportionality test. On the other hand, the right to human dignity is counterbalanced with the test of proportionality. It concerns cases of conflict between human dignity and the right to freedom of expression and the right to information. In such cases the Constitutional Court decided that the fundamental right to freedom of expression is, in principle, equal to the fundamental right to human dignity.³⁴ It should be noted that this approach has been consistently manifesting itself in the case law since the 1990s (i.e., for the period of both Constitutional Courts).

However, another aspect has recently emerged – the severity and proximity (intensity) of an encroachment on the right to human dignity. In this respect, the Constitutional Court differentiates among several spheres of human dignity. The private sphere receives the highest protection in the sense that there is absolute information self-determination, i.e., it is the task of each individual to decide to what extent he/she will disclose information to the surrounding world. The other spheres of human dignity, namely the social,

³² Decision of the Constitutional Court, Ref. No. IV. ÚS 412/04.

³³ Decisions of the Constitutional Court, Ref. No. IV. ÚS 412/04, Ref. No. II. ÚS 2268/07, Ref. No. I. ÚS 557/09.

³⁴ The Constitutional Court was concerned with this conflict repeatedly; for example, in its Decision Ref. No. IV. ÚS 154/97 the Court stated that "where there is a conflict between a basic political right to information and its propagation, and the right to protection of personality rights and of private life, i.e., fundamental rights that are equal, it will always be up to independent courts to decide, taking into account the circumstances of each particular case, whether one right has not unreasonably been given priority over the other right." Similarly, Decision No. IV. ÚS 146/04, on the limits of the right to protection of personality rights of politicians and other public persons.

civil, and professional spheres, are not protected absolutely as there might be information of public interest. The absolute information self-determination in relation to encroachments on human dignity concerns all persons irrespective of whether or not they are publicly known persons. This approach is grounded in the fact that human dignity represents the utmost value which operates as a value superior to other fundamental rights. This approach has been illustrated in particular in cases regarding violations of the right to the protection of human dignity by the awarding of insufficient damages for non-financial losses, and in recent cases regarding conflicts between the protection of human dignity and freedom of expression, or rather the right to information in relation to publicly active persons.³⁵

The protection of human dignity is further reflected by the Constitutional Court in the area of criminal law, for example when deciding on compensation for unjustified custody, unlawfully restricted freedom by the imposition of a sentence of imprisonment, or on issues of the constitutionality of a house search and various modes of obtaining evidence.³⁶ In recent case law, human dignity was also considered in connection with the right to the effective investigation of crime in cases of people trafficking which borders on slavery or other forms of exploitation of people, as well as in connection with cases of degrading treatment of a person in the course of the enforcement of the administrative banishment of a foreigner.³⁷ The Constitutional Court also emphasised respect for the inherent human dignity of persons with mental disabilities when reviewing decisions made in proceedings regarding the admissibility of detaining an individual in a psychiatric facility without his/her consent.³⁸ The Constitutional Court also associated the guarantees of human dignity with the prohibition of forced labour, namely in a decision reviewing the legal duty of job seekers to engage in public services.³⁹

Until recently, human dignity stood aside together with an area it is typically associated with in international case law, namely the prohibition of discrimination and the protection of group identity. The first decision in this respect was made by the Constitutional Court this year, whereby the Court repealed s. 13 (2) of the Civil Partnership Act, which prevented

³⁵ See the decision by the Constitutional Court, Ref. No. I. ÚS 1586/09, regarding the violation of the right to the protection of human dignity and respect for one's private life by the awarding of insufficient damages for non-financial losses; decision of the Constitutional Court, Ref. No. II. ÚS 171/12, regarding the protection of privacy vs. the right to information in relation to publicly active persons; IV. ÚS 1511/13, on the limits of freedom of expression when criticising political representatives.

³⁶ For example, the decision of the Constitutional Court, Ref. No. I. ÚS 987/07, regarding the competence of a general court to impose a disciplinary penalty on a person who refuses to have DNA samples taken in paternity determination proceedings; Decision Ref. No. Pl.ÚS-st. 30/10, regarding the taking of an odor sample, hair sample, and buccal smear with respect to the prohibition of coerced self-incrimination; Decision Ref. No. 3183/15, regarding the compensation for unlawful prosecution (a duty of a state to remedy the harmed person for all mental distress suffered).

³⁷ Decision of the Constitutional Court, Ref. No. II. ÚS 3436/14, regarding the right for effective investigation of crime (people trafficking); Decision Ref. No. I. ÚS 860/15, regarding humiliating treatment in the course of administrative banishment of a foreigner, and the subsequent requirement of effective investigation.

³⁸ Decision of the Constitutional Court, Ref. No. I. ÚS 1974/14, on the requirements for judicial review of detention in a psychiatric hospital.

³⁹ Pl. ÚS 1/12. The duty of job seekers to do public service. Application that Act No. 372/2011 Sb, on healthcare services and the provision thereof, be repealed.

persons living in civil partnerships from becoming the adoptive parents of a child.⁴⁰ The Constitutional Court arrived at a conclusion that by denying a certain group of people a right (although not a constitutional right) merely because they decided to solemnise a civil partnership makes them *de facto* people of “second rate” and stigmatises them unreasonably as persons inferior to and different from others, as well as persons unable, unlike other people, to duly look after children.⁴¹ The Constitutional Court also found a violation of human dignity, regarded as a fundamental right, interpretative clue, and objective value, in connection with the right to the protection of private life.

SUMMARY

The reason why I called this article ‘Comments on the approach to human dignity in case law’ is that it only deals with some approaches to the interpretation of human dignity. It is the wide-ranging and extensive use of human dignity that certainly is a success of the post-war concept of human dignity as a basis for the protection of rights. On the other hand, the universal applicability of human dignity and it being ambivalently used is criticised for leading to vagueness and relativisation of the basic concept of dignity. However, given that the post-war conception is based on human dignity being the grounds for the human rights granted to all people (“All persons will be nobles”⁴²), particularly for the equality of all people because everyone possesses dignity, the universality of human dignity and its extensive use are the typical attributes thereof.

Nonetheless, the interpretation of human dignity also has a particular feature. From its interpretation in the so-called hard cases, it is evident which values are considered crucial in constitutional systems. From this point of view, human dignity becomes a concrete concept: human dignity, whether regarded as a principle, right, interpretative clue, or a moral objective value, makes it possible for individual states to express legally which values are crucial for them.

⁴⁰ (2) Lasting civil partnership prevents one of the partners from becoming an adoptive parent of a child.

⁴¹ Decision of the Constitutional Court of 14. 6. 2016, Ref. No. Pl. ÚS 7/15, Act No. 234/2016 Sb., Registered civil partnership as an obstacle to the individual adoption of a child.

⁴² BARROSSO, L. R. *Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse*, p. 393.