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Human dignity and judicial interpretation of human rights law

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Abstract

This article argues that the use of 'dignity', beyond a basic minimum core, does not provide a universalistic, principled basis for judicial decision-making in the human rights context, in the sense that there is little common understanding of what dignity requires substantively within or across jurisdictions. Having dignity means being treated with respect and treating others with respect. Dignity is one of the most important things to the human spirit. Only with dignity are people able to achieve things like being good in school, finding friends, leading a happy life, and maybe even making a difference in the world. Indeed, instead of providing a basis for principled decision-making, dignity seems open to significant judicial manipulation, increasing rather than decreasing judicial discretion. Human rights are intimately related to the notion of human dignity. The importance of human rights and the requirement to respect everyone's rights is based on the notion of human dignity. In that sense, human dignity is considered to be the foundation of human rights.

Keywords: Basic law, civilization, constitution law, convention, dignity, judicial manipulation, jurisdictions, human rights, humanity, international law, privilege, slavery, universal declaration, etc.

1. Introduction

Dignity has become an important principle in constitutional and human rights discourse during the last few decades. After being incorporated in the Universal Declaration of Human Rights as a central constitutive value, it formed the basis of Fundamental Rights in the national constitutions with an increasing frequency. 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. 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 find the universal common core of very broad and at times ambiguous notion. Further-more, social, political and economic conditions exert significant influence on the judicial interpretation of dignity.

This article demonstrates the legal development of the notion of human dignity in the legal jurisdiction of various countries arguing that some aspects of concept attained universal acceptance. Although 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 purpose of this article to provide a comprehensive study of human dignity and judicial interpretation of human right, it aims to clarify the conceptual confusion regarding the complicated judicial function of dignity in modern constitutional law.

2. Significance of the Study

Human dignity in 'Legal History' originally, human dignity made its first appearance in the legal framework related to the laws of war, a set of rules based on chivalry, religion and humanity and a code of arms for protecting non combatants (Meron, 1993). Attitudes of humanity were however largely disregarded in religious wars in Europe, such as the Thirty

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Table 1: Shows in Universal Declaration of Human Rights

S. N.	Universal Declaration of Human Rights
1	We are all Born Free and Equal.
2	Don't Discriminate.
3	The Right to life.
4	Nobody has any right to make us a Slave.
5	Nobody has any right to Hurt us or torture us.
6	You have Rights no matter where you go.
7	We are all Equal before the Law.
8	Your Human Rights are protected by Law.
9	No Unfair Detainment.
10	The Right to Trial.
11	We are always innocent till Proven Guilty.
12	The Right to Privacy.
13	We all have the right to go where we want in our own country & Travel as we wish.
14	Right to seek a safe place to live.
15	Right to a Nationality.
16	Right to Marriage and family.
17	The Right to your own things or share them.
18	Freedom of thought.
19	Freedom of expression.
20	The Right to Public Assembly.
21	The Right to Democracy.
22	Right to Social and living security.
23	Every grown up has the right to do a job, to a fair wage for their work and to join a trade Union.
24	We all have the right to rest from work and to relax.
25	Right to food and shelter for all.
26	The Right to Education.
27	Copyright is a special law that protects one's own artistic creations and writings; other cannot make copies without permission.
28	A fair and free world.
29	Responsibility (We have a duty to other people and we should protect their Rights)
30	No one can take away your Human Rights.

4.2 Human Dignity

Human dignity is the recognition that human beings possess a special value intrinsic to their humanity and as such are worthy of respect simply because they are human beings. Thus every human being, regardless of age, ability, status, gender, ethnicity etc. is to be treated with respect.

Human dignity performs a central role in the international legal discourse since the beginning of the nineteenth century. Thereafter, it has been explicitly or implicitly recognized in constitutional and international documents and has become the premier value underlying current moral and political debates. It undoubtedly constitutes the most

pervasive concept in international human rights law and is the basis of different legal frameworks being interwoven with various religious and moral traditions. However, human dignity finds no uniform application and generate contrasting reflections over its meaning and ultimate purpose. It has been defined a 'Vacuous Concept' (Mirko and Allan, 2006) ^[14], a subjective idea that changes with time and beholder, masking 'a great deal of disagreement and sheer confusion' (Michael, 2012) ^[13], or noble sentiment that can have no place in an attempt at rational persuasion, failing to provide a universalistic basis for judicial decision making in the area of human rights protection.

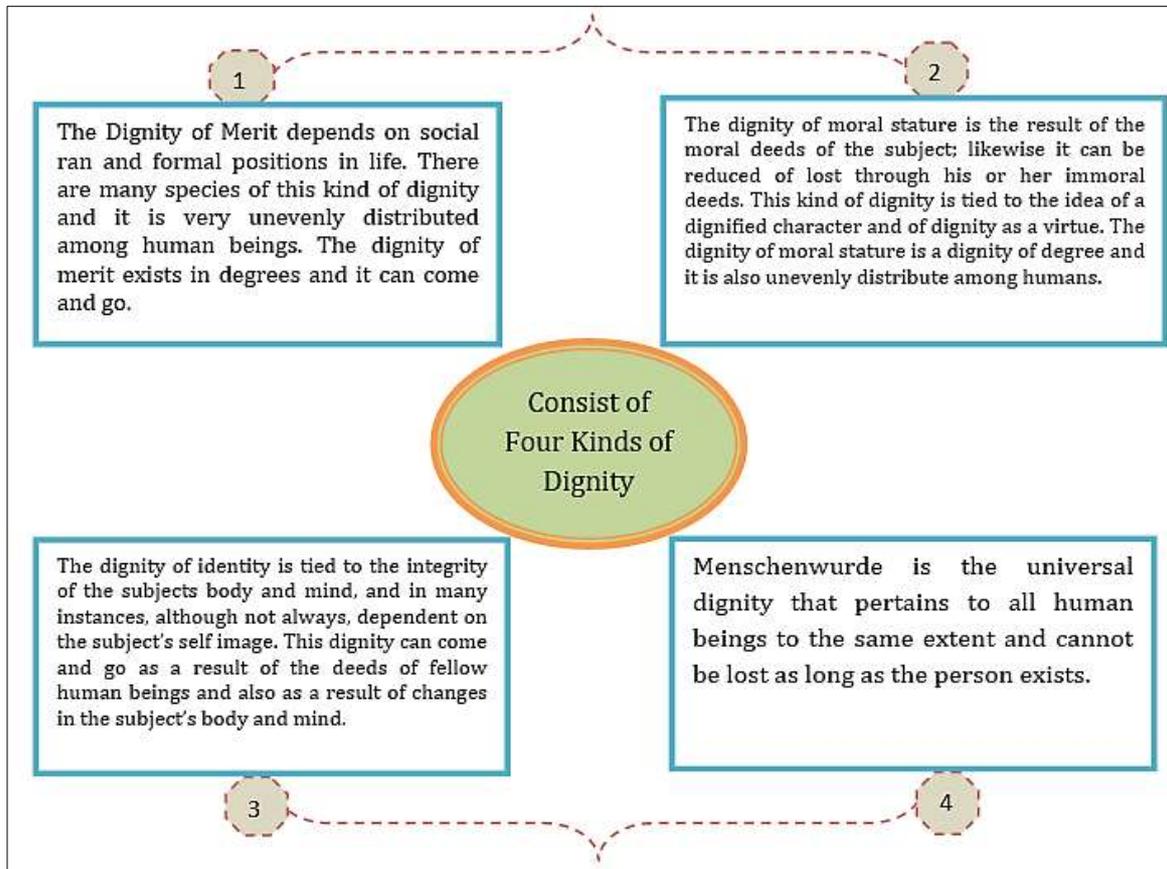


Fig 2: Consist of four kinds of dignity

5. Legal History of Dignity

The legal development of the concept paved its way in the beginning of the twentieth century and received its momentum after incorporation in the UDHR. The open ended nature of the concept of human dignity allowed the people with different ideology backgrounds agree with 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 drafter 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.

International Convention on Civil and Political Rights (ICCPR) incorporates the inherent concept of dignity recognizing its universal nature. The liberty based dignity respect individual freedom of speech should be protected despite the fact whether the content of the speech is dignified or not (Neomi, 2013). 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 (Neomi, 2008) ^[15]. The postwar world created convenient environment for the penetration of the 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 consequences of their authorities non human policies. These countries went further to fill the dignity rights with considerable substantive content (Glensy, 2011) ^[6].

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 court. Similarly, Alexander Hamilton held that a constitutional democracy was the "Safest course for your liberty, your dignity and your happiness" (Henry, 2012). Glensy rightly counters that "Dignity is routinely invoked to make extremely foundational points that range from the notion that the right to dignity is the underlying source of the most important rights in the bill of rights and Reconstruction Amendments" (Glensy, 2011) ^[6]. Furthermore, dignity serves as a basis of all fundamental rights and moral justification for the court's reasoning. 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 modern European constitutions. The modern constitutions go beyond the theory of political order and view individual rights in a broader social context.

6. Selected Theories of Dignity

The political theorist 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 (Shultziner & Carmi, 2014) [7]. However, the nature of human dignity is best explained by the relationship of an individual with society or the state in the 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) [1]. 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.

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. According to McCrudden, the minimum core of dignity contains three elements-

1. The intrinsic worth of all human beings
2. The recognition and respect of the intrinsic worth by others
3. The states duty to protect human rights

The lack of consensus reflects the ideological differences in more general discourse of human rights regarding its universal or culturally relative nature. Neomi offers another concept of dignity consisting of three specific conceptions. First, inherent dignity requires protection from arbitrary interference by the state. Second, 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, (Neomi, 2008) [15]. The judicial invocation of the concept of human dignity raise two important questions- the failure to provide a specific guidance because of the variety of existing concept 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.

The Critics argues that dignity alone cannot resolve such a conflicting situation and particular cultural values. Some scholars, such as Robert Post, Join this criticism and warn against the inevitable confusion by lining dignity with other rights. 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 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.

7. Judicial Interpretation

The content of human dignity in the constitutions varies from country to country. The widespread incorporation of dignity in national constitutions, however, conceals the disagreement over scope and meaning and government programs for implementation of human dignity (Botha, 2009) [3]. Doron and Carmi doubt that human dignity may guide the activities of the three branches of government to determine the validity of complex socio-economic policies based on concrete standards. They argue that incorporating human dignity as general value and individual right in constitutions put the judiciary in a difficult situation. The very broad nature of human dignity will enable judges to

interpret the 'Omnipotent' right without limits implicating complex political issues and competing claims (Doron & Carmi, 2014) [7]. The legal evolution of the meaning of human dignity depends on several factors such as the political and legal system, the power of judicial review and legal tradition. As a substitute, comparative analysis should focus on whether a coherent theory could be developed though the synthesis of the courts decisions. The comparative analysis of this part is focusing on those aspects of dignity that found universal acceptance in the jurisprudence of the most prominent constitutional courts across the world.

7.1 United States of America

The USA Supreme Court referred to the concept of human dignity in many occasion especially in areas of personal integrity, privacy and sexual relationship. According to some studies the Court invoked the term in more than nine hundred cases over the 220 years (Heny, 2011) [8]. The references to dignity embraced the idea of dignity in its meaning of intrinsic worth for all human beings regardless of their mental capacity or achievements connoting that every human being posses equal human dignity (Neomi, 2008) [15].

7.2 Germany

In countries where the courts apply human dignity in social welfare context as well indicate both the extension of modern dimension of the concept and its influence on the political life. Prominent examples are Germany and those countries influenced by German constitutional practice. There seems to be less difficulty for the German Constitutional Court for extending the scope of protection of value oriented nature of the German Basic Law, (Eberle, 2002) [5] particularly human dignity.

7.3 South African Republic

The dignity provision of the South African republics constitution and its interpretation by the Court is an interesting example for the comparison. Section 10 of the constitution reads everyone has inherent dignity and the right to have their dignity respected and protected. Human dignity is one of the most fundamental principles and justiciable rights in the South African Constitutional law. The importance of the principle is confirmed by the South African Constitutional Court when it declared that human dignity cannot be subordinated to another right (S. Afr., 1995 (3) SA 391).

7.4 France and Hungary

A short excursus into the constitutional practices of other countries would be useful to depict the universal framework of human dignity. For example, in France the fundamental nature of human dignity was recognized by judiciary despite the absence of explicit constitutional provision. In 1994, the constitutional Council combined the different pieces of the preamble and elevated human dignity to the level of constitutional principle (Barroso, 2012) [2]. Similarly, the Hungarian constitutional court invoked dignity to secure minimum livelihood. The courts' analysis demonstrates how human dignity is connected with other constitutional rights. The Court invoked human dignity in different contexts including gay marriage, juvenile beating and gender equality (Neomi, 2008) [15].

7.5 Canada

The Canadian Court treats the dignity as part of legal system even though the Canadian Charter of Rights and Freedoms is silent about human dignity. Thus, human dignity has become an important constitutional principle even in the absence of its formal enactment in some national constitutions. The courts not only elaborated the meaning of dignity in specific cases but also revealed the concept's connection with other fundamental rights. The Canadian Supreme Court invoked dignity to prohibit stereotyping under the equal protection clause as well. It seems that, dignity is invoked to support equality argument across many different jurisdictions (Glensy, 2011) ^[6].

7.6 Israel

As opposed to absolute nature of dignity in German Constitutional law the Israeli Supreme Court argue that human dignity can be balanced against other competing rights and societal interests. The Court said: *"The Rights of person to his Dignity, his liberty and his property are not absolute rights. They are relative rights. They may be restricted in order to uphold the rights of others, or the goals of society. Indeed, human rights are not the rights of a person on a desert island. They are the rights of a person as a part of society. Human rights and the restriction thereof derive from a common source, which concerns the rights of a person in a democracy."*

7.7 Brazil

The Supreme Court of Brazil invoked dignity in cases related to torture, equality and minimum conditions of life. In *Herbert Fernando de Carvalho* the Court argued that obtaining evidence from an adolescent by means of torture violates the person's human dignity. In *Rio Grande do Sul State Prosecutor* the court invoked dignity for lack of sanitation and overcrowding of the prisons. The Court reasoned that the government bears positive obligation to provide minimum conditions for prisoners to preserve their mental and physical integrity stemming from dignity.

7.8 India

The Indian Constitution's Article 14 explains that Equality before Law and article 21 highlight that protection of life and personal liberty. It appears that, there is no specific mention of human dignity as no such expression is used in the aforesaid article. However, Indian Supreme Court introduce a judge made doctrine of human dignity by reading the same into these articles of the constitution, on the same line as it was crafted by the American Supreme Court. In fact, as would be demonstrated here in after, in shaping and giving true meaning to the fundamental rights enshrined in part III of the constitution of India, it is the concept of human dignity which has been in the fore front as well as at the back of the mind of the Supreme Court. For example, Indian Supreme Court has read 'right to life' enshrined under Article 21 as "Right to live, life with Dignity." It is linked with right to grow as a human being. Similarly, human dignity is used as lodestar for equality and to counter unfair discrimination while interpreting Article 14 of the Constitution, thereby providing a clear linkage and connection between dignity, equality and unfair discrimination under Article 14 (Sikri, 2016) ^[18].

8. International Human Rights Law

International human rights law emerged following the Second World War with the creation of the United Nations and the adoption and ratification of the core human rights treaties. Prior to this, however, several precursors laid the foundation for the international human rights legal framework as it stands today. In particular, human rights were legally protected in some domestic legal systems, including in France under the 1789 Declaration of the Rights of Man and of the Citizen and in the United States of America, under the 1776 Virginia Declaration of Rights and the Declaration of Independence of the United States (UNHRC, 2016).

In addition, the doctrine of diplomatic protection under international law permitted States to intervene on behalf of nationals abroad, to ensure that they were treated in accordance with international minimum standards of treatment of aliens. Later, the influence of the Red Cross Movement and the establishment in 1919 of the International Labour Organization (ILO) led to the conclusion of, respectively, the Geneva Conventions ¹ and the first international conventions designed to protect industrial workers from gross exploitation and to improve their working conditions. Finally, the minority treaties concluded after the First World War sought to protect the rights of ethnic and linguistic minorities and are therefore sometimes seen as precursors of modern international human rights instruments. In addition, the Slavery Convention, adopted in 1926, and the Supplementary Convention on the Abolition of Slavery, adopted in 1956, (UN&IP, 2016) committed parties to the suppression of the slave trade and the abolition of slavery.

9. Concluding Remarks

It is clear that the idea of dignity has become a central organizing principle in the idea of universal human rights, although with interesting differences between jurisdictions, and that there are several different strands of metaphysical and philosophical thinking feeding these differences. The central meaning of dignity remains the common minimum core and judicial interpretation has done little, so far, to help us move beyond this. So far, the use of the concept of human dignity has not given rise to a detailed universal interpretation, nor even particularly coherent national interpretations. No one jurisdiction has a coherent judicially interpreted conception of dignity across the range of rights, and no coherent conception of dignity emerges transnationally. But that does not mean that dignity has no role to play in the judicial interpretation of human rights.

I am not arguing that there is no more precise conception of human dignity that is possible beyond this minimum content. Nor am I arguing that there is no coherent extra-legal conception of dignity which could form the basis of a common transnational legal approach. The problem is rather the opposite: as the historical examination of the development of dignity indicated, there are several conceptions of dignity that one can choose from, but one cannot coherently hold all of these conceptions at the same time. It could be, therefore, that the interpretation of dignity within Catholic social doctrine, or within a social democratic framework, or within an Islamic framework, or

¹ For further information on the Geneva Conventions and humanitarian law, see *Respect for International Humanitarian Law: a Handbook for Parliamentarians*, Geneva, IPU, 1999.

within the Hindu Tradition, or within the Jewish tradition, or based on Kant, might fulfill this role.

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