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The principle of respect for human dignity

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**Opening Speech by Mr Olivier DUGRIP
Dean of the Law Faculty**

Ladies and gentlemen, Rector

As Dean of the Montpellier Law Faculty, I am very honoured to welcome you this morning and to open this seminar organised by the Venice Commission, the Pôle Universitaire Européen de Montpellier et du Languedoc-Roussillon and the CERCOP of the Montpellier Law Faculty. Firstly, allow me to express my warmest thanks to all the seminar organisers, who have worked together to ensure the smooth running of this event. I would also like to thank each and every one of you for doing us the honour of coming to Montpellier - a great pleasure for us - to attend this seminar on a theme of obvious relevance: the protection of human dignity.

I am delighted to welcome you today to a university whose buildings were very recently renovated. It is a very old university, however one of the oldest in the world, as it was institutionalised by a bull of Pope Nicholas IV in 1289. Law has been taught at Montpellier since before the Middle Ages, and the University of Montpellier is justifiably proud of its record of receptiveness to the outside world since that time and of the fact that it has been able to welcome a considerable number of lecturers and students from all over the world. In my view, it is thus not by chance that you are all assembled here today, at a university which has counted the great Erasmus among its professors.

Human dignity is, I believe, one of the aspects that constitute our common legal heritage. I would like to thank Professor Dominique Rousseau, Professor Marie-Luce Pavia, the various

lecturers and researchers at the CERCOP and Council of Europe and Venice Commission officials for selecting it as the theme of your seminar. The protection of human dignity is recognised as a legal principle by both international instruments and French domestic legal instruments. The international instruments obviously include the International Covenant on Civil and Political Rights of 16 December 1966 and the European Convention on Human Rights of 4 November 1950. As well as being affirmed internationally, these principles have been enshrined in French domestic law. I imagine that the French speakers will expand on this point at some length. Without wishing to dwell on it, I would nonetheless like to take this opportunity to say that the Constitutional Council has enshrined the protection of human dignity as a constitutional principle with which the French legislature is now obliged to comply. After the Constitutional Council, the Conseil d'Etat itself enshrined this principle and gave it completely new meaning and scope, since it ruled that respect for human dignity was a matter of public policy. This principle was established in connection with a very interesting case involving an application to the French administrative courts to set aside a municipal order banning a dwarf-throwing show. As you can imagine, this dwarf-throwing show - insofar as it can be considered a show - consisted in grabbing a short person and trying to throw him or her as far as possible. It had, of course, been organised with the consent of the dwarf, for whom it was a means of subsistence, and had been banned by a mayor, who took the view that the show was inherently degrading and consequently violated human dignity. The decision is noteworthy in that, for the first time, the French administrative courts extended the concept of public policy to include the principle of human dignity. This has very significant implications under French law, particularly administrative law, since mayors - who are responsible for law and order and the municipal police - can now lay down prohibitions to preserve human dignity whenever they consider the latter to be violated. This is both an opportunity and an obligation, since the police authority has to use these powers to ensure compliance with public policy. Respect for human dignity now has an important position in French law and in the French system of public policy in the broad sense. That said, the enshrining of this principle raises problems of definition: what is meant by human dignity? The administrative courts recently ruled that dwarf-throwing constituted a violation of human dignity, but they did not specify the scope of this concept. Both the constitutional and the administrative courts will now have the task of clarifying it, as they deal with appeals and referrals; I have no doubt that your seminar will prove very helpful in this respect, thanks to the international perspective you will be able to provide.

Ladies and gentlemen, before I finish I would like to thank Professor Henri Pujol, Vice-Chancellor of the Pôle Universitaire Européen de Montpellier et du Languedoc-Roussillon, for helping to organise this event and to say how pleased I am that he is with us today. It is very symbolic for me to have Professor Henri Pujol, a first-class doctor and world-renowned cancer specialist who bears witness to the quality of the Montpellier Medical Faculty, beside me this morning to open this colloquy on respect for human dignity. We cannot disregard the role of people - human beings - in the issues we shall discuss, in relation to which doctors obviously play a very important role. Lastly, I would simply like to point out that, following an Act of 29 July 1994 concerning respect for the human body, the French legislature enshrined - in Article 16 of the Civil Code - the principle that the law shall ensure the primacy of the individual, prohibit any violation of the latter's dignity and guarantee respect for human beings from birth. As I said earlier, since the Middle Ages the Montpellier Law and Medical Faculties, as part of the same university, have, over the centuries and all over the world, attempted to uphold this ideal of respect for human dignity. I am delighted that we can once again work together towards this goal and declare our attachment to this principle.

Ladies and gentlemen, I wish you a very pleasant stay in Montpellier and trust that you will

discover the charm and beauty of our city, and of the wider Languedoc-Roussillon region. Have a good stay, and thank you once again for coming to Montpellier.

**OPENING SPEECH by Mr Henri PUJOL
Rector of the Pôle Universitaire Européen.**

Dean, Ladies and Gentlemen, Colleagues,

Allow me to say, quite simply, how pleased I am to be with you, for the opening of this colloquy. I would like to take this opportunity to say a few words. I am very proud to be Rector of the Pôle Universitaire Européen de Montpellier, which brings together the research activities and reception, outreach and international relations activities of each of our universities. I consider that the Pôle Européen is fulfilling its responsibilities by supporting a colloquy such as this one. This demonstrates its confidence in the colloquy organisers, Professor Dominique Rousseau, who has already proved himself, and his team from the CERCOP, since we believe we have a duty to support research activities that will benefit not only the Montpellier academic community but also many other countries. Ladies and gentlemen, I am impressed that there are sixteen countries represented around the table, or at any rate that sixteen countries will contribute to this colloquy. I would like to welcome each and every one of you, without of course forgetting our Italian colleagues and Professor La Pergola, to whom I ask you to pass on my best regards. I would like to focus on one of those sixteen countries, the most distant geographically: South Africa. I welcome our colleague, who I am sure will contribute a great deal to this seminar. Through his country I would like to salute one of the most brilliant people I have ever met, Mr Nelson Mandela. I can assure you that one only needs to see this man once, to see the way in which he behaves, to realise that human rights are a just cause which can but be of ever greater benefit to humanity. Your seminar will begin shortly, and I trust that your work will be effective.

Dean, I know that you believe firmly in research, particularly in the human sciences; a great deal of research is undertaken in the fields of culture and constitutional law, and research entails the bringing together of ideas. During the different contributions, I would ask you to listen to what distinguishes you from others and to put it to good use. I would also like to address those in the second row, who seem to me still young enough to be students and yet their faces are already mature enough for them to be lecturers and researchers. Research means using difference as a springboard for progress. I am sure that this colloquy will provide matter for research and will reveal differences. I know that my colleagues representing the Venice Commission are to seek to publish the proceedings of this colloquy. I ask you to make sure that they are actually published, because I strongly believe that there can be no research without publication. There is no such thing: research is not research unless it is produced, and I know that you will try to produce documents during this colloquy. I wish you success in your activities. I believe that the organisers have made every effort to facilitate your work, and to enable you to enjoy yourselves as befits the land of welcome that Montpellier has been for centuries, a tradition that current citizens and the youth of Montpellier wish to perpetuate.

You know, there is a slight inconsistency in your programme. I would like to finish with this point. Behind me there is a document headed, "The protection of human dignity", whereas the publicity material refers to "Respect for human dignity". I prefer "respect" to

“protection”. Protection is a defensive act, which can be useful, because humanity has cultural, scientific and constitutional assets that should be defended; respect, on the other hand, means opening up to others, being receptive to them and listening to them. I trust that you will be good listeners throughout this colloquy, and I have every confidence that your work will be of a high standard.

**OPENING SPEECH by Mr Christos GIAKOUMOPOULOS
Deputy Secretary of the European Commission for Democracy through Law**

Mr Chairman, Ladies and Gentlemen,

On behalf of the Venice Commission and its President, Antonio La Pergola, I should like to begin by thanking the Montpellier Universities and the CERCCOP for taking the initiative of holding a second UniDem seminar in this university town that is as prestigious as it is beautiful and welcoming. The Venice Commission already had the privilege of organising a UniDem seminar on “The European Constitutional Heritage” in Montpellier two years ago, the proceedings of which have been published in the “Science and Technique of Democracy”¹ collection.

At the first seminar, we discussed the question of whether a European constitutional heritage existed. Although the answer is by no means clear, it would seem that it is possible to reply in the affirmative, while adding, at the same time, that the concept of European constitutional heritage is not well defined.

Some aspects of the concept can probably be drawn from the European Convention on Human Rights. In its judgement on the case of *Loizidou v. Turkey*,² the European Court of Human Rights has already found that the convention is an instrument of the “European constitutional order”. It could be said (and was, indeed, said at the last seminar in Montpellier) that this finding is more a matter of political will than a reflection of legal reality in Europe today. However, it cannot be denied that the European Convention on Human Rights now serves as a benchmark even in the legal systems of certain European states that have not ratified it. The constitutional courts in Lithuania and Croatia both took account of the Convention’s requirements before their countries had ratified it.

The place which the European Convention on Human Rights occupies in the legal system of Bosnia-Herzegovina seems even more significant. The Dayton Agreements actually state that the convention will be directly applicable in Bosnia-Herzegovina, even though the country has neither signed nor ratified the convention nor (yet) joined the Council of Europe. The Dayton Agreements even provide for the establishment of hybrid institutions (some national, some international) to take the place of the convention organs until such time as the latter are competent to monitor the application of the convention in Bosnia-Herzegovina.

¹ “*The European Constitutional Heritage*”, Montpellier, 22-23 November 1996, *Science and Technique of Democracy*, No. 18, Council of Europe Publishing.

² *European Court of Human Rights, judgment on Loizidou v. Turkey (preliminary objections) of 23 March 1995, para 75.*

Lastly, it should not be forgotten that, since the *Nold* judgement,³ the European Court of Justice has applied the European Convention on Human Rights in substance, even though the European Community is not a party to the text.

As a constituent element of the European constitutional heritage, the European Convention on Human Rights is supplemented by the shared constitutional values of Europe's states. Since the *Stauder v. the city of Ulm* judgement,⁴ the European Court of Justice has consistently gone further into and expanded the content of this concept.

The enlargement of the Council of Europe also provided an opportunity to highlight the fact that several European legal instruments are part of what can be regarded as a kind of Council of Europe "acquis". The Council's new member states were asked to ratify certain European instruments and undertook to do so by specific deadlines after their accession to the organisation. In particular, this applied to the protocols to the European Convention on Human Rights (including Protocol No. 6 abolishing the death penalty), the European Convention on the Prevention of Torture, the Framework Convention for the Protection of National Minorities, the European Social Charter, the European Charter of Local Self-Government and the European Charter for Regional or Minority Languages. This gives these instruments, which were in principle and by definition optional, a particular weight and in some way raises them above the other conventions drawn up at the Council of Europe. It could perhaps be said that it makes them part of the "European constitutional heritage" that we are trying to define.

The Venice Commission's work deals with the "guarantees offered by law in the service of democracy". The European constitutional heritage is therefore at the heart of the Commission's interests. European integration and democratic stability in our continent are necessarily based on this constitutional heritage whose sources, scope and core we are seeking to identify.

Is the subject of our seminar, namely respect for human dignity, part of this European constitutional heritage?

I definitely think so. I would even say that respect for human dignity is both the source and the core of that heritage, as human beings, "the measure of all things", are at the heart of European civilisation.

There is also the question of whether human dignity is a European or a universal value. This takes us into an old debate, which was recently revived with some passion at the United Nations conference in Vienna on human rights, in the form of the conflict between the universality of human rights and cultural relativism. This crucial question will no doubt take up some of our time. For the time being, however, I think it would suffice to say that human dignity clearly is a value that is part of the European constitutional heritage.

Indeed, it runs through all the aspects of the constitutional law of Europe's individual states – or should I perhaps say of European constitutional law - and is also at the heart of the law of European integration. In this connection, one might well ask whether it is still justified to make a distinction between national law and European law in the human rights sector. In its

³ *Nold v. Commission*, case 4/74 [1974] ECR 491.

⁴ *Case 29/69* [1969] ECR 419.

opinion on the constitutionality of the death penalty in Ukraine,⁵ the Venice Commission recently found that “*in the European legal area “international constitutionality” or “supra-constitutionality” are increasingly frequent concepts, particularly where human rights are concerned. In the European legal area it is becoming more and more unnatural, where fundamental human rights are concerned, to make separate categories of the obligations to be met by a State under its constitutional law and under public international law*”.

Saying that respect for human dignity is the core of the European constitutional heritage means treating it as belonging to the category of rights that can never be reduced or restricted, even in exceptional circumstances. From a more formal legal point of view – and to move into the sphere of European human rights law – human dignity, as the nucleus of the European constitutional heritage, can be linked with Article 3 of the European Convention on Human Rights, which completely prohibits torture and inhuman and degrading treatment and punishment. In its report in the case of “East African Asians v. United Kingdom”, the European Commission of Human Rights gave a remarkable interpretation of this provision, seeing it as completely prohibiting any discrimination based on racial origin, as such discrimination constituted an affront to human dignity.⁶ In its judgement on the constitutionality of the death penalty (judgement of 24 October 1990 (No. 23/1990), concurring opinion of judges Labady and Tersztyanszky), the Hungarian constitutional court also assigned human dignity a value higher than any other, ruling that the death penalty (was arbitrary) because human existence and dignity were at the top of the scale of values, were the source and basis of all human rights and were values that were inviolable and inalienable under the law. The European Court of Human Rights’ famous judgement on the Soering case⁷ is but another illustration of the predominant role played by the right to respect for human dignity in the European legal system.

What the above examples show is that the law in Europe (that is to say both the national legislation of the various states and European law) regards the human being as its “*raison d’être*”. Destroying human dignity cannot be justified by the need to protect another value. It is on the basis of this idea of the human being and the law that, for instance, people who have committed crimes are seen as having rights, no matter what the crime was. It is also on the basis of this same idea that people who are guilty, people who are in the wrong or have made mistakes, people who are incapacitated and people who are weak must be protected by the law and must not be crushed or destroyed in the interests of other people’s rights, a dehumanised form of justice or an ill-conceived type of liberty that is foreign to the concepts on which our civilisation is based.

I therefore believe that it is not by chance that the concept of human dignity, which we are discussing here, is explicitly enshrined in the European Social Charter. Is that the area where the concept of human dignity takes on a specifically European character? It is perhaps no coincidence that the European Court of Justice’s Stauder judgement, which confirmed for the first time the application in the Community system of the shared constitutional traditions of European states, concerned a case of social exclusion. It has already been said that the Europe of human rights will really deserve its name only if it succeeds in showing that the social question is not a problem but a natural component of our society and that, beyond the

⁵ *Annual report of activities for 1997, p 64 et seq.*

⁶ *East African Asians v. United Kingdom, Commission Report of 14 December 1973, Decisions and Reports 78-A, p. 5 et seq.*

⁷ *Judgement of 7 July 1989, Series A, No. 161.*

distinction between the collectivity and the individual, there is simply the singularity of the human being.⁸

Mr Chairman, Ladies and Gentlemen,

These few words are not intended to be a contribution to the discussions at this seminar. I only wished to demonstrate the link that exists between the subject we will be dealing with here and the work of the Venice Commission. In the process of European integration, which involves various trends and is taking place at various levels and speeds, it is perhaps useful to look at the fundamental values that can unite Europe's citizens and guide those in charge of the process. This is an area for joint action by constitutional courts and lawyers, universities and the Venice Commission. I am sure that this seminar will help to move the debate forward.

**The principle of respect for human dignity by Ms Biruta LEWASZKIEWICZ-PETRYKOWSKA
Judge at the Constitutional Tribunal of Poland**

I. Definition and legal force of the principle of human dignity

The principle of human dignity, which had long been recognised by Polish legal writers, was explicitly incorporated into the Constitution of the Republic of Poland for the first time on 2 April 1997⁹.

Until then, the principle as such was not embodied in law, but that does not mean that it played no role in the interpretation of legal texts.

Polish legal opinion and case-law recognised before the Second World War that human beings had a number of rights purely as a consequence of being human beings. These innate rights, which are inherent in the human being, may be termed "human rights" or "civic rights" when their purpose is to restrict state powers. It should, however, be noted that when they are relied on in cases involving relations between private individuals, they are referred to as "personality rights" and belong to the field of civil law.

During the socialist era in Poland, the principle of human dignity was not a central concern among Polish constitutional lawyers. It was not mentioned in the 1952 Constitution of the Polish People's Republic. Article 57 of this Constitution declared that the Polish People's Republic "safeguards and extends rights and freedoms", but it can scarcely be said that they were respected. Human rights were often violated during the communist era. The 1952 Constitution, it is true, upheld the principle of equality and enshrined various civic rights such as the right to work (Article 68 para. 1), the right to education (Article 72), and the right to health protection and assistance in the event of sickness or inability to work (Article 70). It also enshrined certain fundamental freedoms such as freedom of speech, of the press, of assembly and gatherings, and of processions and demonstrations (Article 83), freedom of conscience and religion (Article 82), the inviolability of the person, the inviolability of the

⁸ Pierre-Henri Imbert, in *"The Social Charter of the 21st Century"*, Council of Europe Publishing, p. 235.

⁹ *Journal of Laws*, 16 July 1997, No. 78, text 483, in force as of 17 October 1997.

home and the privacy of correspondence (Article 87). So much for all these fine words; everyday practice was a different matter. The concept of human dignity did not exist in constitutional practice, which itself was non-existent. Neither was there any review of conformity with the Constitution; the Constitutional Tribunal was not set up until 1985.

It should be noted, however, that the 1960s saw the emergence of a strong current of opinion in favour of rediscovering and protecting personality rights. Legal writers, particularly in the field of civil law, and the ordinary courts developed the theory of personality rights. Article 23 of the 1964 Polish Civil Code¹⁰ stipulates that: "Interests that are inherent in the human personality, in particular health, liberty, honour, freedom of conscience, name or pseudonym, image, privacy of correspondence, inviolability of the home, scientific or artistic creation, invention and rationalisation, remain under the protection of civil law, regardless of the protection afforded by other provisions." Although this article applied only to the field of civil law, it nevertheless highlighted the axiological, philosophical and legal aspects of personality rights. In later years, case-law rejected the idea of personality rights as a single, general concept, coming out clearly in favour of a plurality of specific personality rights and also emphasising that the list provided in Article 23 of the Civil Code was open-ended. The civil courts also extended as far as possible the scope of the penalties available under civil law in order to safeguard personality rights. The efforts of legal writers and case-law in this area cannot be stressed heavily enough: it is as a result of this practice that certain concepts have become familiar. Such efforts have not been in vain; this is illustrated by the fact that contemporary constitutional judges often refer to the body of legal opinion and case-law relating to this matter in the field of civil law.¹¹

Following the collapse of communism in Poland and the birth of a parliamentary democracy, substantial reforms were needed in order to establish a new system. First of all, the amendment of 29 December 1989¹² to the Polish Constitution totally rewrote the first chapter of the Constitution and, crucially, introduced a new Article 1, stating that: "The Republic of Poland is a democratic state ruled by law and implementing the principles of social justice." This text gave the Constitution a new look and provided it with new axiological foundations. It was recognised that: "The principle of the democratic state ruled by law appears not only to be an autonomous source of constitutional standards but also an important guideline for the interpretation of other constitutional or legal provisions."¹³

The Constitutional Act of 17 October 1992 on the mutual relations between the legislative and executive institutions of the Republic of Poland and on local self-government¹⁴, known as the "Little Constitution", repealed the 1952 Constitution while allowing the provisions of its first chapter (on general principles, revised in 1989) and eighth chapter (on the fundamental rights and duties of citizens) to remain in force. Consequently, the Constitutional Tribunal inferred the principle of human dignity from the principle of the democratic state ruled by law, enshrined in Article 1 (see above).

¹⁰ Act of 23 April 1964, *Journal of Laws*, 1964, No. 16, text 93, came into force on 1 January 1965, amended in 1971, 1976, 1982, 1984, 1985, 1989, 1990, 1991, 1993, 1994, 1995 and 1996.

¹¹ See, for example, the judgments of 19 June 1992, U 6/92, OTK 1992, text 13, of 24 June 1997, K 21/96, OTK 1997, text 23, or of 19 May 1998, U 5/97.

¹² *Journal of Laws*, 31 December 1989, No. 75, text 444.

¹³ V.L. Garlicki, *Case-law of the Polish Constitutional Tribunal (1991-1995)*, Warsaw, 1997, p. 37.

¹⁴ *Journal of Laws*, 23 November 1992, No. 84, text 426.

By way of example, let us consider the reasons given for the judgement of 19 June 1992 (U 6/92), which ruled that the Parliament's resolution on *lustration*, i.e. the process of restricting the right of officials under the former undemocratic regime to participate in public administration, was unconstitutional: "The impugned resolution does not comply with the conditions set out above defining the extent to which an organ of state may interfere with an individual's personal interests and does not contain any provision for assessing the reasons for such interference. It creates the threat of a violation of human dignity without ensuring that individual rights are protected. Since these requirements are fundamental to the democratic state ruled by law, it must be recognised that the adoption of the resolution on 28 May 1992 was in violation of Article 1 of the Constitution of the Republic of Poland."¹⁵

The Constitutional Tribunal's case-law demonstrates a consistent belief that the principle of the democratic state ruled by law also extends to certain material situations relating specifically to the rights and freedoms of the individual. This approach enabled the Tribunal to raise to constitutional level the right to dignity (see judgement of 17 March 1993, mentioned above), the right of access to the courts (see judgement of 7 January 1992, K 8/91, OTK 1992, part 1, p. 76, and numerous subsequent judgements), and the right to life (judgement of 27 May 1997, K 26/96, OTK ZU No. 2/1997). In the Tribunal's opinion, there is no doubt that Article 1 of the Constitution confers on human dignity both the status of an individual right, to which all human beings are entitled, and that of a constitutional value of vital significance in establishing the axiological basis on which the constitution is founded. The democratic state ruled by law is a state founded on respect for humanity, and in particular, on respect for and protection of both human life and human dignity.

As was mentioned at the start of this overview, the new Polish Constitution, in force since 17 October 1997, explicitly enshrines the principle of human dignity, declaring in Article 30 that: "The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities."

It will be seen that the Constitution adopts a "strong" conception of the principle of human dignity¹⁶, enabling a number of fundamental rules to be identified:

- firstly, a general axiological principle: human dignity is "inherent" (innate) and "inalienable", in other words it is an essential value which is of paramount importance in the framing of constitutional law;
- secondly, human dignity is "a source of freedoms and rights of persons". This statement emphasises its status as a supreme normative principle. Consequently, respect for it is a matter of public policy and is mandatory both for private individuals and for the public authorities;
- thirdly, human dignity is "inalienable" and "inviolable". Hence the holders of this right may not waive it, and the public, including legislative, authorities may not deprive them of it.¹⁷

¹⁵ *Chronicle*, 1992, No. 13, p. 206.

¹⁶ See J. Krukowski, 'Godnoææ czlowieka podstawa konstytucyjnego katalogu praw i wolnoæci jednostki' (*Human dignity as the foundation of the constitutional rights and freedoms of the individual*) in *Podstawowe prawa jednostki i ich sadowa ochrona*, Warsaw, 1997, p. 47 ff.

It should also be noted that the preamble to the Constitution recommends applying the provisions of the Constitution in a manner that respects human dignity. The preamble declares: “We call upon all those who will apply this Constitution for the good of the Third Republic to do so paying respect to the inherent dignity of the person, his or her right to freedom, the obligation of solidarity with others, and respect for these principles as the unshakeable foundation of the Republic of Poland.”

The principle of human dignity as the source of all human and civic rights and freedoms entails a requirement to interpret law in a manner that complies with the system of values underpinning the Constitution.

The Constitution lists and explains various specific personal rights and freedoms such as the right to protection of life (Article 38), personal inviolability and liberty (Article 41), the right to protection of one’s private life (Article 47), the right to freedom of conscience and religion (Article 53), the right to freedom of expression and the freedom to acquire and disseminate information (Article 54), etc. However, it is the provisions of Article 30 of the Constitution that form the basis for interpreting and applying all the other provisions regarding the rights, freedoms and obligations of the individual.

In the light of Article 5 of the Constitution, safeguarding the rights and freedoms of persons and citizens is one of the Polish state’s fundamental aims and tasks. The obligation to respect the rights and freedoms of others is coupled with a prohibition on compelling an individual to do anything which is not required by law (Article 31, para. 2). Limitations upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary “in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons” (Article 31, para. 3). Such limitations may not violate the essence of freedoms and rights (Article 31, para. 3).

The requirement of respecting and protecting human dignity, set down in Article 30 of the Constitution, applies in its entirety to Parliament in its capacity as one of the organs of the public authorities, i.e. the legislature. Parliament is at the same time the only entity entitled to restrict, by law, the extent to which constitutional rights and freedoms may be exercised. The Constitution precisely defines the fundamental conditions for these restrictions in the form of values (interests) that conflict with individuals’ exercise of their rights and freedoms. “This means, *inter alia*, that limitation of a right or a freedom can only occur when imposed by another rule, principle or constitutional value, and the extent of such limitation must remain in proportion to the significance of the interest which it is meant to serve” (judgement of 24 June 1997, K 21/96).

Lastly, it should be emphasised that even when a state of martial law or emergency has been declared, certain human and civic rights and freedoms may not be limited. According to Article 233 of the Constitution: “The statute specifying the scope of limitation of the freedoms and rights of persons and citizens in times of martial law and states of emergency shall not limit the freedoms and rights specified in Articles 30 (the dignity of the person), 34 and 36 (citizenship), 38 (protection of life), 39, 40 and 41 (para. 4) (humane treatment), 42

¹⁷ See J. Krukowski, *op. cit.*, p. 50, and L. Garlicki, *Polskie prawo konstytucyjne*, Vol. 1, Warsaw, 1997, pp. 109-110.

(ascription of criminal responsibility), 45 (access to a court), 47 (personal rights), 53 (conscience and religion), 63 (petitions), as well as Articles 48 and 72 (family and children).”

II. Application of the principle of human dignity

The Constitutional Tribunal is called upon relatively frequently to rule on matters concerning the principle of human dignity. The Tribunal generally refers to this principle in conjunction with other constitutional principles or rights.

Reviews of conformity with the Constitution are nowadays chiefly concerned with protecting individuals against any infringement of their rights and freedoms. As we have seen, the Polish Constitution establishes the principle of human dignity as the source of the fundamental rights secured to everyone. However, the Constitutional Tribunal may be forced to consider the fact that the Constitution explicitly lists and safeguards a number of different individual and civic freedoms and rights. The Tribunal then has to identify and cite them in order to establish an appropriate basis for reviewing conformity with the Constitution. On the other hand, violations of rights belonging to this category also constitute a violation of the principle of human dignity.

As far as the relevant provisions are concerned, two periods of constitutional case-law may be identified:

1. 1990-1996, the period preceding the adoption of the new Polish Constitution;
2. 1997, when the new Constitution came into force.

Period 1: Although the principle of human dignity did not feature in constitutional texts, the Constitutional Tribunal referred to it, regarding it as the basis and guideline for the interpretation of other constitutional principles, such as the principle of social justice or the democratic state ruled by law.

Let us consider some examples:

In the reasons given for its judgement of 13 July 1993 (p. 7/92), the Constitutional Tribunal observed: “When the principle of social justice is applied to the social problems linked to the phenomenon of unemployment, it must be regarded as a principle governing behaviour in relationships between social groups and, in this specific case, between the broadest social group, the national community represented by the state, and the category of unemployed people. Here, behaviour is dictated by the obligation of the state, in the social sphere of its activity, to ensure that individuals out of work are able to exercise their right to existence and to freedom, in view of the inalienable and natural dignity of the human being. The Constitutional Tribunal has accepted that the social security benefits guaranteed to the unemployed by the state should at least guarantee them a basic level of social welfare.”

In the reasons given for its judgement of 24 June 1997 (K 21/96)¹⁸, the Constitutional Tribunal, ruling that the provisions of the law on tax obligations entitling the tax authorities to publish information on taxes paid by or the amount of tax payable by individuals were not in conformity with the Constitution, explained:

¹⁸ *OTK 1997, text 23.*

“Since none of the constitutional provisions in force today explicitly specify the existence of this right (to respect for one’s private life), the Tribunal considered beforehand whether it was possible to infer the right to privacy from general constitutional principles and, in particular, to establish a link between the principle of the democratic state ruled by law (Article 1 of the Constitution) and that of privacy of correspondence (Article 87, para. 2 of the Constitution).

Recently, the idea of the right to respect for one’s private life has begun to play a significant role in constitutional rules and in case-law. It has become established and has secured a lasting place in modern democratic states. Its constituent rules and principles, which relate to various spheres of the life of the individual, have one thing in common: they grant the individual “the right to live his or her life according to his or her own will, and to keep any outside interference to a minimum” (A. Kopff, ‘Conceptions of the right to privacy and to a private life’, *Studia Cywilistyczne*, vol. XX/1992). Private life conceived in this way relates above all to personal, family and social life and is sometimes defined as “the right to be left in peace” (see W. Sokolewicz, ‘The right to a private life’, in *Human Rights in the United States*, 1985, p. 252). It is generally accepted that respect for privacy also comprises the protection of information concerning individuals and guarantees, *inter alia*, a certain degree of independence allowing individuals to decide on the extent and nature of information about themselves to which others may have access and which may be disclosed to others.” ... “The publication of information about personal details, even if they are true, may have negative consequences for those concerned, with regard both to their economic interests and to their reputation, and hence their personal dignity.”

Later on in the same statement of reasons, the Tribunal found that: “the recognition and guarantee of proper protection of the right to privacy is an essential aspect of a democratic state ruled by law and is thus governed by the general clause in Article 1 of the Constitution.”

Independently of the reference to the general concept of the state ruled by law, the Tribunal saw fit to support its conclusions with three more practical arguments:

- firstly, Article 87, para. 2 of the Constitution (explicitly governing privacy of correspondence) may be seen as the expression of a broader principle relating to the general right to privacy;
- secondly, the right to privacy is generally recognised and safeguarded by international human rights instruments. Poland’s ratification of these instruments supports the assertion that the principle of the “democratic state ruled by law” underlies the legal standards contained in these instruments and the consequences arising therefrom;
- thirdly, the right to privacy was clearly safeguarded in Article 47 of the Constitution of 2 April 1997. “Although this provision as yet has no legal force” – the Tribunal stressed – “it nevertheless reflects our present understanding of individual rights and freedoms, in other words the context in which Article 1 of the Constitution in force is to be interpreted”¹⁹.

The right to life was the central concern of the Constitutional Tribunal when it assessed whether the law on family planning, the protection of the human embryo and the conditions for abortion was in conformity with the Constitution (judgement of 28 May 1997, K. 26/96). In the reasons for its judgement, the Tribunal observed: “The democratic state places the

¹⁹ OTK 1997, text 23.

utmost value on human beings and their supreme interests. One of these is life, which, in a democratic state ruled by law, should be protected at each stage of its development by the Constitution”²⁰. In the Tribunal’s opinion, human life, including the prenatal stage, is a legal interest protected by the Constitution, and cannot be accorded a different value at different stages in its development. This is because we do not have sufficiently precise and well-established criteria enabling us to distinguish between different stages in the development of human life. The Tribunal held that as soon as it appears, “human life becomes a value protected by the Constitution. This also applies to the prenatal stage”. In considering whether the assertion that the right to life is innate by its very nature should be revoked, the Tribunal ruled that no legislative text could create any derogation from this right: “since the innate quality of the right and freedom in question is not dependent on the will of the legislature, it is impossible to derogate from that quality. The granting or withholding of the right to life as a constitutional value is not within the jurisdiction of the legislature. Consequently, the fact of having or not having expressed this right in law has no bearing on the innate quality of the right to life.”

To sum up, constitutional case-law between 1989 and 1997 (before the current Constitution came into force) respected the principle of human dignity. In particular, the Constitutional Tribunal accepted that Article 1 of the previous Constitution (concerning the democratic state ruled by law) formed the basis for formulating the principle of human dignity and for recognising the various human and civil rights arising therefrom.

Period 2: The second period began on 17 October 1997, the date on which the new Constitution of the Republic of Poland came into force. Hence both the reference point and the basis for reviewing conformity with the Constitution have changed. As has been mentioned already, the Constitution explicitly enshrines the principle of human dignity (Article 30), and also lists and explains a number of different specific human and civic rights. The Constitutional Tribunal is obliged, through force of circumstance, to refer to these specific provisions and to use them as a basis for reviewing conformity with the Constitution. The Tribunal is, however, also obliged to interpret this basis in the light of the principle of human dignity set down in Article 30 of the Constitution.

By way of example, let us consider the recent judgement of 19 May 1998 (U 5/97). The Court found Ministry of Health regulations to be unconstitutional in that they required doctors to enter a reference number corresponding to the patient's medical condition on a medical certificate to be sent to the patient’s employer and the social security organisation, thus making it possible for others to identify the kind of illness for which the patient was being treated; in itself, this was a violation of the right to respect for one’s private life. The Tribunal pointed out in its reasons for the judgement that the right to respect for one’s private life was concerned, *inter alia*, with protecting information about individuals and guaranteeing them a degree of independence allowing them to decide what, and how much, information about their private lives was brought to the attention of, or communicated to, third persons.

Regarding the provisions on which its judgement was based, the Tribunal gave the following details: “The Constitution of the Republic of Poland of 2 April 1997, unlike the previous Constitution, directly refers to the right to privacy by declaring in Article 47 that everyone shall have the right to legal protection of his private and family life, of his honour and good reputation, and the right to make decisions about his personal life. The Constitution has also introduced, in Article 51, a new category: the right of the individual to personal data

²⁰ OTK 1997, text 19.

protection, which covers, *inter alia*, the legal conditions under which individuals may disclose information concerning themselves (para. 1), the refusal to allow public authorities to acquire, collect or make accessible information on citizens other than that which is necessary in a democratic state ruled by law (para. 2), individuals' right of access to official documents and data collections concerning themselves and their right to demand the correction or deletion of untrue or incomplete information, or information acquired by means contrary to statute (paras. 3 and 4). The article also contains a general constitutional provision stipulating that the principles and procedures for collection of and access to information shall be specified by statute."

There are clear interconnections between the above constitutional provisions: the right to respect for one's private life, safeguarded in Article 47, is, *inter alia*, applied to the field of personal data protection in Article 51. This highly detailed latter article, which explicitly refers five times to the condition of lawfulness (paras. 1, 3, 4 and 5) and refers indirectly to the principle of the democratic state ruled by law in para. 2, gives concrete expression to the procedural aspects of the right to privacy.

Finally, the Tribunal found that: "In the present state of affairs, there is no need to add to a very broad catalogue of individual rights and freedoms, covering the categories dealt with in Articles 47 and 51, by referring to the general clause in Article 2 of the Constitution, which is concerned with the democratic state ruled by law."

To conclude, the following observation should be made.

Violations of human dignity and of other personal rights (honour, reputation, privacy, etc.) are in principle assessed on the basis of objective facts. The subjective criteria are not decisive: we regard them as too vague. In this particular area, the Constitutional Tribunal follows the case-law established by the Supreme Court in respect of personality rights. When we assess whether dignity or another such personality right has been violated, we must take account not only of the subjective feelings of the person seeking legal protection, but also, if not above all, of objective reactions in society.

Human dignity in German constitutional law by Mr Christian WALTER Assistant at the Constitutional Court of Germany

I. History and character of the norm

A. History

Each constitutional document reflects the preoccupations of the time of its adoption. The Weimar Constitution started with the sentence: "The German Empire is a Republic" thus underlining the abolition of the monarchy. In the same way the Basic Law (*Grundgesetz*; GG) for the Federal Republic of Germany reflects the situation after the end of the Second World War. The wish to break with the past and to start a new constitutional *régime* is condensed in the proclamatory character of the first sentence of the Basic Law: "The dignity of man is inviolable". This desire to create a new, humane order was strongly present in the discussions of the *Herrenchiemsee* Constitutional Convent on the later Article 1 GG. The first draft read:

"(1) The State exists in the interest of the human person, and not the human person in the interest of the State. (2) The dignity of the human personality is inviolable. Public authority in all its forms has the duty to respect and to protect human dignity."²¹

A comparison of the second sentence with the final version²² shows, that - apart from stylistic changes - the text remained basically the same as the original draft. However, the discussions which took place in between reveal that quite different concepts were discussed before the final text was adopted. The main issue was whether the dignity of the human person should be based on a natural law conception or not. One of the propositions explicitly referred to natural law:

"The dignity of man is founded upon eternal rights with which every person is endowed by nature. The German people recognises it again as the foundation of all human community."²³

The amendment was not adopted because the majority wanted to avoid any direct reference to natural law. This aspect leads to the main advantage of the final text: it avoids any reference to a specific philosophical or ethical concept of human dignity and remains open to different approaches. It is nevertheless true that even though the text avoids such reference, the issue re-enters the moment one starts to interpret the human dignity clause. Any attempt to define exact areas of protection will necessarily enter the minefield of different philosophical conceptions. It has rightly been said that the human dignity clause is loaded with two-and-a-half-thousand years of history of philosophy.²⁴

The Constitutional Court tries to avoid a general definition. It has explicitly stated that it is preferable to proceed on a case by case solution to the problem of definition.²⁵ That approach requires travelling along some of the cases in order to pinpoint certain characteristics of the Court's jurisprudence. However, before entering the case law one general question has to be addressed, namely the legal character of the human dignity clause.

B. Legal character

There is some debate as to the exact legal character of the human dignity clause. The Constitutional Court very often uses rather broad and descriptive terms. It has qualified the clause as the "highest value of the Basic Law, informing the substance and spirit of the entire document",²⁶ as the "centre of the scheme of constitutional values"²⁷ and as a "fundamental constitutional principle dominating all parts of the constitution".²⁸

²¹ "(1) Der Staat ist um des Menschen willen da, nicht der Mensch um des Staates willen. (2) Die Würde der menschlichen Persönlichkeit ist unantastbar. Die öffentliche Gewalt ist in all ihren Erscheinungsformen verpflichtet, die Menschenwürde zu achten und zu schützen.", Text in: JöR 1 (1951), 48.

²² "(1) The dignity of man is inviolable. To respect and to protect it shall be the duty of all public authority."

²³ JöR 1 (1951), 48.

²⁴ Pieroth/Schlink, *Grundrechte*, 12th ed., Heidelberg 1996, Margin no. 383.

²⁵ BVerfGE 30, 1 (25).

²⁶ "die freie menschliche Persönlichkeit und ihre Würde ist höchster Rechtswert", BVerfGE 12, 45 (53); see also 27, 1 (6); 30, 173 (193); 45, 187 (227); 82, 60 (87).

²⁷ *Mittelpunkt des Wertsystems der Verfassung*, BVerfGE 7, 198 (205); 35, 202 (225); 39, 1 (43).

²⁸ BVerfGE 6, 32 (36); 87, 209 (228).

Some authors have used the wording of Article 1, para. 3 GG ("the **following** basic rights shall bind the legislature, the executive and the judiciary as directly enforceable law") in order to argue that the human dignity clause was no "basic right" since the constitution mentions it in the preceding paragraph 1.²⁹ The Constitutional Court in some cases explicitly called the human dignity clause a "basic right",³⁰ in others it implicitly considered the clause as such.³¹ Even those authors who refuse to qualify human dignity as a basic right do not deny the legal character of the human dignity clause. They merely maintain that it does not confer an individual right, but must rather be seen as an objective principle.³² The distinction may seem important at first sight, because in order to use the remedy of a constitutional complaint to the Federal Constitutional Court the appellant must claim the violation of an individual right.³³ The practical relevance of the distinction, however, is less significant than it appears to be. In all cases before the Constitutional Court in which questions of human dignity arose the alleged violation of human dignity went along with alleged violations of other individual rights so that access to the Court never depended on the qualification of human dignity as an individual right. Furthermore, one may safely assume that, if this were the case, the Court would not hesitate to view Article 1, para. 1 as an individual right in order to hear the case. It would seem paradoxical if the norm which the Basic Law itself apparently considers to be of utmost importance (and which the Court has always qualified as such³⁴) should not confer an individual right granting access to the Court.³⁵ In this context it should be noted that the Constitutional Court explicitly rejected the rather sophisticated argument from the wording of Article 1, para. 3 GG, according to which Article 1, para. 1 GG was not a basic right because it did not follow Article 1, para. 3, but stood two paragraphs ahead.³⁶

II. Issues with relevance to human dignity

Questions of human dignity may arise at any point during a person's life. However, the most sensitive issues are related to the beginning and the end of human life. It therefore seems appropriate to distinguish between the different stages of life.

A. Beginning of life

Up to now the Constitutional Court has decided twice on the issue of abortion,³⁷ a third case is pending before the first Senate. While the central provision in order to decide on the constitutionality of abortion is the right to life in Article 2, para. 2 GG, the Constitutional

²⁹ References see H. Dreier, Article 1, Margin no. 68 (note 183), in: H. Dreier (ed.), *Grundgesetz-Kommentar*, Vol. I, Tübingen 1996.

³⁰ BVerfGE 15, 283 (286); 28, 151 (163); 28, 243 (263); 61, 126 (137).

³¹ References W. Höfling, Article 1, Margin no. 3, in: M. Sachs, *Grundgesetz-Kommentar*, München 1996.

³² Dreier (note 9), Margin no. 72.

³³ Article 93, para. 1, Nr. 4a) GG.

³⁴ See notes 6 to 8.

³⁵ C. Starck, Article 1, Margin no. 18, in: von Mangoldt/Klein, *Das Bonner Grundgesetz*, Vol. 1, 3rd ed., München 1985; see also W. Höfling, *Die Unantastbarkeit der Menschenwürde - Annäherungen an einen schwierigen Verfassungsrechtssatz*, JuS 1995, 357 (357f.)

³⁶ BVerfGE 61, 126 (137): "the fact that Article 1, para. 1 BL is no 'following' basic right does not exclude that all public authority is bound by this highest constitutional principle."

³⁷ BVerfGE 39, 1 and 88, 203.

Court additionally used the human dignity clause to underline the constitutional requirement for protection of unborn life:

"[We] derive the obligation of the state to protect all human life directly from Article 2, para. 2, first sentence GG. Additionally, [this obligation] follows from the express provision of Article 1, para. 1 GG; for the development of life also enjoys the protection which Article 1, para. 1 accords to the dignity of man. Wherever human life exists, it merits human dignity; whether the subject of this dignity is conscious of it and knows how to safeguard it is not of decisive moment. The potential capabilities inherent in human existence from its inception are adequate to establish human dignity."³⁸

While the recourse to the human dignity clause is sometimes criticised as unnecessary in view of the obligations flowing from the right to life in Article 2, para. 2 GG,³⁹ the Constitutional Court has confirmed its approach in the second decision on abortion in which the Court again relied on Article 1, para. 1 GG in order to establish an obligation of the state to protect unborn life.⁴⁰ The debate which has been generated by the abortion cases reveals the limits of the approach chosen by the founding fathers, who tried to avoid any reference to a specific philosophical concept of human dignity. Whether dignity is inherent in human life or develops with the personality of a human being is the fundamental question that governs the application of the human dignity clause to the issue of abortion.⁴¹

B. During lifetime

1) *Physical integrity*

It is generally accepted that torture, archaic methods of punishment and murder ordered or executed by state organs constitute violations of the human dignity clause.⁴² Fortunately, these questions have not played any role with respect to domestic practices. However, they gained practical relevance in the context of asylum law and the prohibition to extradite people into countries where they would be exposed to such violations of human dignity. In 1987 the Court explicitly stated that an extradition to a country where the extradited person would face a cruel, inhuman or degrading treatment would violate Article 1, para.1 in combination with Article 2, para. 1 GG.⁴³

2) *Minimum conditions for a human life*

Paragraph 1, section 2 of the German Social Welfare Law explicitly states that it is the purpose of the law to "offer the receiving persons the possibility to lead a life in conditions

³⁸ D. P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd ed., Duke and London 1997, 338.

³⁹ Richter/Schuppert, *Casebook Verfassungsrecht*, 3rd ed., München 1996, 73.

⁴⁰ BVerfGE 88, 203 (251-252), for an English translation, see Kommers, (note 18), 349 (351-352).

⁴¹ For a different approach to human dignity and its consequences for abortion, see H. Hofmann, *Die versprochene Menschenwürde*, AöR 118 (1993), 353 (376).

⁴² References see Höfling (note 11), Margin no. 20.

⁴³ BVerfGE 75, 1 (16-17).

which correspond to the requirements of human dignity."⁴⁴ The position of the Constitutional Court on the issue is not yet settled. In its early years it refused to derive from Article 1, para. 1 GG an individual right to public welfare,⁴⁵ but in a more recent decision it left the question explicitly open.⁴⁶ In contrast to this rather restrictive position of the Constitutional Court, the Federal Administrative Court showed a tendency towards the position which derives a right to public welfare to provide for a minimum subsistence level.⁴⁷

The Federal Constitutional Court is more open when the case does not concern positive state action (as in public welfare), but the defence of the individual against state interference. The minimum subsistence issue came before the Court in a tax case. The Court combined the human dignity clause and the equality clause in order to establish that it was unconstitutional if the tax free part of the family income was lower than the sum the same family would have been entitled to under the social welfare law. While the argument depends largely on considerations of equality, it nevertheless shows that the Court moves in the direction of a constitutional protection of the minimum subsistence level.⁴⁸

3) *Conditions for imprisonment and prosecution*

The human dignity clause has played an eminent role in criminal law in so far as it sets limits on the methods of prosecution and determines certain basic conditions of imprisonment and criminal sentencing in general. The Lifetime Imprisonment decision of the Federal Constitutional Court⁴⁹ is a very rich decision with respect to the relationship between criminal punishment and human dignity. In this case the Court not only dealt with the main issue (does the human dignity clause allow lifetime imprisonment with no chance of being released?), but it also added some considerations on the influence of human dignity on the relationship between guilt and atonement⁵⁰ and permissible ways of punishment.⁵¹ According to the Court the human dignity clause prohibits cruel, inhuman and degrading punishment. The State may not turn the offender into an object of crime prevention to the detriment of his or her constitutionally protected right to social worth and respect.

The latter aspect is interesting in so far as the new American trend towards shame punishment raises serious questions of human dignity. One may ask whether it would be compatible with the German human dignity clause if a shoplifter was ordered to walk in front of the store where he committed the offence and to carry a sign on which he publicly admits his crime,⁵² or if a car-driver who was convicted for speeding was ordered to put a sign on his car announcing that he is a dangerous driver and a menace to the security of the traffic on the

⁴⁴ This explicit reference to the human dignity clause in the German Public Welfare Law is a direct consequence of an early ruling by the Federal Administrative High Court (BVerwGE 1, 159 (161-162), see the references presented by V. Neumann, *Menschenwürde und Existenzminimum*, NVwZ 1995, 426 (427).

⁴⁵ BVerfGE 1, 97 (104).

⁴⁶ BVerfGE 75, 348 (360).

⁴⁷ BVerwGE 1, 159 (161-162).

⁴⁸ Dreier (note 9), Margin no. 94.

⁴⁹ BVerfGE 45, 187.

⁵⁰ Kommers (note 18), 308.

⁵¹ *Ibid.*

⁵² The examples are taken from ACLU News of June 25, 1996: *Public Humiliation for Crimes Ain't that a Shame?*

streets. When child molesters are forced to post signs in front of their homes announcing their crimes it becomes clear that the humiliating element in these sentences would almost certainly not pass the standard set by the Federal Constitutional Court when it declared that the human dignity clause forbids degrading punishment.

As already mentioned, the main issue in the Lifetime Imprisonment case was whether the human dignity clause prohibited a lifetime sentence which left no chance for the prisoner to regain freedom. The criminal Courts had interpreted the murder provision in the criminal code, which provides for compulsory lifetime imprisonment, in a way which left no chance for the offender of being released. The Constitutional Court found that such an interpretation of lifetime imprisonment was incompatible with the requirements of the human dignity clause. It ruled that every offender must have "a concrete and realistically attainable chance to regain his freedom at some later point in time".⁵³ According to the Court the State "strikes at the very heart of human dignity if it treats the prisoner without regard to the development of his personality and strips him of all hope of ever earning his freedom."

The lifetime imprisonment issue came up again some years later when the Frankfurt Superior Court refused to release a war criminal who had been convicted of having participated in sending people to death in the gas chambers of Auschwitz and Birkenau and who had been sentenced to lifetime imprisonment in 1962 at the age of 66. The Federal Constitutional Court upheld this decision arguing that the Superior Court had properly weighed the factors at issue. It accepted the lower Court's judgement that even given the complainants advanced age (he was 88 at the time when he asked for release) and the duration of his stay in prison (22 years compared to 15 after which usually release is granted) the gravity of his crime justified further imprisonment.⁵⁴

Another area of criminal law in which the human dignity clause became relevant is the law of extradition. As already mentioned, the Court ruled that extradition was impossible if the persons faced cruel, inhuman or degrading punishment in the country of destination.⁵⁵ This jurisprudence raises the question of whether the possibility of a death penalty in that country precludes the extradition to that country. In an early decision the court ruled that a possible death penalty did not in itself preclude extradition. However, this decision was mainly based on Article 102 and Article 2, para.2 (right to life). The Court did not address the human dignity clause at all.⁵⁶ When the Court was confronted again with the question in 1982 it was able to avoid an answer because the Federal Government had agreed only to extradite if the foreign country's government assured that any death penalty - even if it was pronounced - would not be executed.⁵⁷

Given the fact that the European Court on Human Rights ruled in the Soering case that an extradition to America may violate Article 3 ECHR because of the death row phenomenon,⁵⁸ one may assume that today the Federal Constitutional Court would tend to rule that extradition under such circumstances constitutes a violation of the human dignity clause. The Constitutional Court's jurisprudence with respect to cruel, inhuman and degrading

⁵³ *Kommers (note 18)*, 309.

⁵⁴ *BVerfGE* 72, 105 (117-118).

⁵⁵ *See note 23*.

⁵⁶ *BVerfGE* 18, 112 (116 et seq.).

⁵⁷ *BVerfGE* 60, 348 (354-355).

⁵⁸ *ECHR, Series A, Nr. 161*.

punishment is very close to the standard set by the European Court of Human Rights in the Soering case. In view of the European precedent it is hard to imagine that the Federal Constitutional Court would come to a different conclusion. It should be borne in mind, however, that the European Court of Human Rights only concluded on a violation of Article 3 ECHR because of the specific circumstances existing in American death rows.⁵⁹ It did not rule that the death penalty in itself constitutes a violation of the Convention.⁶⁰

4) *Privacy*

In a number of cases the Court was faced with questions of privacy and the extent to which it is protected by Article 1, para. 1 GG. While it is true that in these cases the human dignity clause was always read in conjunction with the personality clause in Article 2, para. 1 GG, they must be included in this report because they illustrate one of the main functions of the human dignity clause: it is used as a device of interpretation in order to reinforce conclusions which are already indicated by other provisions of the Basic Law.

In its decision on the possibility to use a personal diary in criminal proceedings⁶¹ the Court reaffirmed its constant jurisprudence according to which Article 1, para. 1 GG includes the protection of a last, inviolable sphere of private life, into which no interference by public authorities is allowed. The Court stressed that with respect to this sphere no proportionality test is undertaken in which public interests of intrusion would be weighed against the protection of privacy. The core area of privacy was considered completely exempt from state interference. In its decision on the diary, the Court (in a 4:4 decision⁶²) draw the boundaries of the core sphere quite narrowly when it decided that the fact that the thoughts were written down made it questionable whether they were part of the absolutely protected sphere of privacy.⁶³ In view of the importance of the document (it contained confessions by the complainant, who was accused of having murdered a woman, that he had a tendency to use violence against women) four judges considered it possible to use the diary in the criminal proceedings. The other four judges came to the opposite conclusion, arguing mainly that the complainant had used the diary as a means of coping with his personality problems. They considered that the inner dispute with oneself did not lose its extremely private character simply because it was written down in a diary.

While the diary case is an example stemming from the protection of the individual in criminal prosecution, other important issues related to the rights to privacy and to personality mainly arise out of the context of the modern regulatory and welfare state. The Census Act case illustrates the point. In this case the Constitutional Court invalidated parts of a law which required all people living in Germany to participate in the collection of comprehensive data on the demographic and social structure of Germany. The Court concluded that the technological development in the area of data processing and data storage required special protection of the personality right included in Article 2, para. 1 and Article 1, para. 1 GG. The

⁵⁹ *Ibid.*, 44-45.

⁶⁰ *With respect to German Constitutional law see also, Dreier (note 9), Margin no. 82 arguing that death penalty in itself does not violate the human dignity clause.*

⁶¹ *BVerfGE 80, 367.*

⁶² *In case of a 4:4 decision the law on the Federal Constitutional Court provides in para. 15, sect. 3, cl. 3 that the Court cannot conclude on a violation of the Constitution, which means in practice that the decisions or laws in question remain valid.*

⁶³ *BVerfGE 80, 367 (376).*

Court distinguished between "personality-related data collected and processed in an individualised, identifiable manner and data designated for statistical purposes".⁶⁴ While the bulk of the act was accepted by the Court, certain provisions which would have enabled local authorities to reconstruct or release personality profiles of particular individuals were declared unconstitutional. In doing so the Court struck a balance between the necessity for the regulatory and welfare state to follow changes in the demographic and social structure of the population and the necessity to protect the right to privacy and the personality right.

An entirely different issue of the personality right arose in the Transsexual case.⁶⁵ The complainant had undergone a surgical procedure which changed "his" sex from male to female. "He" then wanted to alter "his" civil status to that of a woman and asked for a change in the birth registry. This was refused following an intervention by the secretary of state. In its decision, the Constitutional Court relied very much on the inner conflict that may be created when a person is prevented from using a first name that corresponds to his or her sex. It noted that the sphere touched by such a refusal belonged to the most intimate realm of personhood. The Court went on:

"Article 1, para. 1 GG protects the dignity of a person as he understands himself in his individuality and self-awareness. This is connected with the idea that each person is responsible for himself and controls his own destiny. Article 2, para. 1 GG, when seen in relation to Article 1, para. 1 GG, guarantees the free development of a person's abilities and strengths. Human dignity and the constitutional right to free development of personality demand, therefore, that one's civil status be governed by the sex with which one is psychologically and physically identified."⁶⁶

The quotation illustrates the Court's technique in personality right cases to combine Article 1, para. 1 and Article 2, para. 1 GG, in order to define the requirements needed to decide the pending case and at the same to avoid a general definition of the extent to which human dignity was decisive for the solution.⁶⁷

5) *Challenges to human dignity by modern technologies*

A number of human dignity issues are raised by modern medical technologies, especially in the field of genetics. When the government introduced its draft for an "Embryo Protection Act",⁶⁸ it invoked the human dignity clause in order to set up restrictions in the fields of artificial reproduction and genetic therapy.⁶⁹ While in the 1980s many authors relied on the human dignity clause in order to argue for restrictions on these possibilities,⁷⁰ a more liberal approach seems to gain influence.⁷¹ Up to now the Constitutional Court has not yet been confronted with any of these questions.

⁶⁴ Translation from Kommers (note 18), 326.

⁶⁵ BVerfGE 49, 286.

⁶⁶ Translation from Kommers (note 18), 331.

⁶⁷ The Transsexual decision has been criticized for being too much focused on the needs of the case and for avoiding to draw general conclusions with respect to a person's right to change his or her name, see A. Blankenagel, *Das Recht, ein "Anderer" zu sein*, DöV 1985, 953 (954 et seq.).

⁶⁸ BGBl. 1990, Part I, 2746.

⁶⁹ See the references in Keller/Günther/Kaiser, *Embryonenschutzgesetz*, para. 5, Margin no. 3-4.

⁷⁰ References in Dreier (note 9), Margin no. 53.

⁷¹ *Ibid.* Margin no. 58 et seq.

The currently most debated question with respect to genetics is the issue of genetic fingerprints. In Germany some weeks ago a person who had abused and killed a 11 year old girl was caught by the police after a unique action relying on the co-operation of the male population and on genetic fingerprints. The police, who had the genetic fingerprint of the offender, asked every male person of certain age living in the area to participate in a voluntary test of his genetic fingerprint. The idea was to reduce the number of possible suspects and to focus the inquiry on those persons who refused to participate. In order to avoid any suspicion the offender decided to participate in the test hoping - in vain - that the huge number of samples gave him a chance to remain undiscovered.

On 26 May 1998 the coalition parties (CDU/CSU and FDP) proposed to change the criminal procedure code and to introduce a register containing genetic fingerprints of persons who have been convicted for crimes related to sexual violence.⁷² The coalition assumes that the security of the population justifies the creation of such a register. Taking into consideration the highly personal character of the genetic information one may raise the question to what extent the human dignity clause may constitute an obstacle to the proposed amendment.

The legal debate on constitutionality is just about to start. Any argument would have to start with the jurisprudence of the Federal Constitutional Court with respect to the protection of the personality right. Since the genetic fingerprint contains all genetic information on the person concerned there seems to be little doubt that it touches the personality right. The decisive question will be, whether or not it falls within the core sphere which the Court declared inviolable in its diary decision. If one looks at the arguments which the dissenting four judges used in the diary decision in order to justify their conclusion that the use of the diary in the criminal proceedings would violate the personality right, it seems quite probable that the proposal will stand the human dignity test. The main argument in the diary case was that it contained confidential information which allowed insight into the writer's personality. In addition to that, the prosecution was specifically interested in the personality of the complainant. It wanted to use the diary in order to prove certain aspects of his personality. In contrast to this, the genetic register would be used in the same way as a fingerprint is used: it will help to identify the author of a crime. If the proposed law assures that the register is only used for that purpose it may stand the constitutionality test.⁷³

A different problem is hidden behind the successful call for a voluntary genetic fingerprint of all male persons having a certain age and living in a certain area. The public response to the call to participate in the test was overwhelmingly positive and thus in a way it psychologically forced the offender to participate in it. The Court has held on a number of occasions that the principle that nobody may be forced to incriminate himself or herself was rooted in the human dignity clause.⁷⁴ Nevertheless, the case does not concern a problem of self-incrimination in the sense in which it is normally used. Normally the principle refers to the rights of the accused during the prosecution procedure. He or she has the right to remain silent. Another classic example is the right of the witness not to testify if the testimony would contribute to his or her own prosecution. The situation of the public call to participate in the genetic fingerprint test was different because the offender had the right and the concrete possibility not to participate in the test. Seen from this angle, the method chosen by the police

⁷² *BT-Drs. 13/10791.*

⁷³ *A chamber of the Constitutional Court decided in 1996 that DNA analysis may be carried out if it is restricted to the identification of the offender and no further conclusions are drawn, BVerfG, NJW 1996, 771.*

⁷⁴ *BVerfGE 38, 105 (114-115.); 55, 144 (150); 56, 37 (43).*

is merely a (rather unusual) way of reducing the number of possible suspects. It did not in itself force the offender to accuse himself.

C. End of life

Human dignity is discussed with respect to possibilities of putting an end to human life.⁷⁵ Does it follow from a person's dignity that he or she has a right to decide on the end of his or her life? Are there legal restrictions on suicide? To what extent is euthanasia lawful? It seems that the contribution which the human dignity clause can make to the debate is rather limited. The problem is that it is quite easy to agree on the basic theoretical elements, but very difficult to realise them in practice. Confronted with life-prolonging methods of modern medicine, which allow the prolonging of irreversibly damaged life, many voices argue for "a right to die in dignity". At the same time, it is obvious that the human dignity clause protects against premature euthanasia. The human dignity clause cannot answer the practical question of determining the correct moment. Similar considerations apply to the issue of suicide. One may agree that a completely free decision to end one's own life is protected by the human dignity clause. But then the important question remains to determine under which conditions such a decision may be considered free. As a basic principle human dignity can do no more than establish general considerations. The details largely depend on practical assessments varying from case to case.⁷⁶

D. Post mortem effects

In the much discussed Mephisto Case⁷⁷ the Constitutional Court assumed that the effects of the human dignity clause may reach beyond death. The case concerned the novel "Mephisto", a satirical book in which Klaus Mann describes the career of an actor during the Nazi *régime* in Germany. The fictionalised character, Hendrik Höfgen, was largely based on the career of the author's brother-in-law, Gustav Gründgens. When the novel was to be re-published in 1964, Gründgens' adopted son successfully tried to ban the distribution. On constitutional complaint by the publisher, the Constitutional Court ruled that the human dignity clause had *post mortem* effects which justified an infringement on the publisher's right to freedom of art and speech. According to the ruling, the post mortem protection of personality diminishes as the memory of the deceased person fades. In the case of Gründgens the Court sustained the assessment of the ordinary courts according to which the protection of Gründgens' personality right prevailed over the publishers rights to freedom of speech and freedom of art.

III. Functions

Based on the cases referred to above and adding some further material, the functions of the human dignity clause may be analysed.

A. Defence against State action

Given the current standard of protection of human rights, one is tempted to see the primary effect of the human dignity clause in rights to positive state action and not in the defence

⁷⁵ See generally, P. Häberle, *Die Menschenwürde als Grundlage der staatlichen Gemeinschaft*, Margin no. 96 et seq., in: J. Isensee/P. Kirchhof (eds.), *Handbuch des Staatsrechts*, Vol. I, 2nd ed., Heidelberg 1995, 815 et seq.

⁷⁶ See also Dreier (note 9), Margin no. 93, who notes that the question of euthanasia reveals limits of the law.

⁷⁷ BVerfGE 30, 173; Kommers (note 18), 301.

against violations of human dignity by the state.⁷⁸ It is nevertheless important to stress that the defensive function of the human dignity clause is essential to maintain the rule of law. One should not forget that - especially with respect to criminal prosecution - the defence of human dignity always remains an issue of importance. The question of genetic fingerprints, as well as the question of whether it is possible to force drug couriers, who transport drugs in their stomach, to take emetics,⁷⁹ illustrate the current relevance of human dignity's defensive character. With respect to extradition, considerations of human dignity also continue to be of practical relevance.

B. Right to positive State action and objective dimension of the human dignity clause

Article 1, para. 1 GG is one of the few examples where the Basic Law explicitly states an obligation of public authorities to act in order to assure the protection of the basic rights.⁸⁰ This element is reflected in the jurisprudence concerning the minimum subsistence level and also in decisions by Administrative Appellate Courts which have decided that the human dignity clause requires the state to provide hostels for homeless people.⁸¹

The obligation on the state to protect human dignity may conflict with the interests of the person which the state allegedly wants to protect. Could it be argued that "peep-shows" violate the human dignity of the woman who (voluntarily) exposes herself? The Federal Administrative High Court thought so in its decision of 1981.⁸² The same question has arisen in the context of dwarf throwing, which an administrative Court qualified as a violation of human dignity.⁸³ Yet another example in which German Courts refuse to qualify human dignity as a right which is at the disposal of the individual concerned is the unanimous rejection of courts of all branches to accept lie detectors as means of proof even with the consent of the accused person.⁸⁴

The reason for these decisions must be seen in the jurisprudence of the Constitutional Court according to which the human dignity clause does not only refer to the individual human being but also to human beings as species.⁸⁵ In addition to this, the Constitutional Court has qualified the basic rights and especially the human dignity clause as an "order of values"⁸⁶ which influences all other branches of law. Even if one generally agrees with this concept of the Constitutional Court, one has to bear in mind that a value-oriented jurisprudence tends to reverse the basic function of the human dignity clause: the "peep-show" and dwarf throwing cases illustrates that human dignity in this context serves as a basis for restraining freedom and not as a means of its protection. The same is true with respect to the Mephisto decision of

⁷⁸ See *Höfling* (note 11), Margin no. 38 et seq.

⁷⁹ See K. Rogall, *Die Vergabe von Vomitivmitteln als strafprozessuale Zwangsmaßnahme*, NStZ 1998, 66.

⁸⁰ The provision does not only call for "respect" but also for "protection" of human dignity.

⁸¹ OVG Münster, NVwZ 1993, 202; VGH Mannheim, NVwZ 1993, 1220.

⁸² BVerwGE 64, 274 (279-280).

⁸³ VG Neustadt, NVwZ 1993, 98; for a comparison with the situation in France see P. Rüdler, *Die Unverfügbarkeit der Menschenwürde in Deutschland und in Frankreich*, DöV 1997, 109.

⁸⁴ BVerfG, NJW 1982, 375; BGHSt 5, 332; BVerwGE 17, 342.

⁸⁵ BVerfGE 87, 209 (228).

⁸⁶ BVerfGE 7, 198 (205).

the Constitutional Court,⁸⁷ where the human dignity clause was used to restrain the publisher's rights.

C. Effects on private law relationships

It has already been pointed out that according to the Constitutional Court the human dignity clause has effects on all branches of law. This jurisprudence requires the ordinary courts to apply the basic rights and the values enshrined in them when they interpret open provisions of civil or administrative law. The concept may be illustrated by the debates on cases in which medical malpractice leads to the birth of an unwanted or handicapped child. Does it violate the human dignity clause if these parents are granted compensation for injuries? Usually, the contract for medical treatment or for medical (genetic) advice between the parents and the doctor constitutes a private-law relationship. The human dignity clause enters this relationship via the famous *Drittwirkung* (third-party-effect) jurisprudence of the Constitutional Court.⁸⁸ The private law norms - in this case, the provision granting reparation for injury in case of medical malpractice - have to be interpreted in the light of the basic rights. In applying the *Drittwirkungs*-doctrine the Second Senate of the Constitutional Court ruled in its second abortion decision that the human dignity clause prohibited qualifying expenses for child rearing as a "damage".⁸⁹ According to this ruling the ordinary courts would have been forced to refuse compensation for medical malpractice in such cases. The First Senate came to the opposite conclusion in a decision of 12 November 1997.⁹⁰

IV. **Distinctive features of human dignity**

A. Difficulty in circumscribing the area of protection

The fact that the human dignity clause is loaded with two-and-a-half-thousand years of philosophy⁹¹ has led the Constitutional Court to avoid general definitions. One definition which has been used quite often is the "object-formula". According to this formula, the human dignity clause forbids "treating people as mere objects".⁹² Later, the Court tried to enhance the requirements for a violation of the human dignity clause, ruling that "general formula, such as the human being may not be reduced to a mere object of public authority, can only indicate the direction in which violations of human dignity may be found. Not rarely man is only an object, not only of circumstances and of social development, but also of law, in so far he has to comply with the law without paying regard to his interests. This does not in itself constitute a violation of human dignity. In addition to that, it is necessary that he is subject to a treatment which principally brings into question his subject-quality or that the treatment constitutes in the concrete situation an arbitrary neglect of human dignity."⁹³ The subject-addition to the object formula has been criticised for not taking into account infringements on human dignity which are either not intentional or not arbitrary.⁹⁴ It has not

⁸⁷ See also *Kommers* (note 18), 312-313.

⁸⁸ *BVerfGE* 7, 198 (Lüth), for an English translation see *Kommers* (note 18), 361.

⁸⁹ *BVerfGE* 88, 203 (296).

⁹⁰ *EuGRZ* 1997, 635 et seq.

⁹¹ See note 4.

⁹² *BVerfGE* 27, 1 (6), for an English translation see *Kommers* (note 18), 299.

⁹³ *BVerfGE* 30, 1 (25-26).

⁹⁴ See for instance *Höfling* (note 11), *Margin* no. 15.

been taken up by the Court in its later jurisprudence.⁹⁵ To the contrary, in a recent decision the Court used the object and the subject definition alternatively and not cumulatively, when it said that the human dignity clause excluded "treating people as mere objects of the state or bringing into question their subject quality".⁹⁶

The problem of definition has its roots in the fact that the human dignity clause - in contrast to other basic rights, such as freedom of religion - does not envisage a specific area of protection. It is of relevance in the broad spectrum of all human activities. It is not so much focussed on a protected activity but rather on the modalities of state interference.⁹⁷ This forces the Court to work without a clear definition of the scope of the human dignity clause and to inquire instead into the means of intrusion.

B. Tandem norm and guideline for interpretation of other norms

The broad area of application which was just mentioned leads to two specific forms of application: the human dignity clause is hardly ever applied as a single norm, but mostly in connection with another basic right. As far as the personality right is concerned, this is Article 2, para. 1 GG.⁹⁸ With respect to the unborn life, it is the right to life in Article 2, para. 2 GG. The same applies as far as torture is concerned. There is broad consensus that the human dignity clause also protects the basic elements of equality.⁹⁹ Slavery and racial discrimination are examples where the violation of the principle of equality goes along with a violation of the human dignity clause.

This underlines the fact that the broad terms used by the Court to describe the human dignity clause¹⁰⁰ correctly reflect the function of the provision as a fundamental norm which inspires the interpretation and application of all other norms of the Basic Law. Thus, the two main features of human dignity as a legal norm correspond to each other: because of its fundamental character, it is difficult to define an abstract area of application of human dignity; at the same time, this fundamental character makes the human dignity clause specifically apt to be used as a source of interpretation.

V. Conclusion

The Court has generally tried to stick to the idea of the founders of the Basic Law not to define the source of the human dignity clause. The limits to this approach are revealed in the abortion cases. The Court's concept of human dignity as the "centre of the scheme of constitutional values" stresses the community aspect of basic rights. The tension between protection of the individual and community orientation in the Court's jurisprudence is very much present in the following excerpt from the "Lifetime imprisonment" Case:

"The constitutional principles of the Basic Law embrace the respect and protection of human dignity. The free human person and his dignity are the highest values of the

⁹⁵ BVerfGE 69, 1 (34).

⁹⁶ BVerfGE 87, 209 (228), *emphasis added*.

⁹⁷ Höfling, *Article 1, Margin no. 7-8*.

⁹⁸ *For details see, Häberle (note 55), Margin no. 8 et seq.*

⁹⁹ P. Kirchhof, *Der allgemeine Gleichheitssatz, Margin no. 99 et seq.*, in: J. Isensee/P. Kirchhof (eds.), *Handbuch des Staatsrechts, Vol. V, Heidelberg, 1992*.

¹⁰⁰ *See above notes 6 to 8 and corresponding text.*

constitutional order. The state in all of its forms is obliged to respect and defend it. This is based on the conception of man as a spiritual-moral being endowed with the freedom to determine and develop himself. This freedom within the meaning of the Basic Law is not that of an isolated and self-regarding individual but rather [that] of a person related to and bound by the community. In the light of this community-boundedness it cannot be "in principle unlimited". The individual must allow those limits on his freedom of action that the legislature deems necessary in the interest of the community's social life; yet the autonomy of the individual has to be protected."¹⁰¹

A foreign commentator has noted that one underlying feature of the Court's jurisprudence is that it tries to define human dignity in "personalistic and communal terms; that is, in terms of a personhood that is not merely a projection of the autonomous self but is also oriented to communication with other persons and which reveals itself in the experience of the community."¹⁰² A critical view on the community-oriented part of the Court's jurisprudence might ask whether it constitutes a misunderstanding of the function of basic rights if they are used in order to define the values of society.¹⁰³

Whether one discovers a paternalistic tendency behind the community oriented value jurisprudence or rather emphasises the dangers for social integration that may flow from solutions which are too individualistic is a matter of personal conviction. To strike the correct balance will always remain one of the most difficult tasks of the Court.

**The principle of human dignity by Mr Jacques ROBERT
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for Democracy through Law**

I. Definition and force of the principle of human dignity

a. The principle of human dignity is not explicitly enshrined, as such, in the Constitution, although it is obviously present in a Constitution that not only refers to the 1789 Declaration of the Rights of Man and the Citizen but also proclaims its attachment to the Preamble to the 1946 Constitution and the new principles laid down therein.

Moreover, can a Republic which declares itself (in Article 2 of the Constitution) to be secular, democratic and social, which guarantees equality of all citizens before the law, regardless of origin, race or religion, and which proclaims respect for all beliefs, do otherwise than treat humans as having an inherent dignity without repudiating its own postulates?

Strictly speaking, however, the concept of human dignity nowhere appears in our constitutional texts. The proposal in the Vedel report to specify in Article 66 of our Constitution ("No one may be arbitrarily detained. The judicial authority, guardian of individual liberty, shall ensure respect for this principle under the conditions stipulated by

¹⁰¹ Translation taken from *Kommers*, 307-308.

¹⁰² *Kommers* (note 18), 312.

¹⁰³ E.-W. Böckenförde, *Grundrechte als Grundsatznormen*, *Der Staat* 29 (1990), 1; B. Schlink, *Freiheit durch Eingriffsabwehr - Rekonstruktion der klassischen Grundrechtsfunktion*, *EuGRZ* 1984, 457.

law") that "all shall be entitled to respect for their privacy and human dignity" failed to win support. Surely, though, human rights, by their very essence, are expressive of human dignity?

b. The entitlement to human dignity has therefore necessarily been an underlying element in all of French positive law, which draws so much of its inspiration from human rights and the philosophy of the Enlightenment, particularly, perhaps, in the fields of defamation, respect for the dead and, of course, crimes against humanity.

But it is only recently that this right has been genuinely enshrined in law. In its decision of 27 July 1994 on two laws, one on respect for the human body and the other on donation and use of parts and products of the human body, medically assisted procreation and prenatal diagnosis, the Constitutional Council held up the protection of human dignity as a principle with constitutional force.

It did so following lengthy discussions and closely argued legal reasoning. As guardian of the historic and sacrosanct constitutional texts, and in order to keep in step with the unavoidable and necessary changes taking place in contemporary society, the Constitutional Council of course sometimes takes it upon itself to create "principles" or "aims" on which it bestows official constitutional validity. The Council may feel that these principles and objectives are dictated by progress, the development of advanced technologies, a more liberal moral climate or the ideas of younger generations.

However, it takes care not to create such standards *ex nihilo* but to find a basis for new rules or freedoms in existing law so as to justify its daring and avoid being accused, as often happens, of "governing".

When, in late June 1994, two bills concerning the human body vis-à-vis biological and medical developments and ethical requirements were referred to the Constitutional Council, it was asked both to censure specific provisions in the bills and to lay down the constitutional principles which at present and in the future must govern the field of bioethics. The Council therefore looked for constitutional-law support for its arguments and final decision.

At pains to adopt a measured position in a fast-moving sector, one beset with passionate views and the subject of a wide range of prejudices, it chose to keep a "low profile" and endeavoured to reach a decision that could not be contested. Nor did it wish to give the impression of conjuring completely subjective constitutional principles out of thin air.

It therefore referred to the first sentence in the Preamble to the 1946 Constitution, which reasserted and proclaimed constitutional rights, freedoms and principles, emphasising from the outset that:

"On the morrow of the victory gained by the free peoples over regimes which have attempted to enslave and degrade the human person, the French people proclaim anew that every human being, regardless of race, religion or creed, possesses inalienable and sacred rights".

From this, it said, it was clear that "safeguarding human dignity against any form of enslavement and degradation is a principle with constitutional force".

However, it added two major qualifications.

Firstly, it considered that individual freedom, as proclaimed by Articles 1, 2 and 4 of the Declaration of the Rights of Man and the Citizen, must be "reconciled with the other principles having constitutional force".

Secondly, it pointed out that, under the tenth sub-paragraph of the Preamble to the 1946 Constitution, "the nation guarantees to the individual and the family the conditions necessary for their development" and that, under the eleventh sub-paragraph "it guarantees to all, especially children, mothers ... protection of their health ".

c. It is obvious that, in present-day France, the principle of human dignity is a "human right" with constitutional force.

Does it have the same legal force as other rights or is it the foundation upon which other human rights are based?

As we know, in France there is no official legal hierarchy of rights and freedoms. None is worthier of interest than any other. It is, therefore, impossible to draw up a list in decreasing order of importance. But the Constitutional Council has often had to decide between two opposing or competing freedoms. A choice has had to be made in such cases. This can be seen in its decisions. When it says of a freedom that it is neither general, nor absolute, it is because it believes that another freedom, which is more so, may take precedence.

d. All individuals in France are entitled to all the rights and freedoms in French law provided that their legal situation is in order and that they have not been deprived of them. But complete standardisation of individual cases is neither achievable nor even desirable, and the Constitutional Council has always worked on the premise that, in legally different circumstances, different principles may be applied.

Essential freedoms, however, must be available to everyone. And human dignity is one of those essential freedoms.

e. It is impossible to specify the content of a concept as broad and vague as "human dignity". Accordingly, in its decision of 24 July 1994, the Constitutional Council did not attempt to do so.

Dealing with draft legislation on the human body and its products, medically assisted procreation and prenatal diagnosis, it ruled that there were limits to what was allowable, that men's and women's bodies were not commodities, that children were neither objects nor toys that could be procured in any circumstances, just because modern-day science made it possible and for purposes of self-gratification alone, that experiments on living humans were not to be countenanced, etc, in short that even if research exerted pressure human dignity should never in any shape or form be violated.

But no one has yet defined the exact content of that dignity. As of when do human beings exist? What law could set the precise time? Studies of foreign law show that no two countries agree about when exactly the human person comes into being. Are embryos and fetuses "people"? If so, how can we allow the legalisation of abortion several weeks or even months into pregnancy?

These are questions for theological debate and which the French lawmaker has steered clear of.

f. It is impossible to list every form of breach of human dignity. Breaches may occur at any moment in respect of each freedom.

I do not think that attacking or insulting someone in the press, for example, is a breach of human dignity. It is to be classified as breach of privacy or defamation.

On the other hand, photographs of a dying person or of someone suffering; ill-treatment wherever it may take place (in prison, in retirement homes, in the workplace, in schools or hospitals); the dire poverty in which many people still live, even in rich countries; the manner in which some foreigners are deported or their detention conditions; the squalor in which marginal members of society, nomads or unemployed people live – all of those are intolerable breaches of human dignity. To the list might be added such things as child labour, the white-slave trade, or - in certain countries - the sale of adolescents into prostitution or for organ transplants.

g. The principle of human dignity is – and must be – a universal principle.

For countries with a Judaeo-Christian tradition that is glaringly obvious.

Into the ancient world, where there was no specific awareness of it (slavery and ostracism were practised, sickly children put to death, etc) the evangelical message introduced two fundamental ideas: that of inherent human dignity and that of equality between human beings.

It accorded everyone inherent dignity because people were created in the image of God and their destiny was eternal.

And that dignity was granted to all humans regardless of origin, race, upbringing, education or fortune.

Therefore any breach of human dignity was an offence to the living God. Christ taught that whatever we do to the lowliest among us was an offence against him.

But other religions have the same conception of human beings.

If the aim of every society is universal happiness, all freedoms must be granted to everyone provided, of course, that public order is not threatened.

But it is difficult to see how – in a civilised country – public order could ever be under such a threat that, for it to be maintained, human dignity would have to be breached. There are exceptional circumstances in times of crisis or war that could lead to – but not justify – serious breaches of human dignity: atrocities by marauding troops, systematic and collective rape amid ruthless ethnic struggle, torture used to obtain information, genocide.

No democracy worthy of that name could begin – even in an extremity – to allow the use of such unspeakable methods to defend itself.

Perhaps it is better to lose a war than lose one's soul ...

II. Applications of the principle of human dignity

a. The principle of human dignity is rarely cited before the Constitutional Council. As stated above, it was cited with reference to the two French laws on bioethics and was not unrelated to the decision of the French Constitutional Council officially to recognise everyone's right to decent housing.

b. A large number of French laws are founded on the principle of human dignity. For example, the code of ethics of the national police force (Decree No. 86-552 of 18 March 1986); numerous provisions in the Code of Criminal Procedure concerning police custody and detention on remand; the long list of legislative changes to the Order of 2 November 1945 concerning entry and residence of foreigners; sections of the Civil Code and Criminal Code concerning privacy; the laws of 20 December 1988, 25 July 1994 and 29 July 1994 concerning, respectively, protection for persons agreeing to undergo biomedical research, the donation and use of parts and products of the human body; the Act of 31 May 1990 implementing the right to housing (see Jacques Robert and Henri Oberdorff, "Libertés fondamentales et droits de l'homme", French and international instruments, 3rd edition, 1997, Paris, Montchrétien Publications).

c. Respect for human dignity has quite recently been given official recognition in French administrative case-law.

Essentially it is a philosophical concept linked to certain views on human nature. Its translation into law is relatively recent. The Declaration of the Rights of Man and the Citizen makes no explicit mention of it although it could be argued that the natural, inalienable and sacred rights that it proclaims are inseparable from an underlying, even if not explicitly stated human dignity.

Certain international instruments have recognised some of its elements. The International Covenant on Civil and Political Rights of 16 December 1966, to which France acceded by the Act of 25 June 1980, acknowledges that such rights stem from the dignity inherent in human beings. The European Convention on Human Rights, for its part, prohibits "inhuman or degrading treatment": is not the very essence of this Convention specifically respect for human dignity and freedom?

As we saw earlier, the lawmaker too, on many occasions, has made respect for human dignity a requirement.

As far as case-law is concerned, the Conseil d'Etat has emphasised the need to preserve human dignity when checks are carried out on employees (15 July 1980, Minister of Social Affairs and Employment v. the CGT Trade Union at the Griffine-Maréchal Company, Rec. p. 215) and it reiterated the fundamental ethical principles relating to respect for human beings by which doctors must abide in their relations with patients, even after the patient's death (Ass. 2 July 1993, Milhaud, concl. Kessler, Rec. p. 194).

In an even more recent judgement (C.E. Ass. 27 October 1995, Municipality of Morsang-sur-Orge, Concl. Frydman, Rec. p. 372), the Conseil d'Etat held that it was for the municipal police authority to take whatever measure was necessary to uphold public policy; that respect for human dignity was a component of public policy; and that the municipal police authority was empowered, even in the absence of special local circumstances, to ban an attraction which was contrary to human dignity.

The Conseil d'Etat came to the conclusion that a "dwarf-throwing" contest incited spectators to use a person with a physical disability, and presented as such, as a projectile; that such a contest was inherently a breach of human dignity; and that, even in the absence of special local circumstances, and although safety measures had been taken to protect the person involved and he had voluntarily taken part for payment, the municipal police authority could still ban the event.

d. Breaches of human dignity may be inflicted on anybody in any circumstance. But obviously the law and the courts must particularly concern themselves with those who, being at greatest disadvantage, are the most frequently exposed to this type of attack (see Florence Tourette, "Extrême pauvreté et droits de l'homme", thesis, Clermont-Ferrand, 22 May 1998).

Here, people's individual circumstances, especially physical or psychological frailty, are relevant factors. But – as we have already seen from the Conseil d'Etat's latest decision – even the "victim's" consent does not cancel out an infringement of human dignity since the consent may, for example, have been dictated by desperate need or stem from lack of willpower caused by long hardship.

It should be added that the very notion of breach of human dignity depends on any number of considerations. Audiovisual material is a perfect example: in assessing it the courts have to take into account objective and subjective factors. A film may shock some and not others. One person may feel that showing a given feature film is quite acceptable while another may regard certain scenes as liable to cause affront.

It will then be up to the municipal authority, which has police powers to assess local circumstances and susceptibilities, to allow or not a given film or entertainment, bearing in mind any offence it might cause the majority, and any assault it would therefore constitute on human dignity.

On this point, French case-law is very firm and well-established. It takes account of every aspect, objective or subjective, of any breach of human dignity.

THE PRINCIPLE OF HUMAN DIGNITY IN EUROPEAN CASE-LAW by Mr José Manuel CARDOSO DA COSTA

President of the Constitutional Court of Portugal

I. Definition and force of the principle of human dignity

a. Right from the outset, and indeed in its very first article, the 1976 Constitution of the Republic of Portugal, which is still in force today, expressly recognised the "dignity of the human person", proclaiming it to be one of the fundamental principles on which the Republic was based. This statement acquired an even clearer and, so to speak, permanent significance, however, when the Constitution was amended in 1989 and Article 1 re-worded as follows: "Portugal is a sovereign Republic, based on the dignity of the human person ... and committed to building a free and fair society that unites in solidarity."

As its position in the opening article of the Constitution suggests, this emphatic and categorical statement is one of great importance and significance. Its purpose and effect is clearly to make sure that the Portuguese Constitution is unequivocally stamped with this

profoundly humanist and person-centred interpretation of the State - the State exists because of us rather than we because of the State – that characterises Western cultural tradition and its democratic constitutionalism.

In proclaiming the principle of human dignity, the Constitution recognises the moral autonomy of all individuals, who are seen as having their own unique vocation and destiny that must be accomplished freely and responsibly within a society based on solidarity and fundamental equality between all people, where no one is merely an instrument or servant of another person or the State. In highlighting human dignity as one of the principles on which the Republic, that is to say the State, is based, the Constitution is moreover declaring that the State is built both on and for individuals. Viewed from a more political angle, this is the same as saying that Portugal must be a State of “citizens”.

b. Clearly, once the principle of human dignity was expressly recognised in the Constitution, the Portuguese courts saw no need to establish it themselves or to give it a foundation.

c. Other than the emblematic reference in Article 1, the Portuguese Constitution contains no reference in its catalogue of fundamental rights to a “right” to “human dignity”. It is moreover significant that on several occasions when the Constitution was amended all attempts to incorporate a general statement asserting “the inviolability of the human person” (similar, for example, to Article 1, paragraph 1 of the German Basic Law), failed, one after another.

Strictly speaking, therefore, it would seem that the Portuguese Constitution does not establish “human dignity” with the force of a “fundamental right” (or human right).

However, if, as a result, it is tempting to suggest that the principle of human dignity is somewhat less than a fundamental right, at the same time it can actually be said to be more than that, as it is the “value principle” that constitutes the very foundation (and “criterion”) on which the fundamental rights listed in the Constitution are based, giving a “unity of meaning” to the catalogue as a whole.

Such, at any rate, is the only coherent conclusion that can be drawn from the importance attached to this principle right from the very first article of the Constitution. If the first principle on which the Republic is based is “human dignity”, then clearly the catalogue of fundamental rights enshrined in the Portuguese Constitution cannot simply be the result of some voluntarist or positivist concession on the part of those who drafted the Constitution, some “princely favour” or concession of power by the State. On the contrary, it expresses recognition of a set of inalienable and inviolable rights which existed before the State and which the State must respect, rights which are linked to our very dignity, as human beings and as people, and which, consequently, are both the result and indispensable expression of such dignity. In short, in recognising the principle of “human dignity” as the State’s foundation, the Constitution reveals the fundamental anthropological concept or presupposition on which “fundamental” or “human rights” are based and which gave birth to such rights.

This direct link between “human rights” and the principle of human dignity is particularly noticeable in the case of the rights grouped together in the Portuguese Constitution under the heading “Personal Rights, Freedoms and Safeguards”, but it is also apparent in the case of those grouped together as “Rights, Freedoms and Guarantees of Political Participation”. In

the specific context of the Portuguese Constitution, which establishes not only “traditional” fundamental rights but also a long and detailed catalogue of “Economic, Social and Cultural Rights”, it is important to point out (as some legal writers do) that these rights, too, have the same foundation and represent the transition, in the historical consciousness of Portuguese society, to a new level of understanding of the needs resulting from this principle, with the “solidarity” (or “fraternity”) aspect, which is as much a part of the principle as “liberty” and “equality”, now emerging more clearly and more tangibly.

d. It is clear from the content and meaning of “human dignity” that entitlement to benefit from this principle extends, at any rate, to all individuals, whether as an actual “right” (subjective) in the technical legal sense, or as a fundamental (objective) legal principle (“value principle”).

The fundamental question here is one of knowing at what precise point a “person” acquires this great dignity. It is a question that arises in particular in connection with human embryos and foetuses and can therefore be very important when problems are encountered concerning, for example, the legal treatment of abortion or scientific experiments carried out on human embryos.

However, in Portuguese constitutional case-law, and even among specialist legal writers, such questions, or to be more precise, the legal treatment of abortion, as the only one of these questions so far to have been examined by the Constitutional Court, have been considered in the light of another constitutional principle (already tantamount to recognition of an actual fundamental “right”) according to which “human life is inviolable” (Article 24, paragraph 1), rather than directly and specifically in relation to human dignity. The majority view of the Constitutional Court in this context was that the principle of inviolable human life has only “subjective” significance in the case of human life that has already been born and that its value throughout the period preceding birth is merely “objective”. While it is true that the minority challenged this view and its corollaries (such as the extremely restrictive position adopted towards the “decriminalisation” of voluntary abortion), no categorical statement was made in support of a philosophical (or juridico-philosophical) conception of the human embryo or foetus as a “person” in the full sense of the term. It was simply argued that human embryos or foetuses are already “human beings” (that, to use another expression, they represent “plans” or “hopes” for a person), and that, as such, they deserve the same “dignity” as anyone else and must therefore receive the special protection resulting from application of the principle established in Article 24, paragraph 1 of the Constitution.

e. There is a broad consensus in Portuguese legal theory regarding the non-classification of the principle of “human dignity” as a “fundamental right” (in the stricter, “subjective” sense of this category). It is not surprising, therefore, that it is also generally agreed that, on its own, this principle has no direct “prescriptive” force, or scope, whether before or after that of the different rights listed in the Constitution. Rather, it is above all through such rights that the principle of human dignity is able to acquire its own force and prescriptive scope. To quote a well-known author (J. C. Vieira de Andrade), “human dignity is not a fundamental right in itself and only specific constitutional or other norms can confer effective rights on individuals or, generally, have autonomous legal effects.”

This is not to say, however, that the principle of human dignity cannot be regarded as a source, if only indirect, of legal solutions. In fact, as a principle that is truly regulatory, rather than simply “hermeneutical”, as pointed out by Vieira de Andrade, it must be recognised as playing a role in the assessment of the constitutionality of legal rules and in the interpretation

and incorporation of rules, be they legal rules or, of course, constitutional rules establishing fundamental rights (which, as has been shown, depend on the presupposition of human dignity for their validity). This role is particularly important in respect of the Portuguese Constitution insofar as Article 16, paragraph 2 expressly states that its provisions relating to fundamental rights are to be interpreted and incorporated in harmony with the Universal Declaration of Human Rights, given that the Declaration is also based on “recognition of the inherent dignity ... of all members of the human family” and “the dignity and worth of the human person”.

f. Any attempt to identify behaviour that violates human dignity and to define it as such must therefore be based, first and foremost, on a study of the constitutional provisions that go to make up the catalogue of rights and, in particular, those grouped together in the Constitution as “Personal Rights, Freedoms, and Safeguards”, which include, *inter alia*, the right to life (Article 24), the right to personal integrity, both moral and physical (Article 25), the right to a personal identity, personal development, protection of intimacy, civil capacity, and other related rights (Article 26), the right to freedom and security and its corollaries in various fields, notably that of criminal procedure (Article 27 ff), freedom of conscience, religion and worship (Article 41), freedom of expression and information and its corollaries (Article 37 ff), and the right to found a family (Article 36).

There can be no doubt in this context that behaviour which is damaging to a person’s honour, or physically damaging, or which violates a person’s “sexual freedom and self-determination”, to quote the Portuguese Criminal Code, breaches the principle of “human dignity” and one or more of the fundamental rights expressive of such dignity.

However, it is even more interesting in this regard to highlight some of the developments and implications of the principle of human dignity that have their origins in modern scientific progress and have already been specifically incorporated in the Portuguese Constitution. Examples include, on the one hand, the right of access of all citizens to data concerning them, the protection of personal electronic data, and the restrictions imposed on the processing of certain data (Article 35, incorporated in the Constitution right from the outset), and, on the other hand, the legal guarantee that must be provided in order to protect the personal dignity and genetic identity of the human being, particularly in the creation, development and use of technology and in scientific experimentation” (Article 26, paragraph 3, added when the Constitution was amended in 1997).

g. It is obvious from the terms used in a) and c) to highlight the content, meaning and scope of the principle of human dignity that it is a “universal” principle. In particular, discrimination between “nationals” and “foreigners” is clearly not allowed. It is a principle that applies to all men and women as “people”, rather than merely as “citizens”.

II. Applications of the principle of human dignity

a. It is not often that the principle of human dignity is cited on its own before the Portuguese Constitutional Court as a ground for declaring a particular legislative solution unconstitutional.

On one occasion, however, the principle was cited as a ground for inferring that a rule of the Portuguese Civil Code, according to which divorce may be obtained even without the consent of the other spouse after six consecutive years of de facto separation, was incompatible with

the Constitution. But in its *Decision N°105/90*, the Constitutional Court dismissed this line of reasoning and rejected the ground on which it was based.

What is understandably more common, given the exhaustive and detailed catalogue of such rights, is for the principle of human dignity to be cited together with one or more of the rights enshrined in the Constitution.

b. Given the considerable amount of research such a task would entail, it is not possible to identify and list all the cases in Portuguese law where specific laws have been expressly and explicitly founded on the principle of human dignity.

Above all, however, it must be stressed that it is all areas of the Portuguese legal system, including its most significant texts that are firmly founded on the humanist and person-centred values reflected so clearly in the Constitution. Portuguese civil law is one example, but so, more significantly, is punitive and, in particular, criminal law. It suffices in this context to point out that the foundation for substantive criminal law in Portugal is the *mens rea* principle, and that in criminal procedure the accused is considered to be one of the “subjects” of the proceedings (rather than a mere “object” of the case), who must therefore be given “all the guarantees of defence”.

In addition to these specific areas of the legal system, there are other areas where the principle of human dignity is either implicitly or explicitly the “regulatory” or “value” principle on which a particular legal provision is founded (e.g. electronic processing of personal data, the rules governing employment contracts and conditions, or the rules aimed at promoting gender equality).

c. Basically, constitutional case-law is in step with the classification of the principle of human dignity found in constitutionalist theory and reveals a similar understanding of the link between this principle and fundamental rights as such. While past decisions that impose specific legal solutions solely on the basis of the principle of human dignity are rare, this principle is frequently cited in conjunction with one or more fundamental rights.

The aforementioned *Decision N°105/90*, which concerned the possibility of obtaining a divorce solely on the basis of the objective situation constituted by a long de facto separation, is particularly significant in this regard. Although the Constitutional Court drew attention to the fundamental importance accorded to the principle of human dignity in the Constitution and even recognised its value as a precept that provided sufficient grounds, on its own, for delivering decisions of constitutionality, the Court also highlighted the difficulty of actually applying such an approach given the general nature and scope of the principle (which meant it could not, therefore, generally be a direct source of specific legal solutions), as well as the historic and cultural aspects involved in its concrete application.

However, there are a significant number of decisions where the Court has referred expressly to the principle (or “value”) of human dignity in conjunction with a particular fundamental right, and where, ultimately, the principle is seen as giving the right both its foundation and meaning and defining its scope.

In one of these decisions, the principle of human dignity was linked to “personality rights”, and in particular a “general personality right” which the Court held was implicitly recognised in the Constitution. The Court ruled that failure to afford these rights maximum protection

was tantamount to denying the role of the person as the central figure in society (Decision 6/84).

Above all, however, it is in relation to criminal matters or matters of criminal procedure that reference is most frequently found in Portuguese constitutional case-law to the concept and force of the principle of human dignity. Particularly noteworthy are the ban on criminal sanctions that involve loss of civil rights (Article 30, paragraph 4), the principle of *mens rea*, and the rights of the defence (Article 32), including the principle that both parties shall be heard and the right to be heard (see, for example, Decisions 16/84 and 474/95, Decisions 426/91 and 83/95; or Decisions 40/84, 394/89, 748/93, 442/94, 443/95). According to one of these decisions, in connection with the rights of the defence, “the principle of the defence was, in other words, ... a necessary part of the human dignity on which the Republic was founded in accordance with Article 1 of the Constitution”.

Lastly, in another decision (Decision 349/91), on a completely different matter, the Court established a direct link between the principle of human dignity and a “social right”, in this particular case the right of retired persons to social security (Article 63). The Court ruled that in order to protect the “supreme value of the human person” a creditor may be required by law to sacrifice his or her claim if it proves to be incompatible with the right of retired persons to receive a pension that enables them to live in a dignified manner.

The right to human dignity in Belgian constitutional law by Mr Francis DELPÉRÉE Professor at the Law Faculty of the Catholic University of Louvain, Judge at the Council of State

It cannot be said too often: the Belgian Constitution is an old Constitution.¹⁰⁴ It is, as André Mast so neatly put it, a Constitution “from the time of Louis Philippe”.¹⁰⁵ It was first published on 7 February 1831, but has since been considerably redrafted.

First, a revision was felt necessary in response to the spread of democratic ideas, with the gradual recognition of a right of suffrage which was as universal as possible. Next came pressure from autonomist movements, which led to the gradual and peaceful transformation from a state with highly unitary structures into a federal state. Lastly, there was pressure from economic and social currents which sought to give the Constitution and the democratic society it established a more contemporary flavour.

It was in this latter context that the Belgian Constitution was revised on 31 January 1994 (*Moniteur belge*, 12 February 1994, p. 3669). A notable addition to Title II of the Constitution – which is headed “Belgians and their rights” but which, under the terms of Article 191 also applies to every foreigner who “is on Belgian territory”¹⁰⁶ – was Article 23.

¹⁰⁴ *Constitutional Justice under Old Constitutions* (dir. E. Smith) Kluwer Law International, 1995

¹⁰⁵ A. Mast, “Une monarchie du temps de Louis-Philippe”, RDP, 1957, p. 987.

¹⁰⁶ F. Delpérée, “Les bénéficiaires ou titulaires des droits fondamentaux. Belgique”, *Annuaire international de justice constitutionnelle*, 1991, p. 221; P. Boucquey, “La Cour d’arbitrage et la protection des droits fondamentaux des étrangers”, *Annuaire droit Louvain*, pp 289-330.

This provision is worded as follows: “Everyone” – and in the first commentaries it was made clear that this expression did not refer exclusively to Belgians but should cover all those who in one capacity or another were on Belgian territory – “has the right to lead a life worthy of human dignity.”

It is interesting to note from the outset that unlike the Basic Law of the Federal Republic of Germany, the Belgian Constitution does not establish an absolute right to respect for, and the protection of, human dignity, which in the German text is presented as an inviolable right (Article 1.1).¹⁰⁷ It establishes, in a less defensive and possibly more practical way, the right of everyone to lead his or her life in conditions which conform with the requirements of human dignity. What is the point of the right to life if life is devoid of any basic dignity?

The second paragraph of Article 23 specifies that “for this purpose” – i.e. in order to ensure people may lead a life worthy of human dignity – “the law, the decree or the rule specified in Article 134 guarantees the conditions of their exercise, taking into account the corresponding obligations of economic, social and cultural rights.” Paragraph 3 lists five rights which are “particularly” covered by this general wording. This detail is by no means superfluous, but there is one question which inevitably arises: is it not the case that more traditional freedoms, in the sense of first-generation rights, might also contribute to achieving this objective? To give but one example, the establishment of the right to the inviolability of the domicile (Article 15) may also be an essential aspect of the respect which is due to the individual and his or her family.

The right to human dignity is therefore enshrined in the Constitution. Not without some irony, judge Martens¹⁰⁸ wrote: “it is not insignificant that dignity is referred to in the Constitution”. Accordingly, this right enjoys strengthened constitutional protection – even though, as one is fully aware, the Court of Arbitration has no competence to censure any infringement of the rules contained in Article 23 of the Constitution unless there is a corresponding violation of the rule of equality. References in case-law – there are five in all over a 13-year period, but to be more accurate the reference period should be much shorter, i.e. five years – are few and far between. Only if citizens and the courts¹⁰⁹ show a real desire for the Constitution to fulfil its potential will they be able in future to make recognition of this right more effective.

Agreement must also be reached on the exact meaning given to this new constitutional right. Clearly, the very concept of dignity has a variety of meanings.¹¹⁰

According to the Dictionnaire Robert, the word “dignité” in French means the respect which someone or something deserves.¹¹¹ In legal terminology, the term was originally used to denote the office or title which may be conferred upon a person (cf. Article 6 of the

¹⁰⁷ See also Article 10 of the Spanish Constitution and particularly Article 1 of the Portuguese Constitution.

¹⁰⁸ P. Martens, “Conclusions générales” in *Les droits économiques, sociaux et culturels* (dir. R. ERGEC), Brussels, Bruylant, 1995, p. 311.

¹⁰⁹ On the procedures for referring a matter to the Court of Arbitration, see the studies by A. Rasson-Roland and M. Verdussen in *La saisine du juge constitutionnel* (Dir. F. Delpérée and P. Foucher), Brussels, Bruylant, 1998.

¹¹⁰ “Is there a minimum consensus on what dignity means so that we do not end up with endless arguments which will negate the proclaimed right?” (G. Haarscher, “Le droit de mener une vie conforme à la dignité humaine”, in *Les droits économiques, sociaux et culturels* (dir. R. Ergec), Brussels, Bruylant, 1995, p. 134).

¹¹¹ Webster’s Third New International Dictionary defines dignity as the quality or state of being worthy, honoured or esteemed.

Declaration of the Rights of Man and of the Citizen: “All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations ...”). By extension, dignity serves to underline the respect which such a person owes to the office or function he or she is discharging.

Parliamentarians must show dignity and, consequently, enjoy their civil and political rights;¹¹² civil servants may not accept any employment which jeopardises the dignity of their duties;¹¹³ a professional person must, as pointed out by the Court of Arbitration, be attentive to the requirements of the dignity of his or her profession (“The monopoly of the Bar, recognised in principle by Parliament, is justified on account of the guarantees of competence and independence offered by barristers and by the principles of dignity, probity and scrupulousness which form the basis of their profession.”).¹¹⁴

This is still an area of concern. Dignity should be preserved, although – in a conflict of dignities – the dignity of the office should not take absolute precedence over the dignity of the persons performing the duties concerned.

Today, however, the emphasis in constitutions, international treaties, legislative documents and case-law is placed on the concept of human dignity. This is no longer to be understood as the respect owed by a person to an institution, but as the respect which every human being should be shown, on humanist grounds, by both institutions and individuals.

Pierre Wigny wrote along these lines in 1952 – note the date: “An individual must be respected by the public authorities. This might appear axiomatic, but tragic experience has reminded us of the need to restate this rule”.¹¹⁵ We may add that this requirement also applies to private individuals.

Clearly, constitutional recognition of the right of each individual to lead a life worthy of human dignity can have at least two different interpretations. Constitutional case-law covers them both.

First, the Constitution – in a tangible way – helps to ensure that everyone enjoys specific rights. These are, however, minimum rights: a minimum level of personality rights. Accordingly, if an individual does not enjoy those rights – in law or in fact – that person, quite improperly, is in a situation where he or she lacks dignity.

The right to human dignity can be an **autonomous right**. The public authorities must help to ensure that it is given appropriate substance. This right gives rise to particular rights. It finds practical expression in specific applications (**I**).

Second, the Constitution requires both public authorities and individuals to behave with discretion and restraint. It is inappropriate to invade the privacy of an individual and to violate the space in which the individual seeks to organise his or her life and activities.

¹¹² F. Delpérée, *Le contentieux électoral*, Paris, P.U.F, 1998, coll. *Que sais-je?* No. 3334, page 114.

¹¹³ F. Delpérée, *L'élaboration du droit disciplinaire de la fonction publique*, Paris, LGDJ, 1969.

¹¹⁴ Court of Arbitration, judgement no 24/92 of 2 April 1992.

¹¹⁵ P. Wigny, *Droit constitutionnel. Principes et droit positif*, Brussels, Bruylant, 1952, p. 317.

From this angle, the right to human dignity is a **relational right**. It serves to draw the outlines of other rights and helps to justify them. At the same time it sets limits on interference by public authorities or private individuals (II).

It is worthwhile looking more closely at this dual meaning of the concept of human dignity.

I. The right to human dignity: an autonomous right

As Rusen Ergec wrote, the concept of human dignity underlies all fundamental civil, political or social rights.¹¹⁶ F. Rigaux writes that the inviolability of human dignity can be the inspiration both for the right to respect for privacy and for economic and social rights.^{117,118} For our part, we describe this right as the “source” of other rights, especially “economic, social and cultural rights”.¹¹⁹

What should we conclude from this? If we limit our comments to the drafting of the Belgian Constitution, two main ideas emerge. An individual has the right to life and to minimum means of subsistence.

1. The right to human dignity is presented, quite rightly, in Article 23 of the Belgian Constitution as a manifestation of the **right to life** – not only of the initial right to existence, but of the right to live one’s own life in accordance with one’s abilities, choices and opportunities.

This question was raised during the discussion on the constitutionality of the law of 3 April 1990 on abortion – amending Articles 348, 350, 351 and 352 of the Criminal Code, and abrogating Article 353 of the same Code. This law provides that “beyond twelve weeks, under the conditions provided for in 1b, 2 and 3, a pregnancy may not be terminated except where the continuation of the pregnancy constitutes a serious danger to the health of the mother or where it is clear that the unborn child will suffer from a particularly serious medical condition recognised as incurable at the time of diagnosis. In such cases, the doctor in question shall seek a second opinion from another doctor, whose opinion shall be included in the file.”

This particular provision has given rise to several applications for review, of which two were filed by applicants who claimed that their dignity had been affected “since the law in question made a distinction between citizens with disabilities and those without.” They also stated that persons without disabilities thus “enjoyed better protection of their right to life.”

¹¹⁶ R. Ergec “Introduction générale” in *Les droits économiques, sociaux et culturels* (dir. R. Ergec), Brussels, Bruylant, 1995, p. 12. Similarly M. Verdusen and A. Noel state that the Constitution is the core of all fundamental rights and a key concept of legislation on social assistance.

¹¹⁷ F. Rigaux, *La protection de la vie privée et des autres biens de la personnalité*, Brussels, Bruylant, 1990, p. 753.

¹¹⁸ This is why it is found in many declarations and constitutions. Cf the texts quoted by W. Pas and J. Van Nieuwenhove, “Het recht een menswaardig leven te leiden”, report to the colloquy of the Interuniversitaire Centrum voor Mensenrechten, 1994, p. 6.

¹¹⁹ F. Delpérée, “Les droits économiques, sociaux et culturels” in *Les droits économiques, sociaux et culturels dans la Constitution*, Brussels, Bruylant, 1995, p. 288.

For well-known political reasons,¹²⁰ the Court of Arbitration clearly does not want to examine the merits of these applications. It therefore considers that the applicants have not proved the legally required interest. “The arguments put forward by the applicants, which come under the common denominator of 'moral interest', refer in essence to their ethical interpretation of the impugned law and to the feelings which that law arouses in them. The fact that citizens disapprove of a law raising ethical issues cannot be regarded as proof of a sufficient interest.”¹²¹

Clearly, however, one must come to the same conclusion as the Head of State that on this occasion the established legal order contained an anomaly and was liable to upset people with disabilities or those caring for them. A law providing for a particular way of dealing with children who have been conceived but who may be born with a serious physical or mental disability surely shows a lack of consideration for disabled people already born.

2. The right to life may call for **minimum means of subsistence**. This is why social assistance is granted under the law of 8 July 1976. It is not simply a question of money; the law also provides for the granting of social, medical, psychological and other assistance. The aim, expressly stated in the law, is to enable the beneficiary to lead a life worthy of human dignity. By focusing – among economic, social and cultural rights – on the right to social assistance, Article 23.3.2 of the Constitution addresses the same aim in two distinct ways.

When asked to give a ruling on the scope of social assistance legislation, the Court of Arbitration held that parliament – and consequently the drafters of the Constitution – had wanted to define a minimum level below which the individual’s life no longer conformed to the requirements of human dignity. This explains why the legislation guarantees the “freedom from attachment and unassignability of sums granted by way of social assistance”. This even applies to persons entitled to maintenance.

The judgement of 6 November 1997 is particularly significant. It shows that minimum benefits are awarded, by way of social assistance, to an individual. It is not permissible to reduce – in any way – the amount of this assistance as this would entail a risk of placing the individual in an unacceptable situation. The Court spelt this out in strong terms: “It is in keeping with the logic of an institution conceived in this way not to allow the situation of its beneficiaries to deteriorate through automatic recovery (of benefits)”. It added very sensibly that “abuses will in any case be punishable as such on the basis of the aforementioned law of 8 July 1976.”¹²²

The Court of Arbitration adopts the same reasoning for other forms of social protection. In particular, it was required to give its opinion on the validity of certain provisions of a Brussels ordinance of 11 July 1991 aimed at guaranteeing the right to a minimum electricity supply.

The main aim of the ordinance was to make it unlawful for an electricity company to cut off the electricity supply to households unable to pay their bills. Nevertheless, it authorised the company to install in the households concerned a device to limit the power supply. In cases

¹²⁰ F. Delpérée, “A propos des anniversaires royaux”, *RFDC*, 1992, no. 9, p.129.

¹²¹ Court of Arbitration, judgement No 32/90 of 24 October 1990.

¹²² Court of Arbitration, judgement No 66/97 of 6 November 1997, B.5.

where the company took such a measure, it was required to inform the municipality in writing of the name of the household concerned.

What avenues are then open to the municipality? It can arrange for a social report to be made by an organisation with which the electricity company has signed a co-operation agreement. In accordance with the preparatory documents for the ordinance, the organisation would normally be the local public social assistance centre.

The Court of Arbitration had no objection to this method of providing efficient social protection. It observed, however, that the social report must be drawn up under conditions which did not violate “the privacy and dignity of certain poor families”.¹²³

In other words, in attempting to ensure that everyone is able to lead a dignified life – i.e. to live with adequate means of subsistence – there must, paradoxically, be no interference with the right of that person, his or her family and household etc, to live autonomously and be free from untimely intervention by the public authorities and the public or private bodies performing social welfare functions.

The right to social assistance – or the way in which it is granted – may jeopardise the right to privacy. Here, therefore, the two aspects of dignity may be in conflict.

2b. The decree of 4 March 1991 on assistance for young people (Article 3) also refers to the need to ensure a “life worthy of human dignity”.¹²⁴

II. The right to human dignity: a relational right

The structure of Article 23 of the Belgian Constitution is particularly significant. Clearly in its first paragraph it establishes the right to lead a life worthy of human dignity as an autonomous right. But it also asserts this right as the aim to be pursued by parliament when establishing other rights.

The Constitution recognises social rights – in particular the right to work and the right to social security. It links these with economic rights, of which the right to free choice of occupation is a prime example. It also refers to cultural rights – foremost among which is undoubtedly the right to education – which are addressed in Article 24.

Nonetheless, it should not be forgotten how these three categories of rights fit into the overall picture. The precise purpose served by economic, social and cultural rights is to enable everyone to “lead a life worthy of human dignity”. This explains and throws light on their inclusion. As we wrote in 1995 in a study on “The inclusion of economic and social rights in the Constitution”, “the right to lead a life worthy of human dignity will perhaps be found, with hindsight, to be the right which serves as a justification for all the others.”¹²⁵

¹²³ Court of Arbitration, judgement No. 14/93 of 18 February 1993, B. 2.12 and B. 2.13.

¹²⁴ Quoted by J. Fierens, *Droit et pauvreté. Droits de l’homme, sécurité sociale, aide sociale*, Brussels, Bruylant, 1992, p. 379, note 152.

¹²⁵ F. Delpérée, “L’insertion dans la Constitution des droits économiques et sociaux”, in *Cinquante ans de sécurité sociale ... et après?*, vol. 1. *La sécurité sociale: reflets de la société*, Brussels, Bruylant, 1995, p. 38. By the same author, “Les droits économiques, sociaux et culturels”, in *La consécration des droits économiques et sociaux dans la Constitution (dir. R. Ergec)*, Brussels, Bruylant, 1995, p. 287.

Should we find this surprising? The Luxembourg European Council said on 29 June 1991: “The promotion of economic, social and cultural rights, as of civil and political rights, and of respect for religious freedom and freedom of worship, is of fundamental importance for the full realisation of human dignity and of the legitimate aspirations of every individual.”¹²⁶

Is it excessive to consider that all rights and freedoms are somehow subject to the achievement of this paramount objective? Is it not acknowledged that the right to human dignity transcends other human rights? Without human dignity what is the use in thinking, teaching and believing? Without human dignity, what is the point in working, educating oneself and enjoying economic and social advantages?¹²⁷

In short, human dignity is placed on a pedestal. It is the fundamental basis, the ultimate reference. The Constitution makes the right to human dignity the objective to be achieved via the attainment of economic, social and cultural rights.¹²⁸

Accordingly, the Constitution establishes – for each and every individual – an absolute right of resistance. It also prescribes a limited duty of restraint for both the government and citizens.

1. With regard to the **absolute right of resistance**, let me refer to the arguments put forward by G. Haarscher.

All individuals have the ability to be free and to give direction to their own lives. “They themselves carry within them, and are responsible for, the meaning of their existence”. Obviously, in practice, everyone is subject to pressure and influences. But no authority is entitled to impose on anyone by force the meaning to be given to that person’s life. “The self-respect to which all individuals are entitled presupposes that the life they lead is the result of a decision taken consciously and not a decision taken by an external authority, even if it were well-meaning and paternalistic.”

The principle of independence presupposes as a fundamental value the individual’s right to an ethical choice of his or her existence. First-generation rights ensure the exercise of this freedom of choice in relation to politics and the community. Second-generation rights are linked to the question of material survival, either at the most basic level of aid or assistance, or – as has been the case since 1945 – at the highest, most demanding level, of a civilised life with high social protection and high integration through work, permitting the effective exercise of democracy.¹²⁹

It has sometimes been argued that Article 23 of the Constitution is a statement of general aims and that these provisions are not for immediate application. There is no justification for

¹²⁶ Quoted by P. Orianne, “Mythe ou réalité des droits économiques, sociaux et culturels”, in *Mélanges offerts à Jacques Velu. Présence du droit public et des droits de l’homme*, Brussels, Bruylant, 1992, t. III, p. 1871.

¹²⁷ The question is of particular relevance in a federal-type state. The Constitution proclaims, in one paragraph, the right to human dignity, but in a second paragraph, or in Article 24, it empowers the various legislatures to take their own decisions in these fields – each according to its own powers and responsibilities (P. Martens, “L’insertion des droits économiques, sociaux et culturels dans la Constitution”, *Revue belge de droit constitutionnel*, 1995, p. 3).

¹²⁸ M. Verdussen and A. Noel, *op. cit.*, p. 131.

¹²⁹ G. Haarscher, *op. cit.*, p. 138.

this view – at least as far as the first paragraph is concerned.¹³⁰ The text is “worded sufficiently explicitly”, writes R. Ergec, “to establish the obligation for both the public authorities and individuals to refrain from any action which might infringe human dignity. [...] As a right of resistance, the right to lead a life worthy of human dignity would therefore produce direct effects, inter alia in horizontal relationships.”¹³¹

2. The **limited duty of restraint** may seem indeterminate insofar as it tends to be confused with the obligation for public authorities and private individuals to respect a number of values referred to in the Constitution. The right to privacy, the right to the inviolability of the home, the right to the inviolability of correspondence, and the right to respect for private and family life are all constitutionally protected interests which may justify an attitude of discretion or even abstention on their part.

But this duty may also have more specific applications, for example in the field of criminal sanctions.

The duty of restraint may be imposed on parliament by the Constitution. When, for example, Article 18 of the Constitution declares that “the civilian death penalty is abolished and may not be re-established”, it prohibits the public authorities from providing for – and a fortiori from carrying out – a penalty which would have prejudicial consequences for the family members of the convicted person, place innocent people in a state of hardship¹³² and prevent them from continuing to lead a life worthy of human dignity.

The duty of restraint may also be reflected in the obligation for the public authorities to adapt their action to particular situations. In the criminal field, in particular, the emphasis should be placed on choosing penalties which are appropriate to the person convicted. M. Verdussen writes: “it is legitimate to ask whether the right to lead a life worthy of human dignity, and more practically, the right to cultural and social development necessarily presuppose the right to individualised punishment for crime, or in more practical terms, the right to be given a sentence which is aimed at what is usually referred to as social rehabilitation.”¹³³

The respect due to individuals must also shield them from inhuman or degrading treatment, in the sense in which it is used in the Convention for the Protection of Human Rights and Fundamental Freedoms.

The duty of restraint may also need to be applied in relations between private individuals. Without analysing the way in which Belgian law applies the theory of the horizontal effect of constitutional freedoms, suffice it to say that many criminal prosecutions are intended as punishment for the behaviour of individuals which violates the dignity of other individuals, be this physical or mental or in relation to their honour, reputation or membership of any kind of group. For example, the legislation to combat racism and xenophobia focuses on respect for individuals irrespective of their origin, race or colour.¹³⁴

¹³⁰ F. Delpérée, “Les droits économiques, sociaux et culturels”, *op. cit.*, p. 288.

¹³¹ R. Ergec, *op. cit.*, p. 16.

¹³² M. Verdussen, *Contours et enjeux du droit constitutionnel pénal*, Brussels, Bruylant, 1995, p. 153.

¹³³ M. Verdussen, *op. cit.*, p. 775.

¹³⁴ Cf D. Batselé, M. Hanotiau and O. Daurmont, *La lutte contre le racisme et la xénophobie*, Brussels, Nemesis, 1992.

Can we regard human dignity as the “alpha and omega”¹³⁵ of the constitutional system for protecting freedoms?

The idea is not a new one. It was already included in the preamble and provisions of the Universal Declaration of Human Rights. “Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”; “All human beings are born free and equal in dignity and rights” (Article 1); cf also Article 23.3.

Human dignity is linked to the very core of the personality. As such it deserves to be in the forefront of human rights. It serves to define the most fundamental rights – if we can use that term. It also establishes an absolute right of resistance.

In addition, human dignity is the objective set for public authorities in the field of human rights: securing and preserving human dignity. This may involve taking positive action, but also, in some cases, refraining from action.

As has been said, dignity is the respect which mankind deserves. Should the emphasis not be on deserving? Human dignity is not something which should be claimed or negotiated. It is something which is absolutely necessary if life is to be worth living.

The right to human dignity in Hungarian constitutional case-law by Ms Catherine DUPRÉ¹³⁶
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Hungary, like most central European states, accords human dignity a special place in its constitutional amendment of 1989.¹³⁷ In Article 54 para. 1, at the beginning of the chapter on fundamental rights, the constitution provides that: “Every human being in the Republic of Hungary shall have the inherent right to life and dignity, of which no one shall be arbitrarily deprived.”¹³⁸

¹³⁵ F. Delpérée, “Les droits économiques, sociaux et culturels”, *op. cit.*, p. 288.

¹³⁶ This paper is the product of four years’ research into the right to human dignity in Hungarian constitutional case-law, summarised in a doctorate thesis entitled: “Imported law and the Hungarian constitutional court: the case of the right to human dignity (1990-1996)”, European University Institute, Florence, June 1998.

¹³⁷ The amended constitution was adopted by the socialist parliament following the Round Tables held in the summer of 1989, and was proclaimed on 23 October 1989. The adopted text marks a break with the socialist constitution of 1949, which had been revised on several occasions. The amended constitution is of a provisional nature and represents a compromise between the country’s various political forces. On the new Hungarian constitutional system, see G. Brunner, *Die neue Verfassung der ungarischen Republik, Entstehungsgeschichte und Grundprobleme*, *Jahrbuch für Politik*, 1991, p. 297; G. Halmay, *Von der gelebten Verfassung bis zur Verfassungsstaatlichkeit in Ungarn*, *Osteuropa Recht*, März 1990, p. 1, and P. Paczolay, *The new Hungarian constitutional state, Constitution making in Eastern Europe*, A.E. Dick (ed.), Washington, Woodrow Wilson Center Press, 1993, p. 21-55.

¹³⁸ Paragraph 2 of Article 54 provides that: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment and, in particular, no one shall be subjected without his consent to medical or scientific experimentation.”

As early as its eighth ruling, the constitutional court, the first judicial body of its kind in the history of Hungary, created by constitutional amendment,¹³⁹ let it be known that it intended to attach considerable significance to Article 54 para. 1.

“The judgement of the constitutional court is based on the interpretation of the right to human dignity. The provisions of Article 54 para. 1 of the constitution define this right as an inherent right of every human being at the beginning of the chapter entitled ‘Fundamental Rights and Duties’. The constitutional court considers the right to human dignity to be one expression of a general personality right. Modern constitutions and constitutional case-law refer to a general personality right in several of its various guises, e.g. the right to free development of one’s personality, the right of self-determination, general freedom of action, or the right to privacy. This general personality right is a ‘parent’ right, i.e. a subsidiary fundamental right, which may be invoked either by the constitutional court or by the ordinary courts in order to protect individual freedom in cases where none of the fundamental rights specifically named can be applied to the situation in question.”¹⁴⁰

Between 1990 and 1996, the court delivered some forty judgements whose key argument rested on the right to human dignity and which helped to regulate the transition from socialist law to the system that Hungary knows today. The human dignity remedy is so wide-ranging and diverse that it is impossible to define all the acts which constitute violations of this right. Also, the connection between human dignity and certain situations protected by Article 54 para. 1 is not always immediately obvious. Article 54 para. 1 is invoked in areas such as abortion or the death penalty, but also in some more unusual ones: procedural matters, the notion of discrimination, the requirement that the proceedings of local assemblies should be public,¹⁴¹ or the right of access to higher education.¹⁴² Also, contrary to what one might expect, human dignity¹⁴³ does not serve as a basis for recognising social rights. In spite of a few hesitations and contradictions concerning the nature of human dignity, its scope and beneficiaries, the Hungarian constitutional court has turned this right into a highly effective instrument of interpretation when it comes to introducing new law in Hungary. In effect, Article 54 para. 1 breaks with the former socialist system of law and in so doing, lays the foundations of the new constitutional order.

I. Human dignity as a turning point

In the present state of Hungarian case-law, human dignity can be defined neither purely in terms of a fundamental right, nor purely in terms of a constitutional principle. It does, however, play a determining role in filtering out, i.e. eliminating, any socialist law still in force after 1989.

A. Human dignity: more than just a constitutional principle or a fundamental right

¹³⁹ Article 32a of the constitutional amendment of 1989 is supplemented by law XXXII of 1989 on the constitutional court. Refer to the special issue of the *Bulletin of Constitutional Case-Law of 1994*.

¹⁴⁰ Judgement No. 8/1990 of 23 April, *Collection 1990*, p. 43. This *Collection* is that compiled annually by the Hungarian constitutional court.

¹⁴¹ Judgement No. 19/1995 of 28 March, *Collection 1995*, p. 101.

¹⁴² Judgements No. 35/1995 of 2 June, *Collection 1995*, p. 163 and 12/1996 of 22 March, *Collection 1996*, p. 241 and *Bulletin of Constitutional Case-Law, 1996*, p. 37, HUN-96-1-003.

¹⁴³ See, for example, the contribution made by F. Delpérée to this collection. See also M.C. Ponthoreau, *La reconnaissance des droits non écrits par les cours constitutionnelles italiennes et françaises, essai sur le pouvoir créateur du juge constitutionnel*, *Économica*, 1994.

In judgement 23/1990, the court ruled that human dignity and human life constituted “a supreme value” and marked the “boundary as regards the State’s power of sanction”.¹⁴⁴ This principle, set forth in the particular context of the unconstitutionality of the death penalty, has not featured regularly in the court’s subsequent decisions.

The early judgements, however, give Article 54 para. 1 a dual philosophical basis which has given rise to two, as yet divergent, interpretations of human dignity. One manifestly draws on the Kantian distinction between object and subject and finds concrete expression in a general personality right. The other, which rests on the notion of equal dignity, as evolved by R. Dworkin, qualifies the ban on discrimination contained in Article 70A para. 1¹⁴⁵ of the Constitution and introduces the notion of positive discrimination.

The notion of equal dignity first appears in judgement No. 9/1990,¹⁴⁶ in which it was held that discrimination based on the composition of families for the purpose of calculating taxation was not unconstitutional. The American origins of this notion are indicated by the president of the court in a later article in an American law review citing the works “Taking Rights Seriously” and “Law’s Empire” by the American theoretician.¹⁴⁷ This judgement was the first in a long series based on the, still largely confused, interpretation of the notion of positive discrimination.¹⁴⁸

At the same time, the court is also developing the notion of human dignity from a Kantian perspective, with the now famous distinction between subject and object. This concept was first heralded in the separate opinion given by the president of the court in judgement No. 23/1990 on the unconstitutionality of the death penalty, but it was not until one year later, in the judgement on abortion, that it was fully adopted by the court. The court’s espousal of the Kantian concept of human dignity can be seen in the following rather bald statement: “according to the classic definition, the human being is a subject which cannot be reduced to an instrument or object”.¹⁴⁹ Thereafter, the court frequently employs this concept to afford protection in situations where there is a threat to individual freedom.

So far, the court has declined to choose between these two philosophical bases for human dignity, making it impossible to define and identify this notion purely in terms of a

¹⁴⁴ *Judgement No. 23/1990 of 31 October, Collection, 1990, p. 93.*

¹⁴⁵ *Article 70A para. 1 provides that: “The Republic of Hungary shall guarantee for everyone in its territory all human and civil rights without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”*

¹⁴⁶ *Judgement No. 9/1990 of 25 April, Collection, 1990, p. 46. A summary of this judgement can be found in the Annuaire International de Justice Constitutionnelle, 1990, p. 748.*

¹⁴⁷ *L. Sólyom, The Hungarian Constitutional Court and Social Change, Yale Journal of International Law, 1994, vol. 19, p. 228.*

¹⁴⁸ *On the interpretation of the principle of non-discrimination through the notion of equal dignity, see in particular judgements 34/1992 of 1 June on the compensation of non-material damage, 61/1992 of 20 November on the tax treatment of loans, 14/1995 of 13 March on the recognition of civil union for homosexual couples (Bulletin of Constitutional Case-Law, 1995, p. 56, HUN-95-1-002), 56/1995 of 15 September on calculating and covering the cost of sick leave (Bulletin of Constitutional Case-Law, 1995, p. 311, HUN-95 3-008), and judgement No. 22/1996 of 25 April on compensation for persons deprived of their life “for ideological reasons” (Bulletin of Constitutional Case-Law, 1996, p. 225, HUN-96-2-006).*

¹⁴⁹ *Judgement No. 64/1991 of 17 December, Collection, 1991, p. 289.*

constitutional value. The alternative, i.e. defining human dignity purely in terms of a fundamental right, appears equally unsatisfactory.

Clearly, ever since judgement No. 8/1990 in which the court effectively paired the right to human dignity with a general personality right, it has regarded human dignity as being separate from the right to life, with which it is linked in Article 54 para. 1. Three years later, the court clarified this distinction: there are two aspects to human dignity: the right to life and a general personality right (judgement No. 4/1993¹⁵⁰). The latter aspect is the dominant one in case-law. While the court clearly affirms that human dignity is also a fundamental right, it has great difficulty defining its constituent elements.

In the early years of Hungarian case-law, the rules governing the protection of human dignity fluctuated between the kind of absolute protection proclaimed in the judgement on the unconstitutionality of the death penalty (No. 23/1990) and ordinary protection of the right to human dignity in conjunction with a general personality right. This distinction stems from judgement No. 4/1993¹⁵¹ on the restoration of the former property of the Church, in which the court separates the two strands of the right to human dignity: the right to life and a general personality right. Judgement No. 75/1995, on judicial proceedings to refute the presumption of paternity, states that it is only when taken in combination with the right to life that human dignity constitutes an inviolable right. In other cases, when human dignity is interpreted in conjunction with a general personality right, it is subject to constitutional limitations in the same way as other fundamental rights. It is worth noting that the only judgement to interpret the right to human dignity “in combination with the right to life” is that on the unconstitutionality of the death penalty. In all the other judgements, therefore, the right to human dignity is deemed to be no more than an ordinary right.

Determining who is entitled to human dignity is just as awkward. The original notion that human dignity is exclusively the preserve of human beings, expressed implicitly in judgement 8/1990 and explicitly in the judgement on the unconstitutionality of the death penalty (No. 23/1990), would seem to be contradicted by a judgement given in 1996. In this complicated judgement (No. 24/1996) on the freedom to acquire and utilise works of art, the court grants certain associations freedom of action (freedom of legal transaction) deriving from a general personality right, which is itself an aspect of the right to human dignity. The court seems to recognise here that certain legal entities can, in some cases, enjoy the right to dignity, which is no longer regarded as an exclusively human quality therefore. As far as natural persons are concerned, the current interpretation of Article 54 para. 1 does not allow the court to resolve the thorny issue of the legal status of the “unborn child”, which is deemed to be a matter for parliament (judgement No. 64/1991).¹⁵²

These numerous contradictions and confusions make it impossible to come up with a consistent (and predictable) view of human dignity, either purely in terms of a fundamental right, or purely in terms of a constitutional principle. The broad lines of the constitutional court’s interpretation of human dignity and the general thrust of its decisions have taken an

¹⁵⁰ A full German translation of this judgement can be found in the work edited by G. Brunner and L. Sólyom, *Verfassungsgerichtsbarkeit in Ungarn, Analysen und Entscheidungssammlung, 1990-1993, Nomos, 1995, p. 421-468.*

¹⁵¹ See the *Annuaire International de Justice Constitutionnelle*, 1993, p. 518-524.

¹⁵² In judgement No. 64/1991, however, the court acknowledged that there was an objective side to Article 54 para. 1 which required the State to protect life. This line of reasoning has seldom been adopted by the court in subsequent rulings.

altogether different path: the notion of human dignity is being used first and foremost to break with the socialist law which still features prominently at every level of regulation in these early years of constitutional transition.

B. The break with socialist law

In invoking the notion of human dignity, the constitutional court is breaking with socialist law in two ways. Firstly, judges are not drawing on the existing body of law to interpret Article 54 para. 1 and secondly, the human dignity clause is helping to rid Hungarian law of any last remaining vestiges of socialist legislation.

The court does not use Hungarian law to interpret Article 54 para. 1: it never avails itself of the civil code articles providing for “rights attached to the personality” and comprising the notion of human dignity. Article 76 of the current civil code provides, as part of a ban on discrimination, for protection of human dignity in combination with protection of the right to honour.¹⁵³ This article does not offer a concrete definition of human dignity. It is, however, surrounded by elements which one also finds in constitutional case-law. Likewise, the court makes no use of the civil rights “attached to the personality” when interpreting Article 54 para. 1. The existence of civil case-law and theoretical works on these civil rights, and the fact that there is an eminent civil rights expert on the court’s staff, suggest that there is something quite deliberate in this eschewal of civil law.¹⁵⁴ For the moment, therefore, constitutional law relating to a general personality right is evolving separately and independently from civil law.

The court makes equally little reference to Hungary’s previous constitutional history with regard to human dignity, which does nevertheless appear at least once in contemporary law, before socialist law became dominant. It was in the preamble to constitutional law I/1946 establishing the powers of the president of the Republic that Hungary first recognised “the right to a dignified human life free from any oppression” and the right “to dignified development and education”.¹⁵⁵ The judges, who referred to this law in another ruling, in order to interpret the scope of the powers of the president of the Republic (judgement No. 48/1991), refuse to accept the 1946 text as a starting point for, or factor in, their interpretation of human dignity.

Generally speaking, whenever the court invokes the right to human dignity, the impugned provision is found to be unconstitutional. In these early transition years, moreover, it is mainly socialist rules that are being annulled in this way. Probably the most striking example of this practice is the stripping of the public prosecutor of his more obviously socialist powers. By judgements 9/1992 and 1/1994, the court did away with two typical features of

¹⁵³ Article 76 of the Civil Code provides that: “Any discrimination against private individuals by reason of their sex, race, nationality or name, any infringement of freedom of conscience, any unlawful restriction of personal freedom, any bodily injury or injury to health, honour or human dignity shall expressly constitute a violation of the rights attached to the personality.”

¹⁵⁴ On personality rights, see L. Sólyom, *Die Persönlichkeitsrechte, eine vergleichend-historische Studie über ihre Grundlagen*, Budapest 1984 and K. Törö, *Protection of the personality within the Hungarian legal system, in Human Rights in Today’s Hungary*, Budapest, 1990, p. 87-109.

¹⁵⁵ Extract from the preamble to Law I/1946 on the form of the Hungarian State: “The inviolable rights of the citizen shall be in particular: personal freedom, the right to a dignified human life free from any oppression, and from any fear, freedom of conscience and expression of opinion, freedom of worship, the right of assembly, the right to ownership, to personal safety, to work, to dignified development and education, the right to participate in the management of the affairs of the State and to self-government (...).”

the public prosecutor's powers under the socialist regime. The first is the procedure for contesting legality which allowed the public prosecutor to challenge a final court decision, in the name of socialist legality, at his own unfettered discretion, with no possibility of appeal and no time-limit. The court based its finding of unconstitutionality on the parties' right of self-determination, as derived from the notion of human dignity.¹⁵⁶ The second judgement, No. 1/1994, found that the public prosecutor's general powers to institute and intervene in civil proceedings in the name of "protecting state interests and important social interests" were unconstitutional. The court ruled that these provisions violated Article 54 para. 1 which grant everyone the right of self-determination in matters relating to proceedings, as well as general freedom of action, implying the freedom to refrain from instituting proceedings.¹⁵⁷

Finally and most importantly, human dignity is used by the court as an alternative legal basis to the constitutional provisions inherited from the socialist regime. Pleading the "subsidiary" nature of human dignity, which the court presents as a right that is used in the absence of a more specific, written constitutional right, the court is, in reality, eliminating from its legal arguments any rights which smack of socialist ideology. These rights are either a direct legacy of the previous constitution and thus appear unchanged in the 1989 amendment, or rights which do not stem directly from the socialist version of the constitution, but whose vague, general wording fails to explicitly banish the spectre of socialist law, as it were. Either way, the use of human dignity allows the court to pick and choose its constitutional arguments to the detriment of any Hungarian socialist law still in force.

This task of negating and destroying the former domestic legal system has gone hand in hand, in constitutional case-law, with the foundation of a new order based on non-indigenous elements, i.e. law which has been imported via the notion of human dignity.

II. Human dignity as the basis for a new body of constitutional law

The right to human dignity allows the court to introduce the new, and fundamental, notion of individual autonomy. It gives concrete expression to this concept by introducing individual rights which the judges derive from Article 54 para. 1. These derived rights all have their origins outside Hungarian law: they are rights which have been imported from western law, namely German constitutional case-law.

A. The introduction of individual rights

Individual autonomy is central to the Hungarian definition of human dignity and, as such, is prompting a reversal of positions between the individual and the State, ideology and society. Nowadays, it is the individual whom the State is required to protect by providing constitutional guarantees of his freedom of action.

The court gives concrete expression to this new principle through a large number of new individual rights, discovered in the wake of the right to human dignity. Generally speaking, the court begins by establishing an equivalence between the right to human dignity and a general personality right which, according to the court, is merely one of its expressions. This right does not feature in the constitution and is connected to the latter by the fact that it is

¹⁵⁶ *Judgement No. 9/1992 of 30 January, Collection, 1992, p. 59. Annuaire International de Justice Constitutionnelle, 1992, p. 581 and Verfassungsgerichtsbarkeit in Ungarn, p. 314-327.*

¹⁵⁷ *Judgement No. 1/1994 of 7 January, Collection, 1994, p. 29; Annuaire International de Justice Constitutionnelle, 1989, p. 801, and Bulletin of Constitutional Case-Law, 1994, p. 28.*

equated with the right to human dignity. The court develops this argument by mentioning four major derived rights: general freedom of action, the right to free development of one's personality, the right to privacy and the right of self-determination. This view of human dignity is explicit right from the outset, in the first judgement (8/1990), and runs as a leitmotiv through subsequent judgements. These examples are not exhaustive and the court uses these rights to discover yet more rights: freedom of action in procedural matters, self-determination in proceedings, the right to know one's genetic origins, the right of access to higher education, freedom to marry, etc.

By far the most commonly invoked right is the right of self-determination. It features in judgement No. 8/1990 concerning the representation of employees by trade unions and is used to justify the unconstitutionality of the powers of the public prosecutor (9/1992, 1/1994). It has also given rise to the right to self-identification and to know one's biological father (57/1991 and 75/1995). The right to free development of one's personality encompasses the right of sportsmen and sportswomen to participate in competitions and to change associations (27/1990), and the right to pursue a higher education (35/1995 and 12/1996). The notion of privacy from the point of view of Article 54 para. 1 is merely outlined by the court because Hungary's amended constitution contains a specific article on the protection of privacy and personal data (Art. 59¹⁵⁸). The reference to privacy as one element of a general personality right thus appears only in the early judgements: processing of personal data (15/1991), and protection of good reputation in the execution of payment procedures (46/1991). In the judgement on abortion, the privacy of the pregnant woman is invoked by the court, but it makes no attempt to develop this argument (64/1991).

The founding role of human dignity is thus twofold. For one thing, it allows judges to introduce the principle of individual autonomy. This has two consequences: one is recognition of the right of self-determination as a fundamental constitutional right, and the other is the obligation now placed on the State to treat the individual as a human being and not simply as an object. Secondly, human dignity allows the court to supplement Hungary's existing body of law with numerous fundamental rights which are not incorporated in the 1989 constitution, but which are recognised by case-law.

Hungarian judges are coming round to the widely held view that human dignity, described as "source-law" or "parent-law" in Hungarian case-law, is the source of other constitutional rights, that it is the basis of other rights and, indeed, of the constitutional system itself. What makes Hungarian case-law special here is the fact that the rights derived from human dignity are rights which have been imported from another country's constitutional case-law, that of the Federal Republic of Germany.

B. The foundation provided by imported law

Through the human dignity clause, the Hungarian constitutional court is importing into its case-law rights which were originally developed by the German federal constitutional court. Accordingly, each of the rights derived from Article 54 para. 1 originates in German judgements delivered in pursuance of Articles 1 and 2 para. 1 of the Basic Law.¹⁵⁹ This can be seen in the use of German expressions such as the free development of one's personality,

¹⁵⁸ Article 59 para. 1 of the constitutional amendment provides that: "Everyone in the Republic of Hungary shall have the right to good reputation, the inviolability of the privacy of his home and correspondence, and the protection of his personal data."

¹⁵⁹ See C. Walter's contribution to this collection.

general freedom of action and also the interpretation of human dignity in connection with the free development of one's personality (Art. 1 para. 1 and Art. 2 para. 1 of the Basic Law). The practice of importing law is illustrated by the similarities in the use made of these rights in German and Hungarian case-law. For example, the Hungarian court, like the German court, derives its notion of privacy from that of human dignity.¹⁶⁰ Likewise, several Hungarian court judgements (particularly in the very early years) can only be fully understood when compared with German rulings on similar questions. The tortuous arguments of the judgement on abortion (64/1991) begin to make sense when read in conjunction with the relevant German decisions (BVerfGE 39, 1 and 82, 203). Similarly, the judgement on the statistical processing of personal data (15/1991) is more easily understood in the light of German case-law (BVerfGE 27, 1, (6), and 65, 1), while the judgement on the right to know one's genetic origins (57/1991) becomes abundantly clear if one is familiar with its German counterpart (BVerfGE 79, 256, (268)).¹⁶¹

Apart from judgements No. 15/1991 and 64/1991 where German case-law is mentioned, the Hungarian court gives no hint of these German references in its case-law. Hungarian judges do regularly refer, however, as part of the core definition of human dignity, to "modern constitutions and their case-law" when interpreting Article 54 para. 1. The Hungarian court is not looking, therefore, to simply copy a ready-made foreign solution: the gap between the two countries' case-law is considerable, and differences abound. Also, despite the fact that it has adopted certain German rights, the Hungarian court tends to rule along different lines from its German counterpart. What the Hungarian court *does* find in the imported law, however, is a judicial benchmark, a yardstick of constitutionality with which to measure the provisions that come under its scrutiny. Incorporated through the open list¹⁶² of human dignity, the imported law of German judicial practice is thus treated as natural law in Hungarian judicial practice.

Interpretation via the notion of human dignity, or rather the invoking of several unwritten, imported constitutional rights, gives a positive dimension to the near-systematic findings of unconstitutionality and annulment of provisions resulting from the arguments based on Article 54 para. 1. At the same time, this constructive judicial practice is enabling Hungary to raise itself, through this highly symbolic law, to a certain European standard of protection of fundamental rights.

The right to human dignity, as found in Hungarian constitutional case-law, possesses a number of universal features: there is a very strong ethical, philosophical or moral side to it, which distinguishes it from the common run of fundamental rights. It is the source of other, derived rights, and the basis of a constitutional order.

The extreme circumstances in which the Hungarian court found itself in its early years of operation, and which saw the rapid transition from socialist law to the current system, have led to extremely intense use of the notion of human dignity, in terms of the number of

¹⁶⁰ Following this initial enthusiasm for importing the concept of privacy derived from human dignity, the Hungarian court seems, in its post-1991 judgements, to have moved away from the German method and to relate the notion of privacy to Article 59 of the Hungarian Constitution.

¹⁶¹ For an outline of the background to the German judgement, see A. Schmidt-Didczuhn, *(Verfassungs)Recht auf Kenntnis der eigenen Abstammung? Juristische Rundschau*, 1989, p. 228-232.

¹⁶² On the concept of the open list as a transition from natural law to positive law, see H. Mota, *The principle of the open list in the field of fundamental rights, La justice constitutionnelle au Portugal*, P. Bon and others (ed.), *Economica*, PUAM, 1988, p. 177.

judgements delivered and their importance, the variety of judicial interpretations placed upon human dignity and its sphere of operation. Finally, and most importantly, it is through the notion of human dignity, this extraordinary instrument of interpretation, that the transition from one legal system to another has been achieved in such a short period of time (less than ten years).

The speed of change in Hungary and the exceptionally innovative nature of Hungarian constitutional case-law make it impossible to draw any firm conclusions here. The most one can do is to venture three possible scenarios for the future of human dignity in Hungarian constitutional case-law. Under the first of these, once the constitutional transition is complete, human dignity would lose its *raison d'être* and would become, in conjunction with a general personality right, an ordinary fundamental right as seemingly suggested by judgement No. 75/1995. Under the second scenario, the importation of individual rights via the notion of human dignity should be viewed as a temporary, emergency solution until such time as the European Convention on Human Rights, signed and ratified by Hungary, acquires its full weight and binding force in Hungarian law. The articles of the Convention would then supersede or redefine, in Hungarian case-law, most of the derived rights imported via human dignity. And under the third and last scenario, once the foundations for Hungary's new constitutional law have been laid, human dignity would come into play only in exceptional circumstances. The court would then begin looking to its own case-law to discover new rights, keeping the human dignity argument for highly controversial matters, i.e. those which require first and foremost a choice of principle (one might also say a choice of policy), as opposed to mere application of the legal rules already in place.

THE PRINCIPLE OF RESPECT FOR HUMAN DIGNITY by Mr Tholakele Hope MADALA,

Member of the Constitutional Court, Republic of South Africa

I. Introduction

In dealing with the principle of respect for human dignity in my country, I wish to begin by setting out a very brief outline of the situation as it obtained immediately prior to the advent of the new constitutional order, and in this regard, I can do no better than refer to Mohamed DP (now CJ) in *Azapo and Others v President of the Republic of South Africa*:¹⁶³

“For decades South African history has been dominated by a deep conflict between a minority which reserved for itself all control over the political instruments of the State and a majority who sought to resist that domination. Fundamental human rights became a major casualty of this conflict as the resistance of those punished by their denial was met by laws designed to counter the effectiveness of such resistance. The conflict deepened with the increased sophistication of the economy, the rapid acceleration of knowledge and education and the ever increasing hostility of an international community steadily outraged by the inconsistency which had become manifest between its own articulated ideals after the Second World War and the official practices which had become institutionalised in South Africa

¹⁶³ 1996 (4) SA 671 (CC) at 676.

through laws enacted to give them sanction and teeth by a parliament elected only by a privileged minority. The result was a debilitating war of internal political dissension and confrontation, massive expressions of labour militancy, perennial student unrest, punishing international economic isolation, widespread dislocation in crucial areas of national endeavour, accelerated levels of armed conflict and a dangerous combination of anxiety, frustration and anger among expanding proportions of the populace. The legitimacy of law itself was deeply wounded as the country haemorrhaged dangerously in the face of this tragic conflict which had begun to traumatise the entire nation.”

The new order was arrived at in two stages. In the two or three years prior to the 1994 elections, heavy negotiations were undertaken by representatives of the various political parties in consequence of which 34 Constitutional Principles were drawn up and which were the basis of the Interim Constitution. Even in those 34 Principles, the principle of respect for human dignity was accepted and subsequently entered in the said Interim Constitution which came into being on 27 April 1994.

The final Constitution is now in place and proclaims itself as the supreme law of the country. In its preamble and in the chapter on founding provisions, we commit ourselves to healing the divisions of the past, to establishing a society based on democratic values, to the restoration of human dignity and social justice and to the advancement of human rights and freedoms.

The principle of respect for human dignity is the cornerstone of our democracy and is enshrined in the founding provisions of the 1996 Constitution which came into force on 4 February 1997. The Constitutional Court had to ensure that the new Constitution was not inconsistent with the 34 Principles aforementioned. If it did not comply with those 34 Principles, it would not have been certified.

In some countries, the Constitution only formalises, in a legal instrument, a historical consensus of values and aspiration evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past what is morally and legally defensible and in the words of Mohamed J (as he then was) in the so-called death penalty case of *S v Makwanyane and Others*:¹⁶⁴

“[...] represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.”

The Constitution identifies the foundational values upon which the democratic state is founded, these being, *inter alia*:

- “(a) ability, responsiveness and openness.” Human dignity, the achievement of equality and the advancement of human rights and freedoms,
- (b) non-racialism and non-sexism,
- (c) supremacy of the constitution and the rule of law,

¹⁶⁴ 1995 (6) BCLR 665 (CC) at para 262.

(d) universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure account.”

In the Interim Constitution, the Principle was enunciated in the Bill of Rights in section 10. In the *Makwanyane* case, the right to human dignity was categorised by the Constitutional Court, together with the right to life as “the most important of all human rights”.¹⁶⁵

O’Regan J. pointed out that “without dignity, human life is substantially diminished”.¹⁶⁶

In South Africa, the restoration of human dignity is really paramount given the fact that apartheid was a denial of common humanity.

The centrality of the Bill of Rights (chapter 2 in the 1996 Constitution) and its foundational values to the newly created democracy are expressed in section 7 of the new Constitution, which provides:

“(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

(2) The state must respect, protect, promote and fulfill the rights in the Bill of Rights.”

Section 10 of the Bill of Rights enshrines the principle of human dignity as a human right by providing that:

“Everyone has inherent dignity and the right to have their dignity respected and protected.”

The South African Constitution in itself does not create a hierarchy of rights but the Bill of Rights, which is the cornerstone of our democracy, enshrines the democratic values of human dignity, equality and freedom. For South Africa this needs to be so because of our past.

The restoration of human dignity and equality in my view will have been fully achieved when the people of South Africa enjoy in full measure the other rights contained in the Bill of Rights.

II. Response to specific aspects of the questionnaire

A. Caveat, mentioned at the outset

In presenting this window into the South African treatment of the principle of dignity, I feel it necessary to mention this caveat right at the outset - we have only recently begun developing a constitutional jurisprudence that expressly includes the right to dignity. Therefore, I will as far as possible refrain from pre-empting any question that our Constitutional Court might be called upon to adjudicate. However, to the extent that I may perhaps be construed as venturing a view on a particular matter which has not come before our Court, I hasten to add

¹⁶⁵ *S v Makwanyane (supra) at para 144.*

¹⁶⁶ *S v Makwanyane (supra) at para 327.*

that such view/s are merely my opinion - a very lightly considered opinion at that. In no way do they reflect any final sentiment of mine, nor can they be taken as a pronouncement of the Constitutional Court.

The reason for this reticence on my part is historical. South Africa has only just emerged as a constitutional democracy and embraced the rule of law as such. Prior to 1994, the principle of human dignity, even at the extra-legal level of 'moral law' was honoured more in its breach than in its observance by the Apartheid regime. Since the adoption of the Interim Constitution on the 27 April 1994 however, the right to dignity, as a human right proper, has become constitutionally entrenched.

B. Applications of the principle of human dignity

a. In the seventy cases thus far decided by the Constitutional Court, approximately thirteen of these have made some sort of reference, with varying degrees of intensity, to the right to human dignity.

These judgements aside though, the right to dignity has on many more occasions been cited by counsel appearing before this Court in oral argument. Dignity itself being such an amorphous and nebulous value, has resulted in the right being cited willy-nilly, without the development of a coherent and informed basis for arguing. Not infrequently, counsel merely catapults the right into their argument as a last resort or as a buttressing right, desperately looking for a peg, any peg that they can find, to hang their argument on.

b. Our very Constitution,¹⁶⁷ although containing the specific right to dignity in the chapter on Fundamental Rights,¹⁶⁸ is itself a law that has been founded on the principle of human dignity. The Constitution is punctuated by references to human dignity, emphatically expressing that this principle is the touchstone of our constitutional state. Herewith follows some of the apposite constitutional text (emphasis mine):

➤ *Chapter 1 (Founding Provisions), section 1(a):*

“The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.”

➤ *Chapter 2 (Bill of Rights), section 7(1):*

“Rights

(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”

➤ *Chapter 2 (Bill of Rights - Arrested, Detained and Accused persons), section 35(2)(e):*

¹⁶⁷ And here henceforth I am dealing with the 1996 Constitution, Act 108 of 1996.

¹⁶⁸ Chapter 2 of the Constitution of the Republic of South Africa, 1996.

“Everyone who is detained, including every sentenced prisoner, has the right

(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment;...”

➤ *Chapter 2 (Bill of Rights - Limitations Clause), section 36:*

“Limitation of rights

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including [...]”

➤ *Chapter 2 (Bill of rights - States of Emergency and table of non-derogable rights):*

Section 37 provides, *inter alia*, for the degree to which a right in the Bill of Rights may be derogated from in a state of emergency. Even in a properly enacted state of emergency, the right to human dignity is protected entirely.

➤ *Chapter 2 (Bill of Rights - Interpretation of the Bill of Rights), section 39(1)(a):*

“When interpreting the Bill of Rights, a court, tribunal or forum-

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom [...]”

In addition to this express incorporation of the principle of human dignity in the Constitution (as described above), there is a veritable thesaurus of other post-1994¹⁶⁹ statutes that have been, and continue to be founded, upon human dignity. Hereunder follows a few of them:

➤ *Promotion of National Unity And Reconciliation Act 34 of 1995 [Assented to 19 July 1995 - Date of Commencement: 1 December 1995]*

The purposive preamble to this act states that it is to provide for *inter alia*:

“ [...] the taking of measures aimed at the granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity of, victims of violations of human rights [...]”

➤ *Higher Education Act 101 of 1997 [Assented to 26 November 1997 - Date of Commencement: 19 December 1997]*

This act attempts to deal with the massive imbalances in tertiary education as a result of the racist practices of the apartheid regime.

¹⁶⁹ *In other words, enacted by the new democratically constituted legislature operating within the parameters of a constitutional state.*

The purposive preamble to it is *inter alia*, to “promote the values which underlie an open and democratic society based on human dignity, equality and freedom;...”

- *Choice on Termination of Pregnancy Act 92 of 1996 [Assented to 12 November 1996 - Date of Commencement: 1 February 1997]*

This act was enacted so as to determine the circumstances in which and conditions under which the pregnancy of a woman may be terminated; and to provide for matters connected therewith.

The preamble to this act “[r]ecognis[es] the values of human dignity, the achievement of equality, security of the person, non-racialism and non-sexism, and the advancement of human rights and freedoms which underlie a democratic South Africa;...”

- *Extension of Security of Tenure Act 62 of 1997 [Assented to 19 November 1997 - Date of Commencement: 28 November 1997]*

The purpose of this act is essentially “[t]o provide for measures with State assistance to facilitate long-term security of land tenure” for people who have lived on that land for generations but have been denied any rights thereto.

Chapter III, section 5 of the Act, dealing with the rights and duties of occupiers and owners, re-iterates the fundamental rights of these hitherto powerless and arbitrarily dispossessed land occupiers:

“Subject to limitations which are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, an occupier, an owner and a person in charge shall have the right to:

- (a) human dignity;”

Paragraph references to the right to dignity in the *Makwanyane* decision are as follows:

- Paras 57; 84; 94; 137; 196; 281-4; 318; 327-8; 335-8; 346.

**Human dignity in constitutional law in South-Africa by Dr Irma Johanna KROEZE
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Higher Education, Republic of South Africa**

I. Definition and legal force of the principle of human dignity

a. Human dignity is enshrined in chapter 1 (the Founding provision), section 1 of the *Constitution of the Republic of South Africa*, 1996 as one of the values on which the Republic is founded.¹⁷⁰ This is repeated in chapter 2 (the Bill of Rights) section 7(1) as one of the

¹⁷⁰ Section 1 reads: “The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms. ...”

democratic values on which the Bill of Rights is based.¹⁷¹ Section 10 contains the explicit protection of the right to human dignity.¹⁷² Section 37(5)(c) provides that the rights protected in section 10 are non-derogable in case of states of emergency. This indicates the importance of this right. Furthermore, section 35(2)(c) provides that detained and sentenced prisoners have the right to "conditions of detention that are consistent with human dignity...".

The Constitution also contains a general limitations clause. Section 39 provides that limitation of rights may only take place " ... in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom ..." Finally, section 39(1) requires that interpretation of the Bill of Rights must promote the values underlying the constitution, including human dignity.

It is therefore clear that human dignity is protected both as a constitutional value and as an individual right. This means that interpretation and application of all rights must be undertaken in order to facilitate human dignity. Human dignity was also included in the 1993 interim Constitution as a founding value. The values underlying the two Constitutions are the same, because the final Constitution had to meet the constitutional principles set out in the 1993 Constitution.¹⁷³

b. Before the introduction of the 1993 Constitution, this principle was not recognised in South African constitutional law. Of course, it was recognised in the private-law sphere as is the case with most civil-law systems. Infringement of a person's *dignitas* constituted a delict and compensation could be claimed with the *actio iniuriarum*. However, this was only enforceable between individuals and not against the state. The rule derived from Roman-Dutch law.

c. The constitution recognises human dignity as not only a human right, but as a value that is foundational to the legal and social order. Academics argue that the constitution contains a hierarchy of values on which all the rights are based. According to some, human dignity is at the top of this hierarchy. This means that human dignity is the source from which all other rights are derived. Consequently human dignity is regarded as both foundational and as a specific right.

d. In terms of section 8 all natural persons are entitled to the rights contained in the Bill of Rights. Section 28(1)(d) makes it clear that children are also entitled to these rights.¹⁷⁴

e. The specific rules are not laid down in the Constitution, but have been developed in case law.

f. *Damage to a person's reputation* is recognised as a ground for a claim based on delict, as an infringement of *fama*. However, the Constitutional Court held that the interim

¹⁷¹ Section 7(1) reads as follows: "This Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

¹⁷² Section 10: "Everyone has inherent dignity and the right to have their dignity respected and protected."

¹⁷³ See section 73 of the 1993 Constitution.

¹⁷⁴ Section 28(1)(d): "Every child has the right to be protected from maltreatment, neglect, abuse or degradation."

Constitution was not applicable "horizontally" between individuals.¹⁷⁵ Section 16 protects the right to freedom of expression, but this right is limited by subsection (2), which prohibits hate-speech.

The *causing of bodily harm* is, in private law, seen as an infringement of a person's *corpus* and, consequently, a delict. In the Constitution, section 12 guarantees freedom and security of the person. Section 12(1)(c) guarantees the right to be free of all forms of violence from either public or private sources, and section 12(2)(b) guarantees security in and control over one's body.

Sexual harassment can be seen as an infringement of the value of non-sexism as contained in section 1. Section 9 prohibits the state from discriminating on the basis of, *inter alia*, gender, sex or sexual orientation. If sexual harassment is regarded as a form of violence, section 12(2)(b), referred to above, is also applicable.

g. The principle of human dignity is a universal concept. However, its content and application is widely divergent as a simple comparison regarding the death penalty shows. While the concept may be universal, its content and application depend on very specific cultural, political and patriarchal circumstances.

II. Application of the principle of human dignity

a. This principle has been cited widely and used extensively by South African courts. See (c) below.

b. The principle is mentioned in at least two acts. In the preamble to the *Choice on termination of pregnancy act* 92 of 1996, which makes abortion on demand legal, the dignity of women is regarded as the basis for the act. It also forms the basis for a new act prohibiting corporal punishment in schools. The rest has been left to the courts.

c. The courts have used this principle to a very large extent, as the selection below indicates.

In *S v Zuma* 11954 BCLR 401 (CC) the Constitutional Court held that a reversal of the burden of proof in this case was an infringement of the right to a fair trial. The right to be presumed innocent is here based on human dignity.

In the very important *S v Makwanyane and another* 1995 3 SA 391 (CC) the Court held that the death penalty was unconstitutional. It was found that the prohibition against cruel, inhuman and degrading punishment was based on the principle of human dignity and that the death penalty was in conflict with this principle.

The prohibition on discrimination was held to be based on human dignity in *Prinsloo v Van der Linde and another* 1997 3 SA 1012 (CC). Discrimination is defined as "... treating persons differently in a way that impairs their fundamental dignity as human beings, who are inherently equal in dignity."

¹⁷⁵ This is what is known as *Drittwirkung* in German law. See *Du Plessis and others v De Klerk and another* 1996 3 SA 850 (CC).

In *Harksen v Lane NO and others* 1998 1 SA 300 (CC) Justice Goldstone held that "(t)he prohibition of unfair discrimination in the Constitution provides a bulwark against invasions which impair human dignity ...". This was confirmed in *President of the Republic of South Africa and another v Hugo* 1997 4 SA 1 (CC) 22G-23A.

Discrimination against non-citizens in educational positions was held to be unconstitutional in *Larbi-Odam and others v Member of the Executive Council for Education (North-West Province) and another* 1998 1 SA 745 (CC). Its unconstitutionality lay in its "... potential to impair the fundamental human dignity of non-citizens ...".¹⁷⁶

In *Gardener v Whitaker* 1995 2 SA 672 (E) it was held that the right to a good name and reputation must be interpreted as part of the right to human dignity. Therefore the right to reputation is on the same level as the right to free speech and expression.¹⁷⁷ This was confirmed in *Bogoshi v National Media Ltd and others* 1996 3 SA 78 (W) 83E-G.

In *S v Williams* 1995 3 SA 632 (CC) it was found that juvenile whipping as a punishment was unconstitutional as it was seen as an infringement of human dignity.¹⁷⁸ Criticism of this type of punishment as an infringement on human dignity had already been present before the Constitution.¹⁷⁹ The position is further confirmed by similar decisions in Namibia, Zimbabwe and the European Court of Human Rights.¹⁸⁰

In *Coetzee v Government of South Africa* 1995 4 SA 631 (CC) the court held that imprisonment of civilian debtors was unconstitutional. The right to dignity is intertwined with the right to personal freedom and security.

FICTITIOUS CASE STUDY - Questionnaire

1. Definition and legal force of the principle of human dignity

- a. Is the principle of human dignity enshrined in the Constitution? If so, since when? On what occasion was it first included?
- b. If this principle is not in the Constitution, has it been recognised by the courts? If so, which courts?

On what foundation(s) have the courts based their recognition of this principle? What legal force have the courts attributed to this principle (constitutional, "supra-legislative", legislative, "infra-legislative")?

¹⁷⁶ *Larbi-Odam and others v Member of the Executive Council for Education (North-West Province) and another* 1998 1 SA 745 (CC) 756G-757H.

¹⁷⁷ *Gardener v Whitaker* 1995 2 SA 672 (E) 691A.

¹⁷⁸ Juvenile whipping was allowed as a punishment in terms of section 294 of the Criminal Procedure Act 51 of 1977.

¹⁷⁹ See *S v Khumalo and others* 1965 4 SA 565 (N); *S v Masia* 1968 1 SA 271 (T); *S v Myute and others* 1985 2 SA 61 (Ck); *S v Zimo and others* 1971 3 SA 337 (T); *S v Seeland* 1982 4 SA 472 (NC); *S v F* 1989 1 SA 460 (ZH).

¹⁸⁰ *S v Williams* 1995 3 SA 632 (CC) 642F-643C.

- c. Is the principle of human dignity a human right? If so, does this principle have the same legal force as other human rights or is it actually the foundation upon which other human rights are based?
- d. Who is entitled to human dignity?
- e. Are specific rules attached to the principle of human dignity? If so, what rules? Have criteria been laid down to identify a breach of human dignity?
- f. From the following list, which are definite breaches of human dignity: damaging a person's reputation? Causing bodily injury? Sexual harassment? Offering for sale items which it is ethically wrong to sell?
- g. Is the principle of human dignity a "universal" principle? If so, why? If not, why not?

2. Applications of the principle of human dignity

- a. Is the principle of human dignity often cited before the constitutional court?
- b. Have laws been founded on the principle of human dignity? If so, which laws? In which fields?
- c. In which cases has the principle of human dignity been used as a basis for the judge's decision?

Do judges combine the principle of dignity with other principles having the same legal force (such as freedom of the individual)?
- d. Do the courts recognise a breach of human dignity on the basis of subjective elements (ie. taking into account the opinion of the person whose dignity is undermined) or only on the basis of objective elements (ie. without taking into account the views of the person whose dignity is undermined)?

FICTITIOUS CASE STUDY - Law aimed at protecting minors under seven years of age from paedophile offences and at limiting re-offending

Article 1: As security is a fundamental human right, it is the State's duty to combat crime, especially sexual offences, using all the statutory means at its disposal in accordance with the principle of human dignity.

In particular, the State is duty-bound to protect minors under seven years of age, a highly vulnerable section of the population, from any offences of a sexual nature and from repetition of such offences.

Article 2: In a judicial inquiry into sexual offences against minors under seven years of age, the judge responsible for the investigation may order the genetic "finger-printing" of any person, living or dead, who may have been linked in any way whatsoever to the case under investigation.

Such "finger-printing" may be carried out without the consent of those concerned. Persons subjected thereto who are eventually exonerated may be awarded lump-sum compensation.

Article 3: Any persons convicted of a sexual offence against a minor under seven years of age may be placed in detention in special establishments set aside for that purpose, where they shall receive rehabilitative psychiatric treatment unilaterally decided upon by the court in the light of expert medical opinion. In no event shall minors under the age of eighteen be allowed to visit them.

Article 4: If a life sentence is imposed, no reduction in the sentence may subsequently be granted. Exemplary behaviour by the prisoner may therefore, at the most, warrant only an improvement in the conditions of detention.

Any lesser prison sentence may not subsequently be reduced by more than one-third.

Any early release shall be accompanied by the placing of an electronic bracelet on the offender's body so that the police, under judicial supervision, may locate him or her at any time. This measure shall terminate when the initial term of imprisonment imposed on the offender expires.

Article 5: Courts may decide unilaterally, after hearing medical experts, that offenders shall undergo a surgical operation or chemical treatment in order to eliminate their sexual faculties.

Article 6: In the interests of protecting all members of society, a national register shall be set up containing the genetic "fingerprints" of everyone charged with and convicted of such offences. Consultation of the register shall be authorised by the presiding judge of the court of appeal in the area where the request for consultation was made.

Article 7: To the same end, all persons sentenced to ten years' imprisonment or more for such offences shall have a stigma imprinted in a visible place on their skin.

Article 8: All persons convicted of sexual offences against minors under seven years of age shall be required to make a declaration to the local authority of the area where they live. This declaration, which shall be renewed every year on pain of a fine, shall be sent to the head of the law enforcement services and to the presiding judge of the first instance court or court of appeal in the area concerned.

**FICTITIOUS CASE STUDY - Summary of discussions - by Messrs T. MEINDL, ATER, and E. SALES
Lecturer, University of Montpellier I**

Article 1

"As security is a fundamental human right, it is the state's duty to combat crime, especially sexual offences, using all the statutory means at its disposal in accordance with the principle of human dignity.

In particular, the state is duty-bound to protect minors under seven years of age, a highly vulnerable section of the population, from any offences of a sexual nature and from repetition of such offences."

In addition to the question of age, which was considered here from the standpoint of the constitutional court's power of interpretation, the discussion focused firstly on the normative character of the first article and the consequences of this for any review of its constitutionality. Mr Gualandi and Mr Walter noted that article 1 took the form of a preamble rather than an article of a law, since it simply expressed the reasons for the legislation. As a consequence, this article was not subject to constitutional review. However, this conclusion was not accepted by Mr Sadikovic, who thought that the form was of little relevance since the constitutional court's sole power was to ensure that legal texts were compatible with the constitution, whatever their form.

Mr Rousseau asked whether the age limit of seven represented discrimination between minors, which a constitutional court could censure, and said that the court would have two options: to find the words "under seven years of age" unconstitutional while retaining the word "minors", thereby re-establishing equality, or censure the "seven years" but refer the law, or at least article 1, back to parliament. Mr Walter favoured the second option since the first approach would transform the court into a legislative body, but Mr Sadikovic thought that the article could be found unconstitutional irrespective of parliament's wishes – what was important was respect for the constitution. Mrs Kroeze thought that the matter could be resolved by transforming article 1 into a preamble, while Mrs Lewaszkiwicz-Petrykowska said that a constitutional court's powers depended on when the review of constitutionality was exercised. In the case of *a priori* review, the court could refer legislation back to parliament, which could then resume its work. This was not possible however in the case of *a posteriori* review, where the wording had to be accepted and the court could only implicitly suggest a change in its scope to parliament.

Article 2

"In a judicial inquiry into sexual offences against minors under seven years of age, the judge responsible for the investigation may order the genetic "finger-printing" of any person, living or dead, who may have been linked in any way whatsoever to the case under investigation.

Such "finger-printing" may be carried out without the consent of those concerned. Persons subjected thereto who are eventually exonerated may be awarded lump-sum compensation."

The discussion focused firstly on whether conducting genetic finger-printing of "any person, living or dead" was constitutional. Mr Rousseau said that the genetic finger-printing of a deceased person recalled a French case which sought to establish paternity post-mortem, where the right of persons to know their origins was considered to take precedence over the right to rest in peace. However, Mr Walter thought that the situation was not the same since the paternity investigation could be justified by the girl's fundamental right to know her origins, hence the relevance of carrying out this operation, which had to be reconciled with the post-mortem dignity of the putative father. In this case, the relevance of genetically finger-printing a deceased person, possibly long dead, is that it would make it possible to establish that the guilty person was dead, and that the danger he represented had disappeared. This relevance presupposed the – debatable – existence of a right to know who had committed the crime. Mr Peukert thought that the relevance was two-fold: firstly, society had a general interest in knowing whether the danger still existed and, secondly, there was the particular interest of the victim, who could seek damages from the heirs.

The possibility of genetically finger-printing persons "who may have been linked in any way whatsoever to the case under investigation" particularly drew the attention of the members of constitutional courts. It raised the issues of the presumption of innocence and of the consent of the person so investigated. Mr Peukert thought that the presumption of innocence was respected since the finger-printing came within the scope of investigative measures and not the establishment of guilt, the latter being the subsequent responsibility of the courts. In addition, these genetic tests gave substance to the preventive function of the legislation that was subject to review. Could such tests be carried out without individuals' consent without infringing their right to privacy? The answer was yes for two reasons. Firstly, because there was a legal justification for carrying them out: public order and the prevention of crime. Secondly, because to carry out such tests it was simply necessary to take a saliva sample, which did not constitute a major form of intervention, comparable to taking a blood sample, which meant that the means were not disproportionate. Thus, to the extent that the right to privacy was infringed, such an infringement was justified. Moreover, such tests made it possible clearly to establish persons' innocence. For all these reasons, human dignity was, in this case, respected. Only Mrs Lewaszkiwicz-Petrykowska supported this view. Mr Walter, with the agreement of Mr Gualandi, thought that the tests must at the least be based on "suspicion" of guilt. This requirement was not obviated by the fact that such tests enabled persons to establish their innocence since this could perfectly well be achieved on a voluntary basis. The extent of the genetic tests should also be specified: they should be confined to genes relating to a person's identity while those relating to that person's character must be excluded. Mr Vonic also argued that the article was unconstitutional because of the absence of the individual's consent. Mr Sadikovic thought that the general interest, which had provided the justification for the gulags, was too abstract to justify genetic finger-printing.

Article 3

"Any persons convicted of a sexual offence against a minor under seven years of age may be placed in detention in special establishments set aside for that purpose, where they shall receive special rehabilitating psychiatric treatment unilaterally decided upon by the court in the light of expert medical opinion. In no event shall minors under the age of eighteen be allowed to visit them."

The discussion mainly concentrated on the power of the courts to decide "unilaterally" to intern "convicted" persons in special establishments set aside for that purpose. The provision was challenged on several constitutional grounds. While Mr Vonic thought that in this respect the article was compatible with the constitution, Mr Walter and Mrs Kroeze thought that there was a contradiction between being "convicted", in other words being found responsible for one's acts, and internment in a special establishment, which was only intended for sick persons, who were not therefore responsible for their acts. In the former case the internment was preventive, and therefore required the consent of the individual concerned, without which, besides, treatment was unlikely to succeed. Consent was even necessary if treatment would avoid the need to lock someone away for life in order to protect society. For these reasons, the unilateral internment of convicted persons was unconstitutional. Regarding the unilateral nature of the courts' decision, Mr Peukert said that specialist reports were also required to demonstrate the need for medical treatment. Only Mr Sadikovic defended the automatic nature of the internment and proposed that the optional form of wording "may be placed in detention ... and shall receive" be replaced with the obligation to receive treatment: "shall be placed in detention ... and shall receive". In contrast to Mrs Kroeze, Mr Walter thought that a constitutional court was not empowered to decide on the nature of the medical treatment that should be applied.

The reference to "special establishments" was also questioned, and Mr Sadikovic thought it should be replaced by "medical establishments". This change was contested by Mrs Lewaszkiwicz-Petrykowska, on the grounds of protecting persons convicted of paedophile offences.

Finally, Mr Vonica said that the banning of visits by minors aged under eighteen could only be temporary and had to be justified - according to Mr Sadikovic by the treatment, without prohibiting all contact with the outside world. Banning visits by children was only possible if they had been victims of sexual attacks, otherwise, as Mr Peukert and Mr Walter noted, this would be a breach of family rights.

Article 4

"If a life sentence is imposed, no reduction in the sentence may subsequently be granted. Exemplary behaviour by the prisoner may therefore, at the most, warrant only an improvement in the conditions of detention.

Any lesser prison sentence may not subsequently be reduced by more than one-third.

An early release shall be accompanied by the placing of an electronic bracelet on the offender's body so that the police, under judicial supervision, may locate him or her at any time. This measure shall terminate when the initial term of imprisonment imposed on the offender expires."

There were two main impediments to the constitutionality of this article: the impossibility of commuting life sentences and the placing of bracelets so that persons could always be located. With regard to the former, Mr Sadikovic proposed complete rejection on the grounds that there would never be totally hopeless cases. He was supported by Mr Vonica, who said that in Romania conditional release became possible after twenty years. Finally, according to Mr Walter, life imprisonment with no real and practical chance of regaining one's freedom would be incompatible with human dignity, according to German constitutional case-law. On the other hand, paragraph 1 was not in clear breach of article 3 of the European Convention on Human Rights since Mr Peukert did not exclude a declaration of compliance.

Participants then discussed the issue of the placing of bracelets so that prisoners could be located "at any time". Mr Sadikovic and Mr Vonica considered this to be a breach of human dignity, as well as ineffective, and proposed that the paragraph be rejected. Mr Walter thought that whether or not human dignity was violated depended on how discreetly the bracelet was placed. If discretion was assured, the provision offered convicted offenders the possibility of early release. Consideration should also be given to periodic reviews of the need for such bracelets where they were associated with life sentences, in accordance with the aforementioned German case-law. Mr Peukert and Mrs Lewaszkiwicz-Petrykowska said that this measure was ultimately comparable to the requirement that convicted persons report regularly to the competent authorities and that in addition since it entailed granting a sort of favour to offenders, the general interest took precedence over their individual interests, having regard to the paedophile acts for which they had been punished.

Mr Walter raised the issue of respect for equality. If early release as a result of the placing of a bracelet only applied to paedophile offences, this would breach the principle of equality between convicted offenders, since only those who had committed paedophile offences could

benefit. Parliament not only had to respect the equality principle within the law, with all paedophiles entitled to benefit from the measure, but also had to ensure that it did not create new inequalities with regard to existing laws, which meant that all convicted offenders had to benefit from the measure.

Article 5

"Courts may decide unilaterally, after hearing medical experts, that offenders shall undergo a surgical operation or chemical treatment in order to eliminate their sexual faculties".

Attention focussed initially on the procedure to "to eliminate their sexual faculties", and the question was then raised of whether it was possible to waive a right. Mr Vonica and Mr Sadikovic thought that removing sexual faculties was unconstitutional since it infringed the integrity of the person and constituted torture or degrading treatment. Mrs Lewasziewicz-Petrykowska also thought that it was clearly unconstitutional, but on the more qualified grounds that the court's decision was taken unilaterally. Participants also discussed whether it was possible to waive a right. Whether or not such a measure was compatible with the constitution could be considered in the context of the individual's free and informed consent. Mr Walter thought that consent in this case was problematic, given the procedural context in which such persons found themselves, and said that the consent also had to be voluntary, in other words on the "initiative" of the individual concerned. Following the example of transsexuals, how could the voluntary, free and informed choice of a person who had recognised his errors be refused? This option was categorically rejected by Mr Vonica and Mr Sadikovic.

Article 6

"In the interests of protecting all members of society, a national register shall be set up containing the genetic "fingerprints" of everyone charged with and convicted of such offences. Consultation of the register shall be authorised by the presiding judge of the court of appeal in the area where the request for consultation was made."

Several points were discussed. Mr Vonica rejected the principle of such a register, on the grounds that it was only possible for medical reasons and would infringe human dignity, but subject to reservations the other participants at the colloquy accepted it. Mr Peukert considered that the inclusion of accused persons on the register would be incompatible with the presumption of innocence. Mr Walter and Mrs Lewasziewicz-Petrykowska supported their inclusion, but only during the period of investigation, after which they should, if appropriate, be removed from the register. Mr Walter also thought that only genes relating to a person's identity should be covered. The main reservations concerned the excessively broad margin of discretion granted to the president of the court of appeal, which in turn raised the question of the "negative incompetence" of parliament. All the speakers agreed with Mr Gualandi that the legislature had not been sufficiently precise, even though fundamental rights were at issue, and that this paragraph was therefore unconstitutional. However, Mrs Kroeze and Mr Endzins thought that in the event of *a posteriori* review, the courts could clarify the cases in which the register could be consulted, to avoid its being declared unconstitutional. Mr Rousseau and Mr Walter rejected this argument, on the grounds that the courts could not take the place of the legislature, whatever form constitutional review took.

Opinions differed on the possibility of a partial declaration of compliance with the constitution. Some speakers, including Mrs Lewasziewicz-Petrykowska, accepted the

possibility of a partial rejection of the article while others thought that it should be totally rejected.

Article 7

"To the same end, all persons sentenced to ten years' imprisonment or more for such offences shall have a stigma imprinted in a visible place on their skin."

All those taking part naturally and automatically deemed article 7 to be contrary to the principle of human dignity.

Article 8

"All persons convicted of a sexual offence against minors under seven years of age shall be required to make a declaration to the local authority of the area where they live. This declaration, which shall be renewed every year on pain of a fine, shall be sent to the head of the law enforcement services and to the presiding judge of the first instance court or court of appeal in the area concerned."

Mr Rousseau thought that this article infringed convicted persons' freedom of movement and their privacy, since the declaration could be communicated to the head of the law enforcement services. All the participants agreed with this view and article 7 was therefore declared unconstitutional.

CONCLUDING REPORT by Mr Dominique Rousseau Lecturer at Montpellier I University, Member of the French University Institute, Director of CERCOP

This seminar has a history. Two years ago, on 22-23 November 1996, also in Montpellier, a seminar was held on the theme of Europe's Constitutional Heritage.

Though ambitious in conception and complex in its comparative approach, this theme could be formulated simply: despite the differences in history, national tradition, culture, language and religion that make Europe so diverse, is there a body of law shared by all Europeans, making up a common constitutional heritage serving to shape every individual, every society, creating a European constitutional allegiance or quite simply a European constitutional heritage?

After two and a half days of discussion, academics from different fields - law, philosophy, history, sociology - and constitutional court judges agreed at least that the question was worth asking. Better still, it was even agreed to test the hypothesis by examining rights one by one to see whether they were defined and implemented by each country in the same way.

A year and a half later, this undertaking has been honoured, since the purpose of this seminar was to take one right, the right to human dignity, and to consider whether it was to be found in all European constitutions and constitutional case law, to pinpoint similarities and differences in the courts' handling of it, and finally to decide whether it could be regarded as one of the components of Europe's constitutional heritage.

To do this, the seminar was divided into two parts. The first, traditional part was devoted to discussing national reports drawn up on the basis of a questionnaire. The second, rather more unusual part involved the constitutional court judges present examining a fictitious case devised by my team. The seminar was turned into a kind of virtual European constitutional court to determine whether, in a specific instance, the constitutional court judges of the various countries represented in Montpellier could agree on a common position.

To sum up the reports, the discussion of them and the sometimes heated exchanges before the "virtual European constitutional courts" is obviously an impossible task. On the case study, a clause-by-clause summary of the debates has been compiled by Thomas Meindl and Eric Sales from the recordings which have been kept and can be made available to everyone.

Some attempt must nonetheless be made to draw some lessons from the discussions which took place over a week, from 2 to 7 July 1998; I would suggest two.

1. Constitutional recognition of the right to human dignity

Today, this right is recognised in all the European constitutions. This has not always been the case. While Germany included it in its Basic Law in 1949, it was not until new constitutions were adopted in Greece (1975), Portugal (1976) and Spain (1978) and until the early 1990s in all the countries of central and eastern Europe that the right to human dignity was explicitly written into each of these national constitutions. The timing of this recognition confers on this right a very clear political significance: after long years of dictatorship, when the state asserted its power to govern not only society, but also the private and communal lives of each of its members, the authors of the new constitutions, to mark the break with the old order, manifested their will to reconstruct the political order on the primacy of the human being and respect for human dignity. Thus, whatever differences there might be in philosophical or religious inspiration, the political history of the inclusion of human dignity in the constitution shows that it is everywhere a response to the same requirement and reflects the same concern: to build a democratic society.

It is true that some states, which are not dictatorships, took a long time to include the right to human dignity in their constitutions (Belgium through a revision of the constitution on 31 January 1994, France by a Constitutional Council decision of 27 July 1994). Although the circumstances were obviously less dramatic, this official inclusion in the fundamental texts of democratic states expressed the same will to affirm or to re-affirm, in the face of the dangers of all kinds that always threaten the democratic nature of a society, the primacy of human dignity. In a way the process of constitutional consecration of this right in France is exemplary. Firstly, because it was the doing of the constitutional court. Although legal writers had been advocating it for years and the Vedel Committee had proposed it in February 1993, France's constitution-making body, although frequently convened since the beginning of the 1990s, had not taken advantage of the many revisions of the constitution to include this right. It was the Constitutional Council that, by decision of 27 July 1994, made human dignity a constitutional principle by a "sagaciously matured process of legal reasoning", as it was put by a then member of the Council, Professor Jacques Robert. Relying on the first sentence of the preamble to the 1946 constitution - "on the morrow of the victory of the free peoples over the regimes that sought to enslave and degrade the human person, the French people again proclaims that every human being, without distinction as to race, religion or belief, possesses inalienable and sacred rights" - the Council held that it followed from this that "the preservation of human dignity against all forms of enslavement and

degradation was a principle of constitutional value". Secondly, because this principle was so recognised as a result of the scrutiny of two so-called bio-ethics laws, one concerning respect for the human body and the other the donation and use of elements produced from the human body; the significance of this timing is that threats to human dignity come not only from the power of the state, but can also come from science; hence the need, at the dawn of new body-manipulating technologies, to re-affirm and consecrate human dignity as a constitutional principle to be obeyed by all authorities.

Whenever and however consecrated, respect for human dignity is now a shared constitutional principle which accordingly forms part of Europe's constitutional heritage. This convergence is all the more remarkable because the 1950 European Convention on Human Rights, although accepted by all the countries of the Council of Europe, does not explicitly recognise this right, Article 3 stipulating only that "no-one shall be subjected to torture, or to inhuman or degrading punishment or treatment". So efforts to identify a European constitutional heritage from a comparison of national constitutions and constitutional case law can help to enrich, develop and augment the protection of fundamental rights.

2. The right to human dignity as the right to have rights

While all European constitutions now include the right to respect for human dignity, none defines or spells it out. It emerges clearly from all the reports that human dignity is a vague concept capable of many interpretations. This seems to be due to the peculiarity of this right in comparison to the other fundamental rights, be they civil, political, social, economic or cultural. Properly speaking, in fact, the right to human dignity is not so much a fundamental right as a right conferring entitlement to fundamental rights. For instance, Francis Delperée describes human dignity as "the source of other rights, in particular economic, social and cultural rights"; Ms Biruta Lewaszkiwicz-Petrykovska also describes human dignity as the source of freedoms and human rights; Christian Walter shows that fundamental rights are presented in Germany's Basic Law as a consequence of the inviolability of human dignity. In this respect, the words of President Cardoso da Costa seem to sum up not just the Portuguese position, but the commonly accepted view of the right to respect for human dignity: "Strictly speaking, therefore, it would seem that the Portuguese Constitution does not establish 'human dignity' with the force of a 'fundamental right' (or human right). However, if, as a result, it is tempting to suggest that the principle of human dignity is somewhat less than a fundamental right, at the same time it can actually be said to be more than that, as it is the 'value principle' that constitutes the very foundation (and 'criterion') on which the fundamental rights listed in the Constitution are based, giving a 'unity of meaning' to the catalogue as a whole."

Thus understood, human dignity is a vague and very broad concept (Jacques Robert), which is neither capable of precise definition nor able to define once and for all the rights which derive from it. To say that human dignity is not a fundamental right but the source of fundamental rights means that dignity exists as a tangible legal reality only through its realisation in each of the fundamental rights; the latter assume life and meaning through and in this right, but conversely the principle of dignity is realised and becomes effective in the legal sense only through the fundamental rights. It emerges from the various reports and the discussions that the various constitutional rights - the right to privacy, the right to consent to undergo treatment, the right to lead a normal family life, the right to housing, to education, to health, ... constitute the legal way in which the principle of human dignity is given shape; they are the mode of their legal realisation, the means whereby, in a particular field, human dignity exists.

Obviously, a lawyer is bound to ask: if human dignity is not a fundamental right, if it has no content of its own, why recognise it in a legal text and, what is more, in the text which occupies the supreme position in each country ? What can be the significance of including in the constitution a principle which appears to be meta-legal, from which fundamental rights are inspired ? The answer is simple: to lend unity of meaning to the variety of fundamental rights, to lend them coherence, in a constitutional harmony, to serve as a reflexive procedural criterion for the recognition of new fundamental rights. If human dignity is the principle which renders all fundamental rights intelligible, it is logical, precisely in order that those rights may indeed be intelligible, that respect for human dignity should be officially and publicly expounded as a constitutional principle.

Any summary is obviously a simplification. Fortunately so, for if it were complete, exhaustive, a reader turning first to the summary might be prompted not to read the reports. Yet it is in the reports, and only there, that the richness of this seminar lies. Respecting the dignity of each reader means respecting his right to draw his own conclusions from the proceedings. Your humble servant did not wish to usurp that right, but merely to highlight and pay tribute to the very great intellectual quality of the reports and the discussions, to the conviviality and even enthusiasm of the exchanges during consideration of the fictitious case, by singling out, no doubt arbitrarily, the two key ideas that make human dignity a constitutional principle commonly recognised for its ability to generate fundamental rights.

Important though it may be, the principle of human dignity cannot by itself confirm the hypothesis of a European constitutional heritage. Encouraged by the success of this seminar and in keeping with the wishes of all the participants, we must press on with this work and weigh up, at a further seminar, another right. Conserving the method which made this seminar a success: discussion based on national reports and examination of a fictitious case by constitutional court judges forming a virtual European constitutional court.

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