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THE CONCEPT OF "DIGNITY" IN JURISPRUDENCE OF THE CROATIAN CONSTITUTIONAL COURT: A EUROPEAN PERSPECTIVE

Summary: The paper examines the normative substance and functional roles of the legal concept of (human) dignity in the jurisprudence of the Constitutional Court of Croatia. In these two aspects, the Constitutional Court's dignity jurisprudence is compared with the jurisprudence of the European Court of Human Rights, the Court of Justice of the European Union, and high (constitutional and supreme) courts of other European states.

Key words: human dignity, normative substance, functional roles, Constitutional Court of Croatia, European constitutional jurisprudence

1. INTRODUCTION

Courses and seminars on 'human dignity' in many law schools often experience what I think of as a 'reversed' learning process: everyone seems to start the class with a clear and informed idea about what dignity is, for some this being obvious, almost self-explanatory. Hence, the discussions during the first week(s) are super enthusiastic and dynamic. However, as a student individually, together with her classmates as a group, unpacks more and more about this – now it seems, rather vague and elusive idea – discussions during the later portions of the semester become somewhat more careful, uncertain. By the end of the course or seminar, one is left genuinely perplexed about the entire concept of dignity and its legal, political, philosophical, sociological, religious, artistic, historical – you name it – dimension and applications. One has, indeed, 'unlearned' everything they have started this learning experience with; what has replaced this unlearned knowledge is less clear. What is for sure is that one becomes more

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attentive in recognizing the ‘dignity talks’ and all the references – well-placed or misplaced, elaborate or mundane – that pop up almost on a daily basis in the public discourse.

Despite its professed universality – for what could be more universal than this ontological essence of human beings¹ – the substantive notions of human dignity remained highly contextual, so did its procedural implications. Importantly, most of the contemporary constitutional ‘communities of values’ are arguably familiar with some sort of dignity concept(s) that capture(s) their social, political and legal identity. In the legal discourse, analyses of the concept of dignity (or its various conceptions) ever-increasingly appear indispensable for understanding the value orientation of the existing constitutional orders.

Now, there are two typical ways to structure the discussion of dignity as a legal concept in a given constitutional order: first would be a more theoretical inquiry that focuses on a highly contextual, temporally specific substantive content of dignity; second would be a more functionalist, ‘process-oriented’ inquiry that looks into the ‘institutional uses’ or functional roles of dignity in constitutional adjudication;² both with their particular advantages and shortcomings.³

In the present paper, I try to address and capture both of these analytical prongs in the dignity jurisprudence of the Constitutional Court of the Republic of Croatia. To add a comparative dimension, I will draw from other jurisdictions that the Croatian constitutional order interacts with in a composite European ‘constitutional space’: jurisdictions of the Council of Europe’s (CoE) European Court of Human Rights (ECtHR), the European Union’s (EU) Court of Justice (CJEU), and high (constitutional and supreme) courts of other European nation-states.

Also worth noting here is that human dignity as a legal concept has drawn a lot of attention from law- and policy-makers starting with the end of the Second World War onwards. Academic interest in human dignity grew continuously during last couple of decades in Europe,

1 Albeit ‘dignity’ as propriety has been ascribed most notably to human beings, living or deceased – thus ‘human dignity’ as the word’s most frequent iteration – it has been likewise extended to other different entities: (some) animals and species, even inanimate objects or phenomena like institutions, professions, activities, lifestyles, works of art, etc. Also, the idea of someone’s or something’s ‘dignity’ may be expressed with different words in different languages, different eras or different communities. See Mahlmann, M., *The Good Sense of Dignity: Six Antidotes to Dignity Fatigue in Ethics and Law*, in: McCrudden, C. (ed.), *Understanding Human Dignity*, Oxford University Press, Oxford, 2013, pp. 593–614, at p. 595: ‘[O]ne should not look only for the term dignity (dignitas, Würde, kavod etc.) but for historical manifestations of the idea designated by these terms. In these manifestations, the idea may not be called dignity at all. This may be the case because the same or a similar idea can be expressed by many different linguistic means and, of course, not necessarily according to the linguistic expectations of posterity. A language may even lack a term for what is referred to in English by the word “dignity”. This is, however, of no importance, because the absence of such a term in a language is no indication that the idea is absent from the minds of the speaker or the listener in the relevant speech community’.

2 McCrudden, C., *Human Dignity and Judicial Interpretation of Human Rights*, *European Journal of International Law*, vol. 19, no. 4, 2008, pp. 655–724.

3 For instance, Catherine Dupré argued that deriving a coherent substantive meaning of human dignity out of case law is not an effective scholarly exercise. See Dupré, C., *The Age of Dignity: Human Rights and Constitutionalism in Europe*, Hart Publishing, Oxford, 2015, p. 86. Professor Christopher McCrudden, on the other hand, in his seminal article essentially concluded that the substantive content of dignity, even within a single constitutional system, provides little beyond ‘a basic minimum core’; he therefore proposed, as a more useful approach, to observe its functional roles. See McCrudden, C., *op. cit.* (fn. 2), pp. 712–713. Paolo Carozza proposed something of a middle ground, arguing that functionalist approaches might actually contribute significantly to our understanding of the substantive meaning and content of the dignity concept(ions). See Carozza, P., *Human Dignity and Judicial Interpretation of Human Rights: A Reply*, *European Journal of International Law*, vol. 19, no. 5, 2008, pp. 931–944, at p. 939.

recently catching ground in Croatia too.⁴ The opinions in the scholarship vary from very critical⁵ to more positive assessments of dignity's normative substance and uses in adjudication processes.⁶ For the most part, I leave aside these normative objections to the judicial reliance on the concept of dignity, since my intention is to provide descriptive account of the Croatian Constitutional Court's dignity case law.

The structure of the paper is as follows. Following the introduction is the overview of the iterations of (human) dignity as they appear in the Croatian Constitution (Section 2). The central part (Sections 3-5) analyzes the jurisprudence of the Constitutional Court of Croatia and discusses, first, the normative substance of the concept of dignity (Section 4); and second, functional roles of this concept in the constitutional adjudication in Croatia (Section 5). The final part (Section 6) briefly concludes.

2. ITERATIONS OF DIGNITY IN THE CROATIAN CONSTITUTION

Often it is held that Croatia's first democratic Constitution adopted in 1990 was closely modelled after the Constitution of the French Fifth Republic.⁷ Perhaps due to this, it does not

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- 4 For more recent works (in English), see Kostadinov, B., *Human Dignity in Croatia*, in: Becchi, P.; Mathis, K. (eds.), *Handbook of Human Dignity in Europe*, Springer International Publishing, Cham, 2019, pp. 151–171; Pavic, I., *Human Dignity in the Context of Prison Privatization*, *Juridical Tribune/Tribuna Juridica*, vol. 8, no. 1, 2018, pp. 6–30; Ljubic, D., *Human Dignity as a New Constitutional Value of the Constitutional System of Republic of Croatia*, *Revista de Drept Constitutional/Constitutional Law Review*, vol. 3, 2016, pp. 49–64.
- 5 See McCrudden, C., *op. cit.* (fn. 2); Rosen, M., *Dignity: The Case Against*, in: McCrudden, C. (ed.), *Understanding Human Dignity*, Oxford University Press, Oxford, 2013, pp. 143–154; Pinker, S., *The Stupidity of Dignity*, *The New Republic*, 28 May 2008, www.newrepublic.com/article/64674/the-stupidity-dignity; Waldron, J., *Dignity, Rank, and Rights: The 2009 Tanner Lectures at UC Berkeley*, NYU School of Law, Public Law & Legal Theory Research Paper Series, Working Paper, No. 09–50, September 2009, p. 6 (arguing 'against a reading of the dignity idea that makes it the goal or telos of human rights'); Milbank, J., *Dignity Rather than Rights*, in: McCrudden, C. (ed.), *Understanding Human Dignity*, Oxford University Press, Oxford, 2013, pp. 189–205 (arguing not only that human rights do not derive from human dignity, but that concepts of dignity and rights are in tension with one another); Schlink, B., *The Concept of Human Dignity: Current Usages, Future Discourses*, in: McCrudden, C. (ed.), *Understanding Human Dignity*, Oxford University Press, Oxford, 2013, pp. 631–636 (arguing that human dignity does not add any substantive meaning to a legal human rights debate that other concepts like liberty or equality already do not add themselves); Ignatieff, M., *Human Rights as Politics and Idolatry*, Princeton University Press, Princeton, 2001 (arguing, in more general terms, against grounding human rights in human dignity). Note that some high courts have also voiced similar concerns. For instance, the Supreme Court of Canada held that 'human dignity is an abstract and subjective notion that [...] cannot only become confusing and difficult to apply; it has also proven to be an additional burden on equality claimants, rather than the philosophical enhancement it was intended to be'. See *R. v. Kapp*, 2 S.C.R. 483, 2008 SCC 41, judgment of 27 June 2008, para 22. See also the ECtHR, *Vereinigung Bildender Künstler v. Austria*, Application No. 68354/01, 25 January 2007, Joint dissenting opinion of Judges Spielmann and Jebens, para. 9: '[T]he abstract or indeterminate concept of human dignity [...] can in itself be dangerous since it may be used as justification for hastily placing unacceptable limitations on fundamental rights'.
- 6 See Carozza, P., *op. cit.* (fn. 3); Carozza, P., *'My Friend is a Stranger': The Death Penalty and the Global Ius Commune of Human Rights*, *Texas Law Review*, vol. 81, no. 4, 2003, pp. 1031–1089; Hill Jr., T. E., *In Defence of Human Dignity: Comments on Kant and Rosen*, in: McCrudden, C. (ed.), *Understanding Human Dignity*, Oxford University Press, Oxford, 2013, pp. 313–325 (responding to the criticism that dignity is abstract, indeterminate, vague, inherently contradictory, manipulable and inapplicable concept). Note, however, that 'even scholars who have commented positively in general terms on the use of dignity in constitutional adjudication also have identified the risk of over-use or abuse of the idea'. See Carozza, P., *Human Dignity in Constitutional Adjudication*, in: Ginsburg, T.; Dixon, R. (eds.), *Research Handbook in Comparative Constitutional Law*, Edward Elgar Publishing, Cheltenham, 2011, pp. 459–472, at p. 467.
- 7 Kostadinov, B., *Predsjednik Republike – Mimikrija Ustava Republike Hrvatske prema ustavnom modelu Francuske*, *Revus – Journal for Constitutional Theory and Philosophy of Law/Revija za ustavno teorijo in filozofijo prava*, vol. 28, 2016, pp. 63–77; Padjen, I., *Uredbe iz nužde hrvatskog predsjednika: mjerodavnost francuskoga javnog prava*, *Politička misao*, vol. 33, no. 1, 1996, pp. 149–165.

contain a German *Grundgesetz*-style separate and independent reference to human dignity,⁸ either as a value or a right. In this respect, the Croatian Constitution arguably resembles more the Italian Constitution.⁹ Although, due to a recent decision of the Constitutional Court in which it ‘incorporates’ Article 1 right to human dignity from the Charter of Fundamental Rights of the EU – itself in essence mirroring Article 1 of the Basic Law – an argument appeared that through this something akin to a German right to dignity indeed became a part of the human rights catalogue of the Croatian constitution (more elaborate discussion of this comes later in the paper; see Section 4).

The constitutional references to (human) dignity are found in the following provisions.¹⁰

Article 25 provides that ‘[a]ny arrested and convicted person shall be accorded humane treatment, and the dignity of such individual shall be respected’. This reference positions dignity within the classical doctrine of ‘criminal humanitarianism’.¹¹

Article 35 guarantees ‘[r]espect for and legal protection of each person’s private and family life, dignity, reputation and honor’. Here, the reference to dignity captures predominantly its relational and reputational dimensions, as indicative of the social status.

Intersecting with the two aforementioned provisions is Article 22, which stipulates that ‘[h]uman liberty and personality shall be inviolable’. Structurally, this provision comes second after the right to life, which is enumerated first in the catalogue of individual human rights guaranteed by the Croatian Constitution. In this context, ‘liberty’ and ‘personality’ are among the notions that are usually taken to underpin the concept of human dignity. Also, note the resemblance of the formulation ‘shall be inviolable’ with Article 1 of the German Basic Law.¹²

8 The very first article of the German Basic Law enshrines that ‘human dignity shall be inviolable’. The rest of the Article 1’s paragraphs 1–2 state: ‘(1) To respect and protect [human dignity] shall be the duty of all state authority. (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world’. In addition, Article 79, para. 3 of the German constitution (‘the eternity clause’ or the *Ewigkeitsgarantie*) states that ‘[a]mendments to this Basic Law affecting [...] the principles laid down in Articles 1 [human dignity] and 20 [right to free development of personality, right to life and physical integrity] shall be inadmissible’.

9 Compare the latter provisions of the Croatian Constitutions (in this Section 2) and the case law analyzed (in Sections 4–5) with an overview of the Italian constitution in Becchi, P., *Human Dignity in Europe: Introduction*, in: Becchi, P.; Mathis, K. (eds.), *Handbook of Human Dignity in Europe*, Springer International Publishing, Cham, 2019, pp. 1–36, at pp. 9–10: ‘Italy is a Republic “founded on work” (Article 1) and not on the “intangibility” of human dignity [...]. However, human dignity is referred to specifically at three precise points. Article 3(1) recognizes the “equal social dignity” of all citizens, Article 36(1) asserts that a worker has the right to remuneration capable of “guaranteeing a free and dignified existence to himself and to his family”, whilst Article 41(2) asserts that private economic activity may not be conducted “in such a manner as to cause harm to safety, freedom or human dignity”. Although the provisions apply to three different classes of persons (citizens, workers and entrepreneurs), in all three cases the accent falls on the *social dimension to dignity*. [...] [W]hilst under the German Constitution “dignity” is an absolute value applicable in abstract terms to the person in and for himself, under the Italian Constitution it is a *relative value relating to his actual position within the fabric of society* (even though society should in any case guarantee each individual minimum conditions of survival below which no person should fall)’ (italics added).

10 Constitution of the Republic of Croatia, Official Gazette No. 56/1990, 135/1997, 8/1998, 113/2000, 124/2000, 28/2001, 41/2001, 55/2001, 76/2010, 85/2010, 5/2014. All subsequent translations of the Constitution and case law are mine. Note also that there are numerous dignity references found across different legislative acts, which are not of my interest here. Pavic, I., *op. cit.* (fn. 4), p. 8, provides examples of Penal Code, Media Act, Civil Obligations Act, Criminal Code, and Enforcement Act.

11 Becchi, P., *op. cit.* (fn. 9), p. 10.

12 See fn. 8. Unlike the *Grundgesetz* Article 1’s absolute right to dignity, however, the important difference is that Article 22 is not mentioned in the Article 17(3)’s list of non-derogable rights, which are absolutely protected even in situations of an immediate threat to the existence of the state, those being the right to life; the prohibition of torture, inhuman or degrading treatment or punishment; the principle of *nulla poena sine lege*; and the freedom of thought, conscience and religion.

In addition, Article 3 enumerating the highest values of the Croatian constitutional order that are the bases for the interpretation of the Constitution, albeit omitting reference to dignity,¹³ includes values that are usually associated with the concept of human dignity, most notably 'liberty' and 'equality'. (Note too that in Article 3, the first value that is enumerated is liberty, immediately followed by equality. A brief reflection on this sequence of values comes later in the text; see Section 4).

Furthermore, in my view two other constitutional provisions indirectly capture the notion of dignity in its social dimension. Article 56 thus guarantees to '[e]very employee the right to remuneration that enables them to ensure for themselves and their families a free and dignified life.'¹⁴ Similarly, Article 63 mandates '[t]he State [to] protect[] maternity, children and youth, and create[] social, cultural, educational, material and other conditions that promote the achievement of the right to a dignified life'.

From a historical perspective, interesting to note is that socialist constitutions of the former Yugoslavia (and of Croatia, as one of its federal units) referenced dignity in their introductory parts, under the titles enlisting fundamental principles. For instance, the Constitutions of 1963 and 1974 emphasized the necessity of having all state institutions, organizations and working citizens, directly and in all their activities, 'contributing to the realization of human freedoms and rights, humanization of the social environment and human personality, strengthening of solidarity and humanity among the people and respect of human dignity'.¹⁵ The socialist constitutions also mentioned that

13 Ljubic, D., *op. cit.* (fn. 4), p. 54, thus notes that 'the provisions of Article 3 of the Constitution do not contain an indication of any circumstances that would establish a certain sphere of the individual protected from the impact of anyone because of the reason that this individual is considered to be a person and arising from his being and existence. Furthermore, the Constitution does not specify a single value that would be immanent to a person, regardless of the social conditioning of the content of its appearance in society. [...] Article 3 of the Constitution does not derive guidelines on the basis of which we could determine the minimum that makes the concept of a human being, with whose harming an individual undoubtedly loses attribute of humanity'. See also Kostadinov, B., *op. cit.* (fn. 4), p. 169: 'Human dignity is a silent partner in the Croatian constitutional system and occupies a subsidiary position among constitutional principles'.

14 A linguistic note: Articles 56 and 63 of the Constitution (as well as all the references to them in the Constitutional Court's case law) in their original, Croatian versions mention word 'dostojan' (literal translation 'worthy' or 'deserving') and not 'dostojanstven' ('dignified'). Nevertheless, throughout this text I chose 'dignified' as a more proper translation, for several reasons. First, the immediate question that follows word 'worthy [life]' is: 'worthy' of what? It seems that in this context it would stand for 'worthy of man', which would be another way of saying 'dignified'. This becomes obvious when observing words for 'dignity' or 'dignified' in other languages; for instance, German word for 'dostojan' or 'worthy' is 'würdig', 'Würde', which translates also as 'dignified', 'dignity', as in 'Menschenwürde' ('human dignity'). Second, Croatian words 'dostojan' and 'dostojanstven' have the same root. Hence, the Croatian Linguistic Portal enlists as the first definition of 'dostojan' 'that which is suitable in dignity, which has dignity; honorable, respectable', and as the second definition 'which is worthy of something, which deserves something'. The same source for the definition of 'dostojanstven' offers 'which has dignity, which is full of dignity'; and for the etymology of this word directs back to the word 'dostojan'. See *Hrvatski jezični portal*, <http://hjp.znanje.hr/> (the Portal is the first and only free and online available dictionary database of the Croatian language). Finally, there is an obvious inconsistency in the two official authoritative translations of these two Articles: English translation of the Constitution available at the Constitutional Court's website chooses word 'decent' in both of these Articles (<https://www.usud.hr/sites/default/files/dokumenti/The-consolidated-text-of-the-Constitution-of-the-Republic-of-Croatia-as-of-15-January-2014.pdf>), which would translate into Croatian more as 'pristojan'; whereas English translation of the Constitution available at the Croatian Parliament's website in the same two places opts for word 'suitable' (<https://www.sabor.hr/en/constitution-republic-croatia-consolidated-text>), which in Croatian would be 'prikladan'; both versions, therefore, missing out on the full meaning of the word 'dostojan'. For a note on different linguistic, temporal or societal ways of expressing the idea of 'dignity', see Mahlmann, M., *op. cit.* (fn. 1).

15 Constitution of the Socialist Federative Republic of Yugoslavia (SFRY), Official Gazette 14/19, Belgrade, 10 April 1963, pp. 261–292, Introductory Part, Fundamental Principles, Title VIII; Constitution of the Socialist Republic of Croatia (SRC), Official Gazette 15/2019, Zagreb, 10 April 1963, pp. 114–142, Introductory Part, Fundamental Principles, Title VIII; Constitution of the SFRY, Official Gazette 9/30, Belgrade, 21 February 1974, pp. 210–263, Title IX; Constitution of the SRC, Official Gazette 8/30, Zagreb, 22 February 1974, pp. 110–142, Introductory Part, Fundamental Principles, Title X.

‘freedoms and rights [and duties] of a man and a citizen are inalienable component and expression of socialist [self-governing] and democratic relations protected by the constitution, in which man is freed from every exploitation and arbitrariness and through personal joint work creates conditions for holistic development and free expression and protection of his personality and for realization of human dignity’.¹⁶

They also guaranteed ‘respect for human personality and human dignity in criminal and every other procedure, [in the case of detention and restriction of liberty,] as well as during the execution of sentence’;¹⁷ as well as mandated public order and security authorities, in performance of their services, ‘to protect personal dignity of citizen’.¹⁸

Some of these references directly capture the idea of inherent and inalienable human dignity, arguably in a clearer and more straightforward fashion than the current Croatian Constitution. Needless to say, due to the character of the one-party repressive communist regime in the former Yugoslavia, all these dignity references were of merely declaratory nature, in practice ‘dead letters’. Or, perhaps, in that regime and then-mainstream constitutional doctrine, the concept of dignity meant something completely different than today; so, these references to dignity might not be that irrelevant and this particular concept of dignity had indeed been achieved through some social practices of that time.

Be that as it may, all this demonstrates at least two important points: first, how the idea of dignity in Croatia, like many other legal concepts and doctrines,¹⁹ predates the 1990 Constitution (although that Constitution formally severs all the ties with the previous regime); second, how the idea of dignity found a prominent place in the highest legal acts of the societies that were founded on completely different political, ideological and value premises than the contemporary Western liberal democracies.

3. A BRIEF NOTE ON THE STRUCTURE OF THE RESEARCH

The research of the dignity jurisprudence of the Constitutional Court of Croatia included decisions published until 1 July 2019.²⁰ The Court’s online case law database was searched textually by the keyword ‘dignity’ (Croatian: ‘dostojanstvo’, ‘dignitet’).²¹ In total, some five hundred decisions were analyzed, with more than a hundred of the most relevant being discussed throughout this paper.

16 1963 Constitution of the SFRY, *op. cit.* (fn. 15), Article 32(1); 1974 Constitution of the SFRY, *op. cit.* (fn. 15), Fundamental Principles, Title V.

17 1963 Constitution of the SFRY, *op. cit.* (fn. 15), Article 50(2); 1974 Constitution of the SFRY, *op. cit.* (fn. 15), Article 179; 1974 Constitution of the SRC, Article 252.

18 1963 Constitution of the SRC, *op. cit.* (fn. 15), Article 63; 1974 Constitution of the SRC, *op. cit.* (fn. 15), Article 136.

19 For an interesting discussion of the remnants of the former socialist legal tradition in the contemporary Croatian legal culture, see Uzelac, A., *Survival of the Third Legal Tradition?*, Supreme Court Law Review, vol. 49, 2010, pp. 377–396.

20 *Praksa Ustavnog suda Republike Hrvatske*, <https://sljeme.usud.hr/usud/praksaw.nsf>.

21 The search engine enlists all the decisions that contain the keyword in any part of their text. To ensure that all relevant decisions were included, the keyword ‘dignity’ was shortened (Croatian: *dostojan**, *dignit**) so that all the words that contain that same root would be indicated.

4. ON DIGNITY'S NORMATIVE SUBSTANCE

In more general terms, the normative substance of human dignity is often said to capture a wide variety of values, informed by different religious, moral/ethical or philosophical views, and conceptualized on both deontological and utilitarian/consequentialist grounds: for instance, God-like nature of human beings that are endowed with reason and hence possess intrinsic value unlike other living beings; capacity for rationality, self-determination and self-realization; liberty, freedom and autonomy; identity, personality and privacy; solidarity and equality; etc.²²

The German concept, arguably the most famous and developed one in comparative constitutional law, offers an illustrative example: historians tell us that origins of dignity in German Basic Law lie somewhere in between Catholic, Christian democratic-communitarian, liberal-individualist, and socialist understandings of its drafters.²³ Hence, the resulting conceptual vagueness and indeterminacy of the right to human dignity from Article 1 of the *Grundgesetz* makes the entire dignity jurisprudence somewhat controversial;²⁴ the contemporary jurisprudence of German courts, it is noted, is informed by multiple (and at times conflicting) ideologies: most importantly by Catholic, Kantian and socialist thinking.²⁵

Two more specific understandings of (human) dignity nowadays dominate the legal discourse. First is dignity as 'the special position of man within the cosmos'; second is dignity as 'the position occupied by [man] within public life'.²⁶ The former understanding indicates 'ontological depth'; the latter understanding socio-political value.²⁷ The former has 'universalist connotations' and there dignity is possessed by everyone; the latter has particularistic connotations and there dignity is possessed only by those who perform certain services that 'contribute[] to the material or spiritual progress of society'.²⁸

Under the first understanding, dignity is absolute 'in the sense that it cannot either be enhanced or reduced'; under the second, it is relative 'in the sense that it can both be acquired and lost'.²⁹ Hence, human dignity as a constitutional category in its former notion resembles

22 On genealogy of the concept of dignity, see Mahlmann, M., *op. cit.* (fn. 1), pp. 594–597. See also Kostadinov, B., *op. cit.* (fn. 4), p. 152, who notes how '[t]rying to define in advance the meaning of and areas protected by the principle of human dignity necessarily exposes any interpreter to the perilous minefield of various philosophical conceptions. The principle of human dignity is loaded with a 2500-year long history of philosophy. [...] Dignity is a very old concept, but with a short constitutional history' (references omitted).

23 Möllers, C., *Democracy and Human Dignity – Limits of a Moralized Conception of Rights in German Constitutional Law*, Israel Law Review, vol. 42, no. 2, 2009, pp. 416–439, at pp. 417–421; Moyn, S., *The Secret History of Constitutional Dignity*, in: McCrudden, C. (ed.), *Understanding Human Dignity*, Oxford University Press, Oxford, 2013, pp. 95–111.

24 Möllers, C., *op. cit.* (fn. 23), p. 425: 'Today, the doctrine of human dignity, originally meant to be the cornerstone of the whole constitutional order, is more contested than the interpretation of any other fundamental right'.

25 Goos, C., *Würde des Menschen: Restoring Human Dignity in Post-Nazi Germany*, in: McCrudden, C. (ed.), *Understanding Human Dignity*, Oxford University Press, Oxford, 2013, pp. 79–93, at p. 79.

26 Becchi, P., *op. cit.* (fn. 9), p. 2.

27 *Ibid.*

28 *Ibid.*, pp. 2–3.

29 *Ibid.*, p. 3.

Arendtian ‘right to have rights’ or Kelsenian *Grundnorm*;³⁰ whereas in its latter notion resembles more ancient Roman *dignitas*; societal rank, reputation, honor.³¹

The most elaborate understanding of the concept of dignity under the Croatian Constitution was offered recently by the Constitutional Court in a constitutional complaint alleging violation of the constitutional right to respect for and protection of private and family life, dignity, reputation and honor of Article 35, being ‘one of the fundamental human rights guaranteed by the Constitution’.³² The relevant paragraph of this decision merits reproduction in its entirety:

‘Human dignity is *the essential factor of the concept of rights and duties of man. Every human being possesses dignity* by a mere fact of belonging to human race. *In their dignity all men are equal* in their rights and obligations that follow from the human nature. Dignity is *inviolable*, because it stems from human equality. *It belongs to everyone and to everyone equally.*

Reputation and honor are *external manifestations* of human dignity as the sum of ethical values that individual possesses as a member of a certain social community. Subjectively, reputation and honor, being constitutionally protected goods, are manifested through *respect from the surrounding and personal feeling of worth*. The Constitution grants protection to *dignity as characteristic of every man*, but also to *its external subjective manifestation*. This protection, therefore, encompasses *the individual’s intimate sphere*, that is his personal and family life’ (italics added).³³

To unpack this dense statement, briefly and point by point:

First, and the most important, is the universalist, naturalist understanding that everyone ‘possesses dignity by a mere fact of belonging to human race’. Conceptually, human dignity under this understanding is absolute, inviolable.

Reading of this conception of dignity from Article 35 came in an interesting doctrinal move, in which the Constitutional Court incorporated into the Croatian Constitution human dignity as a fundamental right from Article 1 of the Charter of Fundamental Rights of the EU – as mentioned above, until then not recognized in that sense by the Constitution itself. More specifically, the Court first acknowledged that ‘by joining the European Union, the Republic of Croatia has accepted the contents of the Charter, whose [...] Article 1 entitled “Human Dignity” explicitly provides that “human dignity is inviolable and must be respected and protected”’; and that in this way ‘human dignity becomes a component of the human rights cata-

³⁰ *Ibid.*, pp. 7–8.

³¹ Waldron, J., *op. cit.* (fn. 5), pp. 22–23.

³² Constitutional Court of Croatia, Decision U-III-2992/2018 of 8 November 2018, para. 19.4.1.

³³ Constitutional Court of Croatia, Decision U-III-1095/2014 of 21 September 2017, para. 14; Decision U-III-6791/2014 of 30 May 2018, para. 7.

logue of the Croatian Constitution'.³⁴ This decision was highlighted by some commentators as a high watermark of the Court's dignity jurisprudence.³⁵

Note that Article 1 of the Charter thereby incorporated in the Croatian constitutional order in essence 'mirrors' Article 1 of the German Basic Law.³⁶ The very wording and position of human dignity clauses in these two documents are telling;³⁷ also, the formulation of the EU's dignity clause was highly influenced by German delegates to the Convention Responsible for Drafting the Charter of Fundamental Rights; the Convention itself being presided by Roman Herzog, former president of the German Federal Constitutional Court (GFCC).³⁸

In this way, the Court managed to read out of Article 35 of the Croatian Constitution – conceptualizing the right to dignity in its reputational dimension, as determinative of one's social status – a German-style conception of dignity as an inalienable characteristic of every human being.

Second, the Court considers human dignity to be 'the essential factor of the concept of rights and duties of man', i.e. the basis of all other human rights that, moreover, stem – another natural law argument – 'from human nature'. The Court's positioning of dignity as the foundation of other rights is a well-known proposition from literature and comparative constitutional jurisprudence.³⁹ In the subsequent decisions, the Court concretized this proposition by holding that, for example, the right to life stems from human dignity and constitutes 'a precondition of human existence'.⁴⁰

34 Constitutional Court of Croatia, Decision U-III-1095/2014 of 21 September 2017, para. 16. Another peculiar feature of this constitutional complaint is that it did not concern the application of EU law at all, meaning the Charter reference was not necessary for the Court's ultimate decision. However, through this 'incorporation' of the Charter's Article 1 into domestic law, the Constitutional Court (quite likely, unintentionally) expanded the scope of the Charter's application beyond the situations in which Member States 'implement EU law' and are hence bound by the provisions of the Charter. Using the Charter in this way, nevertheless, remained an isolated incident, lacking further elaboration by the Court or subsequent related doctrinal developments. For a commentary on this, see Bacić Selanec, N.; Capeta, T.; Goldner Lang, I.; Petrić, D., *National Courts and the Enforcement of EU Law: Report for Croatia*, Report prepared for the FIDE XXIX Congress, The Hague (forthcoming in 2020).

35 Ljubic, D., *op. cit.* (fn. 4), p. 55 and 64, claiming that with this '[human dignity] becomes the basis for establishing relations between the individual and the state and among individuals themselves'.

36 Petrić, D., *Dignity, Exceptionality, Trust. EU, Me, Us*, European Public Law, vol. 26, no. 2 (forthcoming in 2020).

37 Article 1 of the EU Charter: 'Human dignity is *inviolable*. It must be *respected and protected*'. Article 1, para. 1 of the German Basic Law: 'Human dignity shall be *inviolable*. To *respect and protect* it shall be the duty of all state authority' (italics added).

38 Dupré, C., *op. cit.* (fn. 3), p. 166. See also Note from the Praesidium on Draft Charter of Fundamental Rights of the European Union, Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50, CHARTE 4473/00 (2000), p. 3, that determine threefold nature of human dignity in the EU: fundamental right, constitutional principle, and foundation of other rights. These explanations resemble the German constitutional doctrine; see, illustratively, BVerfG 87, 209, judgment of 20 October 1992 (Horror Film), para. 113, and BVerfG 45, 187, judgment of 21 June 1977 (Life Imprisonment), para. 143. In practice, these explanations have been in large part modeled after Roman Herzog's earlier statement. For this last remark, see Dupré, C., *Article 1: Human Dignity*, in: Peers, S.; Hervey, T.; Kenner, J.; Ward, A. (eds.), *The EU Charter of Fundamental Rights: A Commentary*, Hart Publishing, London, 2014, pp. 3–24, at p. 3 (fn. 1).

39 See, as an example, Opinion of Advocate General Stix-Hackl in Case C-36/02 Omega, ECLI:EU:C:2004:162, paras. 76–81; Dupré, C., *op. cit.* (fn. 3), p. 166: '[H]uman dignity [...] is a source of, or "mother" of [other enumerated] rights (Muttergrundrecht)' in the German constitution, which are derived from it; Praesidium on Draft Charter of Fundamental Rights of the European Union, *op. cit.* (fn. 38), p. 3: 'The dignity of the human person is not only a fundamental right in itself but constitutes *the real basis of fundamental rights* [...] the dignity of the human person is *part of the substance of the rights laid down in this Charter*' (italics added).

40 Constitutional Court of Croatia, Decision U-III-1716/2018 of 6 February 2019, para. 7. In other decisions, the Court held that not human dignity but 'the right to life is a precondition for, and origin of, all other rights'. See Kostadinov, B., *op. cit.* (fn. 4), p. 167.

Third, in this paragraph the Constitutional Court forcefully emphasizes the ideological direction of its understanding of human dignity – it repeatedly mentions the concept of ‘dignity as equality’: ‘In their dignity all men are equal in their rights and obligations’; ‘Dignity [...] stems from human equality. It belongs to everyone and everyone equally’. This is important since, in general, dignity is considered to embody two ideas that are oftentimes in tension: liberty and equality. The question of priority has been disputed by philosophers: whether from liberty immediately follows equality, or, on the contrary, whether it is a meaningful, substantive equality from which stems a real liberty? Here it would seem that the Constitutional Court unreservedly opts for the idea of ‘equal dignity’.

In comparison with other jurisdictions, one may note that, similarly, the GFCC most often adopts a communitarian (equality-driven) understanding of human dignity as opposed to an individualistic one (liberty-driven),⁴¹ albeit with notable (occasional) exceptions.⁴² The CJEU, on the other hand, arguably positions the EU concept of dignity as leaning more toward ‘dignity as liberty’.⁴³ Therefore, it led some to remark that ‘in the EU’s “Pantheon of Liberalism”, liberty ranks higher than equality. This perhaps should not come as a surprise, considering the ideological background of the EU’s neoliberal market-integration project’.⁴⁴

Fourth, and finally, is the understanding of dignity as *dignitas*, determining one’s reputation and societal rank. However, this conception of dignity, in the Constitutional Court’s view, is slightly different than the usual, particularistic one that posits dignity as a characteristic of individuals of exceptional status in the socio-political community. Under this view, the Court sees reputation and honor as ‘external [subjective] manifestations of human dignity’, the latter being ‘characteristic of every man’ (that is, the universalist understanding of dignity). So, both reputation and honor are possessed by everyone, not just by few deserving individuals.

This conception of dignity is also marked by relationality and reflexivity, and intersected individualism and communitarianism; that is, not only does it depend on the internal ‘personal feeling of worth’, but likewise on the external acknowledgment and ‘respect from [one’s] surrounding’. This understanding of dignity further raises some questions (conceptual, not

41 Rao, N., *Three Concepts of Dignity in Constitutional Law*, Notre Dame Law Review, vol. 86, no. 1, 2011, pp. 183–271, at pp. 218–220. See also, as an example, Life Imprisonment decision, *op. cit.* (fn. 38), para. 144: ‘[T]he human person is an intellectual-moral being predisposed to determine and develop himself freely. The Basic Law does not understand this freedom as that of an isolated and autocratic individual, but rather as that of a person related to and bound by the community’.

42 Where the GFCC emphasizes strongly the individualistic conception of human dignity. See, for instance, BVerfG 39, 1, judgment of 25 February 1975 (First Abortion), para. 203: ‘[T]he Basic Law established a value-oriented order which puts the individual and his dignity into the very center of all its provisions [...]’. On the individualism v. communitarianism tension in German constitutionalism in general, see Kommers, D. P., *German Constitutionalism: A Prolegomenon*, Emory Law Journal, vol. 40, 1991, pp. 837–873, at p. 873: ‘The Basic Law sees no necessary antagonism between individual rights and communitarian values. The German view, at bottom a Kantian moral perspective, finds the real meaning of liberty in community not apart from community. It does not identify autonomy with mere freedom of choice. To associate liberty with mere choice or atomistic individualism is to misunderstand the very nature of personhood’; and the GFCC’s decision quoted there by Kommers – BVerfG 4, 7, judgment of 20 July 1954 (Investment Aid): ‘The concept of man in the Basic Law is not that of an isolated, sovereign individual; rather, the Basic Law has decided in favor of a relationship between individual and community in the sense of a person’s dependence on the commitment to the community, without infringing upon a person’s individual value’.

43 See Opinion of Advocate General in Omega, *op. cit.* (fn. 39), especially paras. 74–86; Opinion of Advocate General Poiares Maduro in Case C-303/06 Coleman, ECLI:EU:C:2008:61, especially paras. 9–22. See also Article 2 of the Treaty on the EU (TEU), which enlists the EU’s founding values: ‘The Union is founded on the values of respect for *human dignity, freedom, democracy, equality*, the rule of law and respect for human rights [...] These values are common to the Member States’ (italics added).

44 Petric, D., ‘*Different faces of dignity*’: A functionalist account, Maastricht Journal of European and Comparative Law, vol. 26, no. 6, 2019, pp. 792–814, at p. 799.

doctrinal): for instance, what is the relation between the external, public validation and the internal 'feeling of worth'; does constitutional violation occur if only the latter (internal, individualistic dimension) is diminished or it has to be followed by diminishing (or, perhaps, a total loss) of the former (external, communitarian dimension) too?

5. ON DIGNITY'S FUNCTIONAL ROLES

Functional roles or 'institutional uses' of the legal concept of dignity in the jurisprudence of the Croatian Constitutional Court is still somewhat an underdeveloped topic.⁴⁵ On the other hand, this approach to analyzing dignity jurisprudence in comparative constitutional law is more widespread.⁴⁶ This section, therefore, takes on the following questions: How is the concept of (human) dignity invoked and used by the Croatian Constitutional Court? What is its role in the constitutional adjudication? What are its practical (doctrinal and institutional) effects?

5.1. DIGNITY IN BALANCING

In one of its landmark dignity-related decision, the Constitutional Court summarily proclaimed that 'human dignity is absolutely protected, non-derogable and incomparable and cannot be restricted nor weighed'.⁴⁷ In establishing dignity's constitutional rank in this manner, the Court drew inspiration from a variety of sources: the EU Charter and its Article 1 (Human Dignity), where the Court noted that in the EU 'human dignity is the primary indivisible and universal value';⁴⁸ Protocol No. 13 to the ECHR that references 'inherent dignity of all human beings', as well as the ECtHR's dignity-informed approach to interpretation of human rights;⁴⁹ and especially the German Constitutional Court's dignity jurisprudence which posits that 'human dignity is the central point from which it must be departed when balancing

45 See Pavic, I., *op. cit.* (fn. 4), p. 8 (fn. 2), who briefly notes that '[the Constitutional Court's] case law [...] shows a level of uncertainty towards the content and role of human dignity, but it appears that it is interpreted by the [Court] either as a foundation for other rights (dignity as a value) – Article 25 – or as a derogable right on its own (dignity as a right) – Article 35'.

46 For a general overview, see Professor McCrudden's seminal article, *op. cit.* (fn. 2). For the jurisprudence of the CJEU, see Petric, D., *op. cit.* (fn. 44); Heselhaus, S., *Human Dignity in the EU*, in: Becchi, P.; Mathis, K. (eds.), *Handbook of Human Dignity in Europe*, Springer International Publishing, Cham, 2019, pp. 943–967. For the jurisprudence of the ECtHR, see Heselhaus, S.; Hemsley, R., *Human Dignity and the European Convention on Human Rights*, in: Becchi, P.; Mathis, K. (eds.), *Handbook of Human Dignity in Europe*, Springer International Publishing, Cham, 2019, pp. 969–992. More generally, a recent volume edited by Paolo Becchi and Klaus Mathis, *Handbook of Human Dignity in Europe*, Springer International Publishing, Cham, 2019, provides an overview of dignity jurisprudence in forty-three European countries, with contributions that to a certain extent address the functionalist question as approached in this section.

47 Constitutional Court of Croatia, Decision U-I-448/2009 of 19 July 2012, para. 44.4.

48 *Ibid.*

49 *Ibid.*, referencing Refah Partisi and Others v. Turkey, Application Nos. 41340/98, 41342/98, 41343/98 and 41344/98, 31 July 2001, para. 43: '[...] Human rights constitute an integrated system for protection of human dignity'.

all other constitutional values'.⁵⁰ What the GFCC hence does when performing this judicial exercise of 'weighing' or 'balancing' rights in conflict is trying not to construct the one in a way that would completely disregard the essence of the other, sometimes called the 'harmonious interpretation' that strikes a 'practical concordance' between constitutional rights.⁵¹

In the framework of constitutional 'balancing', two most frequent situations are: one, where dignity appears on only one side of the conflicting (often, incommensurable) rights or values; and two, where dignity appears on the both sides of the conflict.⁵²

In the first situation, a significant consequence of using dignity as a 'tie-breaker' when balancing conflicting rights is that certain human rights, themselves arguably a concretization of human dignity, may get restricted; hence, dignity 'trumps' other rights and assumes the role of 'constraint' of those rights. The example from the Croatian Constitutional Court's jurisprudence shows how it approaches this situation: in striking down a provision on the obtaining of evidence of the Law on Criminal Procedure as unconstitutional due to its incompatibility with human dignity,⁵³ the Court ruled that exceptions to the principle that evidence obtained in violation of human dignity is illegal cannot be allowed since '*no other individual right or freedom, that is no other general or public interest, not even the successful prosecution of the most severe criminal acts, cannot be compared or given priority over human dignity*' (italics added).⁵⁴

This role of 'dignity-as-constraint' of other human rights has found expression in the case law of other high courts in Europe. For instance, the Hungarian Constitutional Court restricted freedom of expression (displaying swastikas) of a group of individuals, as the exercise of their dignity and autonomy, for the purpose of protecting dignity of others.⁵⁵ In another case, the same court 'rejected a[n] argument that the right of self-determination, implicit in dignity, should give people the right to use narcotic substances, citing the importance of protecting people, especially children, from the indignity of substance addiction'.⁵⁶ Similarly, French courts have banned the activity of dwarf-tossing, performed with the full consent of involved individuals and viewed by them as the expression of their 'dignity-as-autonomy' (that is, the exercise of their free will) in earning for living with the justification that it affronts human dignity of the entire population of small people;⁵⁷ a similar prohibition of dwarf-tossing occurred in Germany,⁵⁸ where, in addition, the peep shows have been prohibited too, on the ground

50 *Ibid.*, referencing BVerfG 35, 202, 1 BvR 536/72, judgment of 5 June 1973: 'Both constitutional values, in the case of conflict, must be balanced, as far as possible; if that cannot be achieved then, by taking into account typical characteristics and special circumstances of the individual case, it will be decided which of the two interests must yield. Thereby *both constitutional values must be observed in their relation to human dignity as the central point of the value structure of the Constitution*' (italics added).

51 See Kommers, D. P., *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd edition), Duke University Press, Durham, 1997, pp. 45–46; *op. cit.* (fn. 42), p. 851 and 871.

52 See further McCrudden, C., *op. cit.* (fn. 2), p. 714.

53 Constitutional Court of Croatia, *op. cit.* (fn. 47), paras. 44.4–44.5.

54 *Ibid.*, para. 44.4. The Court noted that the illegality of evidence obtained by violation of human dignity is implicitly contained in Articles 17(3), 23(1), 25(1) and 35 of the Constitution, (seemingly) read in conjunction with one another.

55 Decision 14/2000 (V. 12) AB of 5 September 2000, Magyar Közlöny 2000/46.

56 Decision 54/2004 (XII. 13) AB of 13 December 2004, I ABH 2004, 690, discussed in Carozza, P., *op. cit.* (fn. 6), p. 465.

57 Conseil D'Etat, Commune de Morsang-sur-Orge, judgment of 27 October 1995.

58 VG Neustadt, NVwZ 1993, 98, judgment of 21 May 1992.

that these events violate human dignity of women in general, disregarding the autonomy of an individual woman to make free choices about her body.⁵⁹

The second situation – where dignity arguments appear on the both sides of the conflicting rights or values – may cause significant troubles for the courts in resolving the conflict at hand. For example, the UK courts in *Evans* were faced with the clash between Mrs. Evans' right to found a family (in preserving the gametes fertilized by her then-husband) and her ex-husband's right to private life (in destroying the gametes).⁶⁰ Judges hearing the case felt perplexed when it came to justifying a possible reliance on human dignity in solving the conflict of these two rights.⁶¹ Unlike in the UK, the French Conseil Constitutionnel in its Abortion Decision⁶² appeared ready to balance dignity of the unborn fetus (reflected in the fetus' putative right to life) against dignity of the women (as reflected in the women's right to freedom and autonomy).⁶³

The German Constitutional Court's jurisprudence provides perhaps the most instructive examples of this 'institutional use' of human dignity. In various landmark judgments, such as in the First⁶⁴ and Second Abortion⁶⁵ case or the Aviation Security Act,⁶⁶ human dignity was forcefully invoked 'in conjunction'⁶⁷ with both rights in the conflict: dignity of the fetus versus dignity of the mother, or dignity of innocent passengers in a hijacked aircraft versus dignity of expected victims of a terrorist attack. In these cases, the GFCC used human dignity in couple of ways: as providing common metric ('dignity-as-measure') for balancing conflicting rights (for example, the right to life of unborn against the right to autonomy of mother), or as providing greater weight ('dignity-as-weight') to one right at the expense of the other (for example, prioritizing the right to life of passengers against the right to life of terrorists).⁶⁸ Here, the centrality of human dignity in structuring the conflicts of incommensurable values through the proportionality analysis elevates dignity to the rank of 'an overarching and integrating constitutional value'.⁶⁹

59 BVerwG 64, 274, judgment of 15 December 1981, para. 12: '[H]uman dignity is an objective, indispensable value, the respect of which the individual cannot [voluntarily] waive validly'.

60 *Evans v. Amicus Healthcare Ltd. and Others* [2004] EWCA Civ 727; [2005] Fam 1.

61 McCrudden, C., *op. cit.* (fn. 2), pp. 714–715.

62 Decision No. 2001–446 DC of 27 June 2001.

63 McCrudden, C., *op. cit.* (fn. 2), p. 699 and 707.

64 *Op. cit.* (fn. 42).

65 BVerfG 2 BvF 2/90, 2 BvF 4/92, 2 BvF 5/92, judgment of 28 May 1993.

66 BVerfG 1 BvR 357/05, judgment of 15 February 2006.

67 For the discussion of adjudication of the German Basic Law's 'dignity clause' 'in conjunction' with other constitutional rights, and doctrinal difficulties that this judicial exercise raises, see Jones, J., 'Common Constitutional Traditions: Can the Meaning of Human Dignity under German Law Guide the European Court of Justice?', Public Law, 2004, pp. 167–187, at pp. 168–174; Walter, C., *Human Dignity in German Constitutional Law*, in: European Commission for Democracy through Law, Proceedings of the UniDem Seminar, *The Principle of Respect for Human Dignity*, July 1998, pp. 15–28, at p. 27; Möllers, C., *op. cit.* (fn. 23), pp. 423–425; Petric, D., *op. cit.* (fn. 36). For a remark on the Croatian constitutional doctrine, see Kostadinov, B., *op. cit.* (fn. 4), p. 169: 'In Croatian, as well as European, German and French law, the principle of human dignity goes uninvoked and is never used independently. The use of this principle only in conjunction with other constitutional principles is not a specific feature of Croatian constitutional jurisprudence, since the German and French judges also always prefer precise and technical principles and do not rely solely on dignity, except as a case of last resort'.

68 McCrudden, C., *op. cit.* (fn. 2), pp. 716–717.

69 Carozza, P., *op. cit.* (fn. 6), p. 466.

At this point, it may become clear that the second observed situation – dignity on the both sides of the conflicting rights – features prominently in the ‘life and death’ situations, especially the abortion-related issues, where many high courts in Europe (some of which were mentioned above) and elsewhere have adopted distinctive positions. The Croatian Constitutional Court, on the other hand, differs somewhat regarding the ambitiousness of its constitutionality review of the national abortion legislation. At the same time, it adopts very similar premises as its constitutional counterparts in Europe: most importantly, the Court acknowledges the involvement of dignity on both sides of the conflict. It thus held that

‘the termination of pregnancy is, above everything, a moral issue that concerns not only conscience, rights and *dignity of a woman* [...] but also reflects the attitudes of a certain social community about ethical acceptability or non-acceptability of a given act (in the light of public moral), philosophical and ethical viewpoints on the right to protection and right to *dignity of human beings even before birth*’ (italics added).⁷⁰

Here, the Court uses dignity to frame the conflict of rights of woman and fetus in dignity terms (‘dignity-as-measure’), similar to the GFCC; nevertheless, it does not itself engage in the balancing of these rights or explicitly give greater weight (‘dignity-as-weight’) to one right at the expense of the other, but rather reserves that decision and the wide margin of discretion – as well as the authority to decide on the question ‘when does life begin’ – for the legislature, similar to what the Conseil Constitutionnel held.⁷¹ Albeit, in rejecting the alleged unconstitutionality of the existing abortion legislation in Croatia that was under review, the Court arguably prioritized the woman’s dignity and her related right to privacy and autonomy over the fetus’ dignity and its related (putative) right to life.⁷²

⁷⁰ Constitutional Court of Croatia, Decision U-I-60/1991 of 21 February 2017, para. 22. For a contrary view, see Dissenting Opinion to this Decision of Judge Miroslav Šumanović (pp. 98–99), who considers embryo to be a human being in a certain stage of development, created in the moment of conception, and to whom is ab initio inherent human dignity based on which it enjoys the constitutional right to life.

⁷¹ *Ibid.*, paras. 45–46; Kostadinov, B., *op. cit.* (fn. 4), p. 166. Note that the Croatian Constitutional Court in its abortion decision engages in an extensive comparative exercise, taking into consideration a range of international legal instruments, legislative solutions from other European countries, jurisprudence of the ECtHR and the CJEU, as well as notable case law of the constitutional courts in Spain, Portugal, Slovakia, Austria, Italy, France and Germany. On the link between the increase in the use of the concept of dignity in constitutional adjudication and the increase in the use of comparative method of interpretation of human dignity and other constitutional rights and values, see Petric, D., *op. cit.* (fn. 44), pp. 795–796. See also Dupré, C., *op. cit.* (fn. 3), pp. 91–93, who argues that since national courts in Europe increasingly turn to other European (national and supranational) jurisdictions when constructing their own conceptions of human dignity and vice versa, human dignity nowadays arguably stands as ‘a fully European concept’, positioned at the center of European constitutionalism. Further, at p. 112, Dupré argues that ‘similarly striking is the way in which [European national and supranational] courts have tended to anchor their individual construction of human dignity in what can be called a pan or trans-European understanding of this concept, drawing on and combining three main sources (Member States’ constitutions, the ECHR and the EU Charter). This cross-European concept of dignity brings together individual European constitutional orders, and it arguably acts as a locking mechanism, securing human dignity deep at the heart of European constitutionalism [...] This locking mechanism is also an effective tool of constitutional integration, with each constitutional order making up European constitutionalism being rooted in human dignity both as its own foundation and its connection to the whole’.

⁷² See Kostadinov, B., *op. cit.* (fn. 4), pp. 166–168: ‘The Constitutional Court therefore abstained, meaning it chose in favour of personal freedom (like the French Constitutional Council). As in the Croatian case, the French Constitutional Council’s ethical neutrality confirms its choice in favour of liberal democracy. [...] [I]t is the Constitutional Court’s assessment that the disputed legislative solution has not interfered with the just balance between the woman’s constitutional right to privacy (Article 35 of the Constitution) and her liberty and personality (Article 22) on the one hand, and the public interest in protecting the lives of unborn beings which the Constitution guarantees as a constitutionally protected value (Article 21 of the Constitution) on the other. Through this constitutionally well-reasoned and just decision, the Constitutional Court of the Republic of Croatia has

5.2. DIGNITY AS SUBJECTIVITY

One of the most prominent uses of the legal concept of dignity by the Croatian Constitutional Court comes as a reflection of the Kantian *Objektformel* ('object formula'), which mandates treating human beings not as mere means (objects) but as ends (subjects) in themselves.⁷³ This is likewise a predominant motive of the German Constitutional Court's dignity jurisprudence.⁷⁴ In comparative constitutionalism, this conception features most prominently in the areas in which the 'hard, inviolable core' of dignity is endangered, where individual's physical or mental integrity is by definition threatened: in situations of detention (arbitrary imprisonment, inhuman or degrading treatment, prison conditions, denial of procedural safeguards to detainees) or systematic abuse and (racial and workplace) discrimination.

The specific examples of this functional role of dignity from the Croatian constitutional doctrine are as follows.

5.2.1. DIGNITY AND JUDICIAL DUTY TO GIVE REASONS

What is perhaps the most frequent reference to human dignity in the Constitutional Court's jurisprudence comes in the cases involving the right to a fair trial as a constituent element of the rule of law. More specifically, the Court routinely emphasizes that

'the right of a party to a reasoned court's judgment is an unavoidable aspect of the right to a fair trial guaranteed by Article 29(1) of the Constitution and Article 6(1) of the ECHR. The duty of the court to explain its decision and carefully verify the statements of a party has significant importance not only in relation to the exercise of the right to an effective legal remedy (Article 18 of the Constitution, Article 2(1) of the Protocol No. 7 to the Convention), but also because it represents *the violation of honor and dignity of the subjects whose rights and duties have been decided upon*' (italics added).⁷⁵

successfully mediated a social conflict relating to the woman's role in the family and the female issue, the request for substantive equality for women – citizens and the equality of genders, and preserved the social cohesion in Croatia' (references omitted).

- 73 Becchi, P., *op. cit.* (fn. 9), p. 5: 'This obviously does not prevent man from acting also as a means for the realization of goals that are extrinsic to him (as in fact occurs time after time in social life), but rather dictates that he must never be reduced solely to a means'. Under the Croatian constitutional tradition, something akin to this use of dignity is described by Kostadinov, B., *op. cit.* (fn. 4), p. 166, in the following terms: '[I]n the liberal legal system of the Republic of Croatia dignity serves as protection against aggression from and domination by other subjects'.
- 74 See, as an example, BVerfG 27, 1, judgment of 16 July 1969 (Census Act). See also Mahlmann, M., *The Basic Law at 60 – Human Dignity and the Culture of Republicanism*, German Law Journal, vol. 11, no. 1, 2010, pp. 9–31.
- 75 Constitutional Court of Croatia, Decision U-III-2374/2009 of 4 October 2010, para. 8.3; Decision U-III-3395/2007 of 15 March 2012, para. 5; Decision U-III-1247/2009 of 29 March 2012, para. 5; Decision U-III-2418/2010 of 13 September 2012, para. 6.2.1; Decision U-III-2781/2010 of 9 January 2014, para. 8.1; Decision U-III-5618/2012 of 12 March 2014, para. 5.1; Decision U-III-344/2013 of 8 April 2014, para. 4.1; Decision U-III-503/2013 of 8 April 2014, para. 4.1; Decision U-III-4261/2012 of 28 May 2014, para. 9; Decision U-III-4350/2011 of 11 June 2014, para. 8; Decision U-III-413/2011 of 24 September 2014, para. 5.6; Decision U-III-3061/2011 of 15 October 2014, para. 5.2; Decision U-III-3653/2011 of 22 October 2014, para. 6.1; Decision U-III-799/2010 of 5 November 2014, para. 4.1; Decision U-III-2212/2011 of 17 December 2014, para. 5; Decision U-III-1339/2013 of 14 January 2015, para. 5.1; Decision U-III-4571/2012 of 14 January 2015, para. 5.1; Decision U-III-5018/2012 of 14 January 2015, para. 6.1; Decision U-III-1270/2013 of 25 February 2015, para. 5.1; Decision U-III-3137/2012 of 5 March 2015, para. 10; Decision U-III-6415/2014 of 2 July 2015, para. 4; Decision U-III-606/2015 of 9 July 2015, para. 5.2; Decision U-III-2219/2015 of 19 November 2015, para. 8; Decision U-III-5893/2011 of 25 February 2016, para. 28.2; Decision U-III-3936/2015 of 30 March 2016, para. 4.1.1; Decision U-III-2483/2015 of 13 April 2016, para. 4.1.1; Decision U-III-2766/2015 of 13 April 2016,

In this context, the courts as one of the branches of the state government have both negative obligation – to refrain from treating parties to the proceedings as mere objects – and positive obligation – to treat parties to the proceedings as subjects who deserve to be given reasons for the decision adopted against them. In other words, judgments that do not offer relevant and sufficient reasons for the adopted legal position hint at the existence of judicial arbitrariness and self-will;⁷⁶ of a superficial and bureaucratic ‘disposal of the case’ that thus violates dignity of both the party and its representative, effectively reducing them to the objects of such a ‘disposal’.⁷⁷ The lack of properly justified reasons for a decision thus indicates a judicial disregard of the parties’ subjectivity and expressions made in the course of the proceedings.

Here, one may notice that the Constitutional Court goes further than offering only instrumental, consequentialist justifications for the judicial duty to give reasons, such as democracy, transparency, accountability, or institutional hierarchy; rather, it strongly underpins these justifications with a non-instrumental, deontological justification: the protection of dignity of ‘free and equal citizens’, which is ‘fundamental for the moral and political legitimacy’ of the national legal order, and absent which the state’s political authority appears as ‘dehumanizing’.⁷⁸

This use of dignity somewhat resembles the ECtHR’s acknowledgment that violations of the right to a fair trial from Article 6 of the Convention in situations of excessive length of judicial proceedings could involve an interference with the party’s human dignity.⁷⁹ Similar to this is also the approach of the German Constitutional Court in a(n) (in)famous decision on the European Arrest Warrant, in which it dealt with the situation of trial *in absentia* in another Member State of the EU.⁸⁰ For the present purposes, suffice it to say that the GFCC roots the principle of individual guilt in criminal law in the right to human dignity (Article 1 of the *Grundgesetz*), with a strong influence of the Kantian ‘object formula’:

“To achieve that the requesting state does not treat a requested person as a mere object of proceedings [...] conducted by that state, the requested person must have the possibility to influence proceedings, to submit a statement with regard to the charges brought against him or her, to present exonerating circumstances and to have them reviewed and, if this is warranted, taken into account’.⁸¹

para. 4.1.1; Decision U-III-1678/2014 of 21 April 2016, para. 11; Decision U-III-1114/2014 of 27 April 2016, para. 7.1; Decision U-III-1116/2014 of 11 May 2016, paras. 6.1–7.1; Decision U-III-5209/2013 of 25 May 2016, para. 11; Decision U-III-602/2014 of 5 July 2016, para. 47; Decision U-III-1692/2014 of 14 July 2016, para. 7; Decision U-III-2463/2016 of 7 September 2016, para. 4.2.1; Decision U-III-504/2016 of 16 November 2016, para. 9; Decision U-III-2589/2016 of 22 February 2017, para. 5.1; Decision U-III-3473/2015 of 30 March 2017, para. 34; Decision U-III-2085/2016 of 20 June 2017, para. 9; Decision U-III-2879/2017 of 8 November 2017, para. 5.2; Decision U-III-1362/2017 of 10 January 2018, para. 5.1; Decision U-III-2909/2016 of 18 January 2018, para. 10.3; Decision U-III-2064/2016 of 15 February 2018, para. 10; Decision U-III-416/2014 of 13 March 2018, para. 4.3; Decision U-III-952/2017 of 19 April 2018, para. 14; Decision U-III-4290/2017 of 6 June 2018, para. 10; Decision U-III-1771/2017 of 6 February 2019, para. 8; Decision U-III-1826/2018 of 20 March 2019, para. 8.

76 Constitutional Court of Croatia, Decision U-III-3156/2017 of 31 January 2019, para. 8.

77 Constitutional Court of Croatia, Decision U-III-4467/2010 of 5 July 2011, para. 11.

78 Perju, V., *Reason and Authority in the European Court of Justice*, Virginia Journal of International Law, vol. 49, no. 2, 2009, pp. 307–377, at pp. 315–327.

79 Bock v. Germany, Application No. 11118/84, 29 March 1989, para. 48.

80 BVerfG, 2 BvR 2735/14, order of 15 December 2015 (European Arrest Warrant).

81 *Ibid.*, para. 61.

On the other hand, the criticism of the GFCC's 'cultivated fetish' for attaching human dignity to the principle of individual guilt points to the fact that '[a]s a result [of it,] even minor procedural shortcomings may be tantamount to violations of human dignity'.⁸² This approach arguably opens up a plethora of conceptual and doctrinal issues,⁸³ as well as political and jurisdictional ones.⁸⁴

5.2.2. DIGNITY AND THE DOCTRINE OF 'CRIMINAL HUMANITARIANISM'

Another prominent field of jurisprudence in which the Croatian Constitutional Court conceptualizes human dignity through the lenses of the Kantian *Objektformel* concerns the treatment of apprehended or imprisoned persons. Operating in its social dimension – and positing that no one, not even criminals, can be completely stripped off their humanity – dignity here is placed in the heart of the doctrine of 'criminal humanitarianism' that, as a matter of principle, requires that 'no convicted person may be treated in an inhuman manner'.⁸⁵

In this context, the Constitutional Court builds upon the ECtHR's jurisprudence.⁸⁶ It considers, generally, two constitutional prohibitions of Articles 23 (prohibition of torture and forced labor) and 25 (prohibition of inhuman treatment of detainees) of the Constitution to be of absolute nature, representing 'one of the fundamental values of a democratic society'.⁸⁷ Respect for these values, in the Court's view, demonstrates 'the level of society's civility in every individual country',⁸⁸ seen through the way the state respects and guarantees human dignity of persons whose freedom has been restricted (that is, who have been restrained and placed into detention or imprisoned for the purpose of the execution of criminal sentence).

In principle, the state is bound by a positive obligation to ensure that the conditions in prison – indeed, the entire state prison system – respect human dignity.⁸⁹ If the conditions

82 Meyer, F., 'From Solange II to Forever I'. *The German Federal Constitutional Court and the European Arrest Warrant (and How the CJEU Responded)*, *New Journal of European Criminal Law*, vol. 7, no. 3, 2016, pp. 277–294, at p. 281.

83 Petric, D., *op. cit.* (fn. 36).

84 Meyer, F., *op. cit.* (fn. 82), p. 281: 'It is not difficult to see what a formidable tool such a bloated substantive principle could be in the hands of a court eager to regain jurisdictional primacy'.

85 Becchi, P., *op. cit.* (fn. 9), p. 10.

86 Often quoted decision is *Muršić v. Croatia*, Application No. 7334/13, 20 October 2016 (and there referenced *Ananyev and Others v. Russia*, Application Nos. 42525/07 and 60800/08, 10 January 2012; *Olśzewski v. Poland*, Application No. 21880/03, 2 April 2013; and landmark decision in *Kudła v. Poland*, Application No. 30210/96, 26 October 2000), para. 98: 'Indeed, the prohibition of torture and inhuman or degrading treatment or punishment is civilizational value closely related to the respect of human dignity'.

87 Constitutional Court of Croatia, Decision U-III-3717/2009 of 3 March 2011, para. 7; reiterated in Decision U-III-559/2012 of 17 July 2015, para. 6.1; Decision U-III-643/2013 of 17 July 2015, para. 6; Decision U-III-5495/2011 of 7 October 2015, para. 8; Decision U-III-5331/2012 of 10 December 2015, para. 5. See also Constitutional Court of Croatia, Decision U-III-1437/2007 of 23 April 2008, para. 6; Decision U-III-4182/2008 of 17 March 2009, para. 16; Decision U-III-64744/2009 of 3 November 2010, para. 13; Decision U-III-Bi-3241/2012 of 5 May 2016, para. 5.

88 Constitutional Court of Croatia, Decision U-III-Bi-4732/2015 of 5 October 2016, para. 6.

89 Constitutional Court of Croatia, Decision U-III-5725/2016 of 19 December 2017, para. 6.1; reiterated in Decision U-III-2388/2015 of 26 February 2018, para. 6; Decision U-III-1630/2017 of 30 May 2018, para. 7; Decision U-III-145/2017 of 10 July 2018, para. 9; Decision U-III-4077/2017 of 13 September 2018, para. 7; Decision U-III-2439/2016 of 9 October 2018, para. 7; Decision U-III-2731/2017 of 8 November 2018, para. 9; Decision U-III-4719/2017 of 14 February 2019, para. 7; Decision U-III-4780/2017 of 14 February 2019, para. 7; Decision U-III-6228/2016 of 14 February 2019, para. 9; Decision U-III-6229/2016 of 14 February 2019, para. 9.

related to, for instance, the size of the prison cell or the time available to spend outdoors, are unsatisfactory and amount to the violation of prisoner's dignity, the latter is entitled to compensation for immaterial damage.⁹⁰ Also, whether the inadequate conditions amount to violation of prisoner's dignity depends on all circumstances of a given case, objective as well as subjective criteria (physical and psychological effects of such treatment), and individual's personal characteristics (age, gender, health).⁹¹

Given that dignity has this strong subjective dimension, in cases of damages suffered from prison conditions the testimony of the applicant before the court is indispensable, since courts do not award compensation for damages 'mechanically', that is, merely based on the fact that applicants have spent some time in inadequate prison conditions.⁹² The Constitutional Court, moreover, specifically emphasized the need to evade having an individual turn from the subject into the object of criminal proceedings, or having the imprisonment become purpose in itself, in a decision that explicitly links the conceptions of dignity from Articles 25 and 35 of the Constitution.⁹³

Further on torture and inhuman and degrading treatment, the Constitutional Court considers Article 25(1) of the Constitution to be a specific expression of the absolute, non-derogable prohibition of Article 23, applicable to a specific group of people: arrested and convicted persons, containing not only negative obligation of the state to refrain from ill-treating persons whose freedom has been restricted, but also positive obligation to treat them humanely and respect their dignity.⁹⁴ With this, the Croatian Constitution acknowledges that persons whose liberty has been restricted are in 'an especially vulnerable position'.⁹⁵ In this context, applying physical force that was not strictly necessary given the behavior of the person whose liberty has been restricted diminishes that person's dignity and in principle amounts to a violation of the rights guaranteed by Article 23(1) of the Constitution, read both in isolation and in conjunction with Article 25(1) of the Constitution and Article 3 of the ECHR.⁹⁶

5.2.3. DIGNITY, DEMOCRACY AND ELECTIONS

Reviewing constitutionality of amendments to the Law on Local Elections, the Constitutional Court expressed 'the constitutional logic' of the electoral process: it regarded the elections as 'the most important test of commitment to genuine political democracy embodied

⁹⁰ Constitutional Court of Croatia, Decision U-III-5725/2016 of 19 December 2017, para. 6.3. The compensation for damage from being subjected to inadequate prison conditions amounting to the violation of dignity under Article 25 of the Constitution, in the Court's view, 'is a special form of compensation for damages that is not subject to classical determination of the causal relation between the act causing damage and the damage suffered'. See Constitutional Court of Croatia, Decision U-III-272/2017 of 20 December 2018, para. 14.

⁹¹ Constitutional Court of Croatia, Decision U-III-5725/2016 of 19 December 2017, para. 6.3.

⁹² Constitutional Court of Croatia, Decision U-III-731/2016 of 13 September 2018, para. 12.

⁹³ Constitutional Court of Croatia, Decision U-III-2338/2012 of 18 April 2012, para. 11.

⁹⁴ Constitutional Court of Croatia, Decision U-III-6559/2010 of 13 November 2014, paras. 26-26.1; reiterated in Decision U-III-3965/2011 of 25 February 2016, para. 8.1; Decision U-III-1470/2011 of 2 March 2017, para. 12.2; Decision U-III-4032/2018 of 12 December 2018, paras. 5.1-5.2.

⁹⁵ Constitutional Court of Croatia, Decision U-III-6559/2010 of 13 November 2014, para. 26.

⁹⁶ Constitutional Court of Croatia, *op. cit.* (fn. 95), paras. 26.1-28. The Court here also relies heavily on the ECtHR's Article 3 jurisprudence, referencing, most notably, the ECtHR's decision in *Đurđević v. Croatia*, Application No. 52442/09, 19 July 2011.

in the Constitution', and 'an integrated system for the protection of human dignity' – itself 'the central point of the constitutional value order'⁹⁷ – in which the key role is reserved for the highest constitutional values of democracy and the rule of law.⁹⁸ This way, the Court requires the electoral system to ensure the protection and respect for everyone's dignity in two ways: on the one hand, to have a democratically elected government treating the citizens not as mere objects but rather as autonomous subjects, and regulating the political life of its subjects in a way that not only respects (negative obligation) but also furthers (positive obligation) their dignity; and on the other, to guarantee to every citizen an opportunity to exercise their political judgment in electing the government, and autonomously decide – effectuating their 'dignity-as-autonomy' – on who is to govern (and in what way) their political community.

In the context of the majoritarian democracy, the Constitutional Court also emphasized the necessity of ensuring fair and appropriate treatment of minorities regarding the question of parents' beliefs about the upbringing and education of their children – those beliefs which, in the Court's view, 'are worth of respect in democratic society and are not incompatible with human dignity'.⁹⁹ Here, it would seem that dignity serves as a limit to the right of parents belonging to minority groups to decide on the education of their children ('dignity-as-constraint'), where that right would yield in the case of the parents' insistence on educational programs or methods that would go against human dignity as understood by the Court.

5.3. DIGNITY AS PRIVACY-IDENTITY-PERSONALITY

A notable field in which the Constitutional Court relies on the concept of dignity are privacy rights. More specifically, the Court considers personal data to be 'a direct emanation of human dignity' ('dignity-as-privacy').¹⁰⁰ In a similar vein, the Court defines personal name as 'the sign of the identity of natural persons', thus extending the constitutional protection of dignity from Article 35 of the Constitution ('dignity-as-personality') to names.¹⁰¹ Likewise, the freedom to make personal and far-reaching decisions, such as the one on the donation of body organs, is underpinned by human dignity ('dignity-as-autonomy').¹⁰² The Court, in addition, strongly emphasizes the negative obligation of the state authorities not to interfere arbitrarily with anyone's privacy sphere that is at the core of private and family life and their dignity.¹⁰³

5.4. DIGNITY AS RELATIONALITY

⁹⁷ Kostadinov, *op. cit.* (fn. 4), p. 169.

⁹⁸ Constitutional Court of Croatia, Decision U-I-246/2017 of 4 April 2017, para. 49. See also Constitutional Court of Croatia, Notification U-VII-5293/2011 of 12 November 2011, para. 3.

⁹⁹ Constitutional Court of Croatia, Decision U-II-1118/2013 of 22 May 2013, para. 12.4.

¹⁰⁰ Constitutional Court of Croatia, Decision U-I-1242/2004 of 16 November 2009, para. 9.

¹⁰¹ Constitutional Court of Croatia, Decision U-III-484/1998 of 11 July 2007, para. 7, reiterated in Decision U-III-2888/2006 of 24 September 2008, para. 6.

¹⁰² Constitutional Court of Croatia, Decision U-I-3631/2005 of 30 April 2009, para. 6.2.

¹⁰³ Constitutional Court of Croatia, Decision U-III-3202/2011 of 6 June 2016, para. 24.

Another frequent use of the concept of dignity in the case law of the Croatian Constitutional Court comes in the family matters. This function is best captured by a relational dimension of human dignity: developing relationships with one's family, other individuals and the outside world.

The Court frequently reiterates that Article 35 of the Constitution, which guarantees respect and legal protection of family life and dignity, is a constitutional guarantee whose basic purpose is to 'protect individual from unjustified interference of the state with the right to unimpeded family life'.¹⁰⁴ (On the concept of a 'constitutional guarantee' in the Croatian Constitution and its link to human dignity, see later discussion in Section 5.7). Related to the protection of dignity and family life from Article 35 of the Constitution is the Article 63 protection of motherhood, children and youth, to which is linked the state's positive obligation to adopt all appropriate measures in order to 'create social, cultural, educational, material and other conditions that promote the right to dignified life'.¹⁰⁵ Furthermore, from this constitutional guarantee stems a range of specific requirements related to the treatment of individuals by public authorities, including both negative and positive duties of the state. The fundamental requirement is respect for human dignity, which ought to be implicitly contained in all government's relationships with the individuals.¹⁰⁶

The Constitutional Court highlights that the Croatian family legislation itself specifically guarantees legal protection of personal and family life and human dignity. In one particular matter of family law – deprivation of legal capacity – the Court adopts a paternalistic conception of dignity:

'Family law protects human dignity, among others, by declaring persons incapable for reasoning, precisely because with their actions they could jeopardize their personality, their rights and interests, and sometimes rights and interests of the others'.¹⁰⁷

Also, the Court recognizes the importance of community values and interests in decisions on the family law, dignity-related matters: given that the state enjoys a margin of appreciation in this area, in concrete cases the courts are trying to strike a fair balance between conflicting interests of individuals and community at large.¹⁰⁸ This resembles the abovementioned tension between individualism and communitarianism in the dignity jurisprudence of the German Constitutional Court.¹⁰⁹

Within family matters, especially important is the Constitutional Court's reliance on the concept of dignity in the context of the rights of sexual minorities. In a well-known Notifica-

¹⁰⁴ Constitutional Court of Croatia, Decision U-III-1368/2015 of 9 January 2019, para. 7; Decision U-III-1189/2015 of 19 December 2018, para. 5.4.

¹⁰⁵ Constitutional Court of Croatia, Decision U-III-1801/2006 of 20 May 2009, para. 9.

¹⁰⁶ Constitutional Court of Croatia, Decision U-III-2404/2016 of 20 February 2019, para. 7; Decision U-III-1380/2014 of 20 May 2015, para. 10.

¹⁰⁷ Constitutional Court of Croatia, Decision U-III-1380/2014 of 20 May 2015, para. 10. For a discussion of dignity's use as 'an instrument of legal paternalism', and judicial constructions of dignity that may function as a smokescreen 'behind which paternalism or moralism are elevated above [the individual] freedom in legal decision-making', see Feldman, D., *Human Dignity as a Legal Value – Part I*, Public Law, 1999, pp. 682–702, at pp. 699–700.

¹⁰⁸ Constitutional Court of Croatia, *op. cit.* (fn. 107), para. 10.

¹⁰⁹ See text accompanying fn. 42, and remarks offered therein.

tion regarding the proposed referendum on the constitutional definition of marriage,¹¹⁰ the Court started its reasoning by noting that

‘in the Republic of Croatia, the sex and gender diversity are protected by the Constitution. Protected are also the rights of all persons, irrespective of sex and gender, to respect and legal protection of their personal and family life and their human dignity. Those legal facts are nowadays considered a permanent value of the Croatian constitutional state’.¹¹¹

Consequently, on this basis the Constitutional Court distinguished between the right to marriage and the right to respect private and family life and dignity. Therefore, the referendum on the definition of marriage, in the Court’s view, was not the referendum on the right to respect private and family life and dignity. Rather, the latter right is constitutionally guaranteed to every person, including the same-sex couples and families, and under direct protection of the Constitutional Court and the ECtHR.¹¹² The Court then concluded with emphasizing the positive obligation of the state in this matter:

‘[E]ventual amendment to the Constitution [which in the end was passed¹¹³] with a provision that marriage is a life community of woman and man must not have any effect on the further development of the legal framework of the institute of extramarital and same-sex community in accordance with the constitutional requirement that everyone in the Republic of Croatia enjoys the right to respect and legal protection of their personal and family life and their human dignity’.¹¹⁴

It could be noted that this use of dignity in the context of the rights of sexual minorities by the Croatian Constitutional Court falls short of the outcomes delivered in other jurisdictions, where high courts indeed relied on human dignity in order to recognize the right to marriage to same-sex couples.¹¹⁵ However, albeit not going as far as to recognize the same sex-marriage as the constitutional right and the expression of dignity of gay people, the Court still relies on human dignity as the foundation of their right to private and family life. Therefore, in Croatia,

110 Constitutional Court of Croatia, *op. cit.* (fn. 98), subsequently reiterated in Decision U-VIIR-164/2014 of 13 January 2014.

111 Constitutional Court of Croatia, *op. cit.* (fn. 98), para. 7.2.

112 *Ibid.*

113 See Podolnjak, P., *Constitutional Reforms of Citizen-Initiated Referendum: Causes of Different Outcomes in Slovenia and Croatia*, *Revus – Journal for Constitutional Theory and Philosophy of Law/Revija za ustavno teorijo in filozofijo prava*, vol. 26, 2015, pp. 129–149.

114 Constitutional Court of Croatia, *op. cit.* (fn. 98), para. 12.

115 Dignity arguments in recognizing the constitutional right to marriage to same-sex couples was adopted, most notably, by the US Supreme Court in *Obergefell v. Hodges*, 576 US __ (2015), Kennedy, J. (writing for the majority) 2608: ‘No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization’s oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right’. See also Constitutional Court of South Africa, *Minister of Home Affairs and Another v. Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC), judgment of 1 December 2005, the unanimous landmark decision that relied heavily on the concept of dignity in recognizing the constitutional right to same-sex marriage.

as well as in the EU more generally,¹¹⁶ it can be expected that dignity rationale will remain central in the future constitutional adjudication of the right to same-sex marriage.

5.5. DIGNITY AS SOCIAL STATUS

The conception of dignity codified in Article 35 of the Croatian Constitution appears, as abovementioned, in its reputational dimension, as determinative of one's position in the society. This conception, applied in the horizontal relations too (between private persons), has been used in particular as a justification for the restriction of other human rights ('dignity-as-constraint'), most often freedom of expression and freedom of press.

The Constitutional Court has repeatedly held that freedom of expression (like other constitutional rights) is not an absolute right but is rather limited with the rights of others, especially dignity.¹¹⁷ Therefore, free speech that violates others' dignity, reputation and honor must be prohibited by the courts. The Court also considers the protection of dignity of others to be a legitimate aim of anti-discrimination laws, laws suppressing violence on sport events, and media laws, justifying the government's interference with the freedom of expression through, for example, punishment of prohibited hate speech or publication of false information. Nevertheless, the Court in principle considers freedom of thought and expression from Article 38 and the right to protection of personal and family life, dignity, reputation and honor from Article 35 of the Constitution to be constitutional rights of the same rank.¹¹⁸

Interestingly, the Court considers that no one, not even those convicted of the most serious crimes, cannot fully lose their honor as something inseparable from human dignity, even if their community considers them to have no honor or dignity left, but could only diminish it by their undignified actions.¹¹⁹ With this, the Court further elaborates its understanding of this conception of dignity as *dignitas*: it can only be diminished by the loss of respect and external acknowledgment from one's society (the external 'layer' of dignity); at the same time, albeit relative in nature, the inner kernel of dignity – one's intrinsic worth and their feeling of it – can never be completely taken away (the internal 'layer' of dignity).

5.6. DIGNITY OF WORK(ERS)

The Constitutional Court has relied on the EU conception of dignity and the CJEU's human rights jurisprudence in expounding the conception of workers' dignity under the Croa-

¹¹⁶ Petric, D., *op. cit.* (fn. 44), p. 807.

¹¹⁷ Constitutional Court of Croatia, Decision U-III-2723/2003 of 23 November 2005, para. 9; Decision U-III-4256/2004 of 6 July 2006, para. 6; Decision U-III-4491/2005 of 9 November 2006, para. 6; Decision U-III-152/2006 of 24 January 2007, para. 6; Decision U-III-929/2012 of 11 March 2015, para. 5.4; Decision U-III-2588/2016 of 8 November 2016, para. 11; Decision U-III-872/2016 of 22 March 2017, para. 8.2.

¹¹⁸ Constitutional Court of Croatia, Decision U-III-5408/2008 of 4 April 2012, para. 9.

¹¹⁹ *Ibid.* Cf. with the discussion of human dignity and the doctrine of 'criminal humanitarianism' in Section 5.2.2., where similar arguments appear. See also the Constitutional Court's elaboration of its understanding of 'dignity as *dignitas*', in Section 4.

tian Constitution; a conception of dignity that, like the one discussed in the previous section, applies horizontally. This conception of dignity assumes an important role in judicial interpretations ('dignity-as-interpretive-tool'). Thus, the Court held that from the CJEU case law in the field of workplace protection and protection of worker's dignity follows

'legal understanding that *fundamental social rights of a worker must be interpreted broadly*, whereas exceptions and restrictions very narrowly. In that sense, domestic acts that regulate the field of protection of workers' dignity likewise must be interpreted in accordance with the mandatory interpretations that follow from the case law of the CJEU. *Interpretation of those acts must be extensive* because dignity, health and security of workers must be protected not only from discriminatory treatment in the workplace and related to the work, but also from all bad and undesirable behaviors that may hurt the [constitutional] rights of personality. To these undesirable bad behaviors in the workplace and related to the work is directly connected the employer's obligation to protect the worker's dignity' (italics added).¹²⁰

Against such a background, the Constitutional Court proceeded with interpreting the concept of the workplace 'mobbing' in a dignity-informed, extensive manner.¹²¹

Two distinctive points follow from this example: First, the conception of workers' dignity in Croatia is strongly driven by the constitutional comparativism: the Constitutional Court builds upon the jurisprudence of the CJEU, which, in turn, likewise relies on comparative method in constructing EU fundamental rights.¹²² More generally, the use of comparative method in interpreting human dignity, and the 'Europeanization' of the concept itself, have been previously discussed.¹²³

Second, the role of 'dignity-as-interpretive-tool', like in the abovementioned example involving workers' social rights, often results in the extension of the scope of constitutional rights or the adaptation of their application to cover situations that have only recently been understood to amount to specific human rights violations. This use of dignity as a 'vehicle' for expansion of the existing rights is one exercise well known to the highest national (constitutional) courts in Europe.¹²⁴ For instance, McCrudden documented how the Hungarian Constitutional Court has drawn on human dignity in order to expand certain socio-economic rights, such as the right to social security (welfare benefits), or establish correlative state obligation

¹²⁰ Constitutional Court of Croatia, Decision U-III-6791/2014 of 30 May 2018, para. 5.

¹²¹ *Ibid.*: 'The Constitutional Court considers that the notion of "mobbing" includes every type of psychophysical abuse or harassment in the workplace, irrespective of whether it has been caused by some of the forbidden discriminatory grounds from the [Law on Suppressing Discrimination] or not, but rather concerns maltreatment grounded in some other motives'.

¹²² Article 6(3) TEU provides that '[f]undamental rights, as guaranteed by the [ECHR] and as they result from the *constitutional traditions common to the Member States*, shall constitute general principles of the Union's law' (italics added). For the CJEU's classic approach on comparativism, see Case 4-73 Nold, ECLI:EU:C:1974:51 and Case 44/79 Hauer, ECLI:EU:C:1979:290. See also Mayer, F., *Constitutional Comparativism in Action. The Example of General Principles of EU Law and How They are Made – a German Perspective*, International Journal of Constitutional Law, vol. 11, no. 4, 2013, pp. 1003–1020.

¹²³ Cf. with the text accompanying fn. 71. Particularly influential in constitutional comparativism has been dignity jurisprudence of the German Federal Constitutional Court. See McCrudden, C., *op. cit.* (fn. 2), p. 694.

¹²⁴ Carozza, P., *op. cit.* (fn. 6), p. 466: 'In many cases, courts appeal to the idea of human dignity to expand the scope of fundamental rights, either by finding that human dignity requires a substantially extended understanding of a recognized right or by justifying the recognition of a new constitutional right by reference to the requirements of dignity. Such uses of dignity range across a broad spectrum of constitutional rights'.

to secure shelter for homeless.¹²⁵ Similar practice can be encountered in other European countries, again predominantly in relation to socio-economic rights: in Poland, the Constitutional Tribunal derived from human dignity state obligation to guarantee to unemployed ‘social security benefits [...] and a basic level of social welfare’;¹²⁶ the GFCC derived from a combination of human dignity (as a supreme constitutional principle) and other constitutional principles state obligation to provide minimum subsistence to individuals;¹²⁷ the Italian Constitutional Court similarly derived from human dignity the right to decent housing;¹²⁸ whereas the UK House of Lords used human dignity to determine that a systemic lack of support for asylum seekers (for example, prohibiting work to them, even in cases of destitution) amounted to inhuman and degrading treatment.¹²⁹

The role of ‘dignity-as-interpretive-tool’ in extending the scope of other human rights is also recognizable in the case law of the ECtHR and the CJEU. Examples for the former abound.¹³⁰ Likewise, the jurisprudence of the latter provides some notable cases.¹³¹

5.7. DIGNITY AS WELFARE

In a decision in which it reviewed constitutionality of certain provisions of the Law on Enforcement, the Constitutional Court recognized that during the distraint actions (procedures of the enforcement of claims), courts and court bailiffs are obliged to respect dignity of the debtor (distrainee) and their family.¹³² This echoes the abovementioned ‘object formula’,

¹²⁵ McCrudden, C., *op. cit.* (fn. 2), p. 693, discussing Decision 32/1998 (VI. 25) AB, ABH 1998, 251 and Decision 42/2000 (XI. 8) AB, 5/G/1998, Magyar Közlöny 2000/109.

¹²⁶ Polish Constitutional Tribunal, judgment of 17 March 1993, as referenced and discussed in McCrudden, C., *op. cit.* (fn. 2), p. 700.

¹²⁷ McCrudden, C., *op. cit.* (fn. 2), p. 701.

¹²⁸ *Ibid.*

¹²⁹ R. v. Secretary of State for the Home Department, *ex parte* Limbuela [2005] UKHL 66, discussed in McCrudden, C., *op. cit.* (fn. 2), pp. 721–722.

¹³⁰ For the extension of the scope of Article 4, originally prohibiting slavery and forced labor, to cover prohibition of domestic servitude and human trafficking, see, for instance, Siliadin v. France, Application No. 73316/01, 26 July 2005; Rantsev v. Cyprus and Russia, Application No. 25965/04, 7 January 2010. For the instrumental role of human dignity in extending the Article 3 protection (prohibition of inhuman and degrading treatment) to physically and mentally disabled persons, see Keenan v. United Kingdom, Application No. 27229/95, 3 April 2001; Đorđević v. Croatia, Application No. 41526/10, 24 July 2012; M. S. v. United Kingdom, Application No. 24527/08, 3 August 2012; to corporal punishments in schools, see Tyrer v. United Kingdom, Application No. 5856/72, 25 April 1978; Campbell and Cosans v. United Kingdom, Application Nos. 7511/76, 7743/76, 25 February 1982; to forced prostitution, see Tremblay v. France, Application No. 37194/02, 11 September 2007; to mistreatment stemming from inappropriate detention condition and police brutality in custody, see Tekin v. Turkey, Application No. 22496/93, 9 June 1998; Kudła v. Poland, *op. cit.* (fn. 86); Mouiel v. France, Application No. 67263/01, 14 November 2002; Selmouni v. France, Application No. 25803/94, 28 July 1999. See also two landmark cases in which Article 7 (no punishment without law) was interpreted to encompass application of the offence of marital rape, with the ECtHR’s reasoning resting on the importance of human dignity protection: S. W. v. United Kingdom, Application No. 20166/92 and C. R. v. United Kingdom, Application No. 20190/92, 22 November 1995. Further, see similar examples in which the right to private and family life from Article 8 was extended to cover rights of post-operative transsexuals to marry and have their new gender registered: Christine Goodwin v. United Kingdom, Application No. 28957/95, 11 July 2002; L. v. Lithuania, Application No. 27527/03, 11 September 2007.

¹³¹ Petric, D., *op. cit.* (fn. 44); see landmark judgment in Case C-13/94 P v. S., ECLI:EU:C:1996:170, especially paras. 20–24, in which the Court of Justice extended the protection of the EU right not to be discriminated against to transgender persons.

¹³² Constitutional Court of Croatia, Decision U-I-2018/2014 of 29 November 2016, paras. 18.3 and 20.

essentially imposing the negative obligation upon the state authorities in their dealing with the group of citizens in question.

Similarly, the Court interpreted provisions regulating the limits to conducting enforcement actions as having the exclusive aim of protecting dignity of the debtor (distrainee), so as to ensure them resources sufficient for life. With this reading of the enforcement provisions, the Constitutional Court linked the legislator's intent to achieve social justice as one of the highest values of the Croatian constitutional order.¹³³ This conception of dignity embodies the idea of a minimum of economic welfare, necessary for every individual to be able to live a dignified life, as a limit to the government's interference in the citizen's economic wellbeing.

In another line of decisions, the Constitutional Court repeatedly emphasized the fundamental link between dignity and economic welfare, in a conception that puts greater emphasis on the positive duties of the state. The Court views the minimum of economic welfare as a precondition for the achievement of human dignity.¹³⁴ The very 'existential minimum'¹³⁵ of resources that guarantees 'dignified life for humans' is likewise indispensable, in the Court's view, for the efficient realization in practice of all other human rights.¹³⁶ In a similar fashion, the Court interpreted the constitutional right to salary for every employee in the light of its goal to ensure to individuals and their family 'a free and dignified life' ('dignity-as-interpretive-tool').¹³⁷

In a recent decision resolving the important political controversy (Swiss franc loans crisis), the Constitutional Court worked with this conception of dignity that is linked to the minimum economic welfare. The case involved the constitutional complaint challenging constitutionality of the amendments to the Consumer Credit Law. The Constitutional Court started with defining the principle of social justice as containing the state's duty to pursue the establishment and preservation of a just social order, which necessarily implies a minimum of economic welfare as 'the necessary condition for the achievement of human dignity'.¹³⁸ The concept of 'social state', founded on the idea of 'welfare state' that strives to ensure the substantive conditions for 'a dignified life of men', includes the possibility for state intervention in the private sphere of contractual relations, especially in situations of a drastic imbalance of economic power between the contractual parties, and in particular during evident economic and social crisis and market turbulences.¹³⁹

133 Constitutional Court of Croatia, Decision U-I-4082/2017 of 30 January 2018, para. 9.

134 Constitutional Court of Croatia, Decision U-I-1625/2014 of 30 March 2015, para. 37; Decision U-I-4405/2013 of 31 March 2015, paras. 21–21.1.

135 Regarding the 'existential minimum' of resources for life, the Constitutional Court accepts in principle the jurisprudence of the ECtHR, where the Strasbourg court has held that a total amount of the individual's monetary receipts could, if insufficient, amount to inhuman or degrading treatment if those receipts would fail to prevent the deterioration of health or degradation of the quality of life contrary to human dignity. See Constitutional Court of Croatia, Decision U-I-3610/2010 of 15 December 2010, para. 22.1 (referencing Antonina Dmitriyevna Budina v. Russia, Application No. 45603/05, 18 June 2009; Aleksandra Larioshina v. Russia, Application No. 56869/00, 23 April 2002; Kutepov and Anikayenko v. Russia, Application No. 68029/01, 25 October 2005). See also Constitutional Court of Croatia, Decision U-I-988/1998 of 17 March 2010. This reflects a well-established case law of the Constitutional Court in which it draws inspiration from and directly relies on the jurisprudence of the ECtHR. See Capeta, T., Croatian Constitution in EU Integration, in: Member States' Constitutions and EU Integration, Hart Publishing (forthcoming in 2020). Cf. with text accompanied by fn. 49 and 86.

136 Constitutional Court of Croatia, Decision U-I-1625/2014 of 30 March 2015, para. 37.

137 *Ibid.*, para. 37.1.

138 Constitutional Court of Croatia, Decision U-I-3685/2015 et al. of 4 April 2017, para. 26.3.

139 *Ibid.*, para 26.4. See also Constitutional Court of Croatia, Decision U-I-1694/2017 of 2 May 2018, para. 29.5.

The Court then recognized as the legitimate aim of the amendments in question ‘evasion of the escalating debtors’ crisis and *protection of dignity of individual consumers of loans in Swiss francs*’ (italics added), which was jeopardized by harsh material conditions in which the debtors found themselves due to, among others, the extraordinary conditions of appreciation of the Swiss franc.¹⁴⁰ For this reason, the Court held that the amendments did not violate the constitutional right to property, and accepted the protection of dignity of credit consumers as a constitutionally valid reason, jeopardized by the unfair business practice of the credit institutions, for the restriction of other constitutional rights (‘dignity-as-constraint’).¹⁴¹

This decision, moreover, touched upon another important constitutional category and the issue of its relation to human dignity: the one of constitutional guarantees. For instance, the constitutional guarantee of the right to property – of credit institutions, which was at stake in the Swiss franc case – is not absolute but subject to restrictions.¹⁴² Together with other constitutional guarantees, it is ‘directed toward the protection of the rights and freedoms of individuals and social groups, or the protection of certain relations that constitute socio-economic foundations’ of the body politic or its superstructure.¹⁴³ Importantly, constitutional guarantees are not ‘the expression of personality and human dignity of the individual’, but rather the expression of the state’s duty to safeguard certain individual or collective rights and freedoms and to offer them efficient legal protection,¹⁴⁴ to be found in the expressed will of the constitution-maker and its special interests. The government’s duty thus expressed is built into the ‘basic norm’ in the form of constitutional guarantee.¹⁴⁵

Hence, what we see here is the Constitutional Court’s elaborate differentiation between constitutional rights that arise from human dignity of every person on the one hand, and those that result out of the government’s constitutionally prescribed positive obligation on the other. The Court’s qualification of the right to property as part of the latter category of rights might seem peculiar: not understanding it to stem from the basic freedom of everyone to possess and dispose of their property in a liberal society (as would arguably be dominant understanding of the nature of property rights in the Western liberal democracies) might be the reflection of the legacies of the previous socialist regime which restricted property rights; therefore, the new Croatian democratic constitution, breaking away from this history,¹⁴⁶

140 Constitutional Court of Croatia, *op. cit.* (fn. 138), paras. 32.1–32.2.

141 *Ibid.*, para. 32.4.

142 Constitutional Court of Croatia, Decision U-I-763/2009 of 30 March 2011, para. 16: ‘[...] Rights and freedoms and relations that are the objects of the constitutional guarantee, as a rule, are not absolute but are subject to [general and special constitutional restrictions]’.

143 *Ibid.*, para. 16. Similarly, Constitutional Court of Croatia, Decision U-I-3119/2003 of 5 July 2011, para. 10; Decision U-I-3122/2003 of 5 July 2011, para. 12. See also Constitutional Court of Croatia, Decision U-I-722/2009 of 6 April 2011, para. 25.3 (on the autonomy and independence of legal practice as a constitutional guarantee).

144 Constitutional Court of Croatia, *op. cit.* (fn. 142), para. 16.

145 *Ibid.*

146 Some constitutional courts in Europe are notable for building upon the human dignity’s expressive strength, especially in dealing with national histories. Dignity’s function thus symbolizes a resolute rejection of the troubled past in countries going through democratic transition. For instance, the Hungarian Constitutional Court used ‘dignity-as-symbol’ as a mean of ‘filter[ing] the unwanted past’: both to abolish previously-dominant communist law and to reinterpret fundamental rights inherited from that system in accordance with the newly-adopted liberal democratic values. See Dupré, C., *op. cit.* (fn. 3), pp. 62–63. Similarly, the GFCC throughout its dignity jurisprudence emphasized the strongest rejection of the totalitarian past and Nazi atrocities, and relied on dignity to forcefully underpin the new German democratic regime that aims to ensure that such histories repeat ‘never again’. Starting in some of the earliest cases, the German Constitutional Court continuously ‘emphasized that the Basic

over-emphasizes the constitution-maker's intention not to interfere unjustifiably into private property, at expense of the liberal foundations of the right to property.

5.7.1. DIGNITY AND CONSTITUTIONAL IDENTITY

While further elaborating the concept of 'social (welfare) state', the Constitutional Court came to recognize it as a constituent element of the Croatian (and European) constitutional identity.¹⁴⁷ As one of the basic requirements of social state, the Court views the public authorities' obligation to pursue policies of just and equal redistribution of state resources with a view of mitigating the extreme societal inequalities. These policies thus pursued ensure to citizens the 'existential minimum' of resources and promote fundamental social rights that guarantee the achievement of a 'starting minimum' of needs linked to the respect of dignity of every person.¹⁴⁸ The needs in question involve distribution of resources that exceed the 'existential minimum' but are in the contemporary socio-cultural context self-evident (including, for instance, schools and education).¹⁴⁹ Guaranteeing the achievement of this 'starting minimum' of needs for its citizens is, in the Constitutional Court's view, obligatory for the state government.¹⁵⁰

From this approach, one could argue that the Constitutional Court builds the idea of dignity into the foundations of the Croatian constitutional identity only indirectly; that is, via the aforementioned concept of 'social (welfare) state'. The development of the concept of constitutional identity in the Croatian constitutional doctrine, so far explicitly encompassing values such as equality and liberty,¹⁵¹ is still nascent.¹⁵² At the same time, some constitutional scholars convincingly propose that human dignity already constitutes an essential part of the Croatian constitutional identity.¹⁵³

Law established a constitutional order that is the opposite of the totalitarian state which rejects human dignity'. See Grimm, D., *Dignity in a Legal Context: Dignity as an Absolute Right*, in: McCrudden, C. (ed.), *Understanding Human Dignity*, Oxford University Press, Oxford, 2013, pp. 381–391, at p. 385 (fn. 6). See also EVerfG 2, 1, judgment of 23 October 1952 (Ban of the *Sozialistische Reichspartei*); Dupré C., *op. cit.* (fn. 3), pp. 58–61; Barak, A., *Human Dignity: The Constitutional Value and the Constitutional Right*, in: McCrudden, C. (ed.), *Understanding Human Dignity*, Oxford University Press, Oxford, 2013, pp. 361–380, at pp. 369–370. In comparison with these two constitutional courts, the Croatian Constitutional Court has not used dignity as a symbol of severing ties with the previous communist regime. For a note on human dignity in socialist constitutions of the former Yugoslavia, see text accompanied by fn. 15–19.

147 Constitutional Court of Croatia, Decision U-IP-3820/2009 of 17 November 2009, para. 13.1, followed by the statement that '[the Croatian Constitution] belongs to a category of the so-called socially-conscious constitutions'.

148 *Ibid.*

149 *Ibid.*

150 *Ibid.* Here the Court also adds that pursuit of the government's positive duties that stem from the constitutional concept of social state is intertwined with the constitutional principle of the rule of law.

151 On the association between the values of equality and liberty and the idea of human dignity, see discussion in Section 4.

152 Kostadinov, *op. cit.* (fn. 4), pp. 159–160: 'In the still-nascent constitutional identity of Croatian jurisprudence, equality was among the first to be included in the catalogue of "eternal" constitutional guarantees making up the conscience of the Constitution and superseding all other constitutional norms in hierarchical value', with a subsequent introduction of "freedom" to the identity-shaping catalogue of values'.

153 Kostadinov, B., *Ustavni identitet*, in: Bacic, A. (ed.), *Dvadeseta obljetnica Ustava Republike Hrvatske*, HAZU, Zagreb, 2011, pp. 305–337, at p. 320; Horvat Vuković, A., *Ustavni sud Republike Hrvatske kao 'europski' sud i očuvanje nacionalnih standarda zaštite temeljnih ljudskih prava i sloboda*, Zbornik Pravnog fakulteta u Zagrebu, vol. 69, no. 2, 2019, pp. 249–276, at p. 261.

In any event, positioning of human dignity in the heart of the national constitutional identity is another classic feature of dignity jurisprudence of some constitutional courts in Europe.¹⁵⁴ Moreover, in the context of the EU multilevel federalism, dignity as part of the constitutional identity has an important functional role in ‘structuring the relationship between EU law and national law’.¹⁵⁵ Being a fundamental constitutional principle in most of the EU countries,¹⁵⁶ dignity has the potential to serve as a strong check on the expansion of EU law into national legal systems and on the supremacy of the former over the latter, and consequently on the extension of the CJEU’s authority at the expense of national courts’ authority.¹⁵⁷

Recently, constitutional courts in some EU Member States indeed started invoking human dignity in this manner. In 2015 the German Constitutional Court, building upon its previous decisions in which it asserted the authority to control compliance of EU acts with the German Basic Law in the so-called *ultra vires* and constitutional identity reviews,¹⁵⁸ confirmed that human dignity ‘forms part of the inalienable [German] constitutional identity’.¹⁵⁹ This essentially meant that the GFCC intends to strike down any EU act violating dignity (that is, ‘disapply’ it) in Germany.¹⁶⁰

Expressly following the German court’s lead, in 2016 the Hungarian Constitutional Court invoked human dignity as one of the grounds for justifying the Hungarian government’s refusal to comply with the EU’s refugee relocation scheme.¹⁶¹ The Hungarian court sees dignity as underpinning, explicitly or implicitly, all three types of constitutional review of EU law (fundamental rights-sovereignty-identity) it performs.¹⁶² Since most other high courts in the Member States traditionally also follow the GFCC’s doctrines regulating the relationship between the EU and national laws,¹⁶³ more similar judgments can be expected in the future.

154 Petric, D., *op. cit.* (fn. 44).

155 Avbelj, M., *Human dignity and EU legal pluralism*, in: Davies, G.; Avbelj, M. (eds.), *Research Handbook on Legal Pluralism and EU Law*, Edward Elgar Publishing, Cheltenham, 2018, pp. 95–110, at p. 97.

156 Opinion of Advocate General in Omega, *op. cit.* (fn. 39), para. 83, where the AG notes that in some Member States dignity stands as a fundamental constitutional principle (either codified in constitution or expounded by courts on a case-by-case basis); in others as an evaluative or interpretive principle with a prominent role in the case law; while in at least one (Germany) it is a self-standing and fully justiciable human right.

157 The following discussion draws extensively on Petric, D., *op. cit.* (fn. 44), pp. 808–811.

158 BVerfG 2 BvR 2134/92, 2 BvR 2159/92, judgment of 12 October 1993 (Maastricht Treaty); BVerfG 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09, judgment of 30 June 2009 (Lisbon Treaty).

159 *Op. cit.* (fn. 80), especially paras. 36–51.

160 For commentary, see Halberstam, D., *The Judicial Battle Over Mutual Trust in the EU: Recent Cracks in the Façade*, *Verfassungsblog*, 9 June 2016, verfassungsblog.de/the-judicial-battle-over-mutual-trust-in-the-eu-recent-cracks-in-the-facade/; Hong, M., *Human Dignity, Identity Review of the European Arrest Warrant and the Court of Justice as a Listener in the Dialogue of Courts: Solange-III and Aranyosi*, *European Constitutional Law Review*, vol. 12, no. 3, 2016, pp. 549–563; Nowag, J., *EU law, constitutional identity, and human dignity: A toxic mix?*, *Common Market Law Review*, vol. 53, no. 5, 2016, pp. 1441–1454.

161 Decision 22/2016 (XII. 5) AB on the Interpretation of Article E) (2) of the Fundamental Law of 30 November 2016. For commentary, see Kelemen, D. R., *The Dangers of Constitutional Pluralism*, in: Davies, G.; Avbelj, M. (eds.), *Research Handbook on Legal Pluralism and EU Law*, Edward Elgar Publishing, Cheltenham, 2018, pp. 392–403, at pp. 401–402: ‘[T]he Hungarian Court ruled that it had the power domestically to override EU law on refugee relocation (or any other EU law) in the name of constitutional identity if it deemed that the law infringed: (1) human dignity or any other fundamental right; (2) Hungary’s sovereignty; or (3) Hungary’s constitutional identity rooted in its “historical constitution”’. See also Mohay, Á.; Tóth, N., *Decision 22/2016. (XII. 5.) AB on the Interpretation of Article E) (2) of the Fundamental Law*, *American Journal of International Law*, vol. 111, no. 2, 2017, pp. 468–475.

162 Avbelj, M., *op. cit.* (fn. 155), p. 100.

163 Mayer, F., *op. cit.* (fn. 122), pp. 1010–1014.

The German and Hungarian judgments indicate a trend of high national courts using 'dignity-as-defense' against the European law, where human dignity serves as a negative value that keeps the process of EU integration in check.¹⁶⁴ A potential risk implicit in this function of dignity is that it can be employed not only for benevolent, liberal-democratic ends but can likewise be placed in the service of authoritarian and illiberal politics.¹⁶⁵ At the same time, in these situations dignity functions as a justification for judicial defiance to the EU law's influence in their respective national jurisdictions; that is, as a legitimating device ('dignity-as-legitimation') for the high courts' defensive position adopted therein.¹⁶⁶

Now, the Croatian Constitutional Court is expected to soon 'strengthen the doctrine of constitutional identity and explicitly take responsibility in controlling the constitutionality of EU law in relation to it' (constitutional identity).¹⁶⁷ Given that the Court increasingly 'intensifies' the reliance on the concept of constitutional identity and adds new values to its 'catalogue of norms' on a case-by-case basis,¹⁶⁸ and moreover given the influence of the German Constitutional Court on the jurisprudence of its Croatian counterpart, human dignity seems as an ideal candidate for assuming the central role in structuring the relationship between the legal orders of Croatia and the EU.¹⁶⁹

On the other hand, the efforts that the CJEU is putting into the development of its dignity jurisprudence are noticeable.¹⁷⁰ These may, indeed, be seen as an anticipatory response from Luxembourg to these dignity-informed jurisdictional attacks launched by the Member

164 Avbelj, M., *op. cit.* (fn. 155), p. 100: 'It can be deduced from the jurisprudence of the [German and Hungarian] national constitutional courts, which have explicitly addressed the role of human dignity in the context of the national-supranational constitutional relationship, that they conceive of human dignity as a limit to the process of European integration. Human dignity thus plays a defensive role. As the minimal content of any fundamental right, it acts as a bulwark against national and supranational encroachment on fundamental rights. Simultaneously, human dignity is also a foundational concept of the national constitutional identity. From the national courts' perspective, human dignity thus plays a double role: that of the fundamental right and the identity-conferring commitment. [...] This approach can also be identified in the other member states' comprehension of human dignity in European affairs' (italics added); and p. 104: '[R]elying on human dignity as the quintessential aspect of their national constitutional identity, [national constitutional courts] have claimed [that] protection of human dignity, as dictated by national constitutions, requires that in exceptional cases and as ultima ratio the irreconcilable national and supranational claims are to be decided in favour of the former'.

165 Perju, V., *On Uses and Misuses of Human Rights in European Constitutionalism*, Boston College Law School Faculty Papers, no. 1, 2017, pp. 1–45, at p. 35. Similarly, Kelemen, D. R., *op. cit.* (fn. 161), p. 402, discussing the German and Hungarian constitutional courts' two dignity judgments, concluded that '[s]adly, some national constitutional courts are as likely to use constitutional pluralism and identity review to reduce the protection of democratic norms and fundamental rights as to enhance them'.

166 Petric D., *op. cit.* (fn. 44), p. 811. For a remark on the judicial reliance on the concept of dignity in adjudication as an essential 'institutional legitimation technique', see Carozza, P., *op. cit.* (fn. 6), p. 467.

167 Horvat Vuković, A., *op. cit.* (fn. 153), p. 249 (author's translation). See also Horvat Vuković, A., *U ime Ustava – materijalne granice promjene Ustava*, Zbornik Pravnog fakulteta u Zagrebu, vol. 65, no. 3–4, 2015, pp. 481–503; Smerdel, B., *In Quest of a Doctrine: Croatian Constitutional Identity in the European Union*, Zbornik Pravnog fakulteta u Zagrebu, vol. 64, no. 4, 2014, pp. 513–534.

168 Horvat Vuković, A., *op. cit.* (fn. 153), pp. 261–262: 'Determination of the ultimate limit to the participation in supranational integrations should be among the priorities for the Constitutional Court if it wishes to protect the Constitution and present itself as a serious interlocutor to the CJEU. In that sense will the development of the Croatian constitutional identity be inseparably connected to the evolution of the Constitutional Court itself in the light of the logic of the constitutional state' (references omitted).

169 *Ibid.*, pp. 264–265: 'As a guarantor of the objective value order [the Constitutional Court] is the only institution with a jurisdiction to harmonize [with constitutional values] different sources of law in the Republic of Croatia, including the European law when it threatens the inviolable core of the fundamental rights and freedoms guarantees. In that respect, [the identity doctrine] is indeed a mechanism that ensures the separation of powers, which subjects each of them – national or European, judicial or legislative – to the principle of protection of human dignity (concretized in the guarantees of fundamental rights and freedoms) as the dome of the constitutional edifice' (italics added).

170 Petric, D., *op. cit.* (fn. 44).

States' high courts. In this context, the CJEU's dignity jurisprudence becomes essential in justifying that EU law satisfactorily conforms to human dignity requirements. There are already suggestions that the Court of Justice is well equipped to deflect these challenges: the leading example is still the landmark judgment in *Omega*,¹⁷¹ where the Court essentially deferred to national value judgments in a politically sensitive area of the constitutional protection of human dignity.

So, paralleling the elevation of human dignity at the pinnacle of the EU's 'community of values',¹⁷² the concept itself becomes a powerful judicial tool that additionally supports the supremacy of EU law and its effective and uniform application in the Member States. This function of dignity ('dignity-as-legitimation') seems to be the inevitable continuation of the efforts to legitimize (initially based on fundamental rights) EU law in the Member States, in situations where it conflicts with national constitutional standards of human rights protection.¹⁷³ The original pushback against the CJEU's doctrine came from high national courts, which attempted to safeguard human rights under their respective constitutions and draw limits to the supremacy of EU law. In this sense, soon after adopting rights-vocabulary, integration development made it necessary for the Court of Justice to adopt dignity-vocabulary in an attempt to further legitimize EU law and keep up with the evolving dignity jurisprudence in Europe.¹⁷⁴

From all sides engaged in the EU constitutional discourse, therefore, more refined dignity references might be expected in this jurisdictional 'tug-of-war'. This discourse necessitates a respectful, dialogical judicial reasoning and interactions on the issues involving human dignity, and manufactures political consensus around dignity as the foundational value of the EU and national socio-political communities. In this aspect, dignity could indeed prove to be 'a particular favorite "conversation topic" for courts' in Europe.¹⁷⁵

5.8. DIGNITY OF INSTITUTIONS

Another interesting feature of the Croatian Constitutional Court's dignity jurisprudence concerns the idea of dignity of institutions. This conception of dignity revolves around the distinction between philosophical (universalist) meaning of dignity and its social and legal

171 Case C-36/02 *Omega*, ECLI:EU:C:2004:614, especially paras. 37–38. See also Opinion of Advocate General Cruz Villalón in Case C-62/14 *Gauweiler*, ECLI:EU:C:2015:7, para. 61

172 Heselhaus, S., *op. cit.* (fn. 46), p. 964.

173 Similarly, Takis Tridimas argued that 'recognition of fundamental rights as binding norms of [Union] law was the main instrument for the legitimization of the [EU] legal order, the acceptance of supremacy and the embracement of the preliminary procedure by national courts'. See Tridimas, T., *Primacy, Fundamental Rights and the Search for Legitimacy*, in: Poiares Maduro, M.; Azoulai, L. (eds.), *The Past and Future of EU Law*, Hart Publishing, Oxford, 2010, pp. 98–105, at p. 98.

174 As one of its broader functions in internal context, John Tasioulas views 'respect for human rights [a]s at least a necessary condition for the legitimacy of the state'. See Tasioulas, J., *Human Dignity and the Foundations of Human Rights*, in: McCrudden, C. (ed.), *Understanding Human Dignity*, Oxford University Press, Oxford, 2013, pp. 291–312, at p. 293.

175 Dupré, C., *op. cit.* (fn. 3), p. 93.

meanings, neatly exposed by Jeremy Waldron.¹⁷⁶ For Waldron, dignity denotes basic reputation, status or social standing ('*dignitas*') of individuals or groups – one may add institutions, too.

So, similar to other high courts, including the CJEU,¹⁷⁷ the Court accepts as a prominent value the institutional dignity of a range of political and legal actors and institutions: legal persons (companies),¹⁷⁸ private security services,¹⁷⁹ legal profession,¹⁸⁰ public service (administration),¹⁸¹ members of the parliament,¹⁸² courts as institutions¹⁸³ and judiciary as profession more generally.¹⁸⁴ This shows, notably, the awareness of the Constitutional Court about wider possibilities for the constitutional employment of dignity vocabulary, where dignity as propriety gets ascribed not only to human beings but likewise to other entities, objects or phenomena.¹⁸⁵

¹⁷⁶ Waldron, J., *The Harm in Hate Speech*, Harvard University Press, Cambridge, 2012, p. 60: '[D]ignity, in the sense in which I am using it, is not just a philosophical conception of immeasurable worth in (say) the Kantian sense of *würde*. It is a matter of status – one's status as a member of society in good standing – and it generates demands for recognition and for treatment that accords with that status. Philosophically, we may say that dignity is inherent in the human person and so it is. But as a social and legal status, it has to be established, upheld, maintained, and vindicated by society and the law [...].'

¹⁷⁷ Petric, D., *op. cit.* (fn. 44), pp. 811–812.

¹⁷⁸ Constitutional Court of Croatia, Decision U-III-1558/2000 of 19 February 2004, para. 5 (acknowledging the personality right to dignity, reputation and honor of legal persons under Law on Public Information).

¹⁷⁹ Constitutional Court of Croatia, Decision U-I-2828/2008 of 8 October 2016, paras. 8–10 (holding that in the performance of services of private security and protection, the service providers are obliged to act as persons of public trust, while respecting 'dignity and reputation of the service they are performing').

¹⁸⁰ Constitutional Court of Croatia, Decision U-III-2916/2007 of 16 October 2012, para. 8.1 (noting that 'conscientious performance of the attorney's vocation [...] serves as the example of humanity and respect of human dignity as one of the important requirements for the preservation of reputation and dignity of the legal [attorney] profession'; similarly, Constitutional Court of Croatia, Decision U-I-2735/2008 of 16 October 2018, para. 50 (arguing that the ratio of regulating the attorney's profession, including the financial matters such as the service fees, is 'to protect dignity of the profession itself [...] and thereby preserve the trust of citizens in the attorney's profession and the justice system as a whole'). See also Constitutional Court of Croatia, Decision U-I-1350/2011 of 4 November 2014, para. 7.1.

¹⁸¹ Constitutional Court of Croatia, Decision U-I-795/2006 of 29 May 2012, para. 12: 'In the performance of their service, public servants are obliged to act as persons of public trust and respect its [i.e. public service's] dignity and reputation. Therefore, only persons who, besides professional requirements, possess the moral qualities that guarantee dignified performance of public service can be accepted to state service'.

¹⁸² Constitutional Court of Croatia, Decision U-I-4113/2008 et al. of 12 August 2014, para. 47.3 (recognizing 'dignity of a representative's mandate' and with it related values of the multiparty democratic system).

¹⁸³ Constitutional Court of Croatia, *op. cit.* (fn. 47), para. 374.

¹⁸⁴ Constitutional Court of Croatia, Decision U-I-4039/2009 of 18 July 2014, para. 9.1 (ruling that 'the Constitution prescribes the requirement that all elements of the judges' salaries must be regulated by the legislator in a law adopted in the democratic parliamentary procedure, in a manner that respects the essence of the guarantee of the stability of judicial function, that is correct, professional and impartial administration of justice, whereas all elements of the judges' salaries must be appropriate to dignity of the judicial profession and the burden of judges' responsibilities'); Decision U-IX-3911/2009 of 24 September 2009, paras. 6-7, reiterated in Decision U-IX-1182/2013 of 18 December 2013, para. 9.1 ('[S]uccessful performance of the judicial duty requires behavior that constantly promotes impartiality, professionalism and dignity of the judicial vocation and expresses high ethical standards for strengthening the public trust in justness and efficiency of the judicial profession [...]. The independence and freedom of court to render decisions in concrete cases, that is, the independence of judge in adjudication and respect of his freedom in expressing opinions, as well as the autonomy of judicial governance, however, are not principles that in the course of the proceedings protect judge from responsibility for a uttered or in a judgment written word, which deteriorates reputation and dignity of the conduct of judicial profession and the justice system as a whole').

¹⁸⁵ See fn. 1. Note also that decisions in which the Constitutional Court speaks about institutional dignity are the only category in which the Court interchangeably uses two synonyms for 'dignity' in Croatian language, '*dostojanstvo*' and '*dignitet*'.

6. CONCLUSION

In this paper I provided an overview of dignity jurisprudence of the Constitutional Court of Croatia. It was shown in details how the Constitutional Court expounded the different conceptions of (human) dignity from the Croatian Constitution: how the Court – in my view, in an elaborate and informed manner – develops and ‘breathes life’ into the normative substance of the concept of dignity; and what are the various and diverse functional roles the Court assigns to the concept of dignity.

It was also demonstrated how the Croatian dignity jurisprudence is developed in constant interaction with and reflection on other jurisdictions, with which it jointly forms the European ‘constitutional space’; also, how human dignity and its positioning at the core of the concept of constitutional identity increasingly appears in the EU constitutional discourse, which defines the (politically sensitive) relationship between the legal orders of the EU and its Member States, including Croatia.

Finally, it can be argued that the Constitutional Court of Croatia with its dignity jurisprudence does not lag behind its constitutional counterparts in Europe: the ECtHR, the CJEU, or constitutional courts of other European countries. On the contrary, it provides a range of unique approaches to and original uses of the concept dignity that are relevant and of interest to comparative constitutionalism and further developments of this concept in Europe.

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'DOSTOJANSTVO' U PRAKSI USTAVNOG SUDA REPUBLIKE HRVATSKE: EUROPSKA PERSPEKTIVA

Sažetak

Rad analizira normativnu supstancu i funkcije, tj. uloge koje pravni koncept (ljudskog) dostojanstva zauzima u praksi Ustavnog sud Republike Hrvatske. Kroz fokus i raspravu o ova dva aspekta (supstantivnom i funkcionalnom), praksa Ustavnog suda uspoređuje se s pristupom konceptu dostojanstva u praksi Europskog suda za ljudska prava, Suda Europske unije te visokih (vrhovnih i ustavnih) sudova drugih europskih država.

Ključne riječi: *ljudsko dostojanstvo, normativna supstanca, funkcije/uloge, Ustavni sud Republike Hrvatske, Europska ustavna praksa*



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