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"Dignitizing" Constitutions Worldwide: On the Proliferation of Human Dignity in National Constitutions

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"DIGNITIZING" CONSTITUTIONS WORLDWIDE:
ON THE PROLIFERATION OF HUMAN DIGNITY
IN NATIONAL CONSTITUTIONS

*Doron Shultziner & Guy E. Carmi**

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ABSTRACT

Human dignity became widely used in national constitutions after WWII. This Article explores the scope of this increase of uses in constitutions worldwide, and within constitutions, and the different functions that the term serves at present. Our research demonstrates that human dignity is rapidly gaining more place and functions in national constitutions, some of them liberal and some are not. This Article also analyses three functions of human dignity: symbolic-declaratory uses for political purpose; guidelines to the implementation of rights; and also a limitation on fundamental rights. This Article demonstrates the increase in the use of dignity in constitutions over time, and the influence of certain national constitutions over others in the formulations of human dignity. We call attention to the excessive and overuse of the concept, the related issue of separation of powers, and a potential abuse of human dignity.

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INTRODUCTION

Human dignity has become a central term in contemporary constitutionalism following World War II and its inclusion in the preambles of the United Nations Charter (1945) and the Universal Declaration of Human Rights (1948). Only five countries used the term in their constitutions before 1945. At the close of 2012, there are 162 countries that do so. This is a striking number, comprising 84 percent of the world's 193 sovereign states that are members of the UN. Furthermore, human dignity became widely and increasingly used and explored in various areas, reaching a scholarly climax most recently in many fields and sub-fields, including legal studies,¹ political science,² policy studies,³ legal psychology,⁴ bioethics,⁵ human rights and international law.⁶

Many questions remain open and unexplored with regards to the meanings and uses of human dignity, not least because both those who support the use of the term and those who critique it acknowledge that the term is vague and broadly open to interpretation.⁷ This Article addresses

¹ See Orit Kamir, *Honor and Dignity in the Film Unforgiven: Implications for Sociolegal Theory*, 40 LAW & SOC'Y REV. 193-233 (2006); ERIN DALY, *DIGNITY RIGHTS: COURTS, CONSTITUTIONS, AND THE WORTH OF THE HUMAN PERSON*, (U. Pa. Press 2012) [hereinafter DALY, *DIGNITY RIGHTS: COURTS, CONSTITUTIONS, AND THE WORTH OF THE HUMAN PERSON*].

² See GEORGE KATEB, *HUMAN DIGNITY*, (Belknap Press of Harvard Univ. Press (2011); Josiah Ober, *Democracy's Dignity*, 106 AM. POL. SCI. REV. 827-46 (2012) [hereinafter Ober, *Democracy's Dignity*].

³ See D. J. Mattson & S. G. Clark, *Human Dignity in Concept and Practice*, 44 POL'Y SCI. 303-19 (2011) [hereinafter Mattson and Clark, *Human Dignity in Concept and Practice*].

⁴ See Doron Shultziner & Itai Rabinovici, *Human Dignity, Self-Worth, and Humiliation: A Comparative Legal-Psychological Approach*, 18 PSYCHOL. PUB. POL'Y & L. 105-43 (2012).

⁵ See YECHIEL MICHAEL BARILAN, *HUMAN DIGNITY, HUMAN RIGHTS, AND RESPONSIBILITY: THE NEW LANGUAGE OF GLOBAL BIOETHICS AND BIOLAW* (MIT Press 2012).

⁶ See Heath J. Benton, *Mapping Expansive Uses of Human Dignity in International Criminal Law*, in *THE ETHICALIZATION OF LAW* (S. Voneky Springer ed.) (2012).

⁷ See, e.g., Mirko Bagaric & James Allen, *The Vacuous Concept of Dignity*, 5 J. HUM. RTS 257-70 (2006) [hereinafter Bagaric and Allen, *The Vacuous Concept of Dignity*]; R. Macklin, *Dignity is a Useless Concept - It Means no More than Respect for Persons or their Autonomy*, *British Med. J.* 327 (7429), 1419-20 (2003) [hereinafter Macklin, *Dignity is a Useless Concept*]; Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUROPEAN J. INT'L L. 655-724 (2008) [hereinafter McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*]; Herbert Spiegelberg, *Human Dignity: A Challenge to Contemporary Philosophy*, in *HUMAN DIGNITY: THIS CENTURY AND THE NEXT* (R. Gotesky and E. Laszlo. ed. Gordon and Breach, 1970) [hereinafter Spiegelberg, *Human Dignity: A Challenge to Contemporary Philosophy*]; Jeremy Waldron, *Dignity and Rank*, 48 EUR. J. SOC.

several key questions and issues which were not explored yet. How many countries use human dignity in their constitutions and in what ways? What similarities and influences can be identified in the use of the term between nations? What legal functions does human dignity serve in constitutions?

In order to address these questions a database was created in order to map the uses of human dignity in the constitutions or constitutional documents of all the 193 sovereign member states of the United Nations. The analysis of those uses reveals important and surprising results regarding the questions above, as well as on related issues such as evidence concerning constitutional influences in the use, and lack of use, of human dignity among countries, and its fast growing use around the world.

The results are based on a combined quantitative and qualitative analysis of those constitutions, and the equivalent basic laws or bill of rights in the very few countries that have no formal constitution. Indeed, this fast growing field may benefit from the development of empirical and multi-method tools to approach and clarify key issues. For the purpose of this Article, we gathered the following information on each constitutional document: the total number of times dignity is mentioned in the document; the enactment year of the constitution or the year in which dignity was last introduced into the constitution via an amendment;⁸ the number of times dignity is mentioned in the preamble of the constitution; the number of times dignity is mentioned in fundamental principles clauses; the number of times dignity is mentioned in other articles of the constitution; the article numbers in which the term appears; and text quotes of the specific articles in which the term is mentioned.⁹

The analysis includes the word dignity and very closely related conjugations of this word as detailed below. Overall, 649 instances of the term were recorded, out of which the crucial majority of 594 instances (91 percent) are of the word "dignity". In addition 42 instances (6.5 percent) are

201-37 (2007) [hereinafter Waldron, *Dignity and Rank*]; David Weisstub, *Honor, Dignity and the Framing of Multiculturalist Values*, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE* (D. Kretzmer & E. Klein eds. Kluwer Law International, 2002) [hereinafter Weisstub, *Honor, Dignity and the Framing of Multiculturalist Values*].

⁸ Due to the focus on human dignity, years of amendments of constitutions in which this term was not introduced were not recorded nor were amendments of the constitution that primarily involved changing the election system. Only years in which entirely new constitutions were adopted or amendments in which the term was introduced were recorded.

of the word "dignified" (e.g., dignified life, dignified existence, dignified conditions); 8 instances of "dignities"; 4 instances of "dignify"; 1 instance of "dignification". The national constitutions of 162 countries (84 percent) out of 193 UN member states mention the term in their document. The findings reveal complex, surprising, and evolving ways in which the concept of "human dignity" has been used in constitutions. The methodology employed in this Article may prove useful to other constitutional and textual analyses and the growing exploration of human dignity more broadly.

As this Article demonstrates, there are several functions of the term human dignity in constitutions: (1) symbolic-declaratory uses for political purpose; (2) guidelines to the implementation of rights; and (3) a limitation on fundamental rights. In addition, the findings attest to a significant increase in the number of appearances of human dignity both within a national constitution over time and the world over.

In a nutshell, dignity typically appears several times within a constitution and each appearance may have a different function and meaning, depending on its location within the document. While human dignity in preambles and fundamental principle clauses normally serves as a general justification to the constitution with no concrete operative meaning, it can also function as a guideline or even a discrete right with operative meanings when it is located in specific constitutional articles, often in clauses dealing with rights.

Furthermore, we find that human dignity varies not only within the same constitutional document, but its meanings change dramatically across national constitutions. Liberal democracies tend to interpret human dignity as consistent with liberal values, and its application does not usually impinge upon human rights. But even in democracies human dignity may overcome fundamental rights, such as freedom of expression, and lead to their limitation. We also find that the tendency to use human dignity to limit rights in constitutions is stronger in nondemocratic countries. These features of human dignity warrant caution in its use, and clarify a need to better define this concept and to demarcate its borders.

⁹The database will be available online upon publication.

The Article proceeds as follows. We begin with an overview of the uses of human dignity in national constitutions before and after WWII and the lack of a clear definition to the term. We then highlight the symbolic-representation function of human dignity in preambles and fundamental principles clauses of national constitutions. The operative roles of dignity as a guideline to the implementation of concrete constitutional articles and directives are discussed next. We then highlight the functions of dignity as a limitation on rights and as a duty placed upon citizens, mostly in non-democratic countries. Finally, we present interesting findings about the increase in the use of dignity in constitutions over time; the influence of certain national constitutions over others; and the nearly universal characteristic of including the term in almost every constitution enacted in the last twenty years. The conclusions summarize the main findings and key issues arising from the complex functions of the term.

I. HUMAN DIGNITY BEFORE AND AFTER WWII AND ITS DEFINITION

The Second World War was a turning point in the annals of the human experience. The brutality of the war, the utter disrespect for human life, and the systematic and planned execution of millions caused shock and trauma among the nations. The reaction was the emergence of new political and ideological frameworks. The United Nations (UN), established in 1945, embodies the new political order. The new ideological framework is most clearly manifested in the Universal Declaration of Human Rights (UDHR), adopted by the General Assembly of the United Nations (UN) in 1948. Human dignity and human rights are the concepts most identified with this new political and ideological shift after WWII. Human dignity symbolizes an antithesis, a complete rejection, and an alternative to the scourges of the war and what it represented.¹⁰ The term is mentioned in the opening statements (preambles) of the UN Charter and the UDHR. Human dignity is noted as the cause and justification for the establishment of the UN and the

¹⁰ See Yehoshua Arieli, *On the Necessary and Sufficient Conditions for the Emergence of the Dignity of Man and His Rights*, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE*, *supra* note 7 [hereinafter Klaus, *The Founding Function of Human Dignity in the Universal Declaration of Human Rights*].

adoption of the UDHR, although no definition or explanation of the concept is provided in these important documents.¹¹

Since human dignity was enshrined as a constitutive concept in the Charter of the UN and the UDHR, the number of references to human dignity and scope of its legal use have significantly increased in national constitutions compared to the period before WWII and the establishment of the UN.¹² The introduction of human dignity as a key term in these two landmark document was clearly significant to the increase of the uses of the term the world over and in various domains. In the period 1900-1944, only five countries referred to human dignity in their constitutions.¹³ Since 1945, the number of countries that have introduced dignity into their constitutions has increased dramatically to 162, notwithstanding the increase in the number of sovereign UN member states from 67 states in 1944 to 193 states at present. Furthermore, all but 8 countries that enacted constitutions since 1990 have included the term in their constitution and in the last decade all but three have included it.

The first countries to mention human dignity in their constitutional documents following WWII were the defeated axis powers, Japan, Italy, and West Germany.¹⁴ The global growth of democracy had a major influence on shaping constitutions and implementation of human rights. By the end of the twentieth century, 120 states had turned to democracy, the highest number ever and the greatest percentage (63%) of the world's countries. The spread of democracy has brought, in general, more authentic constitutions. The drafting of such constitutions has also brought to light a greater diversity of constitutional arrangements.¹⁵

¹¹ See Klaus Dicke *The Founding Function of Human Dignity in the Universal Declaration of Human Rights*, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE*, *supra* note 7. See also Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT'L L. 848-54 (1983) [hereinafter Schachter, *Human Dignity as a Normative Concept*].

¹² Teresa Iglesias, *Bedrock Truths and the Dignity of the Individual* LOGOS 114-134 (2001) [hereinafter Iglesias, *Bedrock Truths and the Dignity of the Individual*].

¹³ Consistutio'n Poli'tica de Los Estdos Unidos Mexicanos [Const.], *as amended*, Diario Oficial de la Federacio'n [d.o]. Art. 3(1)(c), 5 de Febrero de 1917 (Mex.); Const. of Weimar Germany, 1919, Art. 151 (F.R.G); Const. of Finland, 1919, Sec. 1(1); Ireland Const., 1922 Pmbl.; Const. of Cuba, 1940, Art. 20.

¹⁴ Kenapo, Art. 24 [Japan Const.]; Const. of Italy. Art. 3, 41; Const. of Weimar Germany, 1919, Art 1.

¹⁵ A.E. Dick Howard, *A Traveler from an Antique Land: The Modern Renaissance of Comparative Constitutionalism* 50 VA J. INT'L L. 2, 12-14 (2009); see Fareed Zakaria, *The Rise*

Another increase in the constitutional implementation of human dignity had occurred after the collapse of communism in the late 1980s. Constitutions that followed the fall of the Iron Curtain were characterized by drafters that had previous experience with manipulative use of rights by ruling parties. Poland's 1997 Constitution, for instance, stipulates: "The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities".¹⁶ The implementation of human dignity through constitutions had spread also beyond the borders of post-communist Europe. Notably, the drafters of South Africa's Constitution tried to prevent future effects of apartheid by anchoring human dignity in a new constitution and demanding judges to "promote the values that underlie an open and democratic society based on human dignity, equality, and freedom".¹⁷

But the lack of a definition of human dignity in the UN Charter and the UDHR left the term highly open to interpretation, and invited such interpretation. Political theorists and legal scholars have proposed various accounts of what human dignity means and what it should mean,¹⁸ and judges began to apply the term in complex constitutional matters.¹⁹ These important efforts and applications have not led to an agreed-upon or any predominant definition of the term in either applied (e.g., legal, bioethical)

of Illiberal Democracy, FOREIGN AFF., Nov.–Dec. 1997, at 22.

¹⁶ KONSTITUCJA RZECZYPOSPOLITEJ POLSKIEJ [Constitution] art. 30 (Pol.).

¹⁷ S. AFR. CONST. 1996 ch. 2, § 39(1).

¹⁸ See, e.g., Alan Gewirth, *Human Dignity as the Basis of Rights*, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES (M. J. Meyer & W. A. Parent eds., Cornell Univ. Pr. 1992); Louis Henkin, *Human Dignity and Constitutional Rights*, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES, *id* [hereinafter Henkin, *Human Dignity and Constitutional Rights*]; Ober, *Democracy's Dignity*, *supra* note 2; Schachter, *Human Dignity as a Normative Concept*, *supra* note 13; Waldron, *Dignity and Rank*, *supra* note 9.

¹⁹ See, e.g., Aharon Barak, *The Role of the Supreme Court in a Democracy*, 3 ISR. STUD. 6-29 (1998); Arthur Chaskalson, *Human Dignity as a Constitutional Value*, in The Concept of Human Dignity in Human Rights Discourse, *supra* note 7 [hereinafter Chaskalson, *Human Dignity as a Constitutional Value*]; James R. Fyfe, *Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada*, 70 SASKATCHEWAN L. REV. 1-26 (2007) [hereinafter Fyfe, *Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada*]; Daly, *Dignity Rights: Courts, Constitutions, and the Worth of the Human Person*, *supra* note 1.

or non-applied (theoretical) contexts, despite the proliferation of the use of the term.²⁰

What tends to be forgotten, however, is that the term was originally and intentionally chosen by the drafters of the UDHR precisely for its open-ended nature and indeterminacy, and because it could represent people of various ideological backgrounds, without forcing them to compromise basic principles. The catholic political philosopher Jacques Maritain (1951) led this approach in drafting the UDHR.²¹ As Maritain put it,

...at one of the meetings of the Unesco National Commission where Human Rights were being discussed, someone raised astonishment that certain champions of violently opposed ideologies had agreed on a list of those rights. "Yes", they said, "we agree about the rights but on condition that no one asks us why." That "why" is where argument begins²² (*underline in the original*).

...as I said at the beginning of my speech, the goal of Unesco is a particular goal, agreement between minds can be reached spontaneously, not on the basis of common speculative ideas, but on common practical ideas, not on the affirmation of one and the same conception of the world, of man and of knowledge, but upon the affirmation of a single body of beliefs for guidance in action.²³

²⁰ See critiques in Bagaric and Allen, *The Vacuous Concept of Dignity*, *supra* note 9; Macklin, *Dignity is a Useless Concept*, *supra* note 9; McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, *supra* note 9; Steven Pinker, *The Stupidity of Dignity: Conservative Bioethics' Latest, Most Dangerous Ploy*, THE NEW REPUBLIC, May 28, 2008; Spiegelberg, *Human Dignity: A Challenge to Contemporary Philosophy*, *supra* note 9; Waldron, *Dignity and Rank*, *supra* note 9.

²¹ See JACQUES MARITAIN, *MAN AND THE STATE*, (Univ. of Chicago Pr., 1951). See also McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, *supra* note 9, at 662, 678; Michael Novak, *Human Dignity*, *Human Rights*, 97 FIRST THINGS 39-42 (1999) [hereinafter Novak, *Human Dignity, Human Rights*].

²² Jacques Maritain, *Introduction*, in HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS – A SYMPOSIUM (UNESCO, ed. United Nations Educational Scientific and Cultural Organization Jul. 1948) [Maritain, *Human Rights: Comments and Interpretations*].

²³ Maritain, *Human Rights: Comments and Interpretations*, *supra* note 18, at II.

Maritain also explains that different schools of thought, or ideological camps, emphasize different and even opposing rights that in their view give truer expression to the value of human dignity. Their different “scales of values” are in fact the root cause of mutual accusations that the other camp or ideology does not give proper weight to the “mark of human dignity”, as in the case of those who aspire a collective control of the market and national resources against those who uphold a free-market economy.²⁴ The initial symbolic role of human dignity in the UDHR, thus, was a placeholder to facilitate a practical agreement between representative of opposing ideologies. But once the term had begun to be widely used, it gained a life of its own and began being used and developed in other ways. The next section explores and explains this open-ended function of the term in preambles and fundamental principles of national constitutions.

II. HUMAN DIGNITY AS A JUSTIFICATION AND SYMBOLIC REPRESENTATION IN PREAMBLES AND FUNDAMENTAL PRINCIPLES

Human dignity often appears in preambles and fundamental principles of constitutions. When used in these parts, the function of the term is a cause or justification for the enactment of the constitution and a symbolic-representation for people of different worldviews. These functions, as demonstrated below, are very similar to those of the UDHR preamble, and they are closely related to the term’s open-ended nature that enables a shared starting point for drafting and enacting a constitution even when basic ideological differences may exist.

The preamble is the opening text of the constitution that precedes all of its articles and directives. Preambles often include determinations that serve as a-priori bedrock-truth justifications for the entire constitution.²⁵ Human dignity is often used in national constitutions as one such justification. Not all constitutions have preambles but, where they exist, they usually mention enshrined symbols and values that are meant to reflect the identity of the political community members, as well as their shared history or narrative, and the common goals that they strive to achieve. This reflection of national

²⁴ *Id.* at VIII.

²⁵ See also Iglesias, *Bedrock Truths and the Dignity of the Individual*, *supra* note 12.

values in a nation constitution is also known as *Volkgeist*.²⁶ For instance, the preamble of the Constitution of Ireland notes that the people of Ireland establish the constitution because they seek “to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations.”²⁷ The preamble of the Saint Kitts and Nevis Constitution notes that their people “declare that the nation is established on the belief in Almighty God and the inherent dignity of each individual.”²⁸ The Czech Republic’s Constitution’s preamble declares that the citizens of the republic are “resolved to build, protect and develop the Czech Republic in the spirit of the inviolable values of human dignity and freedom.”²⁹ The preamble of the Bosnia and Herzegovina Constitution of 1995 opens with the statement that the constitution is “based on respect for human dignity, liberty, and equality.”³⁰

The preambles of the constitutions of 63 countries use human dignity in this broad-declarative way; they comprise 39 percent of the 162 sovereign states that use the term in their constitutions. It is interesting to note that among those constitutions employing the term, only 19 (12 percent) refer to dignity *only* in the preamble (see Table 1). The remaining 44 constitutions mention the term both in the preamble and in specific articles in the document where it serves a different function.³¹

The number of states that enshrine human dignity as a founding value of the constitution significantly increases when we also consider the countries that include dignity in their fundamental principles sections.³² Fundamental

²⁶ Literally, *volkgeist* is a combination of *volk* (people, usually refers to the German nation) and *geist* (which has no exact parallel in English, but may mean mind, spirit, or even ghost). Put together, *volkgeist* represents the spirit of a nation. See, e.g., David J. Bederman, *The Foundations of Law: World Law Transcendent*, 54 EMORY L.J. 53, 70 (2005); David M. Rabban, *The Historiography of Late Nineteenth-Century American Legal History*, 4 THEORETICAL INQ. L. 541, 574 (2003).

²⁷ Ireland Const., 1922 Pmbl.

²⁸ Const. Saint Kitts & Nevis, 1983, Pmbl.

²⁹ Ustava CR, (Const. of Czech rep.), Pmbl.

³⁰ Const. of Bosnia & Herzegovina, 1995, Pmbl.

³¹ See Part III, *infra*.

³² Fundamental principles may also be termed "basic principles", "fundamental provisions", "fundamental objectives", "basic provisions", "state principles", "bases of institutionality", and similar terminologies that mark the higher normative role of those sections in the

principles are intended to emphasize certain values (e.g., equality, freedom, religious beliefs, cultural practices or even social structures) and to stress their centrality relative to other important yet possibly competing values. As such, fundamental principles articles create a hierarchy of norms between the basic norms of society on the one hand and the derived procedural directives on the other. In addition, fundamental principles articles may also have an explicit interpretative function for the constitution as a whole or for specific chapters within it. This means that specific rights, directives, and state policies must be consistent with fundamental principles.

In practice, the way human dignity is mentioned in fundamental principles is mostly declarative and open-ended, and closely follows the way the term is being used in preambles. A typical example is Brazil's constitution,³³ which enumerates "the dignity of the individual" in a separate sub-article, as one of the concepts on which the republic is founded. In the Peruvian constitution dignity is stated as a supreme goal whereby "The protection of the individual and respect for his dignity are the supreme goal of society and the government".³⁴ One of the fundamental principles in the constitution of the Democratic Republic of East Timor declares the country to be "a democratic, sovereign, independent and unitary State based on the rule of law, the will of the people and the respect for the dignity of the human person".³⁵

Another common way to use dignity in fundamental principles is to mention the term together with, or linking it to, rights. For instance, the first article in the "Founding Provisions" of the South Africa constitution refers to "Human dignity, the achievement of equality and the advancement of human rights and freedoms" as among the founding values of the Republic.³⁶ Chile's constitution declares in its "Bases of Institutionality" that "Men are born free and equal, in dignity and rights".³⁷ Similarly, one of the General Provisions in the constitution of Thailand proclaims, "The

constitution relative to other sections and articles. Such sections normally follow the preamble (if there is one in the constitution) or serve as the opening chapter of the constitution. Dignity may be used in fundamental principles, rather than in the preamble, or in addition to it.

³³ C.F, Art. 1(III), (Const. of Brazil).

³⁴ Const. of Peru, 1993, Art. 1 (Under "Basic Principles").

³⁵ Const. of E. Timor, 2002, Art. 1 (Under "Fundamental Principles").

³⁶ S. Afr. Const. 1996. Sec. 1 § a.

human dignity, rights and liberty of the people shall be protected".³⁸ In Finland, the 'Fundamental Provisions' section provides that the constitution shall guarantee "the inviolability of human dignity and the freedom and rights of the individual and promote justice in society".³⁹ As can be seen, these formulations are very similar to those found in preambles.

A total of 50 countries (about 30 percent of countries that use the term) use dignity in their fundamental principles. Among those countries, 16 do so both in the preamble and in the fundamental principles clauses. The remaining 34 countries mention dignity in clauses of fundamental principles and, of these, all but two also mention dignity in other articles and directives. Bangladesh and Sweden are the only countries that use dignity in their fundamental principles clauses alone and not anywhere else in the constitution. Calculated in this context, there are 97 countries that use dignity in either the preamble or the fundamental principles section, or both, which are 60 percent of the total number of countries that use the term.

Table 1. Human Dignity in Preambles and Fundamental Principles	Number of Countries	% of 162 Countries
Preambles – Total	63	39%
Only in Preamble	19	12%
Fundamental Principles Total	50	30%
Fundamental Principles & Preambles	16	10%
Fundamental Principles & Articles	34	21%
Preamble or Fundamental Principles – Total	97	60%

What is the function of human dignity in preambles and fundamental principles? In the examples above, which are typical and representative, human dignity is mentioned alongside with other supreme values such as justice, freedom, equality, will of the people, rights, liberty, prudence, charity, solidarity, and God. The term is one of those values that bestow moral justification upon the concrete instructions specified in the document; but it is not meant to be an instruction in and of itself. The articles in a

³⁷ Const. of Chile, 1980, Const. Art. 1

³⁸ Const. of Thailand, 2007, Sec. 4.

³⁹ Const. of Finland, 1919, Art. 1 § 2.

constitution are meant to articulate and specify the belief in human dignity and what it requires. In this sense the function of human dignity is a justification for the specific contents detailed in the constitution. The contents obviously vary between those constitutions but the cause for their enactment is attributed to human dignity in some way. The operative sections of the constitution may also be revised, omitted, and new ones added, but the justificatory function of human dignity normally remains unchanged, even if the Constitution is amended. In other words, human dignity grants moral justification to the constitution and the articles in the constitution specify what this moral foundation means in more concrete ways.⁴⁰ When human dignity appears in the preamble or fundamental principles clauses it serves as a general *value*, whereas when it appears in specific clauses it acquires an operative meaning. Human dignity as a value, as opposed to an operative instruction, is an important distinction, since it, at least from a theoretical perspective, affects the balancing between human dignity, rights and other social interests.⁴¹ Furthermore, operative constitutional instructions, such as rights and other explicit constitutional provisions and interests, are enforceable, whereas values simply affect constitutional discourse in a weaker manner.⁴²

Human dignity, phrased as a general value, enables an accepted starting point for the enactment of a constitution, because human dignity does not determine the reason or rationale among possible reasons and rationales for the existence and protection of certain norms in a constitutional document. Rather, its open-ended nature helps to leave the ideological and philosophical debate undecided and the concrete meaning of the term deliberately vague so that a political consent could be reached about the ideological sources of the constitution. As Henkin puts it in the context of the UDHR:

⁴⁰ See Klaus, *The Founding Function of Human Dignity in the Universal Declaration of Human Rights*, *supra* note 13.

⁴¹ On the balancing between rights and values see Carmi, *Dignity—The Enemy from Within*, *supra* note 17, at 993; Iddo Porat, *From Interests-based Balancing to Rights-based Balancing: Two Models of Balancing in the Early Days of American Constitutional Balancing*, *Expresso* (2007), available at http://works.bepress.com/iddo_porat/1/.

⁴² *See id.*

The Universal Declaration of Human Rights, striving for a pronouncement that would appeal to diverse political systems governing diverse peoples, built on that faith and eschewed philosophical exploration [...] There is no agreed theory justifying "human dignity" as the source of rights, and we are not told how the needs of human dignity are determined.⁴³

The symbolic-representation and founding function approach is advantageous, since the abstention from an ideological decision regarding the source and cause for the constitution paves the way for political consent concerning the specific constitutional articles and directives that should be enacted in the Constitution in practice without waiving or compromising basic principles of belief.⁴⁴ The representatives of various groups of the political community that take part in a constitutive act can conceive human dignity as representing their particular set of values and worldview. Human dignity is thus used as a linguistic-symbol that can represent different outlooks, thereby justifying a concrete political agreement on a seemingly shared ground. In this respect, human dignity facilitates and offers a common ground for political consent.

III. FUNCTIONS OF HUMAN DIGNITY IN CONSTITUTIONAL ARTICLES

Constitutions mostly consist of articles that are meant to give concrete expression to the general statements and declarations in the preamble and fundamental principles. Articles are supposed to translate such general principles and values into clear rules or directives that inform the public and the judiciary about the roles and obligations of state organs, the powers and authority invested in state authorities, and the rights, benefits and obligations of citizens, to mention the most common legal functions. Articles are also the primary textual source which justices are expected to rely upon and interpret when they decide constitutional cases brought before the courts.

⁴³ Louis Henkin, *International Human Rights as "Rights"*, in *THE PHILOSOPHY OF HUMAN RIGHTS* at 134, 135 (M. Winston Belmont ed., Wadsworth Publishing Company, 1989).

⁴⁴ Compare Maritain, *Human Rights: Comments and Interpretations*, *supra* note 19 with Novak *Human Dignity, Human Rights*, *supra* note 19.

Human dignity is thus used and interpreted differently when it appears in the preamble and fundamental principles segment of a constitution compared to its more operative segments. The location of human dignity within the constitutional document is therefore important, and the term may carry different meanings within the same constitution. The majority of countries use human dignity in more than one segment of their constitution. In total, 141 countries (87 percent) mention dignity in concrete articles in a variety of ways. Fifty-two countries (32 percent) include the term only in specific articles and do not use it in the preamble or the fundamental principle clauses. These facts already indicate a certain degree of complexity regarding the legal function of human dignity because in most constitutions, it serves both as a supreme value, goal or justification for the entire constitution and in addition to this it is mentioned in specific articles which are meant to give expression to this supreme value and goal in the form of specific instructions and rights provisions. Furthermore, the number of times that the term is mentioned in constitutions ranges from once to fifteen (see below). This variability indicates the possible range of functions human dignity may serve within a single constitutional document.

The most common and general function of human dignity in specific constitutional articles is a guideline to the implementation of constitutional articles. The meaning of this function is that the term is supposed to guide and clarify how certain rights, norms, state practices and provisions should be implemented and what their limits are. In this general function, the term is meant to serve as a compass that guides the people and state authorities in all their actions. This function of human dignity is exemplified below in three contexts: (1) stipulations of preserving dignity of people whose freedom has been restricted (e.g., arrest or interrogation); (2) dignity in labor-related issues; and (3) dignity in welfare-related issues. We then summarize the evidence and assess the implications of this function for the separation of power in some domains.

One of the more common uses of the term dignity in constitutional articles is its inclusion in relation to conditions of detention, imprisonment, and punishment. For example, the constitution of Armenia directs, "Arrested, detained or incarcerated persons shall be entitled to human

treatment and respect of dignity.⁴⁵ The Constitution of Finland states, “No one shall be sentenced to death, tortured or otherwise treated in a manner violating human dignity”.⁴⁶ Dignity plays a similar function in many constitutions regarding people whose freedom has been restricted. For example, the Constitution of Nicaragua stipulates that the detainee has the right to “...be treated with respect due to the inherent human dignity”.⁴⁷ The Constitution of Malawi similarly requires that detainees and sentenced prisoners “shall have the right to be detained under conditions consistent with human dignity” and it also specifies that these conditions “shall include at least the provision of reading and writing materials, adequate nutrition and medical treatment at the expense of the State”.⁴⁸ Similar functions of the term with regard to detainees, prisoners, and other people whose freedom has been restricted can be found in the constitutions of Afghanistan, Bolivia, Croatia, the Democratic Republic of Congo, Egypt, Ethiopia, Georgia, Haiti, Honduras, Iran, Maldives, New Zealand, Papua New Guinea, South Africa, Serbia, South Sudan, Sudan, Suriname, Tanzania, Togo, Venezuela, and Yemen. In this type of function, dignity is a general guideline instructing how people in state custody may and may not be treated.

This function of human dignity is also prevalent in constitutional articles related to labor. The constitutions of twenty-three countries mention the term in this context. Ten of these constitutions use the term as a guideline to protect the conditions of labor itself. The Constitution of Portugal was one of the first to do so when it stipulated that workers are entitled to the “organization of work in conditions making for dignity so as to permit personal self-fulfillment”.⁴⁹ One clear influence of this article appears in the constitution of Cape Verde, a former Portuguese colony, which stated that “Every worker shall have also the right to the organization

⁴⁵ Const. of Armenia, 2005, Art. 17.

⁴⁶ Const. of Finland, 1919, Art. 7 § 2.

⁴⁷ Const. of Nicaragua, 2005, Art. 33§ 2.1.

⁴⁸ Const. of Malawi, Art. 42 § 1b.

⁴⁹ Const. of Portugal, 1976, Art. 59 § 1b. This article was later revised and the current constitution states that “every worker shall possess the right” [...] “That work be organized in keeping with social dignity and in such a way as to provide personal fulfillment and to make it possible to reconcile professional and family life” (Const. of Portugal, 2005, Art. 59(1)(b)).

of work under dignifying conditions".⁵⁰ Similar provisions are echoed in the constitution of Angola, and the 1990 (former) Constitution of Mozambique,⁵¹ both former Portuguese colonies. Several Latin American countries comprise another cluster with constitutions that mention dignity in relation to labor and working conditions. The Constitution of Colombia, for example, provides that "Every person is entitled to a job under dignified and equitable conditions", and that "The law, contracts, agreements, and labor settlements may not infringe on the freedom, human dignity, or rights of workers".⁵² Similar articles demanding dignified labor conditions and rights can be found in the constitutions of Argentina, Paraguay, Costa Rica, Nicaragua, Ecuador, the Dominican Republic, and South Korea.⁵³

The constitutions of eleven additional countries use dignity as a guideline for just salaries and labor compensations. For example, the constitution of Venezuela entitles workers to "a salary sufficient to allow them to live with dignity".⁵⁴ The constitutions of Guinea-Bissau and Slovakia also have similar salary provisions for a "dignified standard of living".⁵⁵ Some constitutions raise the dignified salary threshold even higher to include the worker's family. For example, under the constitution of Seychelles, the right to work includes "remuneration which guarantees, as a minimum, dignified and decent living conditions for the workers and their families".⁵⁶ So do the constitutions of Andorra, Belarus, Bolivia, the Democratic Republic of Congo, the Dominican Republic, and Madagascar.⁵⁷

In all, the constitutions of twenty three countries use the term dignity in *labor-related issues*: Andorra, Argentina, Belarus, Bolivia, Cape Verde,

⁵⁰ Similar to the Portuguese Constitution, this article was amended in the 2010 Cape Verde Constitution which now reads, "Workers are also entitled to: a) conditions of dignity, hygiene, health and safety at work" (Const. of Cape Verde, Art. 63(1)).

⁵¹ Const. of Angola, 2010, Art. 81; Const. of Mozambique, 1990, Art. 51 § 1.

⁵² Const. of Colombia, 1991, Art. 25, 53.

⁵³ Const. Arg. Art 14(1); Const. of Paraguay, 1992, Art. 23; Const. of Costa Rica, 2005, Art. 56; Const. of Nicaragua, 2005, Art. 120; Const. of Ecuador, 2008, Art. 33; Const. of the Dominican Republic, 2010, Art. 62(3); Const. of South Korea, 1987, Article 32(3).

⁵⁴ Const. of Venezuela, 1999, Art 91; see also Art. 87 and 100.

⁵⁵ Const. of Guinea-Bissau, 1991, Art. 34(4); const. of Slovakia, 1992, Art. 36(a).

⁵⁶ Const. of Seychelles, 1996, Art. 35(d).

⁵⁷ Const. of Andorra, 1993, Art. 29; Const. of Belarus, 1996, Art. 42; Const. of Bolivia, 2009, Articles 46(I), 54(I); Const. of the Democratic Republic of Congo, 2005, Art. 36; Const. of the Dominican Republic, 2010, Art. 63(9); Const. of Madagascar, 1992, Art. 29.

Colombia, Democratic Republic of Congo, Costa Rica, the Dominican Republic, Ecuador, Madagascar, Guinea-Bissau, Nicaragua, Paraguay, Portugal, Saint Vincent and the Grenadines, Seychelles, Slovakia, South Korea, Tanzania, and Venezuela. They comprise 14 percent of the 162 countries employing the term in their constitutions.

Many of the countries with labor provisions related to dignity, as well as a few additional countries, have constitutional articles that invoke the term in what could be defined as welfare-related issues. Some of these provisions are general. The Constitution of Finland, for example, guarantees “the right to receive indispensable subsistence and care” to those “who cannot obtain the means necessary for a life of dignity”.⁵⁸ The Constitution of Switzerland similarly provides that a person “in distress without the ability to take care of himself or herself has the right to help and assistance and to the means indispensable for a life led in human dignity.”⁵⁹ Similar articles invoking dignity in relation to general welfare appear in the constitutions of Indonesia, Saint Lucia, Serbia, and Seychelles.⁶⁰

Other constitutions include dignity in articles guaranteeing welfare rights and protections to specific vulnerable groups, such as elderly people, children, people with disabilities and special needs, and to people dependent on material assistance. With respect to the elderly, the constitution of East Timor, for example, mentions the “old age policy” which is “designed to provide the elderly with opportunities for personal achievement through active and dignifying participation in the community”.⁶¹ In Kenya, the Constitution orders state measures to “ensure the rights of older persons ... to live in dignity and respect and be free from abuse.”⁶² Similar provisions can be found in the constitutions of Venezuela, Bolivia, and the newly formed country of South Sudan.⁶³

Some countries also mention human dignity as a guideline to the rights and protections of people with special needs or disabilities. A typical

⁵⁸ Const. of Finland, 2000, Art 19(1).

⁵⁹ C.E, Art. 12 (Const. of Sweden, 2010).

⁶⁰ Const. of Indonesia, Art. 28H (3), 34 (2); Const. of Saint Lucia, 1979, Pmb.; Const. of Serbia, 2006, Art. 69 (1); Const. of Seychelles, 1996, Art. 37.

⁶¹ Const. of East Timor, 2002, Art. 20 (2).

⁶² Constitution, Art 57(c), 54(1), (2010)(Kenya).

⁶³ Const. of Venezuela, 1999, Art. 80; Const. of Bolivia, 2009, Art. 67(I); Const. of South Sudan, 2011, Art. 30(2).

statement in this context appears in the constitution of Paraguay, which provides that “Any individual unable to take care of himself due to a physical or mental disability has the right to respect for his dignity.”⁶⁴ In Uganda, the constitution similarly declares that “[p]ersons with disabilities have a right to respect and human dignity.”⁶⁵ An identical article exists in the Constitution of Swaziland.⁶⁶ Similar formulations can be found in the constitutions of Bolivia, Gambia, Kenya, South Sudan, and Venezuela.⁶⁷

Other welfare-related issues involving human dignity as a guideline can be found in the Constitutions of India and South Sudan in relation to children’s welfare.⁶⁸ The Constitution of Guatemala guarantees a right to pension that enables “effective dignity.”⁶⁹ Burundi’s constitution directs the state to guarantee “that all citizens have the means to lead an existence worthy of human dignity”, and declares that every person is “entitled to realization of economic, social and cultural rights indispensable for his dignity”.⁷⁰ Cape Verde’s Constitution entitles everyone the right “to a dwelling which should have a minimum of dignity”, and so does Bolivia’s Constitution.⁷¹

The results about human dignity in constitutional articles are summarized in Table 2 and they bring forth several observations. Altogether, 141 countries use the term in constitutional articles, beyond preambles and fundamental principles sections. Fifty-two countries use the term only in articles. Twenty-six countries use the term regarding people whose freedom has been restricted. Twenty-three countries use to the term for labor and employment matters. Another twenty-one countries use the term dignity in their constitution in matters relating to welfare. Combined with the countries that include dignity to protect labor-related issues, the total number is 31 (calculating the overlap), which comprises 19 percent of the total number of countries using the term in their constitutions.

⁶⁴ Const. of Paraguay, 1992, Art. 7.

⁶⁵ Const. of Uganda, 1995, Art. 35(1); see also article XVI in National Objectives and Directive Principles of State Policy of Uganda.

⁶⁶ Const. of Swaziland, 2005, Art. 30(1).

⁶⁷ Const. of Bolivia, 2009, Art. 70; Const. of Gambia, 1997, Art. 31; Const. of Kenya, 2010, Art. 54(1); Const. of Venezuela, 1999, Art. 81.

⁶⁸ India Const. Art. 39(f); const. of South Sudan, 2011, Art. 17(1)(g).

⁶⁹ Const. of Guatemala, 1993, Art. 78.

⁷⁰ Const. of Burundi, 2005, Art. 27, 52.

⁷¹ Const. of Cape Verde, 2010, Art. 69 ; Const. of Bolivia, 2009, Art 19(I).

Table 2. Dignity in Constitutional Articles	Number of Countries	% of 162 Countries
Dignity in Articles - Total	141	87%
Only in Articles	52	32%
Freedom-restriction issues	26	16%
Labor-related issues	23	14%
Welfare-related issues	21	13%
Labor & Welfare-related issues - Total	31	19%

It is worth observing that most of the countries that employ the term in the function of a guideline to welfare issues are developing countries that cannot in practice provide for workers, senior citizens, children, and people with special needs the level of social benefits that exist in developed countries. This of course does not mean that other countries do not have constitutional provisions protecting workers and labor; many obviously do. Yet, it is interesting that the concept of dignity is raised in this context in predominately developing countries but not in developed countries. Namely, constitutional provisions with the term human dignity do not help (in themselves) advance or realize welfare rights and benefits, and serve as a declarative statement. Such factors remain predominantly dependent on state resources and policies.⁷²

There is seemingly nothing problematic with constitutional articles that use dignity as a guideline to worthy goals such as preserving the dignity of workers. No one would seriously challenge that the dignity of workers and all persons should be protected and enhanced. Yet it is precisely this universal acceptance that blurs the substantive political disagreements over the nature of the specific values, the appropriate balance of these values, and the selection of policies and programs reflecting those values in a way that fulfills the ultimate goal of human dignity.⁷³ When dignity gains an operative function, the question whether a certain government policy or a level of salary conforms to human dignity or not becomes an issue of

⁷² *See and Compare* HCJ 366/03 Commitment to Peace and Social Justice Association v. Minister of finance [2005] (handed down on 12/12/2005) (Isr.).

⁷³ E.g., libertarian or socialist; *see* Maritain, *Human Rights: Comments and Interpretation*, *supra* note 20.

judicial interpretation.⁷⁴ Judges may be asked by dissatisfied petitioners to disqualify policies on the basis of an injury to dignity. In such situations, judges and not the elected members of parliament or government officials must ratify or disqualify the policies of the elected political body or executive branch.⁷⁵ In fact, it is not clear at all if and how human dignity could be used as a guideline for the three branches of government to determine complex social and economic matters, and how it can be used as a criterion to settle political conflicts over policy when they arise.⁷⁶

This raises the question of what functions dignity actually serves in constitutional articles. First of all, it is not obvious that a legal term will have the dual function of both serving as a justification for rights and rules and then also constituting a right or rule in itself.⁷⁷ The uses of dignity as a right or as a rule do not necessarily clarify the constitution or make it more consistent. This is equivalent to saying that the constitution is enacted because of human worth (i.e., in the preamble and fundamental principles) and then to enact a specific right to human worth. Furthermore, when the constitution is silent about the definition of this term or does not include any additional explicit standards, it potentially leaves an enormous scope of discretion for the judiciary to establish these standards through judicial interpretation and precedents (or judicial legislation). Chaskalson, former President of the South Africa Supreme Court, admits this when he writes:

The reluctance to give dignity the status of a discrete right in human rights instruments may be due to the breadth of its meanings and the difficulty of defining its limits... where this has been done, the entrenchment or implication of a

⁷⁴ See, e.g., HCJ 366/03 *Commitment to Peace and Social Justice Association v. Minister of finance*, *supra* note 72. HCJ 10662/04 *Hassan v Social Security Service*, [2012] Tak-Al 2012(1) 5203.

⁷⁵ See also Fyfe, *Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada*, *supra* note 17; McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, *supra* note 9.

⁷⁶ See also Bagaric and Allen, *The Vacuous Concept of Dignity*, *supra* note 9; Paul Brest, *Accommodation of the Majoritarianism and Rights of Human Dignity*, 53 S. Cal. L. Rev. 761 (1980) [hereinafter Brest, *Accommodation of the Majoritarianism and Rights of Human Dignity*]; Mattson & Clark, *Human dignity in Concept and Practice*, *supra* note 3.

⁷⁷ See also Brest, *Accommodation of the Majoritarianism and Rights of Human Dignity*, *supra* note 66; Waldron, *Dignity and Rank*, *supra* note 9; Weisstub, *Honor, Dignity and the Framing of Multiculturalist Values*, *supra* note 7.

residual right of dignity might be thought to have an open-ended quality which would be unmanageable".⁷⁸

The enactment of human dignity as both an umbrella value and as a directive or right in constitutional articles puts the judiciary in a difficult position when it needs to decide what the meaning of the concept is, what its political implications are, and how to settle between complex competing claims.⁷⁹ Yet given the initial function of the term as an intentionally vague and open-ended concept that was meant to represent many ideologies and worldviews, it is not clear that human dignity is indeed manageable for this purpose, or whether it should be narrowly defined. This function opens an undecided ideological debate regarding what human dignity *should be* and what it requires from the courts. The more human dignity is opaque, the more leeway the judiciary receives to determine issues that are considered political matters, and that blurs the boundaries of the separation of powers.⁸⁰

The inclusion of dignity in these more elaborate articles may be seen as a tool to (substantively or rhetorically) emphasize the special importance of these matters in the eyes of the legislature or constituent assembly at the time of enactment. Yet the actual meaning and function of dignity in relation to these articles, and to the constitution more broadly, will have a life of its own after enactment. This will depend on the characteristics of the judiciary at different points of development (e.g., degree of activism, type of regime), the composition and identity of the judges who interpret the term, and the specific case at hand.⁸¹ This will also depend on the factors of political culture and history. As the next section will demonstrate, the undetermined nature of human dignity might be used in ways not necessarily consistent with human rights, in particular among undemocratic regimes.

The tendency to reduce the overuse of human dignity as an operative tool, and even an acknowledgement of the legal problems that this function

⁷⁸ Chaskalson, *Human Dignity as a Constitutional Value*, supra note 17, at 135-136.

⁷⁹ See, e.g., Fyfe, *Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada*, supra note 17.

⁸⁰ See also McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, supra note 9.

⁸¹ For various examples of judicial interpretation see Daly, *Dignity Rights: Courts, Constitutions, and the Worth of the Human Person*, supra note 1.

might create, can be seen in the case of Canada. Canadian courts have preferred to focus on the deprivation of liberty of the accused, as appose to the violation of his human dignity. Canadian courts found human dignity to be too vague and general, and that it can be used both by the defendant and by those who represent crime victims.⁸² Another example for preferring the term "deprivation of liberty" over "human dignity" is most notably seen in the criminal law against assisted suicide. While focusing on liberty would most likely lead to the invalidation of the law, the usage of human dignity could result in the law being upheld. Thus, the choice of rhetoric affects the legal outcome.⁸³ Namely, under Canadian law, human dignity may be used for both the supporters and opponents of the law prohibiting suicide assistance.⁸⁴ The long use of dignity as an operative criterion, especially in the field of equality, eventually led the Canadian Supreme Court to admit that the term is problematic and is not necessarily suitable for this goal. This new approach and reluctance to continue using dignity as an operative criterion in judgments is demonstrated in *R v. Kapp* where the Canadian Supreme Court admitted, "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".⁸⁵ Following this judgment, the number of uses and the operative substantive uses of the term decreased significantly in the Canadian Supreme Court. Similarly in legal systems that mention human dignity in their constitutions, such as Germany and Israel, judges often turn to the discretion of the legislature attempting to shape substantive criminal law, due to the vague nature of human dignity.⁸⁶

IV. THE NEGATIVE IMPLICATIONS OF HUMAN DIGNITY

Human dignity is mostly thought of in relation to the enhancement, protection, and application of rights, especially in democracies. Often, as discussed above, human dignity is indeed used as a guideline to protect

⁸² Kent Roach, *The Primacy of Liberty and Proportionality, Not Human Dignity, When Subjecting Criminal Law to Constitutional Control*, 44 *Isr. L. Rev.* 91, 93 (2011).

⁸³ See, e.g., Mayo Moran, *Talking About Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech*, 1994 *WIS. L. REV.* 1425, 1506.

⁸⁴ Roach, *supra* note 54, at 98.

⁸⁵ *R. v. Kapp*, SCC 41 2S. C. R. 483, para 22 (2008) (Can.).

⁸⁶ *Id.* at 101.

rights in general, to safeguard the rights of people whose liberty has been restricted for whatever reason, and to provide for the rights of employees. Human dignity is also used to place positive obligations on the state to provide for and enhance the rights of children, elderly, and people with disabilities. Less obvious, and indeed somewhat surprising, is the finding that the term also serves a very different and even opposite function. Notably, dignity is at times used as a limitation on fundamental rights and as a duty placed on citizens.

Donnelly and Howard were the first to explore such socio-legal or political functions of human dignity.⁸⁷ They observed that some non-democratic countries use human dignity in ways that are actually inconsistent with human rights.⁸⁸ Our research reveals that these functions of human dignity are indeed more a characteristic of countries whose political regime is non-democratic or of developing countries. Yet these functions also exist in certain Western democratic countries and post-Soviet countries. The limitation function of dignity is illustrated as a general limitation on rights, limitation of the right to property, limitation on private enterprise, limitation on the freedom of speech, and as a duty of the citizen towards other citizens or as a citizen's state duty.

The use of dignity as a limitation in constitutional articles is not obvious as it enables state authorities to suppress rights and to politically and legally persecute any perceived threat or opposition using open-ended, and often vague, formulations.⁸⁹ These dangers may be especially relevant in nondemocratic countries and those with high intergroup tensions or those facing security threats. For example, in Lebanon, where deep social divisions exist, the Constitution instructs that education is free as long as it

⁸⁷ See Jack Donnelly, *Human Rights and Human Dignity: An Analytic Critique of Non Western Conceptions of Human Rights*, 76 AM. POL. SCI. REV. 303-16 (1982). See also Rhoda Howard & Jack Donnelly, *Human Dignity, Human Rights and Political Regimes*, 80 AM. POL. SCI. REV. 801-17 (1986) [hereinafter Howard & Donnelly, *Human Dignity, Human Rights and Political Regimes*].

⁸⁸ See also Howard & Donnelly, *Human Dignity, Human Rights and Political Regimes*, supra note 7; Jack Donnelly, *The Relative Universality of Human Rights*, 29 HUM. RTS. Q. 281 (2007); Rhoda Howard, *Dignity, Community, and Human Rights*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVE: A REQUEST FOR CONSENSUS (A. A. An-Na'im ed. Philadelphia 1992).

⁸⁹ Such characteristics may be considered unconstitutional in some countries, such as the United States (see, e.g., GEOFFREY STONE, ET AL., CONSTITUTIONAL LAW 1091-1101 (4th ed. 2001)).

“does not interfere with the dignity of any of the religions or creeds”.⁹⁰ The constitution of Laos also demonstrates the dangerous potential of a broad and open-ended use of dignity to limit cultures and traditions: “All cultural and mass media activities which are detrimental to national interests or the fine traditional culture and dignity of Lao people are prohibited”.⁹¹ Mozambique’s Constitution stipulates that the “exercise of the rights and freedoms” are regulated by laws that give respect to the “dignity of the human person” as well as to the Constitution.⁹² Such vague constitutional provisions can both help protect *and* harm human rights, depending on state authorities’ understanding of what human dignity actually means and what it politically demands in the specific political circumstances they face. Beyond these general limitations, some countries use dignity in their constitutions as a limitation on more specific rights and liberties. In several countries the term has the potential constitutional power to directly override private property rights. For example, Azerbaijan, Moldova and Ukraine, three post-Soviet-Union countries, have very similar formulations of articles that allow the potential limitation of the right to property based on considerations of dignity, although what this exactly means is not defined. In the Ukraine, the Constitution provides that the “use of property shall not cause harm to the rights, freedoms and dignity of citizens”.⁹³ The Constitution of Moldova similarly states that property may not “be used to encroach upon or damage the rights, liberty and dignity of people”.⁹⁴ In Azerbaijan, the Constitution sets the same limitation on the use of property, basing it on rights, liberty and the “dignity of a person”.⁹⁵

Human dignity is also employed in constitutions as a possible limitation on another fundamental right, the freedom of expression. It is also commonly used as a possible limitation in the judicial doctrine of freedom of speech in many other countries, including European liberal-democracies.⁹⁶ The constitutional limitations of human dignity on freedom

⁹⁰ Const. of Lebanon, 1990, Art. 10.

⁹¹ Const. of Laos, 2003, Art. 23.

⁹² Const. of Mozambique, 2004, Art. 48(6).

⁹³ Const. of Ukraine, 1996, Art. 41.

⁹⁴ Const. of Moldova, 1994, Art. 9(2).

⁹⁵ Const. of Azerbaijan, 2002, Art. 13(3).

⁹⁶ Guy Carmi, *Dignity - The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification*, U. Pa. J. Const. L. 9 (4), 957-1001(2007).

of expression include some general restrictions on this right, and more specific limitations on the media and on information. A typical example of a general limitation of human dignity on the freedom of expression is found in the Constitution of Montenegro, which states that, "The right to freedom of expression may be limited only by the right of others to dignity, reputation and honor and if it threatens public morality or the security of Montenegro".⁹⁷ A similar formulations can be found in the Constitution of Moldova, which stipulates that the "freedom of expression may not harm the honor, dignity or the rights of other people"⁹⁸, and in the Constitution of Romania, which directs that "[f]reedom of expression shall not be prejudicial to the dignity, honor, and privacy of person, and the right to one's own image".⁹⁹ The common context of dignity in these articles is reputation and honor.

Indeed, dignity is often used synonymously with reputation and honor in constitutional cases alleging abuse of freedom of speech, or in order to strengthen protections of a person's reputation or a group's honor by terming injuries to the latter two as injuries to dignity. Of course, the courts are also affected by these legal formulations, and there are many examples of rulings within which human dignity overshadows freedom of expression. This is more typical in legal systems which lack a democratic heritage. For example, the court in Samoa ruled that: "The value of a person's reputation is very high indeed, especially in Samoa where authority and respect for authority is deeply ingrained in the Samoan culture. To so defame a man as to seriously lower him in the estimation of his fellows is to deal a severe blow to his pride and dignity, to undermine his authority and standing, to offend his family and even insult his village".¹⁰⁰

But Western democracies may also limit free speech due to human dignity concerns, and Canada and Germany may serve as prime examples to

[hereinafter Carmi, *Dignity - The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification*].

⁹⁷ Const. of Montenegro, 2007, Art. 47.

⁹⁸ Const. of Moldova, 1994, Art. 32(2).

⁹⁹ Const. of Romania, 1991, Art. 30(6)); Art. 40(3) of the East Timor Const., 2002, also has a similar constitutional stipulation on the freedom of speech. See similarly in the Const. of Ethiopia, 1994, Art. 29 (6).

¹⁰⁰ *Malifa v Sapolu* [1998] WSCA 1 (4 March 1998) (Samoa).

legal systems that limit free speech for such considerations.¹⁰¹ Israel's free speech rulings in the past two decades have also been affected by human dignity as a result of the Israeli 1992 Constitutional Revolution, which led to anchoring the unenumerated right to free speech via the concept of human dignity.¹⁰² This has ironically led to erosion in the level of free speech protection afforded under Israeli law, and human dignity has become rationale for both protecting and limiting free speech. It even became a justification for prior restraint in some instances.¹⁰³

The "dignitization process" of speech – i.e conceptualizing free speech in terms of human dignity – warrants special attention. Under this perception, free speech is increasingly becoming linked to human dignity and is derived from it. It should be noted that the dignitization of speech raises many difficulties. First and foremost, the right to free speech has an independent and well-developed theoretical basis that has had little or no correlation to human dignity. Second, the manner in which human dignity is perceived under constitutional jurisprudence stands at odds with the protection of many kinds of speech, including hate speech, pornography, and libel. Third, even areas of speech that were traditionally afforded robust protection, such as prior restraint, are more prone to limitation under dignity-focused legal regimes.

Fourth, "dignitizing" free speech turns human dignity into an internal constraint on free speech and reduces the protected sphere of expression. Dignity-harming speech may well be categorized as "non-speech", similar to the American treatment of obscenity. These newly formed constitutional standards are expected to yield more speech-restrictive results. Fifth, the integration of the human dignity discourse into constitutional law in general and free speech doctrine in particular resulted in an implicit new hierarchy that places human dignity on the top, at the expense of free speech.¹⁰⁴ These

¹⁰¹ See, e.g., *R. v. Lucas*, [1998] 1 S.C.R. 439 and *R. v. Keegstra*, [1990] 3 S.C.R. 697 (Can). For a discussion of human dignity as formulating German free speech see Guy E. Carmi, *Dignity versus Liberty: The Two Western Cultures of Free Speech*, 26 B.U. INT'L L.J. 277, 324-38 (2008).

¹⁰² See Guy E. Carmi, *Dignitizing Free Speech in Israel*, 57 MCGILL L.J. 791, 794 and *passim* (2012).

¹⁰³ See *id.* at 819-20.

¹⁰⁴ See *id.*

concerns are not properly addressed by courts, and require a careful approach towards applying human dignity in the realm of free speech.¹⁰⁵

Another set of restrictions on freedom of expression by human dignity is in relation to limitations on media and information. For example, the Constitution of Gabon provides, "Audiovisual and written communication is free in the Gabonese Republic, subject to compliance with public order, freedom and dignity of citizens".¹⁰⁶ In Saudi Arabia, the constitutional article dealing with limitations on "information, publication, and all other media" mentions the use of "courteous language" and adds that all acts that "detract from man's dignity and rights shall be prohibited".¹⁰⁷ Similar qualifications can be found in the constitutions of Azerbaijan, Laos, Lithuania, Mongolia, Oman, and Thailand.¹⁰⁸ The problem with these articles is that "detractions from dignity" or "abuse of dignity" are formulations that leave a very wide margin for state authorities to persecute and for justices' intuition to decide cases on a political basis.

A very relevant and current example is the Constitution of Belarus, which limits the use of information by laws whose declared purpose is seemingly benevolent and closely follows many of the constitutional articles that were discussed above: "The use of information may be restricted by the legislation with the purpose to safeguard honor, dignity, personal and family life of the citizens and the full exercise of their rights".¹⁰⁹ Yet in practice this constitutional article serves to seriously hinder freedom of expression, and liberty more generally, by using this article to protect the so-called dignity of government officials and of the president, and hence to stifle open criticism and political expression.¹¹⁰ In other words, dignity is used in this way to strengthen a non-democratic regime and to suppress democracy and human rights.

¹⁰⁵ See Guy E. Carmi, *Dignity – The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification*, 9 U. PA. J. CONST. L. 957, 982-89 (2007).

¹⁰⁶ Const. of Gabon, 1991, Art. 94.

¹⁰⁷ Const. of Saudi Arabia, 1992, Art. 39.

¹⁰⁸ Const. of Azerbaijan, 2002, Art. 18(2); Const. of Laos, 2003, Art. 23; Const. of Lithuania, 1992, Art. 25(3); Const. of Mongolia, 1992, Art. 16(17)); Const. of Oman, 1996, Art. 31; and Const. of Thailand, 2007, Sec. 35, 45.

¹⁰⁹ Const. of Belarus, 1996, Art. 34.

¹¹⁰ See especially the report of the organization ARTICLE 19, *Defamation law and Practice in Belarus, Moldova, and Ukraine*, June 2006, available at www.article19.org.

In addition to limitations on the freedom of expression, human dignity is also used as a duty of the citizen toward other citizens and as a state duty. For example, the Constitution of Belarus requires citizens to “respect dignity, rights, freedoms and legitimate interests of others”.¹¹¹ China’s Constitution declares that all citizens “have the duty to uphold the dignity of the Constitution and ensure its implementation” and also stipulates that the “state upholds the uniformity and dignity of the socialist legal system”.¹¹² Similarly, in Uzbekistan, the Constitution obliges all citizens to respect the “dignity of others”¹¹³ and in Sierra Leone it is one of the duties of citizens to “respect the dignity and religion of other individuals”.¹¹⁴ Similar to the limitations on freedom of expression, these constitutional stipulations are open to interpretation in a way that sharpens the tension between an individual and society or individual and state, and could possibly restrict a person’s rights by expansive and illiberal readings of dignity. There are constitutional provisions from several non-democratic countries that illustrate this non-liberal use of human dignity.

The Constitution of North Korea, for example, stipulates that citizens “must strictly observe the laws of the State and the socialist standards of life and defend their honor and dignity as citizens of the Democratic People’s Republic of Korea”.¹¹⁵ Dignity is used in this instance as one of the citizen’s obligations that he or she must actively defend, rather than a value that protects the individual from state interference. The Constitution of Colombia similarly frames dignity as a duty to honor one’s national membership when it states, “To be Colombian is an honor for every member of the national community of Colombia. Everyone has the duty to respect and dignify this honor”.¹¹⁶ The Constitutions of Brazil,¹¹⁷ Grenada¹¹⁸, and Nigeria¹¹⁹ also use the term dignity in relation to duties and obligations of citizens.

¹¹¹ Const. of Belarus, 1996, Art. 53.

¹¹² Xian Fa, Preamble, Art. 5(2), (Const. of China, 2005), (P.R.C).

¹¹³ Const. of Uzbekistan, 1992, Art. 48.

¹¹⁴ Const. of Sierra Leone, 1991, Art. 13(e).

¹¹⁵ Const. of North Korea, 2009, Art. 82.

¹¹⁶ Const. of Colombia, 1991, Art. 95.

¹¹⁷ C.F., Art. 227 (Const. of Brazil, 1988).

¹¹⁸ Grenada closely follows the text of the American Declaration of the Right and Duties of Man (1948) when it too includes in its preamble the determinations “that rights and duties are correlatives in every social and political activity of man; and that while rights exalt individual

Finally, Bahrain, Kuwait and Tanzania, use dignity to define work as a duty of citizens. The term is used in a manner that potentially places obligations on citizens instead of protecting them. Bahrain and Kuwait have identical constitutional formulations of this concept: "Work shall be the duty of every citizen necessitated by personal dignity and the public good."¹²⁰ In Tanzania, under the section "duties to society", the Constitution explains that work is "the measure of human dignity" and that accordingly "every person has the duty to participate voluntarily and honestly in lawful and productive work".¹²¹ As demonstrated, in these countries work is a requirement of dignity, rather than work being a voluntary choice and dignity being the value that protects the citizen's choices.

A review of the list of countries that include dignity as a constitutional limitation on rights and interests, and as a duty upon citizens, reveals that most of them were nondemocratic at the time of the constitution's enactment or were new, weak and underdeveloped democracies. Many of them still are. Indeed there seems to be a close affinity between the non-liberal uses of human dignity in constitutions and the type of regime and the general quality of civil and political liberties in those countries. As seen in Table 3, out of the 31 countries above that use human dignity as a constitutional limitation, only 8 (26 percent) are classified as 'free' according to Freedom House's 2012 ranking (as of December 2012). But the share of nondemocratic countries in this list is significant: 12 are not free and another 11 are partly free (74 percent). The total average of freedom ratings calculated for these 31 countries is 4.18 which is a low freedom ranking (according to Freedom House report 2012) and confirms that most countries with constitutional articles that use human dignity as a limitation on rights are also non-democratic.

freedom, duties express the dignity of that freedom" (Const. of Grenada, 1973, Pmb. (c)).

¹¹⁹ Const. of Nigeria, 1999, Art. 24(c).

¹²⁰ Const. of Bahrain, 2002, Art. 13(a); Const. of Kuwait, 1962, Art. 41(2).

¹²¹ Const. of Tanzania, 1995, Art. 25(1)(a).

Table 3. Freedom ratings of countries with dignity as a constitutional limitation	Countries	Average freedom rating
Not free countries	12	6.14
Partly free countries	11	3.64
Free countries	8	1.88
Total	31	4.18

Yet, the use of dignity as a possible limitation on the exercise of rights is not inherently illiberal or undemocratic nor does it require judges to interpret the term as necessarily limiting rights. Constitutional limitations that are based on human dignity can also be used to protect a group of people from the actions of the state and to protect workers and their labor conditions, as noted above. Other interesting examples of this use can be seen in the constitutions of several countries that use the term specifically to protect women by limiting cultural practices that are inconsistent with women's dignity. The Constitution of Uganda, under the section concerning the "rights of women", accords women "full and equal dignity of the person with men" and prohibits "[l]aws, cultures, customs or traditions which are against the dignity, welfare or interest of women".¹²² In India, the Constitution calls on every citizen of India "to renounce practices derogatory to the dignity of women".¹²³ The Constitutions of Nigeria,¹²⁴ South Sudan,¹²⁵ and Vietnam,¹²⁶ also have similar constitutional provisions that limit cultural practices considered detrimental to the dignity of women. The purpose of these limitations is to protect vulnerable groups from harmful treatment resulting from longstanding cultural practices. Indeed human dignity has been used to such effect as stopping the practice of female circumcision in Uganda¹²⁷ and protecting women's equality in

¹²² Const. of Uganda, 1995, Art. 33(1), (6)); See also Manisuli Ssenyonjo, *Women's Rights to Equality and Non discrimination: Discriminatory Family Legislation in Uganda and the Role of Uganda's Constitutional Court*, 21 INT'L J. L & POL'Y & THE FAMILY 341–72 (2007).

¹²³ India const. Art. 51A(e).

¹²⁴ Const. of Nigeria, 1999, Art. 21(a).

¹²⁵ Const. of South Sudan, 2011, Art. 16(4)(b), 17(1)(g).

¹²⁶ Const. of Vietnam, 2001, Art. 63(2).

¹²⁷ Law & Advocacy for women in Uganda v Attorney General, 2010, Constitutional Petition No. 8 of 2007 [2010] UGCC 4 (28 July 2010).

inheritance rights in face of longstanding unequal traditional laws in India.¹²⁸

The important point to observe, and especially to be watchful of, is that the term does not inherently and automatically lend itself to increased protection of human rights. Certain legal uses and interpretations of the term can also be used to limit rights and other interests. Democracies are also at risk of using or balancing human dignity considerations *against* human rights considerations in times of serious social tensions or security threats.¹²⁹ This is due to the fact that when dignity gains an operative legal meaning it leaves an enormous scope of discretion (and danger) for state authorities to prosecute and to limit rights based on vague considerations of dignity. The interpretive role of the judiciary, in turn, is shaped by such factors as the worldviews of the judges, cultural understandings of the term, the type of regime, political culture and social factors, to mention the most prevalent. As the current experience and abuse of the legal term in Belarus illustrates, such constitutional limitations are sometimes introduced intentionally and human dignity is then used to protect the regime and to abuse fundamental liberties.

V. CONSTITUTIONAL INFLUENCES ON THE USE AND LACK OF USE OF HUMAN DIGNITY

Countries influence one another in many matters, including the drafting of their constitutions. Some countries such as former world colonial powers have had special direct role in shaping political and legal arrangements in many countries. Other countries affected the constitutional documents of their neighborhood due to cross border, language or other cultural affinity. These effects can also be observed with regards to the use and lack of use of human dignity in constitutions. This section notes some of these interesting influences, though it cannot attempt to give exhaustive or definite

¹²⁸ Madhu Kishwar v. The State of Bihar, 1996, AIR 1864 1996 SCC (5) 125 JT 1996 (4) 379 1996 SCALE (3)640.

¹²⁹ See also Carmi, *Dignity - The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification*, *supra* note 78; McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, *supra* note 9; Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, COLUM. J. EUR. L. 14 (2), 201-56 (2008) [hereinafter Rao, *On the Use and Abuse of Dignity in Constitutional Law*].

explanations to all of those similarities or the direction of their influence. There are two general types of influences, those involving the adoption of human dignity in a particular manner in the constitution, and those pertaining to the lack of use of the term in the constitution.

In terms of constitutional impacts of post-colonial powers, we have already seen in the second section, for example, that Portugal's use of dignity as a guideline to conditions of labor influenced the post-colonial constitutions in its former colonies of Cape Verde and Mozambique. Several Latin American countries also have similar uses of dignity as a guideline for labor and working conditions. Other interesting regional similarities are the identical constitutional formulations of Kuwait and Bahrain which both use dignity to define work as a duty of citizens.¹³⁰ In addition, Uganda and Swaziland have identical formulations about the obligation to respect the dignity of people with disabilities, and similar formulations appear in the constitutions of other African countries.¹³¹

One important and influential formulation of human dignity is the first article of the German Basic Law: "Human dignity is inviolable. To respect and protect it is the duty of all state authority".¹³² Much has been written of the centrality of human dignity in the German constitutional law. "It is *the* formative principle in terms of which all other constitutional values are defined and explained".¹³³ In Germany, human dignity is framed in an absolute manner. This "absolutist" framing has been interpreted as referring to the most fundamental norms of man, which cannot be violated under any circumstances.¹³⁴ Although the only mention of the term dignity in the German constitution is in article 1, this formulation has been very influential and was adopted in the constitutions of Afghanistan, Bolivia, the Dominican Republic, Eritrea, Ghana, Kazakhstan, Mali, Poland, and Serbia.¹³⁵ The understanding of the particular constitutional influences of

¹³⁰ Const. of Kuwait, 1962, Art. 41(2); Const. of Bahrain, 2002, Art. 31(a).

¹³¹ Uganda National Objectives and Directive Principles of State Policy XVI, 1995; Const. of Swaziland, 2005, Art. 30(1).

¹³² GG. Art. 1 (German Basic Law, 1949).

¹³³ DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 359 (2d ed. 1997).

¹³⁴ *See id.* at 312-13; Carmi, *Dignity versus Liberty*, *supra* note 101, at 324.

¹³⁵ Const. of Afghanistan, 2004; Const. of Bolivia, 2009; Const. of the Dominican Republic, 2010; Const. of Eritrea, 1996; Const. of Ghana, 1992; Const. of Kazakhstan, 2007; Const. of Mali, 1992; Const. of Poland, 1997; Const. of Serbia, 2006.

the German formulation of human dignity on other countries is beyond the scope of this Article, but the broader topic warrant further consideration.

The influence of constitutional arrangements between countries finds its expression also in constitutions that do not use the term. There are 31 UN member states that do not mention the term in their constitutions.¹³⁶ Among them, France, the United Kingdom and the United States may have a special explanatory role regarding the other countries on this list. France does not mention the term in its constitution.¹³⁷ The United States does not mention dignity in its constitution, nor is it mentioned in its Bill of Rights or Declaration of Independence. The United Kingdom does not have a formal constitution.

Significantly, these three countries have played an important role in shaping the legal and political systems of countries and former colonies that were under their control for long periods of time. Indeed, the majority (16) of countries that do not mention dignity in their constitution were colonies of the United Kingdom and gained independence from it, while among them fifteen (including the United Kingdom) are members of the association of Commonwealth countries. Three more countries are small islands that were under the United States' influence for a long time, in addition to Liberia, whose legal and political system was founded by former slaves who emigrated from the United States in the 19th century and borrowed key elements from the United States' constitution. And another two of the 31 countries are former French colonies. The influence of the United Kingdom, the United States, and France on the absence of the term dignity in these post-colonial countries is, however, only partial, because other former colonies and associate states did introduce the term dignity into their constitutions at some point. A detailed historical analysis of each country in the future would provide a more comprehensive picture.

¹³⁶ These countries are Australia, Bahamas, Botswana, Cameroon, Canada, Cyprus, Denmark, Djibouti, France, Iceland, Jamaica, Jordan, Liberia, Luxembourg, Malta, Marshall Islands, Mauritius, Micronesia, Nauru, Netherlands, Norway, Palau, Qatar, Senegal, Singapore, Tonga, Uruguay, United Kingdom, United States, Vanuatu, Zimbabwe.

¹³⁷ The term does however play an important role in the French legal system both in legal interpretation and it appears in the constitutional block which includes (in addition to the 1958 constitution), the Declaration of the Rights of Man and the Citizen of 1789, the preamble to the constitution of 1946, the environmental charter of 2004 and the Fundamental Principles Recognized by the Laws of the Republic.

While the influence of certain political and legal systems over others is not new, these examples attest to the influences of the ways in which the term human dignity is being used in constitutions. One possible explanation of these similarities and influences is that a political system may be influential due to historical reasons or due to its perceived prestige in the international community or in a particular region. In such cases its constitutional formulations are more likely to be adopted by other countries. Yet this type of legal borrowing is not obvious, especially regarding a key legal concept such as human dignity. The tension between human dignity and liberty, for example, is treated differently in Western democracies.¹³⁸

The German formulation, for instance, does not allow any balancing with the inviolable value of human dignity and hence any right or public interests that conflict with human dignity must yield to dignity or the conflict must be framed as an internal conflict within the general bounds of dignity so as not to violate this basic value.¹³⁹ Many other legal systems utilize an approach whereby human dignity can be balanced against other rights and public interests. Therefore the adoption of certain formulations of a key concept, such as "human dignity is inviolable", will have a substantive impact on the way justices approach legal issues, such as whether or not they balance alleged injuries to human dignity against other rights and public interests.

Nonetheless, the fact that a legal system has borrowed a written formulation does not guarantee that justices within different systems will similarly interpret human dignity in practice, because they may be influenced by other social, political and cultural factors that will guide their interpretation and rulings. For example, the prevalent perception of human dignity in European constitutional jurisprudence includes communitarian

¹³⁸ See Walter F. Murphy, *Ordering of Constitutional Values*, 53 S. CAL L. REV. 703, 708 (1980); BRAD STETSON, HUMAN DIGNITY AND CONTEMPORARY LIBERALISM 3-8 (1998); Leon Sheff, *Two Models of Human Rights Guarantee: An American Model Versus A Possible Israeli Model*, in LAW IN ISRAEL – A PROSPECTIVE APPROACH 199, 277 n.77 (Yedidia Stern & Yaffa Zilbershatz eds., 2003); and William A. Parent, *Constitutional Values and Human Dignity*, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 47 (Michael J. Meyer & William A. Parent eds., Ithaca 1992).

¹³⁹ G.P Fletcher, *Human Dignity as a Constitutional Value*, 22 U. WESTERN ONTARIO L. REV. 171-82 (1984); DONALD P KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY (2nd ed., Duke Univ. Pr. 1997); Weisstub, *Honor, Dignity and the Framing of Multiculturalist Values*, *supra* note 7.

aspects and views human dignity as an absolute and inalienable value. This approach does not resonate in American jurisprudence.¹⁴⁰ The common understandings of U.S. constitutional law seems to offer less protection for values and rights associated with the idea of human dignity than the average European constitution.¹⁴¹ Even from a theoretical standpoint, the manner in which human dignity is perceived in the United States and Europe differs tremendously.¹⁴² American scholars often use human dignity and autonomy interchangeably while European scholars seem to mean very different things when referring to human dignity.¹⁴³

The influence of countries on one another, and the general increase in use of human dignity, could also be observed in quantitative analysis of the use of the term in constitutions over time. One characteristic of national constitutions that do not mention dignity is that their enactment year is on

¹⁴⁰ See also Henkin, *Human Dignity and Constitutional Rights*, *supra* note 16; Rao, *On the Use and Abuse of Dignity in Constitutional Law*, *supra* note 105. The constitutional jurisprudence of Justice Brennan was probably the most serious attempt to introduce human dignity into American jurisprudence, and it peaked during his tenure on the Court, see, e.g., *Paul v. Davis*, 424 U.S. 693, 735 (1976) (Brennan, J., dissenting) (regarding the right to privacy); *Furman v. Georgia*, 408 U.S. 238, 305-07 (1972) (Brennan, J., concurring) (regarding the death penalty); *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970) (opinion by Brennan, J.) (regarding welfare benefits). Although Justice Brennan referred to dignity in numerous opinions and speeches, he never offered a comprehensive definition of the term; see Marc Chase McAllister, *Human Dignity and Individual Liberty in Germany and the United States as Examined through Each Country's Leading Abortion Cases*, 11 TULSA J. COMP. & INT'L L. 491, 501 (2004). After Brennan retired from the bench in 1990, his human dignity legacy was largely forsaken; see Raoul Berger, *Brennan, "Dignity," and Constitutional Interpretation*, in THE CONSTITUTION OF RIGHTS, *supra* note 18, at 129, 134 (describing the limits of Brennan's human dignity legacy). On the issue of balancing human dignity and with other rights and interests in issues such as Fourth and Fifth, and Fourteenth Amendment cases *compare* *Schmerber v. California*, 384 U.S. 757 (1966) (opinion by Brennan, J.) *with* *Furman v. Georgia*, 408 U.S. 238, 305 (1972) (Brennan, J., concurring).

¹⁴¹ Bognetti, *supra* note 4, at 89; As Whitman notes, "[P]rotecting people's dignity is quite alien to the American tradition, see Whitman, *The Two Western Cultures of Privacy*, *supra* note 10, at 1221.

¹⁴² Arguably, the robust protection of the US First Amendment would "immunize" it from balancing, see Robert M. O'Neil, *Rights in Conflict, The First Amendment's Third Century*, 65 LAW & CONTEMP. PROBS. 7, 11-12 (2002); Susan Brison, *The Autonomy Defense of Free Speech*, 108 ETHICS 312, 322 (1998); Carmi, *Dignity—The Enemy from Within*, *supra* note 17, at 982—86. Therefore, it is likely that even if human dignity had been recognized as a right in American constitutional law, its effects on First Amendment law would have been marginal at best.

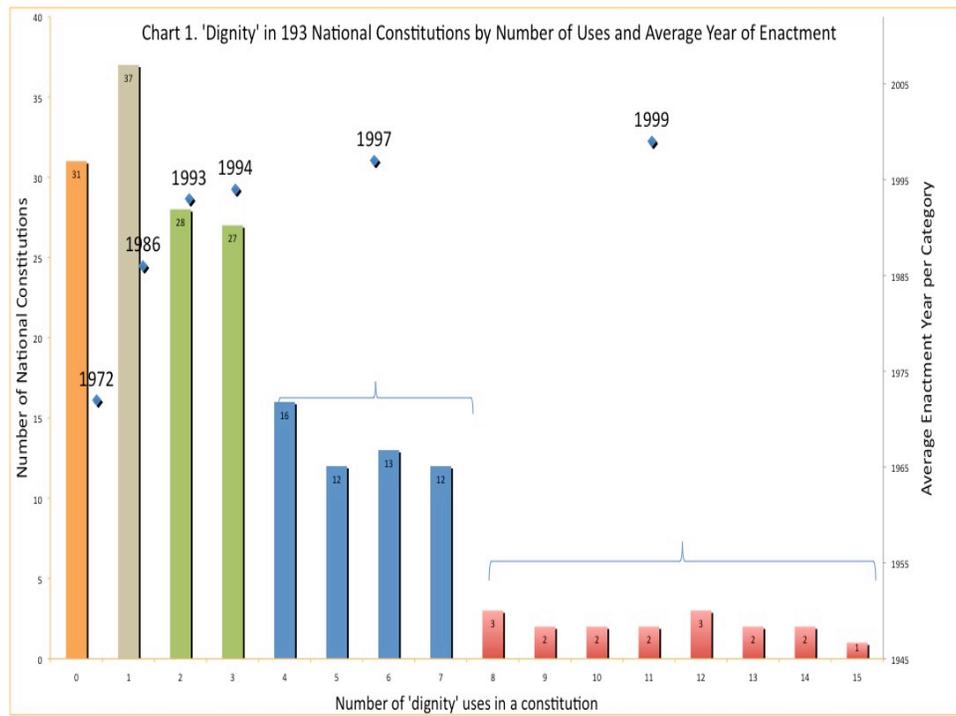
¹⁴³ See Carmi, *Dignity—The Enemy from Within*, *supra* note 17, at 976-82 (regarding Dworkin and Greenawalt).

average earlier than those constitutions which do include the term. The overall weighted-average of the enactment year of the 31 national constitutions that do not mention dignity is 1971 and rises to 1978 when excluding the United States, which is unique in having adopted its current constitution back in 1787. The average enactment year, or the revision year in which dignity was introduced, rises on average the more times dignity is mentioned in a constitution (see Chart 1 below). The average enactment year of constitutions that mention the term once is 1986. Constitutions which mention the term twice have a weighted-average enactment year of 1993, and those that mention it three times have a weighted-average of 1994. Constitutions that mention the term between four and seven times have a weighted-average enactment year of 1997. Finally, constitutions with eight to 15 appearances of the term dignity have a weighted-average enactment year of 1999. These findings attest to the growing use and influence of dignity in legal, political and philosophical discourses, which gradually finds its expression in the redrafting and enactment of constitutions. This finding also suggests that these legal and ideological influences are more likely to find their way into the terminology of a constitution, and also in new contexts within the constitution, the later a constitution is drafted or revised.

One good example of this latter point is Switzerland whose 1874 constitution did not include any mention of dignity. A new constitution was adopted in 1999 and mentioned the term five times, including in contexts such as rules to medical issues.¹⁴⁴ The constitution was amended again in 2010 and the term was added also as a general guideline involving research on humans (Article 118). There are several other examples that illustrate this phenomenon of the growing use of the term in time. The 1992 constitution of Angola mentioned dignity only twice, whereas the 2010 constitution mentions it fourteen times. In 1999 the constitution of Armenia mentioned the term twice, compared to four instances in the 2005 constitution. The constitution of Chile mentions the term once in 1980 and twice in 2000. The 1949 constitution of Hungary mentioned dignity only once, but the amendments of 2011 introduced four additional uses of the term in new contexts. In Mexico the term was mentioned in the constitution

¹⁴⁴ See, e.g, "organ transplantations and gene technology" (Art. 119a(1)).

only once in 1917 and three times in 2011, and in Turkmenistan the uses of dignity increased from two instances in 1992 to six in 2008. Similar increases in the use of the term can be found in the constitutions of Sudan (three in 1998 and seven in 2005), San Marino (none in 1974 and once in 2002), São Tomé and Príncipe (none in 1990 and three in 2003), Niger (three in 1999 and four in 2011), and Morocco (none in 1992 and three in 2011).



In this context it is interesting to observe that the inclusion of human dignity in new constitutions has become nearly a universal feature. The crucial majority of national constitutions enacted after 1980 do include the term in their constitution. There are only 14 countries (7% of total UN member states) whose constitution was enacted after 1980 and do not include the term in their constitution. Among those constitutions, 6 were enacted between 1980 and 1989 (Australia 1988; Canada 1982; Liberia 1986; Netherlands 1983; Palau 1981; Vanuatu 1980); 5 between 1990 and 1999 (Cameron 1996; Denmark 1992; Djibouti 1992; Luxembourg 1998; Norway 1995); and only 3 between 2000 and 2003 (Qatar 2003; Senegal 2001; Tonga 2003). There is no constitution that was enacted after 2003 and

does not include the term. This attests to the great influence and standing that the term human dignity had gained in legal and political thought.

Another important finding about how countries use the term in their constitutions pertains to the number of uses of the term. The analysis of the constitutions confirms that when dignity is used in a constitution it is likely to be mentioned more than once (see Chart 1). In only 37 cases (23 percent) of a total 162 countries, the term is mentioned only once in the constitution. The remaining majority of 125 countries (77 percent) mention dignity several times in their constitutions. Twenty-eight of them mention the term twice, and another 27 mention it three times (i.e., 34 percent altogether). Fifty-three constitutions mention it between four and seven times (33 percent), and the remaining 17 countries (10 percent) use it between eight and the maximum of 15 times in the 1975 constitution of Papua New Guinea. Among the constitutions that refer to dignity, it is used an average of four times per constitution.

Altogether, these findings corroborate the foregoing analysis that many constitutions refer to dignity more than once and in more than one context, meaning or function. These empirical patterns also attest to the growing and spreading use of the term human dignity in national constitutions and the political and constitutional parlance more generally. The term is being increasingly employed both in the number of its appearances in constitutions as well as in new social-political contexts within constitutions. The number of uses of the term in constitutions increases over time and in addition demonstrates constitutional influences in this use across borders.

CONCLUSION

The analysis of the appearances of human dignity in national constitutions reveals interesting findings on several key research questions and issues. Human dignity can currently be found in most of the world's national constitutions. The tendency is toward an increase in the use of the term both in the number of uses within a nation's constitution over time, and across countries' constitutional documents. The extensive use of the term since WWII also resulted in new and non-obvious uses. There is no single or agreed way of using the term in a constitution, and some countries use it remarkably differently. Developing countries, for instance, use the term in relation to labor salaries, labor conditions, and welfare rights and

benefits. Nondemocratic countries tend to use it as a limitation criterion on rights or even as a duty.

The overall extensive use with the term human dignity in national constitutions is characterized by several functions the term can have in national constitutions. Those functions are reflected in, and also dictated by, the appearance of the term in parts of the constitution that normally have distinct purposes. The first function of human dignity is related to, and perhaps shaped by, the term's appearance in preambles and fundamental principle sections. Just as the purpose of these parts of national documents is intended to be symbolic, declarative, and justificatory, so too is the function of dignity in those parts. The second function of human dignity in national constitutions is a guideline to the implementation of various rights and social-political goals. The areas in which this general function is used frequently are prohibitions on torture, cruel punishments, and degrading detention conditions, and in areas pertaining to labor such as pay and working conditions.

We noted that there appears to be an inherent tension between those two functions. It is not without theoretical and practical difficulties that human dignity could serve as both a justification for rights and also as a right and directive in itself. Furthermore, when the term is used in constitutional articles, it turns from a symbolic and undefined justification of the document to a term with legal-operative and political implications. Yet human dignity is broad enough to encompass diverse worldviews and conflicting interpretations and it is not clear if and how this broad and undefined term can help resolve complicated political and constitutional issues. While this is in general a common and healthy practice in democracies with separation of power between the judiciary and the two other state authorities, it is not readily apparent how such a practice is to be implemented with respect to judicial decisions based on human dignity. Both those who support judicial activism and those who oppose it admit that judicial decisions based on this term raise political and constitutional difficulties.¹⁴⁵

¹⁴⁵ See P.G Carozza, *Human Dignity and Judicial Interpretation of Human Rights: A Reply*, 19 *Eur. J. Int'l L.* 931-44 (2008); See also Fyfe, *Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada*, *supra* note 17; McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, *supra* note 9; Rao, *On the Use and Abuse of*

This difficulty is most apparent when the term turns into a limitation criterion on fundamental rights. This third function of human dignity finds its expression in the use of the term as a possible limitation measure on private property, national economic policy, and the freedom of expression. It is also seen in formulations that frame dignity as a type of duty placed on citizens. Although this function primarily characterizes the constitutions of non-democratic regimes, it is also present in the constitutions of some democracies and weak states. This function of human dignity is also present in relation to judicial limitations on the freedom of expression in liberal democracies. The notion that human dignity can only be used to protect and enhance rights thus needs to be carefully examined so that it would not turn into a tool for overriding and undermining human rights.

The rapid increase in the use of the term worldwide and in many new contexts, including medical ethics, bioethics, and international tribunals, requires attention from all three branches of government to the various functions that human dignity can and might serve, as well as to its possible effects on the separation of power between those branches. Human dignity started its way in the international community, and the UDHR in particular, as a concept that united people of very different ideologies and cultural backgrounds. At present, attention is needed from legal scholars and politicians alike to keep a critical eye on its uses and functions so that it would remain a uniting value. If the term means everything – it runs the risk of not meaning anything – and if its functions and applications become inconsistent and open to conflicting interpretations – it runs the risk of not being the uniting concept.

Dignity in Constitutional Law, supra note 105; Weisstub, *Honor, Dignity and the Framing of Multiculturalist Values*, supra note 7; Spiegelberg, *Human Dignity: A Challenge to Contemporary Philosophy*, supra note 9.