Abstract

In the absence of a clear definition of human dignity, scholars mostly focus on different functions that the notion plays in legal discourse. Some argue that it serves as a universal unifying principle for courts around the world, which leads to a dialogue between judges on the interpretation of human rights norms. Others argue that dignity is an empty vessel employed to help judges address the traditional concerns associated with judicial review: the scope and intensity of review, the balancing of rights and the expansive reading of constitutional protection. In the European Court of Human Rights context, however, Jean Paul Costa suggests that human dignity is used by the Court to establish ‘a bridge’ between the Convention and other international instruments. The concept of ‘human dignity’ therefore serves as a tool to situate the Court vis-à-vis other international institutions and to send a message to states about what is at stake. Through an empirical analysis of more than 2000 cases in which the Court refers to human dignity, this article reveals that this is only half of the story. In fact, respondent states themselves often invoke the concept of dignity before the Court. Through the use of different rhetorical devices – from repetition, to mirroring and deference, and silence or outright ignorance, the Court strategically positions itself vis-à-vis these different conceptions. The study reveals which countries’ conception of dignity the Court is willing to accept, or even internalise, and which it ignores. If some scholars suggest that there is a common European conception of dignity, a type of lingua franca, the paper reveals the great variety of understandings of the concept around the Council of Europe and shows a Court willing to engage with certain, but not all meanings.

1 Principal Investigator ERC HRNUDGE project. This is a very rough first draft, please do not cite. Please note that the statistically analysis and coding are not yet completed and so the results are not final.
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I. Introduction

Compared to many other international instruments, the term ‘human dignity’ does not appear in the European Convention of Human Rights. Yet, the notion of ‘human dignity’ appears in 2122 cases of the European Court and has been referred to since the very first cases appeared before the Court in 1960s. In the context of the thousands of cases that the Court has tackled during its existence, this represents about 10% of all of the case law of the Court. The lack of reference to the term dignity in the text of the Convention obviously opens up questions about where the notion is coming from and how and for what purpose it is used in the interpretation of the Convention. The former President of the Court, Judge Jean-Paul Costa argues that on one side, dignity in the ECtHR jurisprudence serves to establish ‘a bridge’ between the Convention and other international instruments, and on the other, is used to send states important signals about what is at stake. This article investigates this claim empirically. It seeks to evaluate the general spread of the term across the ECtHR jurisprudence and asses more particular ways in which it is being used by the Court and with what purpose. My aim is therefore to establish when and why dignity is invoked in the ECtHR case law and by and against whom.

I focus on dignity specifically because out of 47 countries of the Council of Europe (over which the ECtHR has jurisdiction), 38 refer to dignity in their constitution. The concept is used in these documents either in general form (preamble) or in relation to fundamental rights. Although the Convention does not refer to dignity, the concept is therefore shared across the constitutions of the majority of European states. In this regard, scholars have argued that

*The sources of the European ius commune of human rights go beyond Europe's regional treaties, like the European Convention on Human Rights, or its supranational political and legal institutions, such as those of the Council of Europe and the European Union, to include the constitutional traditions of the different member states and the decisions of their courts. The national constitutional systems, however, are independent actors in this community and not merely in a subaltern relationship with supranational laws and institutions.*

In this regard, the relationships which develop between the Court and national constitutional systems are not necessarily of a vertical character. Instead, there is an emphasis on establishing common European approaches and identifying solutions that speak of a European consensus. In this context, the ‘common transnational constitutional space … depends vitally on the fundamental universality of the underlying principles of law expressed through human rights’. In particular, I present the arguments made by Paolo Carozza, who insists that the universal principle of human dignity transcends the differences between jurisdictions and confirms the common, shared experience of the single human family. This is the reason courts ‘treat the idea of human dignity

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as the common thread to be followed across all … contingencies’ and it provides the impetus for transnational judicial dialogue in the human rights field. From this perspective, the European Court of Human Rights almost has no choice but to refer to dignity since the language of dignity forms part of the lingua franca.

If COE countries share the concept of human dignity to the extent suggested by these scholars and judges, then the ECtHR’s attempts to use the ‘dignity language’ in its judgments to send a ‘message’ to states about what is at stake may be wise. The Court, aware of its limited (or non-existent) enforcement powers, uses language as a persuasive tool to encourage state into compliance. Perhaps the use of emotive, shared language, reserved for most basic human rights situations, can trigger a response from countries and lead to a change of behaviour? This is the hypothesis that the paper tests.

Carozza’s view of human dignity is juxtaposed with McCrudden’s seminal inquiry, which reveals that there is no common conception of human dignity. Beyond what he calls ‘a minimum core’, McCrudden finds that dignity is drawn on by judges in a wide range of different substantive areas, that it is assigned differing status and weight, that it attaches to individuals as well as groups, that – depending on the jurisdiction – it can be used both to support rights and to constrain them. McCrudden implicitly criticizes Carozzo for assuming that the fact that jurisdictions share the notion of ‘dignity in the human rights context’ leads to a dialogue between judges on the interpretation of human rights norms. Instead, McCrudden argues that ‘the concept of “human dignity” plays an important role in the development of human rights adjudication … in contributing to particular methods of human rights interpretation and adjudication.’

In this regard, McCrudden speculates that dignity is used in three types of situations, which are common in human rights adjudication: to resolve conflicts of rights, to decide how far domestic rights should be interpreted according to international standards, and finally, to decide how expansively to interpret the text, which is the basis for rights protection. From this perspective, dignity may be used by the Court strategically, to explain the expansion of rights and to interpret the Convention in accordance with international standards, but its appearance in jurisprudence does not confirm a common understanding of the concept.

If McCrudden is correct, this poses several problems for my inquiry. If the concept of dignity is not shared across jurisdictions (I mean here both vertically and horizontally), then who claims the ultimate authority to define its meaning? JP Costa has argued that in the absence of a textual reference to dignity, the ECtHR refers to international instruments. Does it also look at or adopt the conceptions of dignity contained in constitutions of its member states? Is the concept of dignity it uses imposed or derived? As comparative constitutional law scholars have shown, constitutional references to dignity extend from aspirational, to operative and rights limiting. Effectively, different constitutional provisions can provide for conflicting understandings of

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3 Cesare Mirabelli, then President of Italian Constitution Court.
4 McCrudden EJIL 695.
5 Ibid.
dignity. How does the Court react and navigate between these definitions? What strategies does it use to adopt or distance itself from a specific conception? How does it pick and choose?

Both Carozza and McCrudden have drawn on the case law of several jurisdictions and in particular domestic constitutional courts to make their case. In this regard, they focus on the actions of highest domestic courts as engaging in a common judicial endeavour of interpreting rights. There is no formal link between these courts – they remain independent of each other, applying their own constitutional texts and based in their own history, culture and social practices. In contrast, my investigation looks at an international court, where relationships between the Court and states are rather more formal (and vertical). By limiting my inquiry to one supranational jurisdiction, I can seek to understand how in a jurisdiction with no textually pre-determined conception of dignity the terminology is used by different sides and what reactions these arguments trigger. This allows me to move beyond the existing scholarship which focuses on the dialogue between judges (and courts) to reveal the dynamics – the back and forth – between an international court and states (and their executives). Most strikingly, the analysis reveals that it is not only judges who invoke the term ‘dignity’, drawing on other international instruments, but also states appearing before the Court. Often, relying on their own constitutional texts or legislation, they invoke provisions which explicitly mention dignity, usually as a defence to the argument made by the applicant. The strategic use that ensues uncovers the interesting but perhaps troubling implications of the use of the term dignity in human rights adjudication as a term common to different jurisdictions.

I. The Carozza Model – The Ius Commune argument

Carozza speaks of dignity in the context of a comparative paper, which looks at how courts in different jurisdictions draw on each other’s experiences and decisions in death penalty cases. Even if they do not always reach the same solutions, he argues, the process of cross-referencing speaks of a ‘common enterprise’ in which courts are engaged. But Carozza insists that there is more than ‘functionalism present in the ethical premise of the value of human dignity so widely shared among the different courts involved in the transnational jurisprudence of capital punishment.’ He argues that the increasing cross-referencing between constitutional courts and the use of foreign sources in judicial interpretation suggests that

\[ \text{clearly the real center of gravity of the global jurisprudence is in the affirmation of the dignity of the human person and the principle that human rights law exists to protect that dignity. In every region, and in almost every case, the courts' language shows that their capacity to compare with, and to borrow and benefit from, the jurisprudence of foreign legal systems has the most traction when it grips the ground of human dignity.} \]

\[ ^6 \text{Carozza 2003, p 1081, citing McCrudden OJLS 528-9.} \]

\[ ^7 \text{P1081} \]

\[ ^8 \text{Carozza 1079.} \]
When courts invoke foreign sources, Carozza argues, there is ‘a familiar pattern, a movement from the formal aspects of the case to the general principles in play and specifically to the concept of human dignity’. For him, this transjurisdictional dialogue proves the universality of human dignity, which is premised ‘upon the recognition of the common humanity of all persons’ despite the constraints of differing constitutional texts, history, or political and social practice. ‘The courts treat the idea of human dignity as the common thread...’ He goes even further, insisting that those cases ‘within the global jurisprudence that most fully and directly invoke the foundational principle of human dignity tend to be relied upon more frequently and fully by other courts.’ In this regard, therefore, human dignity is the reinforcing concept that both enables cross-reference and serves as proof of the ‘universal character of the global discourse.’ Carozza concludes that the concept of human dignity as a trigger for this global discourse suggests there is a *ius commune* that has developed around the world, a type of a ‘common law’ of human rights shared across different jurisdictions, laws, and practice.

The conclusion that there is a *ius commune* is important because Carozzo seeks to explain the behaviour of national constitutional systems which are independent of each other. Each jurisdiction has its own constitution and passes its own laws. There is therefore no legally pre-defined relationship between the different national systems or indeed between courts across these different jurisdictions (as would be the case with ECtHR). The cross-referencing of top constitutional courts to courts in other jurisdictions (a process that forms purely “horizontal” relationships among partners in dialogue who are otherwise wholly independent of one another) therefore has to be explained by something else than positive law. For Carozzo, the ‘central organizing principle in the idea of universal human rights’ is *human dignity*.

II. The McCrudden Model – An institutional functionalist approach

In his seminal piece on human dignity, McCrudden argues that the ‘use of “dignity”, beyond a basic minimum core, does not provide a universalistic, principled basis for judicial decision-making in the human rights context, in the sense that there is little common understanding of what dignity requires substantively within or across jurisdictions.’ Drawing on the case law of different jurisdictions, McCrudden shows that there is little agreement across constitutional courts about the content of dignity. Beyond what he calls ‘a minimum core’, which underlines the
person’s intrinsic worth, requires respect and recognition of this worth by others, including the state, McCrudden finds that dignity is drawn on by judges in a wide range of different substantive areas, that it is assigned differing status and weight, that it attaches to individuals as well as groups, that – depending on the jurisdiction – it can be used both to support rights and to constrain them. McCrudden implicitly criticizes Carozzo for assuming that the fact that jurisdictions share the notion of ‘dignity in the human rights context’ leads to a ‘dialogue to take place between judges on the interpretation of human rights norms’. Instead, he shows that whilst different jurisdictions accept the existence of the concept of dignity, there is ‘no common substantive conception of dignity.’

In contrast, McCrudden argues that ‘the concept of “human dignity” plays an important role in the development of human rights adjudication … in contributing to particular methods of human rights interpretation and adjudication.’ In this regard, McCrudden speculates that dignity is used in three types of situations, which are common in human rights adjudication: to resolve conflicts of rights, to decide how far domestic rights should be interpreted according to international standards, and finally, to decide how expansively to interpret the text, which is the basis for rights protection. McCrudden therefore understands dignity as a sort of strategic, interpretive device, which helps judges to distance themselves from the case at hand but also to legitimise their approach. Yet as McCrudden concludes, ‘few courts acknowledge that the conception of human dignity that they apply is different from that applied in other countries. Indeed, to do so would appear to undermine the legitimizing function of human dignity.’

There is a clear contrast between Carozzo and McCrudden’s vision of dignity. If Carozzo believes that courts across the world who are engaged in the common endeavour of interpreting human rights provisions are united by a common, universal conception of dignity, McCrudden believes that what unites these courts is merely the process of adjudication. In this process, dignity serves a strategic function – to help justify the need for judicial review, balancing (and therefore limitations of rights), the expansion of rights or wider judicial discretion, domestication of international rights, and finally creation of new rights.

III. The Costa Model – Dignity as a situating tool

15 Ibid 695.
16 Ibid 712.
17 Ibid.
18 Ibid. 710.
In his contribution to an edited volume on *Understanding Human Dignity*, the former President of the European Court of Human Rights Jean-Paul Costa argues that ‘dignity, or human dignity, is often the foundation of the legal reasoning of the Strasbourg Court in its rulings’.¹⁹ This is the case despite the lack of reference to dignity in the text of the European Convention. As Costa argues, ‘the founding fathers of the European system of protection of rights and freedoms shared the same philosophy as the authors of the Universal Declaration.’ The decision not to use the language of dignity, Costa speculates, was probably more due to their intention to ‘concentrate on more practical, even technical issues’ of building a commission and a court and providing a way for cases to be brought to Strasbourg.

Providing an overview of the caselaw, Costa puts forward a thesis, in which he argues that the Court ‘appears to use the concept of human dignity to reinforce the reasoning leading to a violation of the Convention’.²⁰ Costa notes that the Court is quick to refer to international instruments, which mention dignity explicitly – such as the Universal Declaration of Human Rights and the two UN International Covenants. In these cases, the appearance of the concept of human dignity ‘expresses a deliberate intention of building a bridge between the universal instruments and the silent European text, filling the gap or the vacuum created by the authors of the Convention.’²¹ Going further, he says ‘human dignity … emphasizes the value of the human being, who is at the centre of a system aimed at protecting human persons against breaches of their fundamental rights. The Court is not merely adjudicating cases: it also has a pedagogical role, and by referring to dignity it thereby sends important signals to all respondent states.’²²

Costa speaks of human dignity as a ‘bridge’ to the international instruments and a pedagogical tool to tell the states what is at stake. Costa is very explicit about the instrumental, strategic use of dignity – reading his article, one almost gets the feeling that the term dignity is added at the end of the adjudicative process to reinforce the outcome the Court has already reached. If so, this is a very honest account, but it also suggests that there is something in the language of dignity that goes beyond instrumentalism. In this regard, Costa appears to speak of human dignity as a situating concept, that is as a tool which the European Court of Human Rights uses to position itself vis-à-vis the international community and vis-à-vis different member states. He thinks of human dignity as a way of ‘establish[ing] relationships, build[ing] maps’.²³

In the context of the ECtHR, relationships are very important. The Court, which has the responsibility to adjudicate cases coming out of member states of the Council of Europe, forms relationships that are largely pre-defined. Its role is to tell states whether their actions violate the Convention and to bring out precisely those aspects of domestic actions that are problematic, especially if this is the case on a systemic basis. Once the ECtHR has rendered a judgment, the obligation on the state is to put an end to the violation and redress, as far as possible, its negative

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¹⁹ Costa p 393 in McCrudden’s Understanding Human Dignity
²⁰ Ibid 400.
²¹ Ibid 401.
²² Ibid. 402.
²³ P 44 the language behaviour of lawyers.
consequences for the applicant. Yet, if the Court has the power to tell the state what the law is, as an international court it has very low enforcement authority and compliance with its decisions is always voluntary. In this regard, as Shany argues, it is the substance of the judgments and the positions endorsed that will be motivate and persuade states to implement changes.24 The use of concepts like ‘human dignity’ as a type of lingua franca, could persuade the responding states to change their approach. As a famous scholar of ethics and law once argued: ‘To choose a definition is to plead a cause, so long as the word defined is strongly emotive.’25 The use of ‘human dignity’ concept is perhaps meant to trigger that emotive response, to explain to the state what is at stake. If – as Carozza argues – human dignity is said to be ‘universal’, ‘common’ and ‘shared’,26 the decision to use dignity and to refer to the international instruments in doing so, may easily be seen as ‘a customary usage’ or ‘the only possible usage’27 and may in turn trigger a shift in state behaviour.

Costa’s description sits between the Carozza and McCrudden models. On one side, Costa acknowledges the strategic use of the concept of dignity. He gives a very specific vision of the Court as situated between and speaking to two audiences – the international community and the states. The vertical relationship between the Court and States highlights the Court’s pedagogical role but also the need for the Court to justify its decisions so that these get implemented in member states. The reference to ‘the universal international instruments’, which mention dignity as a foundational principle, help locate the Court on the international scene and reinforce its role as an international court, but it also serves to support the Court’s reliance on this concept.

On the other side, Costa appears to share some of Carozzo’s beliefs that ‘dignity is a foundational principle’ and that it has one common, shared meaning. He argues that since the founding fathers ‘shared the same philosophy as the authors of the Universal Declaration’, the Convention must be interpreted not only by looking at the text of the Convention but also by drawing on other international instruments, which serve as external sources of inspiration. ‘Historically, the introduction of human dignity in the international texts appeared just after the atrocities and very serious crimes of the Second World War.’ Yet, it was ‘absent from the classical domestic human rights declarations, such as the English and American Bills of Rights and the French Declaration des droits de l’homme et du citoyen.’28 In this regard, the Court’s decision to refer to dignity in cases involving ‘fundamental, vital rights’ follows the international (and therefore shared) concept of dignity.

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24 Shany (2010: 232)
25 Stevenson Ethics and Language (1944)
26 Carozza
27 Probert
28 Costa p 402.
IV. Human Dignity in the case law of the ECtHR

In this article, I analyse the use of the term “human dignity” or “dignity” in the case law of the European Court of Human Rights. My starting point is the testing of Judge Costa’s model – that dignity is used as a tool which the ECtHR uses to situate itself strategically vis-à-vis two audiences – the international community and the state. For the purpose of the article, I gathered all the cases of the ECtHR that contain a reference to ‘dignity’ or ‘dignité’ and words derived from these two roots. I collected the following information on each of the cases: the total number of times dignity mentioned in the document; the article the case relates to; the respondent state; the judicial panel, which decided the case; the part of decision in which dignity was invoked (facts, law – applicant’s position, governmental position, Court’s position); whether dignity was used in a positive (to expand rights) or negative manner (to constrain rights); the instruments which are relied to as a basis for the dignity argument; the year the case was decided; whether the case ended in a violation; whether it was implemented or remains open. These parameters allow us to evaluate not only the general spread of the term against the different jurisdictions but also to assess more particular ways in which it is being used by the Court. In order to assess the impact of the use of the concept of dignity on the outcome or compliance, I also collected the same information about the other cases within a specific article, ie cases in which dignity was not mentioned. This enables me to assess whether the sole appearance of dignity (rather than the number of mentions) makes a difference to the outcome.

The methodology employed in this Article connects with, and contributes to, quantitative projects in comparative constitutional law, though it is still rare in human rights law. My research focuses on the use of a single term rather than on a comparison of entire cases. This approach allows a higher resolution for topics of interest in comparative constitutional law. It may also prove useful to other constitutional and textual analyses and the growing exploration of human dignity more generally.

A. Human Dignity in numbers

The majority of references to the concept of ‘dignity’ in the case law of the ECtHR (96%) were made from year 2000 onwards. Before this year, only a handful of cases each year referred to human dignity. From 2000-2010, the use progressively increased each year, with an average of 30 cases per year referring to the notion. The highest usage of ‘human dignity’ can be noted from 2010 onwards, where it appears in at least 100 cases, raising to 200 cases in 2012. The increase of the term dignity is consistent with the increase of cases before the ECtHR (compare orange and blue lines on graph below). 29

29 This increase is also consistent with the appearance and expansion of dignity in world constitutions. See section later.
Of the 2122 cases in which ‘dignity’ is referred to, more than half relate to Article 3 (prohibition of torture and inhuman and degrading treatment). In the context of Article 3, dignity is used mostly in cases which relate to poor conditions in prison or in cases, in which the Court is concerned about establishing a minimum level of severity of degradation and humiliation to constitute a violation of Article 3. In this regard, ‘dignity’ is used in the most basic cases that are on the threshold of violations of Article 3. The second cluster of cases in which dignity is used relate to Article 10 (freedom of expression), followed by Article 8 (right to privacy). 30

The main countries against which the term dignity is used is Russia, followed by Romania and Turkey, Ukraine, Greece and France. 31 These countries are the most frequent violators of the European Convention of Human Rights and specifically most frequently violators of Article 3 of the Convention (ie the article in the context of which dignity is most frequently referred to).

B. Human Dignity as an International Term

a) Dignity as an interpretative tool, a bridge to the international community

In his article discussing the use of ‘human dignity’ by the European Court of Human Rights, Jean Paul Costa argues that the ‘the reappearance of the concept of human dignity in the Court’s jurisprudence expresses a deliberate intention of building a bridge between the universal instruments and the silent European text, filing the gap or the vacuum created by the authors of the Convention.’ 32 In this context, he continues that ‘Convention rights must be interpreted not only

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30 1277 cases (or 60% of all references in cases) are in the context of Article 3 only, 258 cases (or 12% of cases) in relation to Article 10 and 219 cases (or 10% of all cases) in relation to Article 8, only 3% of cases refer to multiple violations of the Convention.
31 Russia 368, Romania 207, Turkey 200, Ukraine 128, Greece 96, etc.
32 Ibid.
on the basis of the text of the Convention itself but also drawing on other international instruments (even if they are not strictly legally binding). Costa therefore suggests that the term dignity can be used as an interpretive tool linking the Convention to other international instruments.

The case law reveals that in cases involving dignity the Court regularly refers to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the findings of various bodies, including the UN Human Rights Committee, Committee against Torture and Council of Europe’s own Committee on the Prevention of Torture.

These fundamental instruments are the ‘best possible examples of these external sources of inspiration’, in light of which the Convention can be interpreted. The UDHR, for example, refers to dignity in its preamble and speaks of ‘inherent dignity’ of all members of the human dignity and of the ‘dignity and worth of the human person.’ Article 1 underlines that all human beings are born free and equal in dignity and rights, whilst later articles refer to social rights. The ICCPR contains dignity in its preamble referring to the ‘inherent dignity of the human person’ and in Article 10, which concerns the treatment of individuals deprived of liberty, who should be treated ‘with humanity and with respect for the inherent dignity of the human person.’

It is striking that in cases using the ‘dignity’ terminology the majority of references to international instruments and international institutions are made in the context of Article 3, in relation to prohibition of torture, inhuman and degrading treatment.

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33 JP Costa in McCrudden’s Human Dignity, p 400.
34 In 75 cases.
35 In 171 cases.
36 In 118, 68 and 526 cases respectively.
37 UDHR Article 10.
As Costa insists, ‘Article 3 of the European Convention is the easiest provision to link with human dignity, in the meaning of the Declaration and the Covenants.’ Yet, neither the Universal Declaration nor the Covenants contain references to ‘dignity’ in the prohibition of torture, inhuman or degrading treatment. Instead, the first reference to dignity in the context of Article 3 appears to have been made by judges of the European Court in Ireland v United Kingdom in 1978. The case concerned interrogation techniques used by the UK during the Troubles in Ireland and hinged on the appropriate interpretation of ‘inhuman and degrading treatment’ under Article 3 of the Convention. In his separate opinion, Judge Evrigenis argued that a broader interpretation of Article 3 was necessary, mirroring that adopted by the UDHR. He used dignity to expand the scope of prohibition: ‘By adding to the notion of torture the notions of inhuman and degrading treatment, those who drew up the Convention wished, following Article 5 of the UDHR, to extend the prohibition in Article 3 … - in principle directed against torture … to other categories of acts causing intolerable suffering to individuals or affecting their dignity rather than to exclude from the traditional notion of torture certain apparently less serious forms of torture and to place them in the category of inhuman treatment which carries less of a ‘stigma’… The clear intention of widening the scope of the prohibition in Article 3 … by adding, alongside torture, other kinds of acts cannot have the effect of restricting the notion of torture.’

Similarly, Judge Fitzmaurice invoked dignity as central to the definition of ‘degrading’ treatment under Article 3 of the ECHR. ‘In the present context it can be assumed that it is, or should be, intended to denote something seriously humiliating, lowering as to human dignity, disparaging, like having one’s head shaved, being tarred and feathered, smeared with filth, pelted with much, paraded naked in front of strangers, forced to eat excreta, deface the portrait of one’s sovereign or head of State, or dress up in a way calculated to provoke ridicule or contempt…’

From this, it is clear that the UDHR was used as an inspiration for the expansion of Article 3 and that dignity – the term which appears in the Declaration – served as a tool to achieve this broader interpretation. Since its first appearance in Ireland v UK, dignity has expanded the...
application of Article 3 to many other circumstances. These include instances of disproportionate use of physical force against people arrested or in custody,\(^41\) use of restraint on seriously ill individuals,\(^42\) or prisoners living in cramped spaces,\(^43\) with limited sanitation facilities,\(^44\) or lacking natural light, etc.\(^45\) In particular, the case law relating to poor conditions is now ‘so abundant’\(^46\) that the Court has developed a new, special paragraph, which underlines the importance of dignity in the context of Article 3:

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\text{The Court has consistently stressed that the suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment ... Measures depriving a person of his liberty may often involve an element of suffering or humiliation. However, the State must ensure that a person is detained under conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured ...}^{47}
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This ‘Article 3 \(\text{bis}\)’ paragraph, as it is called by ECtHR insiders,\(^48\) is currently the foremost source of the term ‘dignity’ in Article 3 cases.\(^49\)

Although international instruments are most frequently invoked in respect of Article 3, the Court refers to them also in the context of other Articles, though infrequently. In Article 5 cases (relating to detention, including forcible detention), the Court regularly refers to the COE Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine. The Convention limits the situations in which authorities may intervene in person’s health and imposes the requirement of consent.\(^50\) In Article 8 cases, when they relate to the treatment of children (ie sexual abuse cases), the Court also refers to the Convention on the Rights of the Child, which reaffirms ‘the status of the child as a subject of rights and as a human being with dignity and with evolving capacities.’\(^51\) At times the belief in the international vision of dignity goes so far that the Court argues that even constitutional provisions of member states relating to human rights have to be interpreted and applied in light of the UDHR, Covenants and other treaties to which states are parties:\(^52\) ‘The constitutional precepts concerning

\(^{41}\) Richtschi v Austria, 4 December 1995, para 38 and Tekin v Turkey 9 June 1998, para 53. Selmouni v France.
\(^{42}\) Mousiel v France 14 November 2002
\(^{43}\) Kudla v Poland
\(^{44}\) Isyar v Bulgaria
\(^{45}\) Aliev v Georgia
\(^{46}\) JP Costa 396
\(^{48}\) 390 cases out of 1303 relating to Article 3 concern poor conditions.
\(^{49}\) Batalny, Bouyid etc
\(^{50}\) A and B v Croatia.
\(^{51}\) Shisanov v Moldova
fundamental rights must be interpreted and construed in harmony with the Universal Declaration of Human Rights. This top-down view – as we will see later – is somewhat problematic.

b) Dignity as a persuasive tool?

Costa argues that the secondary role of the Court’s use of dignity is ‘to reinforce the reasoning leading to a violation of the Convention’. This ‘positive’ use of dignity, he argues, applies much more to serious violations, especially to Article 3. The empirical results appear to confirm this. The use of the term dignity in the context of Article 3 leads to the odds of the outcome resulting in a violation as almost four times higher than if dignity is not mentioned. More specifically, the probability of the case ending in a violation is 91% if it mentions dignity, rather than 72% in cases which do not mention dignity.

Furthermore, the results show that for every additional use of the term dignity, the odds of the outcome resulting in a violation are 1.44 higher. More concretely, if the probability of a violation is 91% for a single mention, this increases to 94% for two, and to 100% for 8 or more. This means that the more the Court uses dignity (references range between one and 18x times), the more it is likely that a violation of Article 3 will be found. There is evidence therefore to confirm Costa’s claim that judges are using the term ‘dignity’ strategically, to indicate to the respondent state ‘what is at stake’ and to highlight the seriousness of its actions.

Even once we acknowledge the fact that ‘dignity’ is being drawn from international sources, the invocation of dignity by the Court is still statistically significant. The regression analysis shows that reference to the ICCPR, CAT and findings of the Committee for the Prevention

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53 Portugal Carvalho Pinto
54 J.P. Costa in McCrudden’s Human Dignity, P 400.
55 Note that 2872 cases in which Article 3 was involved, of these 2321 led to a violation. Dignity appears in 1302 cases. Odds Ratio 3.82, p<0.000.
56 Of course, the finding of a violation cannot be divorced from the conduct of the state and what actually occurred. In this regard, perhaps dignity is invoked in cases which allege more serious infringements by the State. To control for this as much as possible, the statistical significance of the appearance of dignity is tested again by looking only at the cases which contain dignity (ie comparing like cases with like) and by focusing on the number of times dignity appears in a judgment. N = 1277; odds ratio = 1.44, p.000.
57 Odds Ratio 1.44, p<0.000.
of Torture pushes the likelihood of a finding of a violation higher. Especially references to the findings of the Committee for the Prevention of Torture, which travels around the Council of Europe and issues reports about different countries on their compliance with Article 3, lead to a greater likelihood of a violation. In all these circumstances, however, the term ‘dignity’ remains significant and increases the likelihood of a violation.

Costa’s argument is therefore confirmed: the Court uses the term dignity to reinforce the Court’s decision leading to a violation of the Convention. Yet, Costa goes further: the Court’s role, he argues, ‘is not merely adjudicating cases: it also has a pedagogical role, and by referring to dignity it thereby sends important signals to all respondent states’ about what is at stake. The use of the term dignity is therefore not only limited to explaining why the country had violated the Convention. What the Court wishes to achieve is to send a message to the state to change its behaviour and to nudge it to implement decisions of the Court and address human rights problems at home. The question is whether in practice the use of ‘dignity’ acts as a persuasive tool.

The impact of ECtHR’s judgments can be measured in various ways. In the context of this paper, I look at whether the use of the term dignity (and its frequency) leads to better compliance with judgments of the Court. For each case, I therefore look at the finding of the Court and trace that decision through to execution. The results of logistic regression show that the cases which use the term dignity are more likely to remain open (and therefore not complied with) than cases which do not use the term (odds are 1.28 times higher for noncompliance than compliance).

| Violation | Odds Ratio | Std. Err. | z     | P>|z| | [95% Conf. Interval] |
|-----------|------------|-----------|-------|-------|---------------------|
| Dignity   | 1.473665   | 0.0520103 | 10.99 | 0.000 | 1.375172 1.579212  |
| universal | 1.369003   | 0.4080829 | 0.89  | 0.371 | 0.6077124 2.725221 |
| HRCt     | 0.697826   | 0.07317   | -3.44 | 0.001 | 0.5675684 0.8564085|
| ICCPRcovenPacte | 1.426565 | 0.1907136 | 2.67  | 0.008 | 1.099242 1.351355 |
| CAT      | 1.588375   | 0.4320655 | 1.70  | 0.089 | 0.9318165 2.706688 |
| CPT      | 1.87838    | 0.2222296 | 5.33  | 0.000 | 1.489568 2.368081 |

58 Please note I tested also for interaction between different variables, but these produced no significant results.
59 Reference to CPT could be distinguished from references to other bodies/instruments. CPT findings could be of a more evidentiary value.
60 In fact, in relation to the other articles of the Convention, only the term dignity remains relevant, whilst reference to international instruments appear to be statically insignificant. This would appear to be consistent with Costa’s claim that dignity is linked to international instruments primarily in the context of Article 3.
62 Another way of measuring impact would be to look at the states’ human rights record (by using eg CIRI data). This dataset is limited (only goes to 2014, which excludes a third of my dataset) and is highly correlated with the compliance dataset (ie the CIRI dataset which codes US reports on states’ human rights records effectively counts the number of instances of human rights violations). The compliance dataset in effect does the same, but each single case can be traced.
63 Note that we have 500 less datapoints relating to compliance than relating to violations. This is because not all cases get to compliance (ie they may be settled or the Court does not provide information on their execution). Judgments are available at hudoc.echr.coe.int, whilst execution information is available at hudoc.exec.coe.int.
This could indicate that the cases, in which the Court uses dignity are also cases, which are harder to implement or which speak about a systemic problem within the state.\textsuperscript{64}

The use of the term dignity is therefore related to worse compliance. Furthermore, the number of times the term appears in the judgment – a tool which judges appear to use to nudge states to change their behaviour – has absolutely no impact on compliance. The variable (the number of times dignity is referred to in the judgment) is statistically not significant. In the context of Article 3, therefore, the use of ‘dignity’ appears to have no persuasive function in leading to better execution of judgments.\textsuperscript{65}

In the context of Article 3, in which dignity is used most frequently, the results therefore clearly reveal two things: first, they confirm that the function of ‘dignity’ in ECtHR’s jurisprudence is to reinforce a finding of a violation. The more dignity appears in the judgments, the more likely there has been a violation. However, the results also show that the use of the term has little impact on states’ behaviour. If judges at the Court believe that the use of ‘lingua franca’ and the familiar, almost universal language of human dignity would encourage states to realise the seriousness of their actions and address these in turn, the facts speak to the contrary. The appearance of the term dignity in a judgment suggests that compliance will be harder to come by and the frequency of the term will have no persuasive impact on states’ behaviour.

C. Human Dignity as a Domestic Concept

JP Costa’s argument about the Court’s use of dignity is predominantly focused on Article 3 and on establishing a link with international instruments. When, however, the whole case-law is observed, it becomes clear that it is not only the Court that invokes human dignity but also states themselves. In this section, I focus on this part of the case law.

a) Human dignity in the constitutions of Member States

\textsuperscript{64} The results have to be checked also through a survival analysis (once that data is available).

\textsuperscript{65} Odds ratio 1, but p value insignificant. These results are not limited to Article 3. In Article 10 cases, which are the second group of most numerous cases, the results are similar. The number of times dignity is used is not a significant predictor of compliance. Nevertheless, the results have to be double checked in the context of other variables that could affect compliance – type of remedy, amount of compensation, time elapsed since judgment...
Human dignity is a key concept in numerous constitutions around the world. Before the Second World War and the adoption of the UN Charter and the Declaration of Human Rights (in 1945 and 1948), only five countries referred to the concept of human dignity in their constitution. Today, that number stands at 162+, with more than 84% of countries referring to ‘human dignity’ in their constitutive documents. Human dignity as a concept is therefore used more and more frequently and widely.\(^6\)

In Europe, out of 47 countries of the Council of Europe, only 9 do not contain the term ‘dignity’ in their constitution (19%). The countries that do not mention dignity include Denmark, Norway, Netherlands, France, and Austria.\(^7\) The majority of states in the Council of Europe, however, refer to dignity multiple times.\(^8\) References to dignity are made on average 3.5 times per constitution. 14 constitutions contain 2 or 3 references to dignity, whilst 10 contain between 4 and 9 references. The three that stand out are Azerbaijan and Belgium with 10 references and the Swiss constitution with 12(!) references. The increases in references follow the enactment year of the constitution. Those constitutions mentioning dignity only once were on average enacted in 1968, those mentioning twice were enacted in 1993, 1994 for three mentions, 1998 for four mentions, and 2001 for 5 mentions. The Swiss Constitution reinforces the point: in 1874, the Constitution did not include any mention of dignity. When a new constitution was adopted in 1999, the term was mentioned 5 times. Since then, another 7 mentions were added. The findings are consistent with Law’s and Versteeg’s argument about “rights creep”, namely ‘the tendency of constitutions to contain an increasing number of rights over time.’\(^9\)

When dignity appears in the constitutions, it is seldom mentioned only once (Germany, BiH, Ireland, Monaco, Romania, Russia, Spain, Sweden, Turkey). In these cases, references either feature in the preamble or in the fundamental principles section of the Constitution. As scholars argue, such uses of dignity serve ‘as a priori bedrock-justifications for the entire constitution.’\(^10\) The appearance of dignity in these early passages of constitutions seeks to enshrine values that are meant to reflect the shared history and narrative of the country and represent the common goals towards which they strive. For example, the Germany Constitution states in the first article: ‘Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.’\(^11\) The same sentiment is mirrored in the Romanian Constitution which states that ‘Romania is a democratic and social state, governed by the rule of law, in which human dignity,

\(^{66}\) The graph is copied from http://comparativeconstitutionsproject.org/files/cm_archives/human_dignity.pdf?6c8912.  
\(^{67}\) The UK does not have a codified constitution and does not mention the term in its Human Rights Act. As regards France, the term plays an important role in the French legal system both in legal interpretation and it appears in instruments such as the Declaration of the Rights of Man and the Citizen of 1789, The preamble of the 1946 Constitution and the Fundamental Principles Recognised by the Laws of the Republic.  
\(^{68}\) Law and Versteeg Sham Constitutions 1170.  
\(^{70}\) AJCL DORON SHULZTINER and GUY E. CARMI ‘Human Dignity in National Constitutions: Functions, Promises and Dangers’ 461, 473.  
\(^{71}\) Article 1
the citizen's rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, …, and shall be guaranteed.’

What is the role of dignity in these constitutions? Dignity appears to play a central role: it serves an aspirational role, reasserting the limits of power of the state and a general duty on the state to protect the individual. It is often mentioned together with other values, such as justice, freedom, equality, liberty. In this regard, it is clear that constitutions position dignity at the top of the hierarchy of norms, thus providing instructions on how other articles of the constitution ought to be understood: ‘fundamental principles articles may also have an explicit interpretative function for the constitution as a whole or for specific chapters within it.’

Although provisions mentioning human dignity may be declarative, rather than operational, the remaining articles in the constitution ‘are meant to articulate and specify the belief in human dignity and what it requires.’ When dignity appears in preambles or fundamental principles, it acts as a general, aspirational value, which ought to be pursued through the other articles of the constitution.

As Shulztiner argues, constitutions also refer to dignity in articles, which ‘give concrete expression to the general statements’ in preambles and fundamental principles. These articles are intended to be more operative, translating general principles into ‘rules and directives that inform the public and the judiciary about the roles and obligations of states organs, the powers and authority invested in state authorities, and the rights, benefits and obligations of citizens.’ These articles are often also those that appear in human rights adjudication, in judicial or constitutional review cases. The articles usually relate to detention, inhuman and degrading treatment, freedom of expression, labour, and in welfare context. In their survey of world constitutions Shulztiner and Carmi find that dignity is most often referred to in the context of conditions of detention, imprisonment and punishment. For example, the Constitution of Armenia states: ‘Arrested, detained or incarcerated persons shall be entitled to human treatment and respect of dignity.’

The Constitution of Finland provides, ‘No one shall be sentenced to death, tortured or otherwise treated in a manner violating human dignity.’ Even Russia and Turkey, the most frequent violators of the European Convention in the context of torture, contain a provision in their constitution, which states: ‘No one shall be subjected to torture or maltreatment; no one shall be subjected to penalties or treatment incompatible with human dignity’ (Turkey) and ‘Human dignity shall be protected by the State. Nothing may serve as a basis for its derogation. No one shall be subjected to torture, violence or other severe or degrading treatment or punishment …’ (Russia)

Other European constitutions contain references to dignity in the context of work and family life: the Portuguese Constitution provides for work to ‘be organised in keeping with social dignity and in such a way as to provide personal fulfilment and to make it possible to reconcile

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72 P 474.
73 Ibid, citing dicke.
74 476
75
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77
78 Article 1
professional and family life’; Slovakia has a provision for a ‘dignified standard of living’, whilst 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.’\(^79\) 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.’\(^80\)

Whilst the majority of references to dignity are made in relation to the enhancement and protection of rights, a number of constitutions include dignity in provisions that appear to limit rights and impose duties upon citizens.\(^81\) In Europe, this type of use is usually linked to the freedom of expression. The Constitution of Montenegro, for example states that, ‘[f]he right to freedom of expression may be limited only by the right of others to dignity, reputation and honour and if it threatens public morality or the security of Montenegro.’\(^82\) A similar formulation can be found in the constitution of Moldova, which stipulates that the ‘freedom of expression may not harm the honour, dignity or the rights of other people,’\(^83\) and in the Constitution of Romania, which directs that ‘[f]reedom of expression shall not be prejudicial to the dignity, honour, and privacy of person, and the right to one's own image.’\(^84\) The common context of dignity in these articles is the protection of reputation and honour and the correlational duty to respect other citizens.

Similarly, dignity imposes limits on rights of property. In post-Soviet Union countries of Azerbaijan, Moldova and Ukraine, the right to property is limited by considerations of dignity. In the Ukraine, the constitution provides that the ‘use of property shall not cause harm to the rights, freedoms and dignity of citizens.’\(^85\) The constitution of Moldova similarly states that property may not ‘be used to encroach upon or damage the rights, liberty and dignity of people.’\(^86\) And in Azerbaijan, the constitution imposes the same limitation on the use of property, basing it on rights, liberty and the ‘dignity of a person.’\(^87\)

This overview of the constitutions of the Council of Europe provides a very varied picture of the different uses and different conceptions of dignity. Shulztiner and Carmi who map out the use of human dignity across the constitutions of the world, show beautifully how the concept of human dignity has been borrowed from one jurisdiction to another and how it has travelled from old constitutions to the new. They map up how European Constitutions – such as the German Basic Law, the Portuguese constitution, and then the influence of the colonial powers such as France and the UK - have helped spread the notion of dignity and specific formulations of constitutional provisions to other countries across the world. They also show that the limiting nature of dignity is mostly ‘characteristic of countries whose political regime is non-democratic or of developing

countries.’ In Europe, they highlight its use in post-Soviet countries. At the same time, they argue that post 1990s, the more provisions arguing for dignity as enhancing rights protection have been borrowed and transplanted into new countries. In this context, the new Eastern European countries and the new Russian Constitution contain for the first time references to the inviolability of human dignity and the duty on the State (rather than citizens) to protect it.  

When states appear before the ECtHR, they can therefore draw on their own constitutions and their own conception(s) of dignity. In fact, from the mapping exercise above, it is clear that states can rely on a number of different constitutional provisions – some which mention dignity generally or even aspirationally, others which contain more operational clauses and finally, provisions which require that dignity be respected by limiting other rights of individuals. Yet, these examples fall outside of JP Costa’s vision for the Court. What happens when the Executive branch invokes dignity before the ECtHR? Does the ECtHR draw on the domestic conception of dignity as it did on the international instruments? Does it seek to use the state’s interpretation of dignity as a tool to expand or potentially limit the interpretation of Convention rights (following Carozza or McRudden)? Or, do certain conceptions of dignity adopted by states clash with the Court’s own view? If so, how does the Court react? The different dynamics are mapped out below.

b) A common conception of dignity

I will address this in the presentation.

c) Dignity as a foreign concept

It is in the context of a different article – namely Article 10 – that the Court’s reaction is most interesting. Article 10 relates to freedom of speech cases in which the Court assesses whether the country’s actions have infringed the right of individuals to express themselves. Whilst in Article 3 cases, about half of the cases refer to dignity, in Article 10 only about 28.5% do. Dignity therefore appears much less frequently in the freedom of expression case law than it does in relation to torture and inhuman treatment. Judge Costa argues that Article 10 applications ‘very seldom involve human dignity arguments’. Indeed, in his intervention in McRudden’s Human Dignity, he reserves only a paragraph to one article 10 case and even there, the reference is to a separate opinion. Yet, looking at the full sample of all cases which refer to the term ‘dignity’, Article 10 cases represent the second highest group of cases (12%, after Article 3). They are therefore the second most numerous set of cases in my dataset. Nevertheless, the cases, which use dignity are rarely mentioned in the jurisprudence relating to ‘dignity’ and indeed, are ignored by Judge Costa. Why is this the case?

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88 AJCL DORON SHULZTINER and GUY E. CARMI ‘Human Dignity in National Constitutions: Functions, Promises and Dangers’ 461 and ff.
89 This part of the article is still being coded and so exact numbers will be included later.
90 JP Costa in McRudden p 400.
91 N=258.
The empirical analysis reveals that in these cases, the Court’s use of dignity is less likely to lead to a violation. In fact, the appearance of dignity in Article 10 cases makes the odds of a finding that there has been no violation 1.43 times more likely. This is in contrast to the results relating to Article 3, where references to dignity meant a violation was more likely. Even further, in Article 10 cases, the number of times the term dignity is used appears to have no bearing on whether a finding of a violation will ensue.\textsuperscript{92} If, as JP Costa suggested, the Court is using ‘dignity’ to reinforce its conclusion (a finding of a breach), this is not the case under Article 10. In contrast to Article 3, where the quantity of references to dignity was a significant variable, in freedom of expression cases the number of references to dignity are not statistically significant in predicting the conclusion of the case.

It would appear therefore that the Court is behaving differently in Article 10 cases and that it is using dignity in a different manner in the context of freedom of speech than it does in the context of inhuman and degrading treatment (where it uses it to reinforce a finding of a violation). In the sections below, I explore what is happening further.

i. Dignity as a limitation on rights

Although dignity appears much less often in Article 10 cases, it is not its quantity but the source from which these references come that appears to be crucial. In Article 3 cases, the references to dignity come from the Court itself (eg most often from the Article 3bis paragraph) to reinforce the seriousness of the violation.\textsuperscript{93} As I showed above, reference is made to international instruments and decisions of international bodies. In contrast, in Article 10 cases, the reference to dignity is as a rule made by the Government. Dignity thus appears in the part of the judgment, which summarises the Government’s position in the context of ‘necessary in a democratic society’:

\textit{The Government insisted that the interference with the applicant’s right to freedom of expression had been justified under Article 10 § 2 of the Convention. In particular, it pursed the legitimate aim of protecting Russian police officers’ reputation and rights and was “necessary in a democratic society”. In the latter

\textsuperscript{92} This variable is not significant for the calculation of a violation.

\textsuperscript{93} There is presumably a high correlation between the Court’s invocation of ‘dignity’ and subsequent applications to the Court, where victims and their counsel make reference to dignity. In the end, in Article 3 cases, it may be difficult to trace whether the exact source of ‘dignity’ comes from the victim or from the Court.
connection, the Government pointed out that the applicant had been found criminally liable for publication on the Internet of a text with a direct intent of an incitement of hatred and enmity and humiliation of the dignity of a group of persons – police officers. The said text had been published on a blog with unrestricted access, with the result that any Internet user could read it.\textsuperscript{94}

A number of other cases cite a similar position from the Government in relation to having to protect the honour and dignity of different groups.\textsuperscript{95}

In cases, where the Government itself invokes the term ‘dignity’, it appears to do so in order to argue that the need to protect another person’s dignity provides the justification for the infringement of the victim’s right to the freedom of speech. Dignity is therefore invoked as a limitation, a trigger for the balancing of rights of two equal rights holders. In this regard, some Governments appear to be using dignity in the same manner as the Court – to reinforce their own position. But if the Court in Article 3 cases uses the language of ‘dignity’ to justify a finding of a violation, the Government’s invocation of dignity serves to reinforce the necessity of infringement and the limitation of the right.

When counsel for the Government rely on dignity, they often cite the term as a foundational principle of Russian Constitution.\textsuperscript{96} In addition, in Savva Terentyev, the Government also relies on the Russian Criminal Code, which explicitly singles out actions ‘aimed at humiliating the dignity of an individual or a group’\textsuperscript{97} and the decision of the Constitution Court of Russia ruling that the criminal code 'guarantees recognition and respect for human dignity regardless of any physical or social attributes, and establishes criminal liability only for actions committed with direct intent and aimed at inciting hatred or enmity, as well as the humiliation of dignity of an individual or a group of individuals. Therefore this legal provision does not lack foreseeability and may not be considered as breaching the applicant’s constitutional rights.'\textsuperscript{98} Multiple domestic sources – from the top of the hierarchy down to the interpretation of the law given by the Constitution Court – are therefore invoked to support the Government’s position that it is dignity (of one group/individual) that limits the rights of others.

Although the European Court of Human Rights does at times respond to these propositions to reiterate in general terms that tolerance and respect for the ‘equal dignity of all human beings constitute the foundations of a democratic, pluralistic society’,\textsuperscript{99} usually it makes no mention of dignity. There is no Article 10bis (like in Article 3 cases), which would underline the importance

\textsuperscript{94} Savva Terentyev v Russia, no 10692/09, Emphasis added.
\textsuperscript{95} Gorlov v Russia. Note however that in the majority of cases in which this clause is cited by the Court, it is related to torture since Article 21 of Russian Constitution in paragraph 21 speaks of torture and inhuman and degrading treatment.
\textsuperscript{96} Article 282.
\textsuperscript{97} decision no. 564-O-O of 22 April 2010.
\textsuperscript{98} Ibid., Para 65.
of dignity in ‘reputation’ or ‘honour’ cases. There is also no reference to international materials, especially those which link dignity to reputation or more broadly to freedom of speech. Rather, it seems that the Government’s invocation of ‘dignity’ triggers two reactions on the side of the Court: first, avoidance of dignity argument and secondly, an enlarged margin of appreciation.

ii. Avoiding dignity

In several jurisdiction the granting of rights to gay, lesbian, and trans-gendered individuals is heavily reliant on dignity. From the decriminalization of sodomy to the permission of marriage between same-sex partners, courts have stressed the extent to which limitations of these rights represent an infringement of human dignity:

“There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 of the Constitution. ... The harm caused by the provision can, and often does, affect his ability to achieve self-identification and self-fulfilment. The harm also radiates out into society generally and gives rise to a wide variety of other discriminations, which collectively unfairly prevent a fair distribution of social goods and services and the award of social opportunities for gays.”

In this context, the ECtHR has had recourse to dignity in Article 8 claims. In Goodwin, a transsexual case, the Court held that the ‘very essence of the Convention is respect for human dignity and human freedom’ and referring to dignity several times, ruled that a refusal by state authorities to grant the applicants the right to be registered on the registry of births with their new gender and the right to marry members of their new opposite sex, violated Article 8.

Yet, when in Bayev v Russia a group of Russian gays challenged the Russian Law on the Protection of the Morality of Children, which prohibited the promotion of homosexuality amongst minors (the case revolved around a static poster claiming ‘Homosexuality is normal’), dignity was not the driving force behind the Court’s finding of a violation of Article 10. Although the applicants themselves invoked dignity in proceedings before domestic courts, the Court did not rely on this argument. Instead, it was the Government that cited the holding of the Russian Constitutional Court which found that the applicants’ dignity was not violated by the prohibition:

100 At most, dignity in these cases is invoked by the Court to distinguish ‘humans’ from ‘legal bodies’.
101 American Convention on Human Rights, art 11(1); Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, etc.
103 Christine Goodwin and I v UK, para 90.
[The prohibition] ... does not signify a negative appraisal by the State of non-traditional sexual relationships as such, and is not intended to belittle the honour and dignity of citizens who are involved in such relationships...

This reference is the only time that the term ‘dignity’ appears in the judgment. The Court does not juxtapose its own view of dignity with the one adopted by the Russian Constitutional Court. In *Goodwin* (the case above), the Court underlined that the society ‘may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost’. In *Bayev*, in contrast, there is no teaching moment about what the society ought to endure or tolerate. The Court does not challenge the respondent state’s understanding of dignity. In contrast, the Court’s focus is on highlighting how the prohibition adopted by the respondent state leads to stigma and prejudice: ‘by adopting such laws the authorities reinforce stigma and prejudice and encourage homophobia, which is incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society.’

The recognition of stigma is of course an important step in assessing how a certain measure affects the victims. It shows how the victim is singled out and treated differently from other groups. For the Court, the use of the word stigma is also associated with a greater likelihood of a finding of a violation. But whilst the definition of stigma includes “unworthiness, disgraceful, [and] shameful,” with an expectation of negative behaviour, dignity is defined as being of “elevated character and worthy of respect”. As some international experts have argued, the positive language of dignity should therefore be used to (re)address the negative stigma individuals have suffered. Or in other words, the language of dignity should be used to underlie the ‘dignity and worth of individual’ (as happens in *Goodwin*) and to elevate the discriminated person to equality. As McCrudden writes, dignity is one of the values that further anti-discrimination norms. The notion of ‘equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual.’ In *Bayev*, however, the Court refers to the trifecta of equality, pluralism and tolerance, but dignity makes no appearance.

Perhaps the Court understands dignity and stigma as two sides of the same coin and therefore reference to dignity is unnecessary. Nevertheless, the Court’s decision not to phrase the discussion in dignity terms and to stop at the ‘mere’ recognition of stigma would appear to be ‘the easy way out’. The silence allows the respondent state and its organs (in this case, Russian

104 Bayev, para 25.
105 Para 91.
106 Para 83.
107 Empirically stigma is used almost exclusively in torture cases and is associated with a higher degree of violations and of compensation.
109 MCC HD EJIL P 689.
110 IAmCHR Advisory Opinion OC-4/84 of 19 Jan 1986. Para 55-6
Constitutional court) to maintain its own view and interpretation of dignity. It is clear that this view of dignity differs from the Court’s.

For example, although the current Russian constitution contains reference to dignity in Article 21 (“Human dignity shall be protected by the State. Nothing may serve as a basis for its derogation.”), before 1993 – in the Soviet Union – the term dignity served a different function. The 1977 Soviet Constitution spoke of ‘honour and dignity of Soviet citizenship’ and in turn of the duties placed upon its citizens:

**Article 59.** Citizens’ exercise of their rights and freedoms is inseparable from the performance of their duties and obligations. Citizens of the USSR are obliged to observe the Constitution of the USSR and Soviet laws, comply with the standards of socialist conduct, and uphold the honour and dignity of Soviet citizenship.

…**Article 64.** It is the duty of every citizen of the USSR to respect the national dignity of other citizens, and to strengthen friendship of the nations and nationalities of the multinational Soviet state.

Dignity therefore referred to the *state*. Even before the adoption of the Constitution, ‘honour and dignity’ were measured by a person’s striving to build the new communist society and her capacity to fulfil her duties towards the *state*:

> “the Soviet person who forgets about his dignity as a citizen of the country of socialism,” legal scholars argued, “loses his right to the respect of his Motherland.”

Since 1993,

> The moral scale by which dignity was evaluated disappeared from juridical discourse …, but the legal protection of “honor and dignity” remained. References to the dignity of Human Rights superseded references to communist morality, but could not provide the law with a new scale by which [to] make moral striving externally observable: Human Rights discourse employs dignity as an inalienable value of all humans, irrespective of their moral striving. Contemporary Russian jurisprudence thus lacks a codified scale that would allow dignity to be evaluated, forcing judicial practice to manoeuvre according to “commonly accepted social standards” and the term's “general linguistic usage.”

I provide this historical overview of the Russian conception of dignity in order to show how dignity or достоинство (dostojanstvo) was originally/traditionally perceived in Russia. It was not about the individual, but about the *state*. Although in 1993, after a change of regime and in

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111 From “the Ignoble Cross” to “Commonly Accepted Standards”: Dignity As a Juridical Term in the Russian Empire, the Soviet Union and the Russian Federation. http://eng.nlobooks.ru/node/469

112 Ibid.
light of the influence of other international instruments and other constitutions, dignity starts referring to the individual, and to underline his worth, even today – as the quote above suggests – there are still remnants of the previous understanding of dignity. Even today, dignity in Russia is not an absolute notion.

In 2009, for example, the head of the Russian Orthodox Church, Patriarch Kirill I, ‘emphasises that human beings are born in sin, and … dignity is something that can be acquired and lost. If the person is not acting in a “good” way, she can lose her dignity, and – as can be logically inferred from Kirill’s argument – the foundation of her human rights.’ This view is reinforced by Kirill’s perception that Russia ‘should not be patronised by the West but, instead, that it has all the right to proudly remain normatively “on its own.” Patriarch Kirill’s position, which is directed towards a domestic Russian audience, has great appeal in Russia and has been shown to play an important role precisely in the context of the treatment of homosexuals. Kirill, who ranks 10th in the country’s list of influential people, openly talks of homosexuals as ‘suffering from a disease’. Chief Justice of the Russian Constitutional Court has adopted some of Kirill’s views almost verbatim, arguing in an emotional article called ‘The Margin of Giving In’ that ‘the preoccupation of contemporary European lawyers with homosexual rights’ was becoming ‘grotesque’. In turn, he maintained that Russian courts should impose ‘firm domestic constitutional limits to judgments of the ECtHR concerning Russia.’

When looked at from this angle, the rejection of the Russian Constitutional Court that the Bayev case infringes on victims’ dignity can therefore be understood as espousing a different type of dignity than perhaps that adopted by the Court in Goodwin. In the same vein, perhaps, we can also make sense of the European Court of Human Rights’ decision to avoid using this same, charged terminology as a way to prevent a direct confrontation with a domestic court.

iii. Margin of Appreciation

Avoiding the term dignity is one thing. But often, the Government’s reliance on dignity will go further – it will lead to a reconsideration by the Court of how wide a margin of appreciation it should grant to the state. In Savva Terentyev case (the case above relating to freedom of speech of applicants who insulted police officers), the Court finds that because the dignity of police officers is at stake Russia is entitled to a wider margin of appreciation:

113 Mila Versteeg on Sham Constitutions
115 Ibid 24
117 Malksoo, P 26
119 Malksoo 25.
120 Malksoo ‘Case Note on Markin v Russia’ 106 AJIL (2012) 836-842.
It remains open to the relevant State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and without excess to such remarks... where such remarks incite violence against an individual, a public official or a sector of the population, the State enjoys a wider margin of appreciation when examining the need for an interference with freedom of expression ...121

The Government’s reliance on dignity therefore appears to have a different impact on the international court. The ECtHR does not ignore the Government’s reliance on dignity. Instead, it widens the margin of appreciation the Government is entitled to. The aim of the margin of appreciation is to underline ‘the subsidiary nature of the supervisory mechanism established by the Convention and in particular the primary role played by national authorities.’ The margin of appreciation recognises that national authorities are ‘best placed’ to assess the necessity and appropriateness of restrictions and limitations.122

For this reason, the Court is generally willing to leave a certain amount of discretion to the States in determining the reasonableness of interferences with the Convention rights. Similar to the administrative law doctrines of deference, a margin of appreciation then means that the Court will relatively easily accept the reasons and arguments advanced by the government, except where they are clearly unconvincing or disclose arbitrary decision-making.123

The Court therefore appears to be reacting to the Government’s reliance on dignity in a deferential manner, by providing it more leeway. In fact, looking at the full sample of cases invoking dignity in the context of Article 10, it becomes clear that the interaction of dignity and the margin of appreciation importantly affects the likelihood of the case ending without a finding of a violation. As the empirical results suggest, there is an interactive effect when the two terms appear together in the same judgment: the odds of the case ending with no finding of a violation are 3 times higher than if the two terms do not appear in the judgment.124

121 Savva Terentyev v Russia, no 10692/09, para 65.
124 This holds for cases, which refer to dignity – see third row, Odds ratio 2.98 and p=0.000. For cases that hold no reference to dignity, the result is extremely similar.
More precise calculations reveal that when dignity appears on its own in the judgment, there is 27% probability of the case ending with no violation. When paired with the margin of appreciation, the probability increases to 29%. In contrast, when the Court extends no margin of appreciation to the Government and when no dignity is invoked, the likelihood of the case ending in a violation is 88%. There is therefore a statistically significant joint effect of the two terms appearing in a judgment together.

This is a striking result. If under Article 3, the use of dignity led to a higher likelihood of a violation, the reverse is true of Article 10. Via the margin of appreciation, the use of dignity reduces the likelihood of a violation.

It is unclear whether states are aware of this impact of the use of dignity language. It is even unclear whether the Court realizes how it is reacting to the states’ invocation of ‘dignity’ and the correlation between the words used and the outcome of the case. It is clear, however, that when states use dignity as a limitation on rights, the Court will not challenge this perception of dignity and will instead phrase the judgment in a different way or indeed, widen the margin of appreciation, thus increasing the likelihood of a no violation. Whether the two actors realise it or not, the ‘dignity’ language appears to have an impact on how the Court ultimately behaves. In essence, states could use the language strategically to achieve the result they wish or at least, a wider margin of appreciation. The language of dignity can therefore have ‘strategic’, persuasive powers, which both Court and states (can) make use of.

V. Conclusions

Note: _cons estimates baseline odds.

125 It is however certain that they are aware of the impact margin of appreciation has on the outcome (reduced likelihood of a violation).