

19

ADAM MICKIEWICZ UNIVERSITY LAW BOOKS

Michał Urbańczyk

# Fight Against Discrimination

## Human Dignity in American Legal Tradition



WYDAWNICTWO NAUKOWE UAM



FIGHT AGAINST DISCRIMINATION.  
HUMAN DIGNITY  
IN AMERICAN LEGAL TRADITION



ADAM MICKIEWICZ UNIVERSITY IN POZNAN  
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Michał Urbańczyk

**FIGHT AGAINST DISCRIMINATION.  
HUMAN DIGNITY  
IN AMERICAN LEGAL TRADITION**

Translated by  
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## PREFACE AND ACKNOWLEDGEMENTS

On 26 August 2018, the American statesman Senator John McCain died. After many years of struggling with an incurable disease with no chance of improvement, he stopped taking medications. In the last words of his political will published in New York Times, this outstanding Republican politician and war hero identified the most important American values, namely freedom, equality before the law and... respect for the dignity of all people.<sup>1</sup> He was not the first to mention human dignity as underlying the foundations of the American political, social and legal system, and even more broadly, belonging to the supreme values nurtured in the United States. In 2011, one of the most prominent American philosophers of twentieth century law, Ronald Dworkin, published a book entitled *Justice for Hedgehogs*,<sup>2</sup> making human dignity its guiding principle. In 1987, during a television interview, one of the most influential Supreme Court Justices of the last century, Justice William J. Brennan Jr., when asked about the most important value of the American political system, without hesitation pointed to human dignity as well.

It would be hard to suspect an American statesman, a giant of political and legal thought, or an eminent Justice, of a reckless choice of ideas fundamental to America. This choice, however, must come as a surprise for a simple reason. Neither the Declaration of Independence, nor the American Constitution, nor the American Bill of Rights and other amendments, nor even the famous American Creed contain any mention at all of human dignity.

The overall purpose of this collection of essays is to present the American experience in order to include it into the European debate on the place of the idea of human dignity in a liberal democracy. The author is convinced that the American experience, especially the case law of the Supreme Court as the longest acting court in a democratic system, is an important comparative material for European regulations. The specific purpose of this book is an attempt to answer the question of the place which human dignity occupies in American legal tradition. The

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<sup>1</sup> Senator John McCain's Farewell Statement [online], <https://www.nytimes.com/2018/08/27/us/politics/john-mccain-farewell-statement.html> [20.02.2022].

<sup>2</sup> Compare Jerzy Zajadło, *Ronald Dworkin (1931–2013). Strategia jeża i obrona liberalnej demokracji* [online], <https://kulturaliberalna.pl/2013/02/12/piatek-stany-zjednoczone-zajadlo-ronald-dworkin-1931-2013-strategia-jeza-i-obrona-liberalnej-demokracji/> [20.02.2022].

author agrees with the statement that “the soul of the rule of law is the judicial review,”<sup>3</sup> and believes that an analysis of case law of the Supreme Court of the United States will certainly help to understand the role which the idea of human dignity has played and continues to play in the American legal system itself, and in a wider understanding American political and legal tradition.

The American experience seems to be extremely important for learning and understanding the significance of the idea of human dignity in modern democracy. The general goal, however, requires concretization in the form of the following questions. Did the idea of human dignity in the twentieth century case law of the U.S. Supreme Court emerge as a result of the creation of an international system of human rights protection? Therefore, if not, then what is the origin of the concept of human dignity found in the Supreme Court case law? What was the evolution of the understanding of human dignity in the American political and legal tradition like? Can we talk about the American doctrine of human dignity in the Supreme Court case law? How can the American idea of human dignity be defined? What roles and functions are performed by the idea of human dignity in the Supreme Court case law?

\* \* \*

This book is based on my Polish publication from 2019 entitled *Idea godności człowieka w orzecznictwie Sądu Najwyższego Stanów Zjednoczonych Ameryki* [The idea of human dignity in the jurisprudence of the Supreme Court of the United States of America]. I would like to take this opportunity to express my gratitude to people without whom this book would not have been written.

First of all, my deepest appreciation goes to Professor Henryk Olszewski. It was through the discussions with him that the shape of the book was created and without his comments I would never have taken an interest in American law. I would also like to thank Prof. Roman Budzinowski (former dean of the Faculty of Law and Administration of the Adam Mickiewicz University), whose methodological remarks were exceptionally accurate, Prof. Tomasz Nieborak (current dean of the Faculty of Law and Administration of the Adam Mickiewicz University), who for many years has supported me in my journey as a researcher of law and jurisprudence, Prof. Jerzy W. Ochmanski for creating a space in the Laboratory that facilitates academic work, Prof. Maria Zmierczak for directing me on the subject of human dignity, Ms. Anna Baziór, for all editorial (and other) advice, which has always proved extremely pertinent, and Ms. Iwona Grenda for translation (and forbearance in the face of my organizational shortcomings).

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<sup>3</sup> “(...) the soul of a government of laws is the judicial function.” This statement comes from a speech given by Arthur E. Sutherland on June 17, 1964 in St. Paul, Minnesota, quoting from: William J. Brennan, “Some Aspects of Federalism,” *New York University Law Review* 39(6), 1964, p. 961.

Heartfelt thanks are also due to reviewers Prof. Rett Ludwikowski and Prof. Przemyslaw Dabrowski. Special thanks are due to Prof. Albert Harris, whose comments pertaining to the English manuscript significantly enhanced its substantive value.

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May the publication of this book also be an opportunity to thank my family and friends. I would like to thank Konrad as without his support and help the writing of this book would have never gone beyond the pondering stage. I would also like to thank Jakub, who provided me with the quiet place to write in his own apartment and allowed me to be the worst roommate in the world for many months. Many thanks to my Parents, especially for infecting me with passion for books, and my sister Agata, for her constant support.

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## THE IDEA OF HUMAN DIGNITY

Human dignity is a fundamental element of the legal system of a liberal democracy. It is treated as an innate and inalienable, equal and invaluable value which belongs to every individual solely by virtue of his or her being human. When describing the place and functions of human dignity in a democratic system of law, it is necessary to indicate the three levels on which the law operates and on which it plays an important normative role. First, it is at the level of the international law system, where human dignity is the value underlying the establishment of the post-war world order. It suffices to refer to the Charter of the United Nations in which, right from the Preamble, the need to restore faith in fundamental human rights, human dignity and the worth of man is highlighted.<sup>4</sup> Similarly, the introduction to the Universal Declaration of Human Rights states that man has been fighting for his freedom and dignity for hundreds of years, while in the text of the Declaration itself, human dignity is mentioned as many as five times, twice in the Preamble,<sup>5</sup> and then right away in the first Article that states that “[a]ll human beings are born free and equal in dignity and rights.”<sup>6</sup>

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<sup>4</sup> Preamble to the UN Charter:

We, the People of the United Nations determined (...) to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.

<sup>5</sup> Universal Declaration of Human Rights:

Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, (...) Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.

<sup>6</sup> Furthermore, Article 22 provides that everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality. Article 23(3), on the other hand, states that everyone who works has the right to just and favorable remuneration ensur-

The second level where human dignity plays a primary role is the system of the protection of human rights. This system defines human dignity as an inviolable value underlying it (as is in the case of e.g., the Charter of Fundamental Rights of the European Union<sup>7</sup> or the German Constitution<sup>8</sup>). Human dignity, frequently referred to directly as a source of human rights (for example, Article 30 of the Constitution of the Republic of Poland<sup>9</sup>), is also one of the most important foundations and links of the system of human and civil rights and freedoms.

Finally, human dignity plays an important role in shaping the regulation of individual areas of national legislation. In criminal law in its broadest sense, it had and still has an overwhelming influence on the array of penalties and penal measures that the State apparatus may impose on criminals. Many States and societies have abandoned the death penalty precisely because of its incompatibility with human dignity. Because of the perception of human dignity, the way in which prison sentences are served has evolved and continues to evolve. Civil law, on the other hand, considers personal dignity as a specific kind of dignity and one of the most important personal rights.<sup>10</sup>

Its protection in social media and the world of digital communication is becoming quite a challenge in the twenty-first century and an increasingly important exercise not only for lawmakers and the courts, but above all for individuals. Also, in administrative law broadly understood, the impact of human dignity is extremely evident. It may be found, for example, in the regulations on social welfare or in the obligations of the State with regard to its citizens in the economic, social and cultural sphere. This is merely the beginning since references to human dignity in

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ing for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

<sup>7</sup> Art. 1. Human dignity

Human dignity is inviolable. It must be respected and protected. It should be stressed that the very Preamble to the Charter of Fundamental Rights indicates that the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity. In addition, its opening Title I is devoted to dignity in its entirety and apart from Article 1 above, it concerns the right to life (Article 2), the Right to the integrity of the person (Article 3), the prohibition of torture and inhuman or degrading treatment or punishment (Article 4) and the prohibition of slavery and forced labor (Article 5).

<sup>8</sup> Article 1 of the Basic Law for the Federal Republic of Germany

1. Human dignity is inviolable. Its respect and protection are the duty of all state authorities.

<sup>9</sup> Article 30 of the Constitution of the Republic of Poland

The inherent and inalienable dignity of the human being is a source of freedom and human and civil rights. It is inviolable and its respect and protection is the responsibility of public authorities.

<sup>10</sup> Article 23 of the Polish Civil Code states that human personal rights, such as, in particular, health, freedom, dignity, freedom of conscience, surname or pseudonym, image, confidentiality of correspondence, inviolability of home and scientific, artistic, inventive and improvement achievements work, remain under the protection of civil law regardless of the protection provided for in other regulations. On the other hand, the Polish Supreme Court defines personal dignity as a person's inner conviction of his moral and ethical integrity (judgment of the Supreme Court of 21.03.2007, I CSK 292/06).

general, as well as to particular of it, are present in such diverse branches of law as labor law (the dignity of the worker<sup>11</sup>) or medical law (the dignity of the patient).<sup>12</sup>

It would, therefore be difficult not to agree with the statement that the post-war period constitutes *high era of dignity*.<sup>13</sup>

However, while the thesis about the growing importance of dignity in a democratic system of law is undisputed, it would be difficult to find another issue that triggers so many disputes and polemics across the range of political and legal thought, the theory and philosophy of law or in the theory and practice of individual branches of statutory law. These discussions take place in many contexts, starting with questions about the nature of dignity and how to define it. Equally fierce disputes concern the era in which the origin and genesis of dignity is to be sought and how to characterize the evolution of its understanding. Last but not least, there are questions about the functions of human dignity and the roles it plays or should play in the legal system of a democratic state. At the same time, disputes about the essence of dignity go far beyond the legal sciences in the broadest sense of the term, and leave an equally strong mark on such areas of scholarship as ethics, philosophy, theology, and the political and social sciences.

Professionals argue about whether modern dignity has its roots in ancient Greek philosophy (and the Stoic philosophers are mainly, although not exclusively, mentioned here),<sup>14</sup> or rather in the legal institutions of ancient Rome (in this case, the kinship with *dignitas* or official dignity is emphasized).<sup>15</sup> Other thinkers,

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<sup>11</sup> In Article 11(1) of the Polish Labor Code the legislator states that the employer is obliged to respect the dignity and other personal rights of the employee. The Act of 26 June 1974 – the Labor Code (Dz.U.2022.1510 as amended).

<sup>12</sup> Article 20 of the Polish Act on Patient's Rights and the Patients' Rights Ombudsman states in paragraph 1 that a patient has the right to have his or her privacy and dignity respected, in particular when receiving healthcare services. Paragraph 2 states that the right to respect for human dignity includes the right to die in peace and dignity. These provisions are contained in Chapter 6 entitled "Right to respect for the privacy and dignity of the patient." 540 The Act of 6 November 2008 on Patient's Rights and the Patient Rights Ombudsman (Dz.U.2022.1876 as amended)

<sup>13</sup> The term *high era of dignity* was used by James Q. Whitman in one of his essays, in James Q. Whitman, "On Nazi Honor and New European Dignity," in *Darker Legacies of Law in Europe. The Shadow of National Socialism and Fascism over Europe and its Legal Traditions*, C. Joerges, N. S. Gha-leigh (eds.), Oxford, 2003, p. 243. It should be noted, however, that the author does not agree with Whitman's claim that this pursuit of dignity clearly distinguishes European law from American law. The present publication, providing evidence to the contrary, is an expression of this disagreement.

<sup>14</sup> Magdalena Środa pointed out four "ethoses and ideas" present in the culture and philosophy of ancient Greece, which shape the basic meanings of the concept of dignity: the ethos of the aristocrat, the ethos of the citizen, the ethos of the sage and the image of man in general, in Magdalena Środa, *Idea godności w kulturze i etyce*, Warszawa, 1993, compare especially Chapters I–IV (pp. 13–104). Marek Piechowiak, in turn, points to the influence of Platonic philosophy: Marek Piechowiak, "Przemowa Demiurga w Platońskim „Timajosie” a współczesne pojęcie godności," in: *Abiit, non obiit. Księga poświęcona pamięci Księdza Profesora Antoniego Kościa SVD*, Dębiński, Antoni, et al. (eds.), Lublin, 2013.

<sup>15</sup> As Środa points out, the term *dignity* was first used by Cicero in "De inventione," in Magdalena Środa, op. cit., p. 8. The roots of the contemporary human dignity were described in a similar way by,

especially theologians and supporters of a personalistic philosophy, point to the inseparable link between the idea of human dignity and Christian theology.<sup>16</sup> Some researchers combine the genesis of the idea of human dignity with the Renaissance humanism, pointing to such Renaissance luminaries as Giovanni Pico della Mirandola and other Italian thinkers. In writing about the philosophical roots of the idea of human dignity, references are also made to the philosophy of Hugo Grotius or Samuel Pufendorf.<sup>17</sup> Some believe that our contemporary understanding of human dignity emerged with (the birth of) the philosophy of Kant. Indeed, one cannot disagree that his concept of the person and the principle of the categorical imperative belong to one of the most important sources of the modern perception of human dignity.<sup>18</sup>

among others, Gregory Vlastos and Jeremy Waldron, compare Gregory Vlastos, "Justice and Equality," in *Theories of Rights*, Waldron, Jeremy (ed.), Oxford, 1984, pp. 41–76; Jeremy Waldron, "Dignity, Rank, and Rights," in *The Tanner Lectures on Human Values*, Berkeley, 2009, pp. 207–53; idem, "Dignity and Rank," *European Journal of Sociology* 48(2), 2007, pp. 201–37; idem, "Dignity, Rights, and Responsibilities," *Arizona State Law Journal* 43(4), 2011, pp. 1107–36; idem, "Dignity and Defamation," *Harvard Law Review* 123(7), 2009–2010, pp. 1597–657; idem, "Cruel, Inhuman, and Degrading Treatment: The Words Themselves," *New York University Public Law and Legal Theory Working Papers* 98, 2008, pp. 1–47. It is worth noting that in Jeremy Waldron's philosophy, the idea of dignity plays a very important role in various contexts. Compare the following monographs: *Dignity, Rank and Rights* (Oxford, 2012), *Political Theory* (Cambridge, MA, 2016), *One Another's Equals: The Basis of Human Equality* (Cambridge, MA, 2017), and the following articles and chapters published in monographs by collective authorship: Jeremy Waldron, "The Rule of International Law," *Harvard Journal of Law & Public Policy* 30(1), 2006, pp. 15–30; idem, "The Dignity of Groups," *Acta Juridica* 66(1), 2008, pp. 66–9; idem, "Torture and Positive Law," *Columbia Law Review* 105(6), 2005, pp. 1681–750; idem, "What are Moral Absolutes Like," *New York University Public Law and Legal Theory Working Papers* 301, 2011, pp. 1–43; idem, "How Law Protects Human Dignity," *New York University Public Law and Legal Theory Working Papers* 317, 2012, pp. 1–25; "Citizenship and Dignity," in *Understanding Human Dignity*, McCrudden, Christopher (ed.), Oxford, 2014, pp. 327–43. In Polish legal literature Jeremy Waldron's views may be found in Wojciech Cieszewski, "Demokratyczny status sądowej kontroli konstytucyjności prawa," *Filozofia Publiczna i Edukacja Demokratyczna* 5(1), 2016, pp. 170–86, Michał Urbańczyk, "Od godności dobrze urodzonych po egalitarne szlachectwo dla wszystkich. Szkice ze studiów nad ideą godności człowieka," *Czasopismo Prawno-Historyczne* 66(2), 2014, pp. 153–84.

<sup>16</sup> In this context, Polish personalists are worthy of note: St. John Paul II, Mieczysław Krąpiec, Tadeusz Styczeń, Adam Rodziński, Andrzej Szostak, Piotr Duchliński, Henryk Piliś, Mieczysław Gogacz, Aniela Dylus, compare: Leszek Bosek, *Gwarancje godności ludzkiej i ich wpływ na polskie prawo cywilne*, Warszawa, 2012, especially pp. 43–62. For the Christian roots of the idea of human dignity look, among others in Marek Piechowiak, "Klasyczna koncepcja osoby jako podstawa pojmowania praw człowieka. Wokół Tomasza z Akwinu i Immanuela Kanta propozycji ugruntowania godności człowieka," in *Prawo naturalne – natura prawa*, Dardziński, Piotr, and Longchamps de Bérrier, Franciszek, and Szczucki, Krzysztof (eds.), Warszawa, 2011.

<sup>17</sup> Compare, among others Stephen Darwall, "Pufendorf on Morality, Sociability, and Moral Powers," *Journal of the History of Philosophy* 50(2), 2012, pp. 213–38.

<sup>18</sup> Compare, among others Oliver Sensen, *Kant on Human Dignity*, Berlin, 2011, p. 230. It is worth adding, however, that Kant's writings on dignity were not uniform. More in Michał Urbańczyk, "O wieloznaczności godności. Rozważania na marginesie filozofii Immanuela Kanta," in *W kręgu doktryn politycznych i prawnych: księga jubileuszowa dedykowana Profesorowi Markowi Maciejewskiemu*, Antonow, Radosław, et al. (eds.), Wrocław, 2020, pp. 705–23.

When exploring the history of the idea of dignity, the much more recent events must also be considered. Since it is today treated as a source of human rights and freedoms, it is necessary to refer to the revolution of the late eighteenth century, i.e., to the birth of modern declarations of rights. After all, as Hugo A. Bedau points out, in Western societies human dignity is “the premier value underlying the last two centuries of moral and political thought.”<sup>19</sup> However, it should be noted immediately that the idea of human dignity does not appear in the texts of the first Declarations. Neither the American Bill of Rights nor the French Declaration of Human and Citizens’ Rights refers to the idea of dignity as a source of human rights. Moreover, the term dignity does not appear in these texts in any other context either (with the exception of Article VI of the French Declaration, where dignity (*dignité*) in the sense of honorable public positions is mentioned). Yet, this idea was present in the revolutionary political and legal thought of the end of the eighteenth century, as can be seen in the views of Mary Wollstonecraft and Thomas Paine, for example. Also, in the post-revolutionary nineteenth century period, there was a large group of philosophers who referred to the idea of dignity in their writings and works.

A widely accepted turning point in the history of the idea of dignity was the end of World War II. After 1945, virtually all human rights Acts, starting with the 1948 Universal Declaration of Human Rights, recognized human dignity as a source of rights. After the tragic experience of the twentieth-century wars and genocidal totalitarianisms, along with the renaissance of the idea of natural rights, human dignity began to play a fundamental role in both the systems of international law and the laws of individual States. This in turn encouraged further philosophical reflection on the concept of human dignity and new interpretations of the idea, for there emerged disputes about its normative character and its function in the system of human rights. The assumption that human dignity serves only as a foundation for human rights raises doubts. Some scholars argue that this is also a constitutionally protected value, and that it may be referred to as a specific right (subjective right). Some go further, recognizing that there are even a number of specific subjective rights, largely differing from one another, such as the right to a dignified death or the right to a decent home. Increasingly, in the theory and philosophy of law, there are theories about the existence of the right to dignity.<sup>20</sup>

On the assumption that there is a right to dignity, it should be established whether it is a single right or whether it is a set of dignity rights that affect different

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<sup>19</sup> Hugo Adam Bedau, “The Eighth Amendment, Human Dignity, and the Death Penalty,” in *The Constitution of Rights: Human Dignity and American Values*, Mayer, Michael J., and Parent, William A. (eds.), Ithaca – London, 1992, p. 145.

<sup>20</sup> As in, among others, Rex D. Glensy, “The Right to Dignity,” *Columbia Human Rights Law Review* 43(1), 2011, pp. 65–142, and Alfonsas Vaišvila, “Human Dignity and the Right to Dignity in Terms of Legal Personalism. (From Conception of Static Dignity to Conception of Dynamic Dignity),” *Jurisprudencija* 3(117), 2009, pp. 111–27.

areas of law. Such specific dignity rights exist mainly in specific branches of law, e.g., anti-discrimination law, medical law (with particular emphasis on patients' rights), or social welfare regulations. The broad sphere of human rights, as well as international law, also include issues that may be regulated by the rights to dignity. Examples of these are challenges such as the fight against torture and persecution, the fight against hunger and poverty, humanitarian aid and problems linked to refugees and the civilian victims of ongoing wars. In contrast, in the context of constitutional law, the right to dignity may be related to discrimination (for instance against women in some developing countries) or to the multifaceted issues of social, economic and cultural rights mentioned above.

Another direction in which the theories relating to the idea of human dignity are being developed is the question of whether dignity is only for individuals or whether one may speak of the dignity of groups, such as minorities, which are discriminated against on grounds of racial or ethnic origin or on the grounds of religion. At the same time, more and more often voices are raised about the need to take into account the dignity of social groups, such as people with disabilities and the elderly. One of the most recent research fields in which the influence of the idea of dignity is becoming apparent is animal rights.

Finally, one of the most important areas in which human dignity plays an important normative role is bioethics. The development of biotechnological sciences has resulted in reflections on the beginning and end of human life, or more generally the essence of humanity, and it has become extremely fascinating and alarmingly topical. Problems such as abortion, in vitro fertilization, stem cell research, cloning (both for therapeutic reasons and in other forms), euthanasia and assisted suicide, or the right to death as well as genetic engineering have become a background for deliberations about the essence of human dignity and its impact on legal regulations. They show the strong impact of a certain understanding of human dignity on legal norms. These debates also show the ambiguity of the idea of dignity and the lack of uniform understanding of it. In discussions about abortion, the argument of dignity is used by the opponents of abortion (the dignity of a human being) as well as its supporters (the dignity of a woman). Similarly, in the case of euthanasia, the argument based on human dignity is used by both supporters and opponents of the right to die.

From the review of doctrines and philosophers who have referred to the idea of dignity, it would seem that the idea of dignity is already so well established in philosophy, ethics and culture that it will function as a clear, unambiguous and unquestionable institution or a principle of law. Therefore, its interpretation, implementation of its content in practice, as well as its influence on the application of the law, will be unequivocal and reference to this idea will explain the disputes rather than inflame them. Unfortunately, the increasingly frequent debates involv-

ing references to the idea of dignity seem to have no end; on the contrary, they are becoming increasingly intense. The ambiguity and vagueness of the term dignity, which should be an advantage, has become a disadvantage in the eyes of many thinkers, bioethicists, philosophers and publicists. It has become very convenient to reach for an argument relating to dignity, which has in turn brought about criticism of the idea of dignity and voices claiming its uselessness as an idea or institution.<sup>21</sup> Some suspect the idea of dignity to be a camouflaged argument of the supporters of natural law, others point out that dignity has become an argument that refers too much to the religious sphere, and thus turns out anachronistic. Some scholars indicate that dignity is an empty phrase that means nothing or is a set of unspecified wishes as to how this term ought to be understood.<sup>22</sup> Another major doubt or objection is that dignity adds nothing new or significant to the global debate on law. For a political and legal idea, likewise for a legal principle, this is a fatal accusation because it undermines the very essence of the law – its functionality and purpose. All this makes dignity an incredibly multi-dimensional idea. On the one hand, the numerous discussions that are going on strengthen its position as an essential element of the normative system (not only the law) and facilitate the understanding of its essence. On the other hand, however, such a situation makes it virtually impossible, or at least incredibly difficult, to describe this idea in its entirety, since its perception goes far beyond the sphere of philosophy, theory and practice of law, boldly entering the fields of ethics, morality, bioethics, medicine, global politics and even religion. How big the problem faced by researchers into the idea of dignity is, can be seen clearly in the very fact that the terminology of each of the above-mentioned fields of research is different. The concepts and terms used in them do not always fit together properly and their definitions are not identical, and it is therefore difficult to find a language that would not so much satisfy the terminological sense as allow for a coherent description of dignity analyzed in many different aspects. Perhaps that is why discussions and debates about dignity are so difficult. They involve scholars working in different fields, who use the same terms in a completely different way and understand them differently. In addition, there are issues of cultural diversity in a globalizing world, where the idea of dignity is examined from different angles in many different places of the world, and with the objective of finding its traces in such different philosophies and religions such as Judaism, Buddhism or Islam.

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<sup>21</sup> In her article Ruth Macklin described the idea of dignity as a useless concept, writing that dignity “is nothing more than respect for persons and their autonomy,” in Ruth Macklin, “Dignity is a useless concept,” *British Medical Journal* 327(7429), 20–27.12.2003, p. 1419.

<sup>22</sup> Extremely critical of the idea of dignity was for example Steven Pinker, amongst others in his article meaningfully entitled “Stupidity of dignity” in Steven Pinker, “The Stupidity of Dignity,” *The New Republic*, 28 May, 2008, pp. 28–31.

# HUMAN DIGNITY AND THE ORIGINS OF AMERICAN LAW

The American War of Independence, which ended with the founding of the United States, was fought in a unique intellectual and doctrinal climate. The Age of Enlightenment,<sup>23</sup> which was the age of reason and philosophers, brought about radical changes, the most visible sign of which were two revolutions – the American and the French ones. Both were accompanied by a change of attitude towards the relationship between the power (authority) and the man who underwent a transformation from a subject to a citizen. What is more, the new authority declared the recognition of certain inherent rights that belong to every human being solely by virtue of being human. This was reflected both in the French Declaration of the Rights of Man and of the Citizen, and in the American Bill of Rights which are the first ten amendments to the United States Constitution. Today, it is believed that human dignity is the source of rights and freedoms. However, as already mentioned in the Introduction, neither the American Constitution nor the subsequent amendments to the Bill of Rights made any reference to this idea.

This does not mean, however, that the idea of dignity was not present in the philosophy, political and legal thought or political journalism of the time. And yet, it should be noted, there were two completely different concepts of dignity. One referred to the traditional concept of dignity as a rank, high status, or dignity associated with a noble birth, position or office held. The fullest expression of this perception of dignity appeared in the views of Edmund Burke in his work *Reflections on the Revolution in France* published in 1790. While opposing the revolution, Burke also protested against the understanding of dignity as a value belonging to all subjects.<sup>24</sup> His work became the most serious criticism of the changes of the Enlightenment, as a result of which this long-standing statesman and politician of the Whigs party paradoxically went down in history as the father of modern

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<sup>23</sup> For more on the American Enlightenment see *Myśl amerykańskiego oświecenia*, Furmańczyk, Wiesław, and Sowińska, Iwona (eds.), Warszawa, 1964.

<sup>24</sup> More on this in Michał Urbańczyk, *Od godności...*, pp. 156–61.

conservatism. Burke's work provoked a great and heated discussion, even a war of pamphlets,<sup>25</sup> and his adversaries criticized, among other things, his vision of dignity, as can be seen in Mary Wollstonecraft's writings: *Vindication of the Rights of Men* and later *Vindication of the Rights of Woman*.

This discussion, together with other European doctrines, opinions and views, had reached the United States as well. However, it must not be forgotten that as British subjects, the Americans also had their own ideas, concepts and political doctrines that had been shaped from the time of the first colony established on the American continent.<sup>26</sup> Religious doctrines, especially Puritanism, had a significant influence on the political and legal thought that was being formed. Among the first American thinkers who, during the colonial period, addressed the idea of dignity in its egalitarian form was the puritanical preacher, Roger Williams.<sup>27</sup> As stressed in American legal science "[t]hroughout his life, Williams adamantly insisted on guaranteeing respect for the dignity and equality of each human, whether Native Americans or settler."<sup>28</sup> His innovative views were primarily concerned with religious tolerance. The work of 1644 under the title *The Bloody Tenent of Persecution* was one of the most important voices on this issue in the British American colonies.<sup>29</sup>

However, one must agree with the statement that even in the revolutionary times of the last decades of the eighteenth century the perception of the idea of dignity as shown by Burke was standard.<sup>30</sup> Unquestionably, the egalitarian understanding of human dignity was present in the political and legal thinking of the Founding Fathers. This view is also affirmed in the Polish literature. For example, according to Marek Maciejewski, Adams and Jefferson, the main authors of the Declaration of Rights of the First Continental Congress of 1774 and the Declaration of Independence of the United States of America of 1776, believed that "every

<sup>25</sup> More on the literature of this period see in Ewa Małek, *Wojna pamfletów w Anglii 1790–1793*, Toruń, 1993, especially chapter IV entitled "Radykalni oponenty E. Burke'a" and chapter V "Umiarowani oponenty Burke'a."

<sup>26</sup> Concepts of how to arrange social and political life in the New World appeared even earlier, i.e., before the first settlers arrived on American soil. An example of this can be the contract from the ship Mayflower (the Mayflower Compact), concluded by the first pilgrims on 11 November 1620.

<sup>27</sup> For more on the life and work of Roger Williams, see, among others Tadeusz J. Zieliński, *Roger Williams. Twórca nowoczesnych stosunków państwo-kościół*, Warszawa, 1997, p. 288. The Williams doctrine as one of the first examples of democratic-liberal thought on the American continent is discussed in point 2 of Chapter II of Małgorzata Ciepluch's monograph entitled *Myśl liberalno-demokratyczna w amerykańskiej kulturze prawnej w latach 1620–1865*, Gdańsk, 2015, pp. 34–8.

<sup>28</sup> Nina J. Crimm, Laurence H. Winer, *Politics, Taxes, and the Pulpit: Provocative First Amendment Conflicts*, Oxford – New York, 2011, p. 28.

<sup>29</sup> It is worth remembering that during the colonial period, the idea of religious tolerance was not widely recognized; see more on this subject Michał Urbańczyk, "Narodziny wolności czy dziedzictwo zniewolenia. U podstaw amerykańskiej liberalnej doktryny wolności słowa," *Studia nad Autorytaryzmem i Totalitaryzmem* 35(3), 2013, pp. 105–20.

<sup>30</sup> Also in, among others: Michael J. Meyer, "Introduction," in *The Constitution of Rights...*, p. 5.

human being is entitled by nature, only confirmed, not created by the State, to the right to life, safety, dignity, freedom, property and the pursuit of happiness and that a Christian is also entitled to freedom of religion and freedom of conscience.”<sup>31</sup>

It is necessary, therefore, to refer to the writings of the Founding Fathers keeping in mind that we should not limit ourselves to the idea of human dignity in its contemporary understanding. Instead, the analysis should extend to the whole set of widely understood views which in the course of historical evolution created elements considered today to be naturally connected with the idea of human dignity, i.e., the rational nature of man,<sup>32</sup> as well as to natural rights, to the issue of equality and the scope of freedom and the autonomy of the individual and the normative effects resulting from these ideas on the law to be enacted and judgments to be passed.

How varied the perception of the idea of dignity and the idea of human dignity was, may be seen, for example, in the texts contained in Federalist writings. Even there, the term *dignity* appears in very different terms that have little to do with human dignity. However, it must be stressed right away that from his very first text, when Alexander Hamilton referred to the concept of dignity when he said that the enactment of the Constitution was “the safest way to freedom, dignity and happiness,”<sup>33</sup> he certainly had no dignity of the nobility in mind. This issue was not, however, developed any further. More frequently there were references to the dignity of colonists as a particular community. An example here is Hamilton who warned of the dangers arising from the termination of the agreement between the states and writing about it in *The Federalist 6*, referred to national dignity. In *The Federalist 58* James Madison stressed that parliamentarians would represent the dignity of their country *vis-à-vis* other peoples and states.<sup>34</sup> In *The Federalist 15*, which concerned the failure of the confederation to protect the interests of the Union, Hamilton claimed that a loose confederation would mean *de facto* an inability to protect the interests and rights of Americans. He emphasized that Americans had neither the military, the treasury, nor the government, as a result of which the states were not even capable of opposing the violation of their interests and their citizens with dignity.<sup>35</sup>

<sup>31</sup> Marek Maciejewski, “The beginnings of the concept and regulation of human rights and freedoms until the Enlightenment,” in *Współczesne koncepcje ochrony wolności i praw podstawowych*, Bator, Andrzej, et al. (eds.) Wrocław, 2013, p. 14.

<sup>32</sup> To clarify the relationship between “reasonableness” and “human dignity.”

<sup>33</sup> *The Federalist 1, General Introduction* [online], <http://www.let.rug.nl/usa/documents/1786-1800/the-federalist-papers/the-federalist-1.php> [22.02.2022].

<sup>34</sup> *The Federalist 58, Objection was That The Number of Members Will Not Be Augmented as the Progress of Population Demands Considered* [online], <http://www.let.rug.nl/usa/documents/1786-1800/the-federalist-papers/the-federalist-58.php> [22.02.2022].

<sup>35</sup> *The Federalist 15, The Insufficiency of the Present Confederation to Preserve the Union*, [online], <http://www.let.rug.nl/usa/documents/1786-1800/the-federalist-papers/the-federalist-15.php> [22.02.2022].

However, most frequently the idea of dignity featured in the essays of political supporters of the federation in the traditional sense, as the dignity of persons holding public offices, such as that of president,<sup>36</sup> governor,<sup>37</sup> judge or justice,<sup>38</sup> Member of Parliament,<sup>39</sup> or a public official,<sup>40</sup> as well as in terms of the dignity of authority as such,<sup>41</sup> or being the attribute of power,<sup>42</sup> or the dignity of the State, or a State as a constituent part of a federation.<sup>43</sup>

However, it seems that there is an explanation for the almost complete lack of references to the idea of human dignity in the sense of the invaluable and inherent value of every human being. The articles published under the pseudonym “Federalist” had one basic aim – the political struggle for the shape of the future State. Because they were supposed to convince readers of the strong power of the federation, there was no need to include in them philosophical reflections on human nature. There is no doubt though that the Founding Fathers had a clear vision of man with significant traces of the idea of human dignity in it.

The history of the American Constitution and the Bill of Rights is a story of the rejection of the traditional social hierarchy and the struggle to secure individual freedom. In American political and legal thought, one of the answers to

<sup>36</sup> *The Federalist 69, The Real Character of the Executive* [online], <http://www.let.rug.nl/usa/documents/1786-1800/the-federalist-papers/the-federalist-69.php> [22.02.2022].

<sup>37</sup> *The Federalist 67, The Executive Department* [online], <http://www.let.rug.nl/usa/documents/1786-1800/the-federalist-papers/the-federalist-67.php> [22.02.2022].

<sup>38</sup> *The Federalist 78, The Judiciary Department* [online], <http://www.let.rug.nl/usa/documents/1786-1800/the-federalist-papers/the-federalist-78.php> [22.02.2022].

<sup>39</sup> *The Federalist 71, The Duration in Office of the Executive* [online], <http://www.let.rug.nl/usa/documents/1786-1800/the-federalist-papers/the-federalist-71.php> [22.02.2022].

<sup>40</sup> *The Federalist 70a, The Executive Department Further Considered* [online], <http://www.let.rug.nl/usa/documents/1786-1800/the-federalist-papers/the-federalist-70a.php> [22.02.2022].

<sup>41</sup> Hamilton wrote about dignity, prominence and splendor of the federal government in: *The Federalist 17, The Same Subject Continued (The Insufficiency of the Present Confederation to Preserve the Union)* [online], <http://www.let.rug.nl/usa/documents/1786-1800/the-federalist-papers/the-federalist-17.php> [22.02.2022]. Hamilton and Madison wrote about the dignity of the emperor’s power in *The Federalist 19, The Same Subject Continued (The Insufficiency of the Present Confederation to Preserve the Union)* [online], <http://www.let.rug.nl/usa/documents/1786-1800/the-federalist-papers/the-federalist-19.php> [22.02.2022]. Madison wrote in a similar way in *The Federalist 46, The Influence of the State and Federal Governments Compared* [online], <http://www.let.rug.nl/usa/documents/1786-1800/the-federalist-papers/the-federalist-46.php> [22.02.2022].

<sup>42</sup> Hamilton, when criticizing a weak power asked a rhetoric question of “How can it ever have energy or stability, dignity or credit, national trust or respect abroad?” in *The Federalist 30, Concerning the General Power of Taxation* [online], <http://www.let.rug.nl/usa/documents/1786-1800/the-federalist-papers/the-federalist-30.php> [22.02.2022]. A similar approach was used when he wrote about certain prominences and attributes of sovereignty in *The Federalist 45, The Alleged Danger From the Powers of the Union to the State Governments Considered* [online], <http://www.let.rug.nl/usa/documents/1786-1800/the-federalist-papers/the-federalist-45.php> [22.02.2022].

<sup>43</sup> *The Federalist 81, The Judiciary Continued, and the Distribution of the Judicial Authority* [online], <http://www.let.rug.nl/usa/documents/1786-1800/the-federalist-papers/the-federalist-81.php> [22.02.2022].

the question of why the freedom of the individual should be protected is that it is the individual and not the State who is worthy of the highest level of dignity. This means, therefore, that it is the individual who has a unique value and stands higher than the State and that in public life all individuals should enjoy an equal position in terms of their civil rights.<sup>44</sup>

Indirect traces of human dignity can be found in the Declaration of Independence adopted by the Second Continental Congress on 4 July 1776. From the very beginning of the Declaration, we read that all people are created self-evidently equal, that the Creator has endowed them with certain unalienable rights, that these rights include the right to life, freedom and the pursuit of happiness.<sup>45</sup> This is a clear acknowledgement of the equality of all people and the inalienability of their natural rights. Together with the declaration, both in individual states and on the national level, other documents and declarations were also adopted.<sup>46</sup> And so, in November 1777, the Articles of the Confederation and of the Perpetual Union were adopted. It was a legislative act in which independent states – former British colonies – established rules of cooperation within the confederation they had established. What must be stressed though is that they did not address the issue of natural and civil rights directly there. Still, indirect traces of respect for certain human rights may be found, as for example in Article IV in which all free citizens, except beggars, vagrants and fugitives, were granted the right to enjoy all the privileges and integrity of free citizens in all states.<sup>47</sup> Despite that, there was no mention of the natural rights that belong to everyone without exception, let alone the equal invaluable worth of every person.

During this important period, individual States initiated work aimed at creating state constitutions. However, when reviewing their content, we will not find any direct references to the idea of human dignity either. The individual state legislative acts of former colonies contain only indirect references to the values currently identified with the idea of dignity. In this context, priority must be given to the efforts of Virginia. In Williamsburg, the Legislative Convention met on 6 May 1776, and the independence of the colony was declared on 15 May. On 12 June

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<sup>44</sup> Michael J. Meyer, *Introduction*, p. 7.

<sup>45</sup> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

<sup>46</sup> For more information on American law-making activities after independence and before the adoption of the Constitution see, among others, Katarzyna Maćkowska, *Normatywny wymiar amerykańskich wczesnych konstytucji stanowych*, Lublin, 2008; Bartosz Różanek, *Trudna droga do Konstytucji Stanów Zjednoczonych Ameryki. Od konstytucji stanowych do „poprawionej” konstytucji federalnej*, Łódź, 2017.

<sup>47</sup> Article IV. In order to consolidate and maintain the mutual friendship and relationships between the inhabitants of the individual States of the Union, the free inhabitants of each of these States, except for beggars, vagrants, fugitives (outlaws under the administration of justice) shall have the right to enjoy all the privileges and integrity of free citizens in all States.

1776 the Virginia Declaration of Rights was adopted and on 29 June the State Constitution was adopted. The Virginia Declaration of Rights became an exemplary document for this type of activity, pointing to values similar to those identified in the Declaration of Independence. Article 1 provided that everyone was equal and free by nature, and had certain inherent rights which could not be waived by any agreement when a society was formed. These rights included the enjoyment of life and freedom, and among them the acquisition and possession of property and the pursuit of happiness and security.<sup>48</sup>

Furthermore, Article 4 of the declaration prohibited the granting of privileges and the introduction of hereditary social hierarchies. The provision stipulated that no person or group of people was entitled to obtain any privileges or benefits of any kind from society, except for those resulting from the performance of public functions. It also prohibited the creation of hereditary offices in the executive, legislative and judicial power.<sup>49</sup>

The above regulations took account of the values associated with the idea of human dignity: they contained a declaration of the rights of man that are inherent by nature, innate and inalienable. This, in turn, is already a typical approach to the contemporary perception of human dignity. Moreover, they also provided for the prohibition of the introduction of a hereditary hierarchy, so characteristic of the traditional understanding of dignity.

On 2 March 1780, the constitution of Massachusetts and the Massachusetts Declaration of Rights were passed. In them, too, we find indirect normative traces of dignity (the characteristic elements of the “doctrine of dignity” described in the twentieth century in the American literature). They are included, among others, in Article I,<sup>50</sup> Article IV,<sup>51</sup> Article V<sup>52</sup> and Article XXIX.<sup>53</sup> The legislature of the State

<sup>48</sup> That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

<sup>49</sup> That no man, or set of men, is entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge, to be hereditary.

<sup>50</sup> Article I. All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.

<sup>51</sup> Article IV. The people of this Commonwealth have the sole and exclusive right of governing themselves, as a Free, Sovereign, and Independent State.

<sup>52</sup> Article V. All power residing originally in the people, and being derived from them, the several magistrates, and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them.

<sup>53</sup> Article XXIX. It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen, to be tried by judges, as free, impartial, and independent, as the lot of humanity will admit.

of New Hampshire passed a constitution on 27 December 1775. In that constitution, a reference was made to the concept of natural powers.<sup>54</sup>

However, such radical actions were not taken in every State. For example, the State authorities of Connecticut only confirmed the validity of the colonial bill (after all its articles confirmed that it derives from the will of the people, so it was difficult to reject it).<sup>55</sup> It was not until 1784 that the Bill of Rights was added to it, but the first constitution in the form of an ordinary law was passed only in 1818. In Rhode Island, on the other hand, no new constitution was adopted, but in 1776 only a resolution was issued by virtue of which the image of the king was removed from the official seals used by the state authorities.

For the purpose of this book, however, it will be necessary to refer primarily to the text of the Constitution of the United States. As it has been noted before, it too makes no direct reference to the idea of human dignity. And yet, paradoxically, in American legal science a great deal of space has been devoted to reflections on the place of the egalitarian idea of human dignity in the American Constitution, and indirect traces of such dignity have been highlighted. They include the political system itself in which the separation of powers as proposed by Lock was to guarantee the limitation of the political power in order to protect the individual and individual's rights from the abuses of the monarchy. American scholars have also pointed out that each of the three elements of American constitutionalism – federalism, the separation of powers and the constitutional judiciary (judicial review) – should be understood as limitations of political power in the service of the normative goal which is the protection of human dignity.<sup>56</sup>

It should also be stressed that the text itself rejects the traditional concept of elite dignity, understood as a high social rank, justified by birth and noble titles. Article I, Section 9, point 8 provided that the United States did not confer any noble title. Furthermore, anyone holding on behalf of the United States, whether in return for payment or in honor of, any office, was prohibited from accepting any gift, reward, office or title from a king, prince or foreign country without the consent of Congress. Likewise in Section 10, paragraph 1, of the same Article, it was laid down that no State may confer any title of nobility. In this way, the idea of a society in which the hierarchy is based on origin and birth was rejected, which is one of the most significant indirect constitutional traces of the normative influence of the idea of egalitarian human dignity. The ban on granting noble titles by both the federation and individual states was accompanied by a ban on accepting such distinctions from foreign hands. The return of the hereditary social hierarchy was thus prevented in two ways.

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<sup>54</sup> (...) many grievous and oppressive acts of the British Parliament, depriving us of our natural and constitutional rights and privileges.

<sup>55</sup> Bartosz Róžanek, *op. cit.*, p. 69.

<sup>56</sup> David A. J. Richards, "Liberty, Dignity and Justification," in *The Constitution of Rights...*, p. 91.

The idea of human dignity, on the other hand, found a prominent place in the first precedent ruling of the Supreme Court, considered to be the landmark case. It was the case of *Chisholm v. Georgia*<sup>57</sup> of 1793. In 1792, Alexander Chisholm, the estate manager working for Robert Farquhar, sought to sue the State of Georgia before the Supreme Court for the payment of goods that his employer had delivered to the colony authorities during the American War of Independence. The defendant state refused to appear as a party, claiming that as a sovereign State it could not be sued without prior consent.

The Supreme Court had to decide whether the State fell under its jurisdiction. Four Justices (including Justice James Wilson<sup>58</sup>) ruled in favor of the complainant. The Justices found that Article 3 Section 2 of the Constitution repealed State immunity and gave Federal courts powers to settle disputes between citizens and States. Accordingly, the proceedings of the State might be subject to judicial review. Incidentally, it is worth noting that only Justice Iredell disagreed with this position arguing that under prevailing and universally applicable law, a state, being a sovereign state, cannot be sued without consent. Paradoxically, this position ultimately prevailed, as demonstrated by the Eleventh Amendment adopted in 1795, which prohibits a complainant from suing a State before a Federal court without its consent.

However, the arguments used by Justices James Wilson and John Jay in their *ratio decidendi* are more relevant to the subject in question.<sup>59</sup> What is worth noting immediately though, is that in the ruling that is being analyzed here, the idea of dignity appeared in two meanings, or two senses. First, it appears as the dignity of the authority which is an attribute of a sovereign State and was used in this sense by Justice Blair when he wrote about the dignity of a State – in the sense of the dignity of a State.<sup>60</sup> But second, dignity is precisely a value that belongs to man.

<sup>57</sup> *Chisholm v. Georgia*, 2 U.S. 419 (1793).

<sup>58</sup> For more on the life and work of James Wilson see Footnote 156.

<sup>59</sup> John Jay (1745–1829) – American politician, diplomat and lawyer; during the American War of Independence, delegate in 1775–76 to the Second Continental Congress, in 1778–79 its chairman; in 1780–82 MP in Spain; in 1782 he became a member of the committee negotiating in Paris the terms of the peace treaty with Great Britain, signed 1783; in 1784–89 Secretary of Foreign Affairs; in 1787 he participated in the Constitutional Convention; proponent of the Federalist Party and the Constitution of 1787; actively sought its ratification – he was a co-author (with J. Madison and A. Hamilton) of political essays (“Federalist”) defending its principles; in 1789–94 he was the first President of the Supreme Court; in 1794 he concluded the Jay Agreement with Great Britain, regulating, among others, the matter of American debts and mutual trade relations; in 1795–1801 the Governor of New York State. *Encyklopedia PWN* [online], <https://encyklopedia.pwn.pl/haslo/Jay-John;3917365.html> [22.02.2022].

<sup>60</sup> “A dispute between A. and B. is surely a dispute between B. and A. Both cases, I have no doubt, were intended; and probably the State was first named, out of respect to the dignity of a State. But that very dignity seems to have been thought a sufficient reason for confining the sense to the case where a State is plaintiff. (...) A judgment by default, in the present stage of the business, and writ of enquiry of damages, would be too precipitate in any case, and too incompatible with the dignity

In the second sense – crucial to the subject under discussion here – the mention of dignity appeared in the reasoning of Justices Wilson and Jay. Justice Wilson emphasized at the outset that the case before the court was a case of exceptional significance because the question of whether a sovereign State falls under the jurisdiction of the federal Supreme Court was extremely important for the American State. And yet, he considered that the answer to this question depended on resolving a much more important issue: do people living in the United States form a Nation? To answer this question, he decided to examine the problem from three points of view: First, philosophy and the science of law, second, the laws in force in various States, and third, from the point of view of the principles contained in the Constitution. And it is in the first context – philosophy and the science of law – that we find important references to the idea of human dignity.

Wilson rejected the claims that States are sovereign in the sense that they are not subject to any authority, solely because of their existence. He emphasized that the State and its governance were created for man.<sup>61</sup> No matter how valuable and useful a tool a State is, it is only a tool to serve man. Its entire meaning and value derive from the *native dignity*.<sup>62</sup> In view of such a formulation, one can hardly stress more strongly the primacy of human dignity in the value system underlying the American political system.

Further, Justice Wilson described his belief in natural human rights as primordial to the rights created by humans. He stressed that the only reason a free man is bound by rights is because he voluntarily agrees to be bound by them. In the same way, he is subject to the courts that create these rights. Wilson said: “The only reason, I believe, why a free man is bound by human laws is that he binds himself. Upon the same principles upon which he becomes bound by the laws, he becomes amenable to the courts of justice which are formed and authorized by those laws. If one free man, an original sovereign, may do all this, why may not an aggregate of free men, a collection of original sovereigns, do this likewise? If the dignity of each singly is undiminished, the dignity of all jointly must be unimpaired. A state, like a merchant, makes a contract. A dishonest state, like a dishonest merchant, willfully refuses to discharge it.”<sup>63</sup>

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of a State in this. Further opportunity of appearing to defend the suit ought to be given.” *Chisholm v. Georgia*, 2 U.S. 419 (1793).

<sup>61</sup> “In doing this, I shall have occasion incidentally to evince, how true it is, that States and Governments were made for man; and, at the same time, how true it is, that his creatures and servants have first deceived, next vilified, and, at last, oppressed their master and maker.” *Ibidem*.

<sup>62</sup> “Man, fearfully and wonderfully made, is the workmanship of his all-perfect Creator. A State, useful and valuable as the contrivance is, is the inferior contrivance of man, and from his native dignity derives all its acquired importance. When I speak of a State as an inferior contrivance, I mean that it is a contrivance inferior only to that which is divine. Of all human contrivances, it is certainly most transcendently excellent.” *Ibidem*.

<sup>63</sup> *Ibidem*.

Justice John Jay, Chief Justice of the Supreme Court at the time, referred to the idea of dignity in similarly key areas of his reasoning. As a proponent of strong Federal power, Justice Jay described the path followed by people living in America, from colonists inhabiting the colonies to citizens united by a common goal, who established a confederation, a constitution and a federal government. When they drew up the Constitution, they were aware of their rights, their own sovereignty, and the full range of their powers. For Justice Jay, the first sentence of the Preamble to the Constitution, which contained the Declaration, was an expression of this deliberate conduct accompanied by a sense of dignity: "We, the people of the United States, (...) introduce and establish for the United States of America this Constitution."<sup>64</sup> Of course, one may question whether Justice Jay meant human dignity as such rather than, for example, the dignity resulting from the functions and honorable actions performed. Such doubts, however, are dispelled by his further reflections expressed in the ruling.

In a later part of his reasoning, Justice Jay stressed that there was no inequality between citizens in America: "(...) for all citizens are fully equal in terms of civil rights, and in this respect, there is no one citizen lower than the other." Consequently, one free citizen may also file a class action against a selected group of other citizens (e.g., corporations) or *vice versa*. The parties to such a dispute before a court have equal rights and such a procedure is not incompatible with the dignity of either party.<sup>65</sup> The United States is a State of equal liberty and neither of the parties to the judicial dispute will be favored in such a way as to undermine the basis of the entire political system, which Justice Jay described in a single sentence: "the equal rights we claim; with the equality we profess to admire and maintain, and with that popular sovereignty in which every citizen partakes."<sup>66</sup>

To sum up these considerations, it is worth highlighting a few points. First, the very fact that the idea of human dignity did emerge in a matter so important from the point of view of the newly established State should be considered important. Second, it is evident, especially with regard to Justice Wilson, that the belief in the inherent dignity of man is a certain axiom, a philosophical credo from which his views on the State and the law derive. Finally, it should also be emphasized that the authors of these statements were the Founding Fathers who were people involved both in the War of Independence and in the adoption of the Constitution. Thus, one may risk the statement that we are dealing here with a quasi-authentic interpretation of the provisions of the Constitution.

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<sup>64</sup> It is remarkable that, in establishing it, the people exercised their own rights, and their own proper sovereignty, and, conscious of the plenitude of it, they declared with becoming dignity, "We the people of the United States, do ordain and establish this Constitution." Ibidem.

<sup>65</sup> "Will it be said, that the fifty odd thousand citizens in Delaware being associated under a State Government, stand in a rank so superior to the forty odd thousand of Philadelphia, associated under their bill, that although it may become the latter to meet an individual on an equal footing in a Court of Justice, yet that such a procedure would not comport with the dignity of the former?" Ibidem.

<sup>66</sup> Ibidem.

# THE NATURAL DIGNITY OF MAN AND THOMAS PAINE

One of the most influential and important personalities for the American experience was Thomas Paine,<sup>67</sup> who, with his writing talent, actively supported the American revolution. Paine is known and famous primarily as the author of *Common Sense*<sup>68</sup> and *Rights of Man*. He authored numerous other works too, but they did not bring him as much fame. He was also an extremely prolific publicist whose numerous articles were published in the American press. Since some of them were written under a pseudonym, his entire legacy is still difficult to estimate.

Both in the above-mentioned works and in the later writings of this “apostle of freedom,”<sup>69</sup> the idea of human dignity was understood, not as a sign of elite of social status, but as an egalitarian value. To him, the individual and the entire human race played an essential role. Paine’s views on human dignity are important for one more reason. This English revolutionary did not see the colonists’ war with the metropolis as merely the question of independence. Paine regarded the American cause as closely related to the cause of the whole of humanity.<sup>70</sup> He believed that the rebellion against the English, which was initially supposed to be limited to fighting for their own rights, should eventually turn into a new Crusade, which would no longer be about independence and a break with the British monarchy, but about a revolution that would inspire others, because “the American cause is very much a matter for all mankind.”<sup>71</sup>

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<sup>67</sup> Thomas Paine (1737–1809) – English philosopher and political publicist, actively participated in the American War of Independence; supported the French Revolution; member of the French National Assembly; imprisoned by the Jacobin government, author of such works as *Common Sense*, *Rights of Man*, *Age of Reason*, *Agrarian Justice*; died in 1809 in New York.

<sup>68</sup> Thomas Paine, *Common Sense*, Philadelphia, 1776, Polish edition Thomas Paine, *Zdrowy rozsądek*, trans. C. Błaszczuk, Warszawa, 2016.

<sup>69</sup> Gregory Claeys, *Thomas Paine, Social and political thought*, Washington, 1989, p. 20.

<sup>70</sup> Philip S. Foner, “Introduction: Thomas Paine – World Citizen and Democrat,” in *The Complete Writings of Thomas Paine*, Philip S. Foner (ed.), New York, 1945, p. xiii.

<sup>71</sup> Waclaw Szyszczkowski, *Twórcy Stanów Zjednoczonych. Waszyngton, Jefferson, Hamilton*, Warszawa, 1980, p. 19.

Just how important the idea of universal and equal dignity of man was for Paine was further confirmed by his anti-slavery attitude. In an article published in 1775 entitled "African Slavery in America"<sup>72</sup> Paine considered the slave trade and related practices to be contrary to the light of nature, to every principle of justice and humanity. He stressed that every person has a natural right to live in freedom. In his opinion this right was equally valid for the whole human race.<sup>73</sup>

In the extremely popular pamphlet *Common sense* (published in 1776) Paine made direct references to human dignity as well as indirect statements demonstrating how close he was to the idea of an innate and precious value equal to every human being who cannot be deprived of it by even the most powerful authority. As Zofia Libiszowska wrote, in his works Paine expressed his faith in "the rights that everyone, regardless of birth, brings into the world," in the "invariability and inviolability" of those rights and in "equality before the law."<sup>74</sup> Moreover, Paine was a supporter of the evolutionary genesis of the State brought to life by means of a social contract concluded by society that had already been developed and by the decision of all its members who in this way delegated some of their prerogatives to the elected authority. In his opinion, the creation of the State and the government was a necessary evil, and he considered the excessive growth of power and authority, and particularly the absolute abuses of the king, an insult in violation of the social contract.<sup>75</sup> This was the context in which Paine wrote about the *proper dignity of man* which is forsaken by anyone who betrays reason and rejects rational arguments against the oppression of the British monarchy towards its colonies. Such a person places himself automatically below wildlife.<sup>76</sup> As a matter of fact, for Paine every absolute power was tantamount to a disgrace to the human being.

His subsequent works bring further evidence of how important the idea of dignity as a law-making (and State-forming) value was to him. During the years of the American Revolution, between 1776 and 1783, a series of his pamphlets was published under the common title *American Crisis*<sup>77</sup> and the pseudonym *Common Sense* that referred to his previous work. In these pamphlets he promoted the idea of the independence of the American colonies. The main arguments in favor

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<sup>72</sup> Thomas Paine, *African Slavery in America* [online], <http://thomaspaine.org/deattributed/african-slavery-in-america.html> [22.02.2022]. Due to the date of publication of this text, Zofia Libiszowska called Paine the first abolitionist. Surely, the text was well received and made its way to an extremely vulnerable area. Three weeks after its publication, the first (and one of the most important) American Anti-Slavery Society was established, which operated with great success – already in 1780 Pennsylvania abolished slavery. Zofia Libiszowska, *Tomasz Paine. Obrońca praw człowieka*, Warszawa, 1976, p. 65.

<sup>73</sup> *Ibidem*.

<sup>74</sup> *Ibidem*, p. 82.

<sup>75</sup> *Ibidem*.

<sup>76</sup> Thomas Paine, "Common sense," in *The Complete Writings...*, p. 41.

<sup>77</sup> *Idem*, "American Crisis," in *The Complete Writings...*, pp. 49–239.

of independence were presented in three principles: the continent's natural right to independence, the interests stemming from independence, and the necessity of as well as moral benefits resulting from independence. Also, the idea of human dignity and related values are present in these texts' references.

In the second of the "crisis" pamphlets, written in the form of a letter to Lord Howe,<sup>78</sup> Paine pointed to independence as America's natural right and interest. He stressed that there were no reasons why the colonists should be deprived of the right to decide their own fate. At the same time, he was critical of the monarchy which he saw as a system that humiliates the *dignity of man*.<sup>79</sup> This was not the only occasion that Paine criticized the monarchy. During the revolution in France, he admitted that he did not feel a personal enemy of the monarchs themselves, but was a declared and fearless enemy of what is called a monarchy. He based his criticism on foundations that he considered unquestionable, even indestructible. First, on his attachment to humanity and the concern he felt for "the dignity and honor of the human race." Second, on the contempt for the people who allowed themselves to be governed, as he put it, by "directed by children and governed by brutes." Third, on the criticism of the wars waged by monarchs, and namely all the evil that the monarchy brought to humanity.<sup>80</sup> It is also worth adding that giving power to minors was considered by Paine to be inconsistent with rational reasons and offensive to the proper dignity of a nation that would be governed by them.<sup>81</sup>

Reference to humiliation that the metropolitan authorities meted out on the colonists was often repeated in his pamphlets. In his sixth pamphlet, Paine strongly and expressively criticized calls for the recognition of the sole authority of England over the colonies without regard to the rights and interests of the colonists living there. He stressed that unlike the lofty power that despises its subjects, the colonies judge persons and things according to their real worth. He described the calls of the colonists who proposed bowing to the authorities and pursuing exclusively British interests (e.g., by attacking the French in their colonies in the north of America) as a universal insult to the status that man possesses among all creatures, and even an insult to his creator.<sup>82</sup>

This approach and promotion of the egalitarian and universal dignity of man transpiring in Paine's political thought included the entire community of colonists, to whom as a community he also attributed exceptional value on account of their

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<sup>78</sup> Richard Howe (1726–1799) – British politician, aristocrat and a military man. In 1775 he was sent to America to resolve the conflict with the colonies; he was known for his sympathies with the American colonists. After the outbreak of the uprising, as admiral, he commanded the British fleet concentrated off the coast of the continent. In 1788 he resigned from his military function and returned to Great Britain, where he successfully continued his political career.

<sup>79</sup> Thomas Paine, "American...", p. 72.

<sup>80</sup> Idem, "Rights of Man," in *The Complete Writings...*, p. 363.

<sup>81</sup> Ibidem, p. 374.

<sup>82</sup> Thomas Paine, "American...", p. 135.

attachment to their independence. This, in turn, resulted in other unique features of the colonists' character; America was a special place in Paine's eyes. The colonists' strong, unbreakable will added charm to America, a charm that conquered the whole world, made its enemies docile, and gave America dignity, which is often superior to power.<sup>83</sup> After all, Paine hoped for an awakening of a strong sense of national dignity among colonists.<sup>84</sup>

In his next work, *Rights of Man*, published in 1791 as a response to Burke's reflections on the revolution France, the idea of equal value for all people was prominent. Importantly, instead of arguing with Burke about individual theses, what Paine did write was practically an *antimanifesto*, conceived as a certain whole, which distinguished itself among the numerous polemics opposing him.<sup>85</sup>

In *Rights of Man* the idea of human dignity also played an important normative role. First of all, it should be stressed that Paine referred to the natural dignity of man when describing the theory of natural rights and presenting his own version of the transition from the state of nature to society and the creation of authority. The dignity of man had an important function in his concept because only governments created in accordance with the natural dignity of man are legitimate and can function. In such a context, the dignity of man becomes a value that legitimizes the authority established and operating with respect for that value. Likewise, it may be a reason to delegitimize the authority if, by its origin or operation, it violates the dignity of man belonging to every citizen.

In his theory, Paine first distinguished between natural rights and civil rights. Natural rights are rights that result from the very existence of man. They are intellectual rights, or rights of the mind, and all those powers of action that an individual has in order to ensure personal happiness and prosperity, except for those that are harmful to the natural rights of others. Civil rights in turn are those that concern a person as a member of society.<sup>86</sup> Paine explained that every civil right is based on some kind of natural law that previously was due to an individual. However, the individual does not always have sufficient power to exercise the rights. If this is the case, it makes sense for the State to create laws that may govern the exercise of individual rights due to each person. However, at the same time, all the natural rights that a person can exercise independently remain in that person's sole possession. Among these rights the most important one is the intellectual right or the right of the mind (also concerning religious issues).<sup>87</sup>

<sup>83</sup> *Ibidem*, p. 232.

<sup>84</sup> *Ibidem*, p. 237.

<sup>85</sup> "If Burke speaks for the ruling classes, he [Paine] speaks for the ruled. Burke is an advocate of the special rights of the monarchy and the aristocracy, while he is an advocate of the sovereignty of the whole nation; Burke recognizes constitutional laws, he recognizes the laws of nature, Burke glorifies the past, he glorifies the present;" in Ewa Małtek, *op. cit.*, p. 73.

<sup>86</sup> Thomas Paine, "Rights of..." pp. 275–6.

<sup>87</sup> *Ibidem*, p. 276.

This right to one's own judgments and views is inherently due to man and he did not relinquish it even when society was created. However, in order to be able to fully exercise the rights and freedoms in society (e.g., to settle disputes or protect property), by becoming a member of society, man has given up some of these rights and freedoms, in a form similar to a deposit, so that he can enjoy the benefits of living in a community (e.g., receive assistance from the authorities in enforcing court judgments).<sup>88</sup>

From these considerations, Paine drew three conclusions. First, every right established by the authorities is a kind of substitute for a natural right. Second, the power of any government is based on that body of natural rights of the human being, and thus it results from the fact that individuals have deposited some of their rights in the common resource of society. Third, the government may not use its power originating from the common resource of natural rights transferred to infringe those natural rights which individuals have not conferred on it.<sup>89</sup>

Thus, Paine's theory of natural rights determined the way in which the State and public authority had been created. Paine believed that his theory of natural rights made it easy to distinguish between governments that grew in their own right in a given community or were formed under a social contract (social compact), and those that did not have such origins. Generally speaking, he believed that power could be achieved in three ways: (i) authorities derived the origins of their power from superstition and their power was based on "priestcraft," (ii) power rested in the hands of those who, like William the Conqueror, took it by force. In this case power was held as long as the violence that supported achieving it continued. However, as Paine stressed, in order to use every means to support their domination, these conquerors used fraud and force and created an idol which they called "Divine Right," thus committing religion to their ends, in the imitation of the power of the Pope.<sup>90</sup> Paine was critical of such governments. In his opinion, their authority, based on force and fraud, constitutes an insult to *the natural dignity of man*.

Only the third way of government, based on reason, is consistent with the idea of human dignity. However, power is not the result of a contract between the subjects and the rulers. This would mean putting the effect before the cause. The only way governments have the right to come into being and the only principle on which they have the right to exist is when individuals, within the framework

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<sup>88</sup> Ibidem.

<sup>89</sup> Ibidem.

<sup>90</sup> "[...] but that they might avail themselves of every engine in their favor, they united fraud to force, and set up an idol which they called Divine Right, and which, in imitation of the Pope, who affects to be spiritual and temporal, and in contradiction to the Founder of the Christian religion, twisted itself afterwards into an idol of another shape, called Church and State." Ibidem, p. 277.

of their personal and sovereign rights, have entered into an agreement with each other to form a government.<sup>91</sup>

Unfortunately, as Paine regretted, these truths are not widely recognized, especially in Europe. With the exception of revolutionary France, States and communities continue to be founded on archaic rules that have nothing to do with natural rights and principles stemming from reason. The most striking example of this is the social inequality based on noble titles. The French Constitution abolished the titles of nobility, which caused the aristocracy to disappear, or as Paine perversely commented, resulted in a situation in which the peer had been exalted into a man. Paine ridiculously wrote that titles are only nicknames that make a man irresponsible, enjoying the “new *garter* like a child.” A truly rational man, thirsting for his natural home which is the of whole society, denounces this kind of illusory values. Paine described the latter as trinkets. A rational individual cannot be locked in a “circle drawn by the magician’s wand” that separates him from real life.<sup>92</sup>

Luckily, as Paine concluded, the French discovered at the right moment that status and dignity in society must be based on different principles. Paine wrote metaphorically that dignity must be based on the real basis of character rather than on the chimerical ground of titles, which is why the revolutionaries “brought their titles to the altar, and made of them a burnt-offering to Reason.”<sup>93</sup>

This proper dignity of character can be regained through public activity and in the fight against Tyrannical power. This is how Paine described the attitude of the deputies of the French legislative assembly, who, as he preached with emphasis, were elected by the largest group of men exercising electoral rights ever seen in Europe. It was these parliamentarians who were properly elected, unlike in the United Kingdom, where MPs come from the “dirt of depopulated constituencies” or are servants of aristocratic communities.<sup>94</sup> It is not surprising that Paine was a great apologist for the political system that was the fruit of the French revolution. In a work published in 1797 entitled *Agrarian Justice*, he wrote: “I have always considered the present Constitution of the French Republic the *best organized system* the human mind has yet produced.”<sup>95</sup> But he also saw its flaws. He was critical of the inequality in the electoral law, where the right to vote was made contingent on the payment of taxes.<sup>96</sup> It is worth pointing out that Paine did not

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<sup>91</sup> “The fact therefore must be, that the individuals themselves, each in his own personal and sovereign right, entered into a compact with each other to produce a government: and this is the only mode in which governments have a right to arise, and the only principle on which they have a right to exist.” *Ibidem*.

<sup>92</sup> *Ibidem*, p. 287.

<sup>93</sup> *Ibidem*.

<sup>94</sup> *Ibidem*, p. 295.

<sup>95</sup> Thomas Paine, “Agrarian Justice,” in *The Complete Writings...*, p. 607.

<sup>96</sup> *Ibidem*.

always use the term dignity in the sense of an egalitarian value belonging to every human being. However, it was precisely this understanding of the idea of human dignity that underpinned his entire philosophical and political system and public activity. It is worth quoting here the opinion expressed by Philip S. Foner, who, in the introduction to *The Complete Writings of Thomas Paine*, stressed that the English revolutionary “like Jefferson, believed in the dignity of the ordinary man” and, alongside him, insisted that all people should have equal opportunities to shape their own fate and the destiny of the world in which they lived. Those who worshipped Jefferson as the Father of Democracy should remember that he adhered to “the same principles” as those contained in Paine’s “Rights of Man.”<sup>97</sup> The role of Paine’s philosophy was described even more clearly by Harvey J. Kaye, who concluded that, “heartened and animated by Paine, we have pressed for the rights of workingmen; insisted upon freedom of conscience and the separation of church and state; demanded the abolition of slavery; campaigned for the equality of women, confronted the power of property and wealth; opposed the tyrannies of fascism and communism; and challenged our own government’s authorities and policies, domestic and foreign.”<sup>98</sup>

Paine’s achievements are evaluated similarly in Polish legal science. It is pointed out that he developed a thesis about the existence of an unbreakable link between respect for human rights by governments and peace in the world. In Paine’s opinion, the condition for lasting peace was respect for dignity, freedom, equality and the right of nations to self-determination.<sup>99</sup> Zofia Libiszowska speaks in a similar apologetical tone about Paine, stressing that this “poor, uneducated and socially disadvantaged Englishman played a leading role in the transformation and upheaval of the last quarter of the eighteenth century.”<sup>100</sup> His ideas were based on a deep conviction that man, in addition to natural rights, had natural dignity that is a natural and inalienable value, equal to all, including slaves. At the same time, while evaluating Paine’s work, it should be noted that he frequently referred to the ideas of John Locke, especially in his reflections in the *Second Treaty on Government*.

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<sup>97</sup> Philip S. Foner, op. cit., p. xlv.

<sup>98</sup> Harvey J. Kaye, *Thomas Paine and the promise of America*, New York, 2005, pp. 258–9.

<sup>99</sup> Nina Baranowska, Tomasz Chłopecki, “Kilka słów o kształtowaniu się praw człowieka w okresie XVIII–XX w.,” in *Księga dla naszych kolegów: prace prawnicze poświęcone pamięci doktora Andrzeja Ciska, doktora Zygmunta Masternaka i doktora Marka Zagrosika*, Mazurkiewicz, Jacek (ed.), Wrocław, 2013, p. 51.

<sup>100</sup> Zofia Libiszowska, *Tomasz Paine...*, p. 5.

# THE EQUAL CREATION OF MAN AND THOMAS JEFFERSON

At first sight Thomas Jefferson is so well known as to need no further presentation.<sup>101</sup> The author of the Declaration of Independence and third President of the United States, is a figure of exceptional importance for world history and deliberations on American political and legal thought. Without reference to his legacy would be by definition, incomplete. As is pointed out in the literature on the subject, “under Jefferson’s pen, the political thought and philosophy of the Age of Enlightenment have taken real legal shape.”<sup>102</sup> We must agree that Jefferson left behind a remarkable intellectual legacy and has gone down in history as one of the most outstanding minds of the American Enlightenment.<sup>103</sup> Wiktor Osiatyński was also right when he said that “[f]ew American politicians of his time and of subsequent times had such a deep knowledge of history and political thought as Jefferson did.”<sup>104</sup> That knowledge constitutes the basis upon which Jefferson created his own political and legal doctrine that combined universal and timeless values with the political practice and socio-economic reality of late eighteenth century America. At the heart of Jefferson’s philosophical system was his belief in the invaluable value of every life, a belief that he demonstrated even in private correspondence.<sup>105</sup>

Jefferson assumed that the world is governed by certain laws that man can discover, name and apply using reason and rational thought. This simple truth applies equally to nature and to society which is made up of humans. Every hu-

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<sup>101</sup> Tomasz Wieciech wrote interestingly about the place of Jefferson in American consciousness in Tomasz Wieciech, *Unia w myśli politycznej Thomasa Jeffersona*, Kraków, 2012, pp. 11–3.

<sup>102</sup> Zofia Libiszowska, *Tomasz Paine...*, p. 6.

<sup>103</sup> Tomasz Wieciech, “Wstęp,” in Thomas Jefferson, *Uwagi o państwie Wirginia*, Tomasz Wieciech (translation, introduction and elaboration), Kraków, 2014, p. IX.

<sup>104</sup> *Wizje Stanów Zjednoczonych w pismach Ojców Założycieli*, Osiatyński, Wiktor (ed.), Warszawa, 1977, p. 169.

<sup>105</sup> Thomas Jefferson, *Letter to Thomas Jefferson Smith (21.02.1825)* [online], <https://founders.archives.gov/documents/Jefferson/98-01-02-4987> [22.02.2022].

man being is endowed with reason, independently of his or her race, origin and wealth. In the same way, every individual is endowed with a moral sense owing to which one is able to distinguish between evil and good, being a “part of the nature of every human being.”<sup>106</sup> Everyone has certain rights which are natural rights. He stressed this in the concluding remarks of a pamphlet of 1774 entitled *A Summary View of the Rights of British America* in which he recalled that Americans are members of a free people who claim their rights as a natural right and not as “the gift of their chief magistrate.”<sup>107</sup>

For these reasons, people are equal in moral terms which the law must respect. And yet, each person uses his or her reason and abilities differently. Therefore, there is no real equality between people and a certain hierarchy is created in society. Jefferson considered this understanding of equality to be the fairest, revealing “a due sense of our equal right to the use of our own faculties, to the acquisitions of our own industry, to honor and confidence from our fellow citizens, resulting not from birth, but from our actions and their sense of them.”<sup>108</sup>

As a result of the diversified use of each person’s natural properties, “natural aristocracy” may be created. As Jefferson wrote in one of his letters, “(...) there is a natural aristocracy among men. The grounds of this are virtue & talents.”<sup>109</sup> The hereditary aristocracy of privileges, power and money is contrary to nature. Social hierarchy, based on the use of people’s skills and diligence is compatible with natural law. An “artificial aristocracy,” on the other hand, is based on wealth and birth but is devoid of virtues and talents. If it had them, it would be a natural aristocracy instead.

As can be seen, there was clearly a certain line of reasoning in Jefferson’s thought. Natural equality gives rise to equal rights for every human being: the right to life, the right to freedom, and the right to pursuit of happiness, also understood as the right to property. These rights are granted to everyone and derive from the very nature of man – today we would say that they originate in the innate and inalienable dignity of man. In order to exercise these rights, people unite in communities and form States. Power in States must be limited and those in power must always be treated, metaphorically speaking, like wolves constituting a threat to the governed ones. As a matter of fact, this metaphor appeared several times in Jefferson’s writings, as for example when he wrote about governments in Europe, saying: “too much law, as among the civilized Europeans,

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<sup>106</sup> Idem, *Uwagi o państwie Wirginia*, p. 130.

<sup>107</sup> Idem, *A Summary View of the Rights of British America* [online], <https://thefederalistpapers.org/wp-content/uploads/2012/12/Rights-of-British-America-by-Thomas-Jefferson.pdf> [22.02.2022].

<sup>108</sup> Idem, *First inaugural address* [online], <https://jeffersonpapers.princeton.edu/selected-documents/first-inaugural-address-0> [22.02.2022].

<sup>109</sup> Idem, *Letter to John Adams (28.10.1813)* [online], <https://founders.archives.gov/documents/Jefferson/03-06-02-0446> [22.02.2022].

submits man to the greatest evil (...) the sheep are happier of themselves, than under care of the wolves.”<sup>110</sup> Power must be limited because when limited, it is too weak to violate the rights of individuals. In this context, Jefferson also spoke innovatively about discrimination against minorities and the need for the law to counteract such practices. In his inaugural address opening of his first term as President, Jefferson spoke of a sacred principle, “that though the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable; that the minority possess their equal rights, which equal laws must protect, and to violate would be oppression.”<sup>111</sup>

The power of each government must be limited by the purposes for which it was established, which include the implementation and safeguarding of selected natural rights. This is because, as Jefferson wrote, “our rulers can have authority over such natural rights, only as we have submitted to them. The rights of conscience we never submitted, we could not submit.”<sup>112</sup> There is a problem though since power has a negative impact on people: “[i]n every government on earth is some trace of human weakness, some germ of corruption and degeneracy, which cunning will discover, and wickedness insensibly open, cultivate and improve. Every government degenerates when trusted to the rulers of the people alone. The people themselves therefore are its only safe depositories.”<sup>113</sup>

This is why Jefferson stressed the need for a system in which the government is bound by law. A system in which the details must be included in the constitution and the restrictions on authority must be “concrete, formulated in terms of natural rights and human freedom.”<sup>114</sup> A good example of such regulation may be the *Draft for a Bill for Establishing Religious Freedom* written by Jefferson.<sup>115</sup> Having concluded that God endowed man with reason and, at the same time, made his mind free, “making it altogether insusceptible of restraint,” Jefferson specifically enumerated which practices of power against a citizen restrict the citizen’s freedom of conscience and degrade or discriminate against him in the public sphere. One such practice was in his opinion the requirement that a candidate for public office confirm or renounce certain religious dogmas (like faith in the Trinity). Such practices, he argued, would be contrary to the Bill and would unlawfully deprive an individual of those privileges and benefits to which he has a natural right on

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<sup>110</sup> Idem, *Notes on the States of Virginia*, p. 128 [online], <https://www.thefederalistpapers.org/wp-content/uploads/2012/12/Thomas-Jefferson-Notes-On-The-State-Of-Virginia.pdf> [22.02.2022].

<sup>111</sup> Idem, “Pierwsze przemówienie inauguracyjne,” in *Wizje Stanów Zjednoczonych w pismach Ojców Założycieli*, Osiatyński, Wiktor (ed.), Jaraczewski, Andrzej (trans.), Warszawa, 1977, pp. 208–9.

<sup>112</sup> Idem, *Notes on the States...*, p. 176.

<sup>113</sup> Ibidem, p. 169.

<sup>114</sup> Wiktor Osiatyński, “Thomas Jefferson (1743–1826),” in *Wizje Stanów Zjednoczonych...*, p. 171.

<sup>115</sup> A draft statute for religious freedom in Virginia was presented at a legislative meeting in 1779, but was not adopted until 1786.

an equal footing with all other citizens.<sup>116</sup> Next, in the draft Bill, Jefferson listed actions by the State against religion that would be prohibited. Finally, he again referred to the philosophical premises and concepts of natural law. The draft Bill closes with a declaration that all the rights it provides are the natural rights of mankind and any law that would restrict them in the future would be a violation of natural law.<sup>117</sup>

At the same time, Jefferson was also aware that even the best-organized governments would not survive without a properly formed society. Ideally, there should be a community of free citizens who are primarily engaged in agriculture and stockbreeding, rather than living in ever larger cities and working on a contract basis. Jefferson emphasized the role of education and training and pointed to the link between education and human dignity. These ideas were also raised by Mary Wollstonecraft in the context of the fight for women's dignity. Links to education and human dignity are also present in the writings of Martha Nussbaum about the role of education in relation to human dignity. Jefferson himself put forward an initiative to create a system of universal education, but this proposal was rejected.<sup>118</sup>

Jefferson was convinced that freedom would not survive in a society of "the unenlightened," whereas among enlightened people, it would. For, as he pointed out, a rational and enlightened people aware of their interests will hand over power to those who really should exercise it because they are the "natural aristocracy" of wisdom, reason and virtue.<sup>119</sup>

One of the basic ways of creating a properly functioning community is therefore to educate people. Jefferson wrote that "their minds must be improved to a certain degree. (...) An amendment of our constitution must here come in aid of the public education."<sup>120</sup>

The United States Declaration of Independence is undoubtedly one of Jefferson's most important works. Hence it will be worth discussing here its draft version which was the exclusive work of Jefferson, rather than the final version, revised and supplemented by other members of the editorial committee and then by Congress. One of the sentences opening the Declaration is often referred to in American literature as a *quasi*-definition of human dignity.<sup>121</sup> Thus the Jefferson-

<sup>116</sup> Thomas Jefferson, *Draft for a Bill for Establishing Religious Freedom* [online], [https://ahp.gatech.edu/rel\\_freedom\\_1779.html](https://ahp.gatech.edu/rel_freedom_1779.html) [22.02.2022].

<sup>117</sup> *Ibidem*.

<sup>118</sup> Only the Bill to Establish a University was implemented. More on this in Michał Urbańczyk, "Tomasz Jefferson jako „duchowy ojciec” Biblioteki Kongresu," in *Biblioteki i archiwa na jednolitym rynku cyfrowym*, Chałubińska-Jentkiewicz, Katarzyna, and Kakareko, Ksenia, and Sobczak, Jacek (eds.), Poznań, 2018, pp. 27–44.

<sup>119</sup> Wiktor Osiatyński, *op. cit.*, p. 173.

<sup>120</sup> Thomas Jefferson, *Notes on the States...*, p. 169.

<sup>121</sup> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

ian description should, with even more justification, be regarded as a descriptive definition of human dignity. Fragments that were deleted from his draft are also interesting. In the original version, the second sentence of the Declaration read: "We consider the following truths to be sacred and undeniable: the obvious fact that all men and women are created free and independent, that from this equal creation they derive inherent and inalienable rights, among which are the protection of life, freedom and the pursuit of happiness."<sup>122</sup>

The analysis of the definition of human dignity arising from Jefferson's draft version and the final version, especially in the context of contemporary attempts to define human dignity, are important here. First, it turns out again that Jefferson was radical in his views. For him "the truths" were not only "self-evident" but also sacred and undeniable. Second, in the final version of the text, we read that people are born free but they are no longer independent, which may allow for a situation where some people may find themselves dependent on others (e.g., as slaves). Third, the reference to equal creation, from which people can derive their natural and inalienable rights, was removed from the final version of the Declaration. Fourth, people are only endowed with certain inalienable rights, but no longer with inherent rights, which again may suggest that these rights may be changed. Finally, it is worth pointing out that in the final version, there is a direct reference to the Creator, which was absent in the draft Declaration. This last change should not be over-stressed as is frequently done and suggested for example that Jefferson wished to draw up a more secularized version of the Declaration. After all he was writing about truths that are "sacred," and that people were created – presumably by God. What is more, all subsequent changes concerning the source of the rights – from a statement that people themselves derive the content of the rights, to saying that God endowed them with these rights – distances the final version of the Declaration from other writings of the Enlightenment period that were more critical of religion.

It will also be interesting to compare the Jeffersonian passus to contemporary definitions of dignity. For example, human dignity is often defined as an innate and inalienable, invaluable value belonging to every person because of the fact of being a human being. If we replaced the sacred and undeniable equal creation of human beings, from which the innate and inalienable rights can derive, with the contemporary understanding of human dignity, it would turn out that Jefferson defined ideally the value that we today define as human dignity, which he himself called equal creation – a sacred truth, that is invaluable and equal to all people

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<sup>122</sup> "We hold these truths to be [sacred and undeniable] self-evident, that all men are created equal and independent; that from that equal creation they derive in rights inherent and inalienable, among which are the preservation of life, and liberty and the pursuit of happiness;" in Thomas Jefferson, *Jefferson's draft of the Declaration of Independence, 28 June, 1776* [online], <http://www.let.rug.nl/usa/documents/1776-1785/jeffersons-draft-of-the-declaration-of-independence.php> [22.02.2022].

(because everyone was created/born) and from which the innate and inalienable rights of man flow.

Another example supporting the argument that the idea of *equal creation* was important to Jefferson will be his passionate criticism of slavery, eventually removed from the final version. Jefferson was aware of how difficult, but at the same time vital, it would be for the emerging State to prohibit the possession of and trade in slaves. In his *Autobiography*, he concluded with a sneer that “[t]he clause too, reprobating the enslaving the inhabitants of Africa, was struck out in complaisance to South Carolina and Georgia, who had never attempted to restrain the importation of slaves, and who on the contrary still wished to continue it. Our northern brethren also, I believe, felt a little tender under those censures; for tho’ their people have very few slaves themselves yet they had been pretty considerable carriers of them to others.”<sup>123</sup> As Jefferson wrote in the draft Declaration:<sup>124</sup> the King “(...) has waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating and carrying them into slavery in another hemisphere, or to incur miserable death in their transportation hither. This piratical warfare, the opprobrium of infidel powers, is the warfare of the Christian king of Great Britain. [determined to keep open a market where MEN should be bought and sold,] he has prostituted his right to veto for suppressing every legislative attempt to prohibit or to restrain this execrable commerce, and that in this assemblage of horrors he is now inciting those very people to rise in arms among us, and to purchase that liberty of which he had deprived them, by murdering the people upon whom he also obstructed them: thus paying off former crimes committed against the liberties of one people, with crimes which he urges them to commit against the lives of another.”<sup>125</sup>

Jefferson described slavery as a cruel war against human nature itself, an act that violates man’s most sacred rights of life and liberty. It is therefore clear that Jefferson’s objection to slavery stemmed directly from his belief in the exceptional value of every human being. In fact, he combined the criticism of slavery in his writings with actions in practice in the sphere of law and politics. Working as an attorney, he represented the black people of New England in the courts.<sup>126</sup> When he began his political career in 1769, he became a member of the Virginia Colony (the House of Burgesses) legislature. Already at that time, Jefferson was regarded as a politician with radical views, not only on the issue of relationships with the metropolis, but also on slavery. As a deputy, he wrote a draft law that

<sup>123</sup> Thomas Jefferson, *Autobiography* [online], [https://avalon.law.yale.edu/19th\\_century/jef-fauto.asp](https://avalon.law.yale.edu/19th_century/jef-fauto.asp) [22.02.2022].

<sup>124</sup> Idem, *Jefferson’s draft...*

<sup>125</sup> Idem, “Autobiografia,” in *Wizje Stanów Zjednoczonych...*, p. 188.

<sup>126</sup> Małgorzata Ciepluch, op. cit., p. 79.

allowed freedom to be granted to one's slaves,<sup>127</sup> and also admitted in his *Autobiography* that just once he applied for the liberation of slaves, but his proposal fell: "(...) in fact, no one could have expected any liberal moves to be successful under royal rule."<sup>128</sup>

In the above mentioned *A Summary View of the Rights of British America*, Jefferson criticized the King for his improper use of the right of veto, writing that "His Majesty rejected even the most salutary laws. The abolition of slavery is the desired goal of those colonies where it was unfortunately instituted at the time when they were established. But before the liberation of the slaves owned, any further import from Africa must be forbidden."<sup>129</sup> He repeated his negative attitude to slavery as a member of Congress, presenting in 1784, a report to the American Parliament, in which he proposed, in addition to the expansion into Western territories, the adoption of the prohibition of slavery on the newly conquered territories in the West. As was the case with the Declaration of Independence, the fragment on slavery contained in the report was not included in the final version of the New Territories Act adopted by Congress in 1787.<sup>130</sup>

Much criticism on slavery was also in his *Notes on the State of Virginia*.<sup>131</sup> There he once again included a proposal calling for the adoption of a law granting freedom to all those born after its entry into force. At the same time, Jefferson recognized the need to take care of the new citizens of the state – he proposed various forms of supporting them, foreseeing that the liberated slaves would be incapable of coping with the new reality without State aid.<sup>132</sup>

While today Jefferson can be criticized for his view that the two races would not be able to live peacefully in one country, and while the idea of sending slaves back to Africa may be questionable, what could be fairer and just, consistent with natural laws, than sending the kidnapped back to their home country. This is especially so as Jefferson envisaged that each new State would need to be assisted, writing that "declare them a free and independant people, and extend to them our alliance and protection, till they shall have acquired strength."<sup>133</sup>

Similarly, other comments, including those relating to the differences in capabilities between races, must be considered in the context in which they were written. Jefferson, when writing about the capability deficits of the black race, rejected the thesis about their natural inclination to steal and disrespect property rights. He believed that these deficiencies were the result of the disastrous social

<sup>127</sup> Longin Pastusiak, *Prezydenci Stanów Zjednoczonych Ameryki Północnej*, Warszawa, 1999, p. 79.

<sup>128</sup> Thomas Jefferson, *Autobiography...*

<sup>129</sup> Idem, "Krótki przegląd praw brytyjskiej Ameryki," in: *Wizje Stanów Zjednoczonych...*, p. 180.

<sup>130</sup> Wiktor Osiatyński, "Thomas Jefferson...", pp. 165–6.

<sup>131</sup> Thomas Jefferson, *Uwagi o państwie Wirginia...*, p. 296.

<sup>132</sup> Ibidem, p. 186.

<sup>133</sup> Thomas Jefferson, *Notes on the States...*, p. 162.

situation of slaves. For he was convinced that changing the position of man would change his concept of good and evil.<sup>134</sup>

Thus, it is evident that Jefferson criticized fiercely the system of slavery and human trafficking that existed during his lifetime.<sup>135</sup> He believed that slavery had an unfortunate impact on the habits of American society. He wrote that “[t]he whole commerce between master and slave is a perpetual exercise of the most boisterous passions, the most unremitting despotism on the one part, and degrading submissions on the other.”<sup>136</sup> He stressed that these negative effects are manifold. The existing situation allowed “one half the citizens thus to trample on the rights of the other, transforms those into despots, and these into enemies, destroys the morals of the one part, and the amor patriæ of the other.” Second, together with the morality of people their industriousness is also destroyed.<sup>137</sup>

The issue of slavery returned many times in Jefferson’s thinking. He was critical of Congress’s actions on the Missouri compromise. He wanted the universal emancipation and expatriation of slaves and believed that these demands would gradually be implemented. He believed, however, that Congress had no authority to decide that the slave inhabitants of a State might gain freedom, or whether they were forbidden to live in that State.<sup>138</sup>

He was equally critical of other aspects of life in the colonies, and among other things of certain court proceedings. According to the provisions of the law passed by the British Parliament (as a reaction to the “Boston tea party”), the defendants were to be heard by the Royal Bench Court sitting in Middlesex, United Kingdom. Witnesses were also to testify there. Jefferson pointed out that such a trial could not be fair – the accused would be tried without any practical possibility to defend himself, and being a witness in such a trial is nothing different than a pecuniary punishment, because the witnesses had to cover their expenses (above the amount arbitrarily set by the royal governor) out of their own pocket.<sup>139</sup> This

<sup>134</sup> *Ibidem*, p. 193.

<sup>135</sup> The allegations that he himself had slaves seem not worthy. Living in a State where slavery prevailed and running a farm, he would have doom himself to bankruptcy (and his family to poverty) if he had got rid of the slaves, and would have continued to live this way alongside the farms and plantations which continued to use free labor. In this regard, Jefferson acted like others, although contrary to his views. Zofia Libiszowska, in her monograph devoted to Jefferson, cites an example of an advertisement that Jefferson gave for an escaped slave in a local newspaper. Zofia Libiszowska, *Tomasz Jefferson*, Wrocław, 1984, p. 29.

<sup>136</sup> Thomas Jefferson, *Notes on the States...*, p. 178.

<sup>137</sup> *Ibidem*.

<sup>138</sup> “I regret that I am now to die in the belief that the useless sacrifice of themselves, by the generation of ’76. to acquire self government and happiness to their country, is to be thrown away by the unwise and unworthy passions of their sons, and that my only consolation is to be that I live not to weep over it.” Thomas Jefferson, *Letter to John Holmes (22.04.1820)* [online], <https://founders.archives.gov/documents/Jefferson/03-15-02-0518> [22.02.2022].

<sup>139</sup> Thomas Jefferson, *A Summary View...*

criticism of the actions of the British King and Parliament in this area is important, because in the twentieth century care for fair procedures and the avoidance of abuses in criminal proceedings became an important context in which the idea of human dignity affected the judicial decisions of the Supreme Court.

Similarly, Jefferson was very critical of the regulations concerning the operation of courts in the newly emerging counties in the western colonies. The King forbade the establishment of new counties if the new entity did not relinquish its representation in the legislature. In this way, the monarch limited the number of deputies which in practice led to a situation in which the counties were very large in size and without a western border, which required travelling long distances to the cities for court hearings or meetings of public authorities. Jefferson asked rhetorically whether by doing so, the monarch wanted to announce to the world that his subjects were to renounce the honorable right of representation, with all its benefits, and to consider themselves slaves of their monarch's will.<sup>140</sup>

Jefferson's objections to social inequalities resulting from the feudal hierarchy are also noteworthy. In 1776, upon his return to Virginia, he put forward legislative initiatives which, as Osiatyński noted, were made with the goal of eliminating the aristocratic feudal privileges and creating a *natural aristocracy* based on skills and abilities, and not on inheritance or wealth.<sup>141</sup> Jefferson realized that equality of birth did not always translate into equality of living conditions, which was clear from the predominance of the idea of freedom over the idea of equality. In one of his letters, he emphasized that in America there are no distinctions between people other than those between private individuals and officials who exercise power in the name of their rights. Among those who do not hold any public office, "the poorest labourer stood on equal ground with the wealthiest Millionary." Jefferson noted sarcastically that the experience to date with social rank depending on birth or public office shows that basing society on such an idea is wrong. Jefferson believed that the evil which these inequalities cause in society could only arouse emotions in European countries, where the dignity of man was lost in arbitrary distinctions.<sup>142</sup> There was no such a problem in America, where every citizen is equal before the law and before each other. In Europe, on the other hand, "the many are crouched under the weight of the few," "the human species is classed into several stages of degradation."<sup>143</sup> As a matter of fact, Jefferson was generally very critical of the social and economic relationships prevailing in Europe. He wrote elsewhere that experience shows that "man is the only animal which devours his

<sup>140</sup> Idem, "Krótki przegląd praw...", pp. 200–1.

<sup>141</sup> Wiktor Osiatyński, "Thomas Jefferson...", p. 164.

<sup>142</sup> Thomas Jefferson, "Observations on Dêmeunier's Manuscript (June 22, 1786)," in *Memoir, Correspondence and Miscellanies. From the Papers of Thomas Jefferson*, vol. 1, Randolph, Thomas J. (ed.), Charlottesville, 1829, p. 422.

<sup>143</sup> Ibidem.

own kind, for I can apply no milder term to the governments of Europe, and to the general prey of the rich on the poor.”<sup>144</sup>

It is worth noting at this point that here too Jefferson was ahead of his time because he saw the need to eliminate the greatest social differences, and believed that it was the duty of the State not to allow a situation that would be contrary to natural law in this respect. Such actions – aimed at restricting freedom for the sake of economic equality – are nowadays often justified precisely by arguments relating to dignity (which may be found on the pages of this book in the doctrine of Justice William J. Brennan).<sup>145</sup> Arguments of this kind were also used by Jefferson who identified extreme situations which undeniably violated natural rights. He considered them to be circumstances in which land ownership was reserved for a few, while a large part of the population could not support itself because there was no place for them to work or no land to farm or cultivate. He expressed such a thought as early as 1785, in a letter to James Madison in which Jefferson wrote that “an equal division of property is impracticable. But the consequences of this enormous inequality producing so much misery to the bulk of mankind, legislators cannot invent too many devices for subdividing property, only taking care to let their subdivisions go hand in hand with the natural affections of the human mind. (...) Whenever there are in any country uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right. The earth is given as a common stock for man to labor and live on. The small landowners are the most precious part of a state.”<sup>146</sup>

Other indirect traces of the normative influence of the idea of human dignity on Jefferson’s views may be found in his political activities as well. In addition to the above, it is worth recalling that Jefferson claimed that the draft American Constitution lacked the Bill of Rights.<sup>147</sup> Another example is provided by his re-

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<sup>144</sup> Thomas Jefferson, *Letter to Colonel Carrington (16.01.1787)* [online], <https://founders.archives.gov/documents/Jefferson/01-11-02-0047> [22.02.2022].

<sup>145</sup> It is worth stressing immediately that in this context, the idea of human dignity has played a significant role in the doctrine of the civil rights movement, and especially the political thought of Martin L. King. Today, in this context, numerous references to human dignity can be found in the philosophy of Martha C. Nussbaum.

<sup>146</sup> Thomas Jefferson, *Letter to James Madison (28.10.1785)* [online], <https://founders.archives.gov/documents/Jefferson/01-08-02-0534> [22.02.2022].

<sup>147</sup> Among others, in a letter to James Madison, he wrote: “I will now add what I do not like. First the omission of a bill of rights providing clearly & without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies, restriction against monopolies, the eternal & unremitting force of the habeas corpus laws, and trials by jury in all matters of fact triable by the laws of the land & not by the law of Nations;” in Thomas Jefferson *Letter to James Madison...* In another letter he wrote: “What I disapproved from the first moment also was the want of a bill of rights to guard liberty against the legislative as well as executive branches of the government, that is to say to secure freedom in religion, freedom of the press, freedom from monopolies, freedom from unlawful imprisonment, freedom from a permanent military, and a trial by jury in all cases determinable

action to the Act on Foreigners and Subversive Activity which limited civil rights and was adopted by Congress during John Adams's presidency in 1798. Jefferson prepared the resolution, subsequently passed by the Kentucky state legislature, himself. The resolution condemned the adopted legislation as unconstitutional, inconsistent with the Constitution, the Bill of Rights and democratic ideals, and threatened to declare to secede the State of Kentucky from the Union if it were to remain in force.<sup>148</sup>

Also, in the draft constitution for Virginia, Jefferson included his views and concepts that were in line with the idea of human dignity. First of all, he provided for a universal suffrage for all male citizens (not limited by any census of property). Second, the constitution provided for freedom for all born after 31 December 1800.

How much Jefferson cherished certain values is demonstrated by what he considered to be the greatest successes of his life. He dictated the following words to be inscribed on his tombstone: Author of the Declaration of American Independence, of the Statute of Virginia for religious freedom and Father of the University of Virginia. He was an idealist of some kind, and therefore faith in certain absolute values that were necessary for human life was no stranger to him. He agreed with the claim that society must be based on belief in certain axioms and absolutes: "liberty, truth, probity, honor, are declared to be the four cardinal principles."<sup>149</sup> From this point of view, there was only one step to recognizing that additionally an unnamed idea identical in effect to the act of equal creation is human dignity, which results in freedom, truth, righteousness and honor in the life of a person perceived as an individual as well as a member of the community in which he or she lives.

To sum up the above reflections, it should be pointed out that the direct idea, though not always named in the same way, underlying Jefferson's philosophy and the political and legal doctrine was the idea of human dignity, expressed in the conviction that there exists an invaluable and egalitarian value of every human existence, from which natural and inalienable rights derive. The protection of these rights is best served by a republican political system based on the principle of the division of power. Jefferson hoped that America's independence would be a signal given by people rising from their knees that other nations would throw off "the chains, under which Monkish ignorance and superstition" made them lock themselves and accept "the blessings & security of self government."<sup>150</sup>

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by the laws of the land..." See Thomas Jefferson, *Letter to Francis Hopkinson (13.03.1789)* [online], <https://founders.archives.gov/documents/Jefferson/01-14-02-0402> [22.02.2022].

<sup>148</sup> Wiktor Osiatyński, "Thomas Jefferson...", p. 167.

<sup>149</sup> Thomas Jefferson, *Letter to Pierre Samuel Dupont de Nemours (24.04.1816)* [online], <https://founders.archives.gov/documents/Jefferson/03-09-02-0471> [22.02.2022].

<sup>150</sup> Idem, *Letter to Roger C. Weightman (24.06.1826)* [online], <https://founders.archives.gov/documents/Jefferson/98-01-02-6179> [22.02.2022].

Certain values – essential to the functioning of the idea of human dignity – occupied a permanent place in Jefferson’s deliberations. Even when writing his only work, *Notes on the State of Virginia*, which was intended to answer the French ambassador’s questions, he was actually writing about the most important ideas without which human dignity cannot function. Indeed, as is rightly noted in the literature on the subject, basically, Jefferson’s work addressed three issues in particular: slavery, the value of universal education, and the nature of free governance.<sup>151</sup> Each of these issues is crucial to the description and functioning of the idea of dignity. Slavery is the most serious violation of human dignity and means the objectification of the individual because it leads to treating the human being as an object of a legal relationship and not as a subject and an equal party to legal or social relationships. Even today, the lack of education is widely regarded as one of the basic obstacles to the full realization of the idea of human dignity. An uneducated person may be aware of his or her value, but is not aware of the consequences of this principle being adopted in social life. Republican, and therefore free, government, is the basic form of safeguarding the idea of human dignity.

This unwavering faith was expressed by Jefferson in his last text – a letter in which he responded to an invitation on the 50th anniversary of American independence. He wrote that “all eyes are opened, or opening to the rights of man. The general spread of the light of science has already laid open to every view the palpable truth that the mass of mankind has not been born, with saddles on their backs, nor a favored few booted and spurred, ready to ride them legitimately, by the grace of god.”<sup>152</sup> It would be difficult to find a more realistic way of saying what it actually means to recognize the normative nature of human dignity. Clearly, Jefferson was a precursor in many areas: in his 1804 speech he spoke about the rights of minorities, in his letter of 1826 he wrote about human rights.

Finally, it is worth noting that he also took a stand in the dispute over the interpretation of the Constitution, which subsequently erupted in the twentieth century between contextualists and originalists. This is all the more important since the idea of human dignity was often criticized for being an “excuse” used to implement solutions that are inconsistent with the original intentions of the Founding Fathers. Meanwhile, Jefferson believed that the law and the political system must evolve along with the development of society, going on as the human mind progresses. Although he maintained that the law should not be changed with every social whim, he acknowledged that “each generation is as independent of the one preceding, as that was of all which had gone before.” Consequently, each new generation has the right to choose for itself the form of government it consid-

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<sup>151</sup> Tomasz Wiecech, “Wstęp...,” p. XV.

<sup>152</sup> Thomas Jefferson, *Letter to Roger C. Weightman...*

ers best suited to its own happiness.<sup>153</sup> That is why he proposed, for example, that the Constitution be revised from time to time. Interestingly, similar statements may be found in Paine's deliberations, who wrote that "every generation is – and must be – reliable in terms of its own goals, which circumstances require. For they affect the living, not the dead."<sup>154</sup> It was a criticism directed against Edmund Burke's conservative attitude and views.

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<sup>153</sup> Idem, *Letter to "Henry Tompkinson" (Samuel Kercheval) (12.07.1816)* [online], <https://founders.archives.gov/documents/Jefferson/03-10-02-0128-0002> [22.02.2022].

<sup>154</sup> Quoted after Magdalena Modrzejewska, *Libertariańskie koncepcje jednostki i państwa we współczesnej amerykańskiej myśli politycznej*, Kraków, 2010, p. 46.

## CHAPTER 4

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# THE NATIVE<sup>155</sup> DIGNITY AND JAMES WILSON

The legal and political thought of James Wilson<sup>156</sup> is of material importance because of the judgment delivered in the *Chisholm v. Georgia* case discussed above. It is therefore worthwhile to refer to his views in order to determine to what extent the reference to native dignity was incidental in his case, and to what extent he consciously referred to the egalitarian concept of dignity. James Wilson's legacy is extremely diverse. As a politician, Supreme Court Justice, writer, and active participant in the revolutionary events of the late nineteenth century, he left behind numerous sources originating from his written works (e.g., *Lectures on Law*) and

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<sup>155</sup> James Wilson used the term "native," while today the term "innate" is used to describe a feature of human dignity, which is its innate (intrinsic) value. According to the Meridian-Webster dictionary, these terms are synonymous.

<sup>156</sup> James Wilson (1742–1798) – an American lawyer and political philosopher, one of the Founding Fathers of the USA, a signatory of the Declaration of Independence and the Constitution of the USA, a Supreme Court Justice; born in Scotland, emigrated to America in 1765, where he first taught Greek and rhetoric at the College of Philadelphia, then studied law under John Dickinson, statesman and delegate to the First Continental Congress; Wilson became famous and popular with the publication in 1774 of his work entitled "Considerations on the Nature and Extent of the Legislative Authority of the British Parliament," where he presented an empire scheme in which the British colonies would have equal status with the metropolis; he then became a delegate to the Second Continental Congress; in 1779 he was appointed Advocate General for France and represented the country in matters arising from the alliance with the American colonies; he was an associate of Robert Morris during the struggle for currency reform after 1781, as a member of Congress (1783 and 1785–86), he insisted on amending the statutes of the Confederation to allow Congress to collect a general tax; during the Constitutional Convention in 1787, Wilson helped to draft the text of the Constitution and then campaigned for its ratification in Pennsylvania; in 1790 he drafted the new Pennsylvania Constitution and gave a series of lectures (published after his death in 1804, under the title *Lectures on Law*), which are widely regarded as fundamental to American legal science; between 1789 and 1798 he served as a Supreme Court Justice. For more details, see *James Wilson, United States Statesman* [online], *Encyclopedia Britannica*, <https://www.britannica.com/biography/James-Wilson-United-States-statesman> [22.02.2022]. For more on his life and political thought see, among others Charles Page Smith, *James Wilson: Founding Father, 1742–1798*, Chapel Hill, 2011; Geoffrey Seed, *James Wilson, Scottish Intellectual and American Statesman*, Millwood, 1978; Mark David Hall, *The Political and Legal Philosophy of James Wilson, 1742–1798*, Columbia, 1997.

spoken addresses and speeches that have been written down and survived to the present day as important sources of his era, well known to American law historians.

Wilson's *Lectures on Law* is rightly regarded to be his most important work. When he first gave lectures on law at the College of Philadelphia and later wrote them down and supplemented them, he had two audiences in mind. One was the immediate audience attending his lectures, a modest 15 people. But Wilson's ambition was much greater. He wanted to be recognized as the American equivalent of William Blackstone, one of the most prominent British lawyers and author of the fundamental work *Commentary on the Laws of England*. Therefore, in order to gain comparable fame, he planned to publish his lectures as a complete treatise on American law. To this end, he carefully prepared written versions of his lectures, which ultimately comprised 52 scrupulously numbered volumes.<sup>157</sup> Unfortunately, Wilson never managed to get his work published. This was done only after his death in 1804 under the editorship of his son Bird Wilson.<sup>158</sup>

A closer look at his thought reveals that Wilson made a very conscious reference to the idea of human dignity in the judgment in *Chisholm v. Georgia*. His views on the law and the political system were deeply rooted in philosophical beliefs in which human dignity plays an important role. The idea of dignity influenced his views on the shape of the law and its application, and this is particularly manifest in his views on (i) the nature of man, (ii) the origin of power and the State (or the circumstances and conditions of a social contract) and (iii) the functions of penalties and their severity.<sup>159</sup> They are especially noteworthy because they relate to contexts in which the idea of human dignity appeared much later, in the second half of the twentieth century, as a normative value or a legal principle.

Wilson considered knowledge about the law to be a key element of knowledge about man. Both the politician making the law and the judge applying it must have a thorough knowledge of human nature in order to perform their tasks properly and achieve the goals set by the law. Wilson wrote that “[a]n accurate and distinct knowledge of his nature and powers, will undoubtedly diff use much light and splendour over the science of law,” and “law can never attain either the extent or the elevation of science, unless it be raised upon the science of man.”<sup>160</sup>

Wilson studied human nature in several of its aspects. First, he wrote about man as an individual. Second, he looked at the nature of man as a member of society. Third, he wrote as a member of the State. And fourth he wrote as a member of a great community of nations. He devoted the first part of his argumentation to the consideration

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<sup>157</sup> Mark David Hall, “Bibliographical Essay. History of James Wilson’s Law Lectures,” in *Collected Works of James Wilson*, Hall, Kermit L., and Hall, Mark David (eds.), Indianapolis, 2007, p. 746.

<sup>158</sup> *The Works of the Honourable James Wilson, L. L. D.*, Wilson, Bird (ed.), Philadelphia, 1804. More on the history of the lectures see Mark David Hall, *Bibliographical Essay...*, pp. 401–13.

<sup>159</sup> Obviously, Wilson used the term *dignity* also in other senses.

<sup>160</sup> James Wilson, “Lectures on Law,” in *Collected Works...*, p. 585.

of reason, the senses, the body and the soul of man. Also, in such contexts he wrote about dignity, such as the dignity of human reason or human conscience.<sup>161</sup>

Starting from the statement that man is by nature a social being, Wilson concluded that society forms spontaneously as a result of the human inclination to live in a community which is built owing to this natural inclination of man. The two basic principles that lie deep within human nature are to have confidence in promises and to do no harm to the innocent. Keeping promises is essential for society. Similarly, it is crucial that the moral sense stops people from being injurious and harming others, especially innocent people, as it teaches that the innocent have the right to be protected against harm.<sup>162</sup> Just as the human moral sense dictates to respect the personal safety of others, it also dictates respect for the property of others. Wilson emphasized that robbery and theft are not permitted in any community, even in the community of thieves where they are prohibited altogether.<sup>163</sup>

Wilson believed that every person has a natural tendency to accumulate possessions, which is in fact a necessary feature helping to provide for self and family. But this tendency would be ineffective if people could not use what they had accumulated peacefully and safely for no one would toil to accumulate what he could not possess in security. This security of possession is also safeguarded by the moral sense which requires that goods produced by the work of individuals be treated as their property and that this property should be inviolable.<sup>164</sup>

According to Wilson who was also a Supreme Court Justice, owing to our human nature, we are fit and destined for society, and society is fit and destined for us. This statement becomes even clearer when one looks more closely at the actions that man takes within the community. Wilson emphasized that man has all the feelings and emotions that are necessary for society to be formed and maintained.<sup>165</sup>

Therefore, for human beings, society is as necessary as it is natural.<sup>166</sup> When Wilson wrote about man as an element of society, he was referring to the idea of the unique value of every man. Concluding his reflections on man's natural inclination to live in a community, Wilson emphasized that when it comes to dignity, it is within a community that "the social operations and emotions of the mind rise to a most respectable height." The uniqueness of the "excellency of man," on the

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<sup>161</sup> "This moral sense, from its very nature, is intended to regulate and control all our other powers. It governs our passions as well as our actions. Other principles may solicit and allure; but conscience assumes authority, it must be obeyed. Of this dignity and commanding nature, we are immediately conscious, as we are of the power itself;" in James Wilson, "Lectures on...", p. 512. A few pages further he pointed out: "Our instincts, as well as our rational powers, are far superior, both in number and in dignity, to those, which the brutes enjoy." *Ibidem*, p. 518.

<sup>162</sup> *Ibidem*, p. 627.

<sup>163</sup> *Ibidem*, p. 628.

<sup>164</sup> *Ibidem*.

<sup>165</sup> *Ibidem*.

<sup>166</sup> *Ibidem*, p. 630.

other hand, is evident in those activities which lead to the improvement of the human being, and the best place for undertaking them is in society. According to Wilson, this pursuit of self-improvement in the conditions that society creates is limitless, and one cannot even imagine what level of perfection man can reach in the future. This pursuit of self-improvement is also a unique human characteristic, as it is essential to achieving happiness.<sup>167</sup>

The other context in which Wilson's thinking relating to human dignity can be found is in his description of the circumstances and conditions under which the social contract was concluded, or in other words, the origin of power. The idea of human dignity appeared in reflections on the creation of the State and the attitude of the ruled ones (the subjects) towards those in power. Wilson defined a State as a set of free people, united for the common good, to enjoy peacefully what is in their possession and to live according to fair rules. It is an artificial human creation with legal personality and the ability to define its rights and obligations.<sup>168</sup>

In order to form a State, it is necessary that the will and powers of all members be united in such a way that they act together for the same purpose. It is from this union of will and power that the policy of the State and its institutions derive. Wilson emphasized that the only rational and natural method of creating a civil society is the common consent of the members who create it. Only such a community, i.e., a voluntary union of people joining together for the same purpose, may actually be termed a society of free citizens. He pointed out that such a union is to be "a benefit, not a sacrifice," because the social framework created by the State is additional to the natural order.<sup>169</sup>

Further, Wilson described the rules that apply once a social contract is concluded. Under a social contract, each individual engages with a certain collective entity, which is the State, and this State being a community engages with each individual. These engagement obligations are mandatory because they are mutual. Individuals who are not party to these obligations are not members of society.<sup>170</sup> The statement that begins Wilson's reflections on individual freedom is extremely important. Wilson stressed in it that in such a society and under the *civil government* created on the basis of it, all people are equal, pointing out metaphorically, that "of one blood all nations are made; from one source the whole human race has sprung."<sup>171</sup> So here we see very strong emphasis on the equal value of all people, which is a key element underlying the idea of human dignity. Wilson used the term *all nations* and *whole human race* very consciously. Considering the context in which he wrote on the place of the individual in society, he left no doubt that

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<sup>167</sup> Ibidem, p. 632.

<sup>168</sup> Ibidem, p. 635.

<sup>169</sup> Ibidem.

<sup>170</sup> Ibidem, p. 636.

<sup>171</sup> Ibidem.

he had in mind a certain value common to all people, owned by every human being by virtue of belonging to the human race.

He later specified his considerations and added that this equality did not apply to “their virtues, their talents, their dispositions or their acquisitions.”<sup>172</sup> For here, every man is different. However, no matter how diverse and unequal people are with regard to the aforementioned characteristics, there is still, in Wilson’s opinion, one aspect in which all people are equal in society and before public authority. It is the equality of rights and duties which are the same for everyone. These natural rights and duties belong equally to each and every person.<sup>173</sup>

Just as everyone in society is equal in the sense indicated by Wilson, so everyone is free. Thus, no one may claim the primacy of their rights over those of others; no one may claim power over others. Again, it would be difficult to interpret these words other than as a confirmation of the existence of the equal value of all people, a rejection of both the traditional hierarchy based on the elite concept of dignity by birth and inherited titles, and as a general attitude showing opposition to slavery. This interpretation was reaffirmed on other pages of his work where Wilson expressed direct criticism of slavery.<sup>174</sup>

Just as he presented his concept of equality and freedom, so he also expressed in his work his views on man’s third natural right to the pursuit of happiness. Wilson emphasized that nature itself instilled in man the desire for his own happiness. As he explained, nature gave man a number of abilities to achieve this goal.<sup>175</sup> As a consequence, there is no doubt that everyone has the right to use his or her abilities in his or her own way, without outside interference, of the State in particular, to achieve his or her objectives. Provided, of course, that he or she does not cause any harm to others.<sup>176</sup>

Wilson defined this pursuit of happiness as natural liberty. Everyone is aware of this right and feels it. In addition, every human being has the natural ability to feel the limitation or violation of this right. Wilson rejected all paternalism here.

<sup>172</sup> Ibidem.

<sup>173</sup> Ibidem, p. 638.

<sup>174</sup> For instance, regarding the ratification of the Constitution he stated: “I consider this as laying the foundation for banishing slavery out of this country; and though the period is more distant than I could wish, yet it will produce the same kind, gradual change, which was pursued in Pennsylvania;” James Wilson, “Remarks of James Wilson in the Pennsylvania Convention to Ratify the Constitution of the United States, 1787,” in *Collected Works...*, p. 210. Elsewhere he said: “If there was no other lovely feature in the constitution but this one, it would diffuse a beauty over its whole countenance. Yet the lapse of a few years, and congress will have power to exterminate slavery from within our borders.” Ibidem, p. 241.

<sup>175</sup> “(...) has inspired him with many tender affections towards others, especially in the near relations of life; she has endowed him with intellectual and with active powers; she has furnished him with a natural impulse to exercise his powers for his own happiness, and the happiness of those for whom he entertains such tender affections.” Ibidem, p. 638.

<sup>176</sup> By the way, it is worth noting that this issue was actually defined by the great representative of liberal philosophy John Stuart Mill.

He was aware that some would use these abilities wisely, others would not use them at all, and others still would use them in a way that would hurt them. But as long as such an unreasonable person is not injurious to others, it would be worse to deprive him of his freedom on the grounds of the imprudent use of his liberty.<sup>177</sup>

In the description of this value, too, Wilson wound his considerations around the idea of human dignity. He believed that this right to exercise our natural freedom is not only given to us by inclinations of ours that may be described as a selfish concern for our own interests. For man also has an inclination to be good to others, in which our right to pursue happiness is also expressed. This is reinforced especially by our moral sense, which in a natural way makes us understand that in both actions (i.e., the voluntary and unforced pursuit of our own happiness and that of the happiness of others), our *dignity and perfection* are manifested.<sup>178</sup>

The system of each State must take these issues into account. Only a properly created State, i.e., properly established, properly organized and properly managed, is able to fulfil its role. Such a State, as Wilson put it metaphorically, “feels her own importance, her own power, and her own vigour.” Such a State has significant consequences for the functioning of its own citizens. Such a State is endowed with the trust of its own citizens and the respect of foreigners. This, in turn, has important consequences for the citizens themselves. It ensures peace and *dignity and security* in the enjoyment of the benefits of this peace.<sup>179</sup>

Wilson stressed the importance of the influence of a good or bad Constitution on citizens, not only in the above context of the community as a whole, but also in relation to every citizen treated as an individual. He wrote with zeal that a proper Constitution awakens energy and delightful sensations in the individual; the mind of the individual will become aroused and elevated, and his heart will be cleansed and enlarged. Most importantly, under a good Constitution, the citizen becomes aware of his dignity, which is then manifested in his behavior and in his every gesture and word uttered. This is so because the individual is aware and certain that “if he is innocent and upright, the laws and constitution of his country will ensure him protection.”<sup>180</sup>

Finally, in this context, Wilson, a supporter of the American Republic, was critical of the concept of the power of the monarch resulting from the subjects’ relinquishing their rights and vesting them with the ruler. He believed that the recognition of such a justification for the exercise of power over others was “legal suicide” that had frequently been committed in human history. This form of the State is expressed in terms that are “most disgraceful to the dignity of man.”<sup>181</sup>

<sup>177</sup> James Wilson, “Lectures on...,” p. 639.

<sup>178</sup> Ibidem.

<sup>179</sup> Ibidem, p. 715.

<sup>180</sup> Ibidem, p. 716.

<sup>181</sup> Ibidem, p. 486; he criticized the British monarchy on other pages too, see, among others: p. 722 and p. 724.

The last context relevant to Wilson's political and legal thought regarding dignity will be the issue of the function of penalties, with particular emphasis on the way they are measured and their nature. This issue was raised by Wilson in his speech to the Circuit Court of Virginia in May 1791<sup>182</sup> in which he was critical of penalties that were too cruel. He stressed that, in his opinion, three features of punishment made it an appropriate preventive measure against crime. They were: moderation, speed of adjudication and inevitability.<sup>183</sup> Wilson opposed cruelty to convicts. He believed that the entire system of punishment should be free of cruelty, because even one cruel punishment gives an excuse for further excessively severe penalties, until finally "under the specious appearance of necessary justice, a system of cruelty is established by law." Such a system is designed to eliminate all human feelings and replace them with the most depraved and degrading tendencies. The result is fear and intimidation, and a nation that is plunged into such sentiments becomes both lost and despicable.<sup>184</sup>

Wilson believed that both in whole communities and in individuals, cruelty was an expression of cowardice subsequently resulting in slavery. This spirit is hostile to the prosperity of the whole nation as well as to "the dignity and virtue of men."<sup>185</sup> Therefore, referring, among other things, to the idea of human dignity, Wilson proposed punishing criminals (in away appropriate for modern times), taking a similar approach to Cesare Beccaria who was promoting similar views in Europe, thus becoming a precursor of legal humanitarianism.

Ending his speech, Wilson appealed for "criminal laws to be few in number: let them be clear: let them be simple: let them be perfectly precise." Let the punishment be proportionate – let it be analogous to the crime. Finally, the punishment of the perpetrator and his rehabilitation should be treated equally. In this way, according to Wilson, "the dignity of the nation" will be exalted, instead of by cruelty it is guided by more adequate rules of punishment.<sup>186</sup>

To sum up, it is worth emphasizing that Wilson's philosophy of man is, on the one hand, an exceptional creed, and, on the other hand, characteristic of the trends found in the Enlightenment, which put man on a pedestal. Wilson's political and legal philosophy and doctrine was filled with faith in the equality and freedom of people and their unique value. It is clear, therefore, that it was no accident that the idea of human dignity appeared in the *Chisholm v. Georgia* ruling.

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<sup>182</sup> James Wilson, "A Charge Delivered to the Grand Jury in the Circuit Court of the United States, for the District of Virginia, in May, 1791," in *Collected Works...*, pp. 320–45.

<sup>183</sup> *Ibidem*, p. 320.

<sup>184</sup> *Ibidem*, p. 322.

<sup>185</sup> *Ibidem*.

<sup>186</sup> *Ibidem*, p. 344.

## THE CIVIL DIGNITY AND FRANCIS LIEBER

The Civil War went down in the history of the evolution of the idea of dignity not only because of the abolition of slavery. This event is connected with the entry of what is known as the Lieber Code, which laid the foundations for the Anglo-Saxon understanding of the laws of war (especially in the context of the treatment of prisoners of war). The author of the Code, Francis Lieber,<sup>187</sup> was an American lawyer of German origin, a university lecturer and political philosopher. The idea of human dignity played an important role in his work, and so it would seem extremely important to reflect on his views.

Lieber was commissioned to draft this Code by the Union authorities who recognized his conviction of the need for a systematized and institutionalized procedure to mitigate the effects of war, protect civilians and regulate the treatment of prisoners of war. His views had been expressed in his earlier works, where we can also find traces of the normative influence of the idea of human dignity.

A fundamental element of Lieber's views is his definition of civil liberty, which he included in his work *On Civil Liberty and Self-Government*. Lieber wrote that while it was difficult to define exactly what liberty was in general, there were no such problems with defining it as an idea embedded in certain times, places and

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<sup>187</sup> Francis Lieber (18.03.1798 – 2.10.1872) – or rather Franz Lieber, lawyer, university lecturer, political-legal philosopher and political activist. Born in Berlin; studied in Jena; then politically active in liberal parties, twice imprisoned by the Prussian authorities; in 1827 he fled to England and then to the United States. Between 1829 and 1833 he edited and published the first edition of the *Encyclopaedia Americana*. In 1835 he was appointed professor of history and political economics at South Carolina College (Columbia); in 1857 he started working at Columbia College in New York. During this period, he completed his two most important works: *The Manual of Political Ethics* and *On Civil Liberty and Self-Government*, first published in 1853. However, he is best known for creating the "laws of war," which are contained in his *Code for the Government of Armies in the Field* of 1863, which in the Anglo-Saxon legal science are considered the foundations of the later Geneva Conventions. For more details, see *Francis Lieber. American Philosopher and Jurist* [online], *Encyclopedia Britannica*, <https://www.britannica.com/biography/Francis-Lieber> [22.02.2022].

circumstances.<sup>188</sup> The liberty which he defined in relation to his time and place was described as *civil liberty*. It was a freedom that was the result of the dual nature of man, who was at one and the same time an independent individual and a social being (i.e., a member of the community in which he lived). According to Lieber, man is obliged both by his nature and by the Creator to live in society, which means that he is also a political being – in relation to the State.<sup>189</sup>

*Civil liberty* described in this way always meant a high degree of mutually guaranteed protection, against interference with important interests and rights that were highly valued by large groups of people or inhabitants of a given country. These guarantees were combined with effective participation in the creation and application of the law as the best tool to ensure this protection and constituting the most dignified government, the most worthy of a people aware of their rights and the destiny of humanity. Finally, by civil liberty, Lieber understood not only the absence of individual limitations, but freedom within the social system and the political organism as a combination of principles and rights that “acknowledge, protect, and favor the dignity of man.”<sup>190</sup>

It should be stressed straight away that in such an approach, human dignity – alongside liberty – becomes a value that underpins the entire political and legal system. It is a value whose protection is aimed at the whole system of civil rights. Lieber actually went so far as to say that civil liberty is responsible for protecting and fostering human dignity. This is a typical American approach to the idea of human dignity that is not seen as a value competitive to liberty, or as one that may restrict it, but as a primary value from which flow not only the individual’s particular rights, but one on whose protection the entire political system is founded.

Lieber argued that liberty understood in this way might be defined in different ways, but its definition was common to all civilized societies contemporary to him, in which it always meant freedom in the political area of human activity. In this sense, the term is treated positively by free people, or those who are striving to be free. However, “bureaucrats fear it and despots hate it.” Also, in this sense it covers both the sphere of *public liberty* and that of *personal liberty*. Regardless of the details, it will always mean a wide range of unrestricted political acts that a citizen may undertake and “an acknowledgment of his dignity” and his essential rights by a public authority that is subordinate to him not only “roundabout and vague” but in a “positive and organic.”<sup>191</sup>

<sup>188</sup> This is how he treated the layout of his work, which was arranged according to a chronological division, and in which he dealt with the freedom of the Ancients, the freedom of the English, the American freedom and so on.

<sup>189</sup> Francis Lieber, *On Civil Liberty and Self-Government*, Philadelphia, 1883, p. 25.

<sup>190</sup> *Ibidem*, pp. 24–5.

<sup>191</sup> *Ibidem*, p. 36.

Lieber was convinced that the political system that the United States had chosen was the best way to protect civil liberties. He saw the advantages of the American political system not only in protecting liberty, but also human dignity. These views were similar to Paine's and the views of the twentieth century philosophers of law and politics, who pointed to human dignity as a fundamental value underlying specific systemic solutions, even if it was not explicitly indicated. Although in this context Lieber used a slightly different term – he wrote about *political dignity* – his belief in the superiority of American solutions is all the more evident. Lieber argued that as both history and modern times had proved, the American State was a State that best suited a person. The guarantees contained in the American solutions were necessary to protect the common *political dignity* and to ensure a positive effect ensuring the stability of the government and the functioning of the whole of society.<sup>192</sup> Here, another similarity with Paine's philosophy can be seen. Paine often wrote about the dignity of the American people, who in order to guarantee it must cast off the yoke of British tyranny.

References to the influence of the American political system on the consciousness of society and the formation of appropriate attitudes – and implicitly the love of freedom – may be found in Lieber's other works too, and also in the context of the idea of human dignity. When describing the features of the American Republic, Lieber pointed to an important element of individual autonomy expressed in its "institutional self-government." This was an important difference between the American Republic and the European monarchies. Lieber emphasized that institutional self-government shapes the mind and cultivates the proper character of subordination to the law based on the "habit of liberty," as well as the recognition of the authority of law based on the rule of law. Such a system, as it were, educates the citizen for freedom and cherishes *civil dignity* in every citizen, just as it teaches everyone to respect the rights of others.<sup>193</sup>

Lieber was convinced that all this was absent from other political systems that built respect for the law on fear of punishment or obedience to hierarchy. This was the case, for example, during the fall of the Roman Republic. Lieber noted that Julius Caesar had not sought to take power to institute freedom nor claimed to be the leader of a free State. Instead, his rule, which ended a long period of civil liberties, marked the beginning of the decline of freedom. According to Lieber, this type of ruler and this type of government can never improve the state of affairs with regard to *civil dignity* and healthy self-government. And while they may bring

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<sup>192</sup> *Ibidem*, p. 270.

<sup>193</sup> Institutional self-government trains the mind and nourishes the character for a dependence upon law and a habit of liberty, as well as of a law-abiding acknowledgment of authority. It educates for freedom. It cultivates civil dignity in all the partakers, and teaches them to respect the rights of others. *Ibidem*, p. 324.

peace and order and even end Civil War, they always destroy even the smallest seeds of freedom that would allow it to develop in the future.<sup>194</sup>

However, civil dignity defined in this way may easily be destroyed as was the case in France in the middle of the nineteenth century, when Louis Bonaparte took power by establishing the Second Empire. For Lieber, it meant not only the collapse of the Republic, but also of progress in terms of representative public authority, human rights and liberties and *civil dignity*.<sup>195</sup>

It was Lieber, a man of such broad philosophical horizons and beliefs, who was the author of General Order No. 100 issued by Abraham Lincoln on 24 April 1863, entitled Code for the *Government of Armies in the Field* commonly known as the Lieber Code.<sup>196</sup> However, it is worth adding straight away that issues related to the humanitarian treatment of all people – soldiers, prisoners of war and civilians alike – had already been resolved in Lieber's views before the Code was announced. Indeed, in 1862 Lieber gave a series of lectures entitled *Guerrilla Parties Considered with Reference to the Laws and Usages of War*. The Code laid down provisions for the humane treatment of soldiers and civilians during wartime. It was a ground-breaking document published more than a year ahead of the first Geneva Convention, and the Code itself consisted of 157 articles (the Geneva Convention consisted of only 10 articles) and regulated in detail and exhaustively the issues related, as we would say today, to human rights during and in connection with waging war.<sup>197</sup> The Lieber Code was one of those pieces of legislation which were based on a deep conviction that the unique value of every person's life deserves protection, especially in wartime. Although the Code made no reference to the idea of human dignity, a number of its provisions are inextricably linked to a belief in human dignity and that it must be respected even in the most extreme conditions that war brings with it.

Respect for human dignity is a feature of a number of provisions of the Code. Article 16 stipulates that unnecessary cruelty, such as inflicting suffering for the sake of suffering or vengeance itself cannot be considered necessary in warfare, likewise mutilation or wounding with the exception of during fighting, or tor-

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<sup>194</sup> Ibidem, p. 375.

<sup>195</sup> Ibidem, p. 426.

<sup>196</sup> Francis Lieber, *A Code for the Government of Armies in the Field, as Authorized by the Laws and Usages Of War on Land* [online], <https://www.gutenberg.org/ebooks/53699> [22.02.2022].

<sup>197</sup> The Code comprised 10 Sections of the following titles: Section I. Martial Law – Military jurisdiction – Military necessity – Retaliation; Section II. Public and private property of the enemy – Protection of persons, and especially of women, of religion, the arts and sciences – Punishment of crimes against the inhabitants of hostile countries; Section III. Deserters – Prisoners of war – Hostages – Booty on the battlefield; Section IV. Partisans – Armed enemies not belonging to the hostile army – Scouts – Armed prowlers – War-rebels; Section V. Safe-conduct – Spies – War-traitors – Captured messengers – Abuse of the flag of truce; Section VI. Exchange of prisoners – Flags of truce – Flags of protection; Section VII. The Parole; Section VIII. Armistice – Capitulation; Section IX. Assassination; Section X. Insurrection – Civil War – Rebellion.

ture for the purpose of extorting a confession. Article 22 makes a distinction between soldiers of the enemy army and inhabitants of the enemy State (hostile countries). An unarmed citizen should be spared personally and financially and be treated honorably, as far as circumstances permit. The subsequent Article 23 states that citizens should not be killed or taken captive or transported by force to distant parts of the State. Man should be treated in such a way that his private life is disturbed as little as possible, not of course to the extent that the military can afford it.

The whole of Section II, in accordance with its title Public and private property of the enemy – Protection of persons, and especially of women, of religion, the arts and sciences – Punishment of crimes against the inhabitants of hostile countries is devoted to the rights of civilians deriving from the general obligation to respect human dignity.

The Lieber Code also contains provisions directly related to slavery. Article 22 states *expressis verbis* that neither natural law nor the law of the nations has ever acknowledged slavery which is only possible by virtue of local laws. Slavery itself is described as “complicating and confounding the ideas of property, (that is of a thing,) and of personality, (that is of humanity).” Referring to Roman law, this provision of the Code pointed that in the context of the law of nature all people are equal. Furthermore, its provisions indicated that for centuries fugitives from countries in which they were slaves, villains or servants had been considered free in other countries. These theses are developed in Article 23, which states that in a war between the United States and an enemy which accepts slavery, an escaped slave, when placed under the protection of the United States armed forces, is immediately entitled to the rights and privileges of a free man. Returning such a person to slavery would mean enslaving the free man, and neither the United States nor any of its officers may do so. Moreover, a person released in this way under the law of war is under “under the shield of the Law of Nations.”<sup>198</sup>

Normative traces of human dignity may also be found in Section III concerning deserters, prisoners of war, hostages and war loot. Article 75 states that prisoners of war shall be locked up or imprisoned to the extent deemed necessary for reasons of security, but shall not be subjected to any other intentional suffering or humiliation. The limitation and treatment of a detainee during detention may vary according to security requirements. Last, Article 76 specifies that prisoners of war shall, as far as possible, be fed clean and wholesome food and be treated humanely.<sup>199</sup>

A reading of the Lieber Code prompts some general conclusions. It set standards of warfare ahead of its time, and even, given the atrocities of World War II, set standards far better than those implemented in the twentieth century. The laws

<sup>198</sup> Ibidem.

<sup>199</sup> Ibidem.

governing the rights of the defeated and of civilians are firmly rooted, not so much in the nineteenth century idea of human dignity, but in the universal philosophy of humanitarianism based on a deep conviction of the unique value of every human life – the innate and inalienable dignity of man. From this value stem principles such as the prohibition of cruelty and respect for another human being.

## HUMAN DIGNITY AND FREDERICK DOUGLASS

The American jurisprudence stresses that the general Enlightenment vision of human dignity is inextricably linked to *human capacity* and the tendency to *self-government*. The general sense of the moral, political and legal thought of the American Enlightenment led to the equal recognition of individual human dignity which was based precisely on the conviction of each citizen's capacity, or ability, to make sovereign decisions and the commitment to treat them equally.<sup>200</sup>

However, as noted earlier, this did not happen with the creation of the new State. Only the abolition of slavery and the Civil War, the Civil Rights Act and the enactment and ratification of the Fourteenth Amendment (called the Second Constitution) are intrinsically linked in this process. An integral element of it was the doctrine of abolitionism. Slavery is one of the most important elements of United States history, culture and society. At the same time, however, it is not only historical in nature, but is a phenomenon that has an extremely strong influence on contemporary American culture, politics and law.

One of the most important activists of the abolitionist movement was an African American Frederick Douglass.<sup>201</sup> His works contain a number of references

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<sup>200</sup> Michael J. Meyer, "Introduction," p. 7.

<sup>201</sup> Frederick Douglass (real name Frederick Augustus Washington Bailey; 1818–1895) – African American activist of the abolitionist movement, writer, publisher of the abolitionist press. Born as a slave in Talbot County, Maryland. In 1838 he escaped from captivity and came to New York, where he made a living from various casual jobs. In 1841 he attended a meeting of the Massachusetts Anti-Slavery Society, where he gave a fiery speech against slavery. From then on, he collaborated with the abolitionist movement and soon became one of its leading activists thanks to his inborn oratorical and writing skills. He is the author of the *Narrative of the Life of Frederick Douglass, An American Slave, Written by Himself* (1845), *My Bondage and My Freedom* (1855). During the Civil War, he was actively involved in the recruitment of Union troops, including the 54th and 55th Massachusetts Regiments. After the Civil War, he actively supported the freed slaves. In the last period of his life, he held a number of functions in the American administration. The award for the best book on slavery awarded annually by the Gilder Lehrman Centre of Yale University bears his name. His importance to the social and cultural world of America at that time can be attested by the fact that his death was

to the idea of human dignity.<sup>202</sup> Douglass escaped from slavery in 1838 and soon became one of the most prominent leaders of the abolitionist movement. In addition to his political activities, he was also the author of many works that played a significant role in creating an African American identity and influenced the entire American culture. His autobiographical works made him famous, and his books, like other abolitionist works, brought “an extremely interesting individual story to a wide readership,” and “provided insight into a hitherto unknown world of slaves – its spirituality, the value system, and the perception of the white man.”<sup>203</sup>

In Douglass’s writings there are passages in which, when writing about slavery and freedom, he evokes the idea of human dignity. First of all, he stressed that “a Negro is self-evidently a man, and therefore entitled to all the rights and privileges which belong to human nature.”<sup>204</sup> He believed that such a statement required no additional justification. In another part of his rich output, he recalled that after his escape from captivity, he went to the waterfront in Baltimore to take a look at the famous port of that time. Standing on the seafront, he saw people working hard. However, this view was completely different from the one he knew from the slave plantation. After all, he did not know work without the swearing and whips of supervisors. But the dock workers behaved quite differently. Douglass had the overwhelming impression that each of them understood the purpose of his work; they approached it with seriousness, but also with a smile. The work itself, although difficult and hard, was accompanied by an awareness of its deeper meaning and a combined sense of the worker’s “own dignity as a man.”<sup>205</sup> Slaves had a special relationship to the work they did. As Ira Berlin wrote, “the land they worked on was close to their hearts. Even though the yields they obtained and the animals they looked after did not increase their wealth, nor did they provide

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announced in an extensive article in the *New York Times* of 21 February 1895, in which he was referred to as the most representative African-American that America had produced; “Death Of Fred Douglass,” *New York Times*, 21 February, 1895 [online], <https://archive.nytimes.com/www.nytimes.com/learning/general/onthisday/bday/0207.html> [22.02.2022].

More on life and works of F. Douglass see William S. McFeely, *Frederick Douglass*, New York, 1996; C. James Trotman, *Frederick Douglass: A Biography*, Greenwood, 2011; L. Diane Barnes, *Frederick Douglass: Reformer and Statesman*, New York – Abingdon, 2013.

<sup>202</sup> Douglass’s work belongs to the fourth and fifth phase of the development of African-American political ideas. Roman Tokarczyk has distinguished 8 such phases of development. The fourth phase covers the period before the Civil War, when Afro-Americans were striving for full participation in social life, while the fifth is the period after the Civil War, when they began to criticize the existing ideas and a search for new forms of combat began. More on this in Roman Tokarczyk, *Współczesna amerykańska myśl polityczna*, Warszawa, 1981, p. 211.

<sup>203</sup> Marek Pawełczak, “Wstęp,” in Ira Berlin, *Pokolenia w niewoli*, Warszawa, 2010, p. 14.

<sup>204</sup> Frederick Douglass, “Prejudice Against Color,” in *The Life and Writings of Frederick Douglass*, Foner, Philip (ed.), New York, 1975, vol. 2, p. 130; quoted after Bernard R. Boxill, “Dignity, Slavery and The Thirteenth Amendment,” in *The Constitution of Rights...*, p. 109.

<sup>205</sup> Frederick Douglass, *Narrative of the Life of Frederick Douglass. An American Slave*, Boston, 1845 [online], <https://www.gutenberg.org/files/23/23-h/23-h.htm> [22.02.2022].

them with the independence they so desired, they hoped that one day this might change.”<sup>206</sup> All this happened despite the fact that for the white owners they were usually mere tools, and they did their work in conditions that deprived them of their dignity. At the beginning of his autobiography, Douglass wrote about the deliberate deprivation of slaves of elements of humanity. He admitted that he did not know the date of his birth. Habitually, slave owners kept their slaves in the dark about when they were born. As he wrote, “the larger part of the slaves know as little of their ages as horses know of theirs.”<sup>207</sup> Douglass emphasized that black slaves were spared nothing that could further humiliate them on the “scale of humanity.” As he wrote: “[n]othing has been left undone to cripple their intellects, darken their minds, debase their moral nature, obliterate all traces of their relationship to mankind.”<sup>208</sup>

Slavery deprived people of their sense of dignity, of the awareness of being a valuable person. This overwhelming feeling of objectification originated in the fact that slaves were treated as objects. The lack of knowledge of the basic facts of one’s life was only one of the elements of the dehumanization that was guaranteed by law. The lack of self-esteem, or of a sense of being a fully-fledged human being, hindered self-assessment or self-awareness. Douglass wrote that as a slave he was nothing and so he thought of himself. Such a helpless man is deprived of “the essential dignity of humanity.”<sup>209</sup>

In his works (not only his autobiographies) Douglass repeatedly referred to his own individual experiences of being a slave. However, he never based his disapproval of slavery solely on “so narrow as my own enslavement, but rather upon the indestructible and unchangeable laws of human nature, every one of which is perpetually and flagrantly violated by the slave system.”<sup>210</sup>

In 1866 the Civil Rights Act was passed, and two years later the Fourteenth Amendment was finally ratified. As the American legal science emphasizes, this improved the position of the individual in relation to the authorities.<sup>211</sup> Both the abolition of slavery and the fight against the Black Codes were further steps on the road to an increasingly widespread recognition of human dignity as an

<sup>206</sup> Ira Berlin, op. cit., p. 191.

<sup>207</sup> Frederick Douglass, *Narrative...*

<sup>208</sup> Ibidem.

<sup>209</sup> A man, without force, is without the essential dignity of humanity. Human nature is so constituted, that it cannot honor a helpless man, although it can pity him; and even this it cannot do long, if the signs of power do not arise. Frederick Douglass, *My Bondage and My Freedom*, Chicago, 1970, pp. 246–7. An electronic version of this book is available online in the digital library resources of the University of Virginia, <http://web.archive.org/web/20110116090246/http://etext.lib.virginia.edu/etcbin/toccer-new2?id=DouMybo.sgm&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=all> [22.02.2022].

<sup>210</sup> Frederick Douglass, *My Bondage...*, p. vi.

<sup>211</sup> Michael J. Meyer, op. cit., p. 8.

egalitarian value. The guarantee of equal protection of the laws contained in the Fourteenth Amendment is considered to be an element of an evolution leading to the recognition of equality not only in formal terms but also in specific social contexts, which meant in practice an attempt to eliminate inequalities of a degrading nature.<sup>212</sup>

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<sup>212</sup> Ibidem.

## HUMAN DIGNITY AND WOMEN'S RIGHTS

Another problem that emerged with full force in the second half of the nineteenth century was discrimination against women who became an even more discriminated against group than former male slaves. The Fifteenth Amendment granted black people the right to vote but it did not grant these rights to women. The draft amendment, prepared by Elizabeth Cady Stanton together with Congressman Thaddeus Stevens in 1866, guaranteeing universal suffrage, was rejected in 1866. Yet the literature of the suffragettes was full of references to the idea of dignity.

There are opinions in the American literature on the subject that in the context of indirect traces of human dignity, the Fifteenth Amendment should also be mentioned. Section 1 states that neither the United States nor any State may deprive or restrict the voting rights of United States citizens on the grounds of race, skin color or previous slavery. In this way, the Fifteenth Amendment prohibited one of the most serious violations of human dignity, namely the exclusion of the right to vote on the ground of race.<sup>213</sup> It did not, however, refer to the deprivation of the right to vote on the ground of gender. The discrimination of women, which suffragettes fought against, stemmed from the idea of inequality, which in this case was gender inequality. A woman was inferior, so she did not deserve recognition of her place in society, let alone political rights. The suffragettes opposed this by fighting for women's rights and for the social position equal to that enjoyed by men.

The abolitionists and the suffragettes often acted side by side, and frequently the same activists or thinkers were involved in both movements or at least cooperated with one another, hosting each other at congresses or conventions. However, this was not without conflicts. The most famous case of this kind, and at the same time the most serious, occurred in 1840, when during the international abolitionist congress in London the representatives of the suffragettes from the United States were not allowed to speak or take a seat and had to stand.<sup>214</sup>

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<sup>213</sup> Louis Henkin, "Human Dignity," in *The Constitution of Rights...*, p. 219.

<sup>214</sup> Maria Ciechomska, *Od matriarchatu do feminizmu*, Poznań, 1996, p. 119.

Following this, a few years later, a convention held at Seneca Falls adopted a declaration for women's rights.<sup>215</sup>

In the United States, the nineteenth century struggle for equal rights for women was a period during which the suffragette movement was established and suffragettes became active (although they were not the first women in America to fight for their rights<sup>216</sup>). This first wave of feminism, an expression of women's rights in the struggle for an increase in their participation in public life, was not only aimed at ensuring voting rights for women. Among the numerous demands, there were issues such as the opportunity to study and gain education, equality before the law, especially in the sphere of civil and family law (Anglo-Saxon civil law discriminated strongly against women in matters of property, inheritance, parental rights, etc.). The suffragettes also agitated actively for the introduction of economic equality for women, proposed the right to work and for equal pay and for the right to the free disposal of their earnings by married women.

In the United States, the two main organizations fighting for women's rights were founded in 1869. One, initiated by Susan B. Anthony<sup>217</sup> and Elizabeth Cady Stanton,<sup>218</sup> was the National Women Suffrage Association (NWSA), and the other was the American Woman Suffrage Association (AWSA).<sup>219</sup>

Numerous conventions (national conventions for women's rights), shaping both political and legal thinking and the suffragette movement itself, were of significant importance as well. The first such meeting, considered to be the birth of the American feminist movement, was the Convention in Seneca Falls in 1848.<sup>220</sup> The Declaration of Sentiments adopted at the Convention is regarded by the theo-

<sup>215</sup> The Seneca Falls Convention was a key event in the history of organized feminism. Its co-organizers were Elizabeth Cady Stanton and Lucretia Mott, two delegates that had been excluded from the London conference against slavery. June Hannam, *Feminizm*, Poznań, 2010, p. 41.

<sup>216</sup> More on the role of women in the history of the United States see Carol Hymowitz, and Micheale Weissman, *A History of Women in America*, Toronto – New York – London – Sydney – Auckland, 1978.

<sup>217</sup> Susan Brownell Anthony (1820–1906) – American suffragette and abolitionist; during the Civil War she campaigned among women for the northern States. *Encyklopedia popularna PWN*, vol. 1, Warszawa 1997, p. 153.

<sup>218</sup> Elizabeth Cady Stanton (1815–1902) – American suffragist and abolitionist; participant of the first congress of American women in Seneca Falls in 1848; in 1865–93 chairwoman of the American Women Suffrage Association fighting for women's voting rights. *Encyklopedia popularna PWN*, vol. 9, Warszawa 1998, p. 61.

<sup>219</sup> AWSA was founded by Lucy Stone, who disagreed with Stanton and Anthony on the role of religion in the system of female oppression; more in Rosemarie Putnam Tong, *Myśl feministyczna. Wprowadzenie*, Warszawa, 2002, p. 34.

<sup>220</sup> Kazimierz Ślęczka wrote about the origin of the convention in a colorful manner: Elizabeth Cady Stanton, one of the ladies deprived of a voice during the British Congress, and living in the small town of Seneca Falls (carefully educated by her father, a judge with an abolitionist husband, mother of six children), placed an announcement in the local newspaper "Seneca County Courier" that she is inviting to a meeting all ladies to whom their fate as women in American society did not seem fair. And – to her amazement – she saw a string of carts and carriages stretching towards the assembly

rists of feminism to be a document of the same importance as the French Declaration of Human and Citizen's Rights and the American Bill of Rights.

It should be remembered that American suffragettes were not limited in their fight to organizing conventions, issuing declarations and publishing political writings. On many occasions they also tried to vote in elections, which often ended in their arrest, as did their numerous demonstrations. And although from 1869 they were allowed to vote in the State of Wyoming, in 1875 the Supreme Court rejected their demands in the *Minor v. Happersett* case.<sup>221</sup> Attempts to amend the Constitution also failed, and it was not until 1920 that the amendment guaranteeing women's right to vote was adopted.<sup>222</sup>

The Declaration of Sentiments is almost identical to the American Declaration of Independence. It was intended to demonstrate to Americans that the rights demanded by women have the same roots and rationale as those sought by the American colonists in their struggle for their independence against the despotic governments of the British metropolis. Thus, the first reference in the Declaration was to natural law which God also bestowed upon women. Similarly, it contained assurances that the authors of the Declaration of Sentiments recognized that all women and men were created equal, and God bestowed upon them certain inviolable rights, among which were the right to life, to freedom and the freedom to pursue happiness.<sup>223</sup> However, because the authorities prevented women from achieving these goals, they were entitled to take action against the authorities, even though they had so far patiently tolerated their position. The time came, though, to demand the equal position that was due to women.<sup>224</sup>

Yet the Declaration of Sentiments, like other documents of that time, made no reference to the idea of human dignity. By contrast, in the literature and in the numerous statements made at conventions and congresses references to the idea of human dignity were made in various contexts.

In the introduction to the fundamental work *History of Women Suffrage*<sup>225</sup> its authors had already regretted the state of spiritual demoralization of women and saw its sources in the legally sanctioned serfdom which simply deprived women

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point from the entire circulation area of the entire region of the subscribed newspaper, a 50-mile radius. In Kazimierz Ślęczka, *Feminizm*, Katowice, 1999, p. 59.

<sup>221</sup> *Minor v. Happersett*, 88 U.S. 162 (1875).

<sup>222</sup> The Nineteenth Amendment: Neither the United States nor any state may deprive U.S. citizens of their electoral rights or restrict them on the basis of gender. The Congress shall have the right to ensure the implementation of this Article by appropriate legislation.

<sup>223</sup> "Declaration of Sentiments," in: *Declarations of Freedom and Human Dignity*, Anderson, Lieselotte (ed.), Millis, 1997, p. 29.

<sup>224</sup> *Ibidem*, p. 30.

<sup>225</sup> *The History of Women Suffrage* was written by Elizabeth Cady Stanton, Susan B. Anthony and Matilda Joslyn Gage. This four-volume work, published between 1881–1922, contains almost 6,000 pages on which suffragettes wrote down the history of their movement. It is also a collection of letters from the rich correspondence of suffragettes, as well as speeches and addresses given at

of their own dignity. In the laws of individual States, women were placed next to such categories of people as the mentally ill or criminals.<sup>226</sup>

In the writings and speeches of American suffragettes there was a strong belief not only in the natural equality of all people regardless of gender, but also in the very idea of human dignity. Men and women, as members of the human family, have the same moral responsibility. After all, they are the ultimate and most dignified work of Nature.<sup>227</sup> Therefore, the differences in the treatment of women in certain legal situations are incomprehensible, especially when they were degrading them. For example, marriage regulations resulted in a woman being denied “the dignity of a rational and accountable being.”<sup>228</sup> The laws that governed the position of the wife in fact enslaved the woman, took away her subjectivity and prevented her from achieving “the true dignity of human nature.”<sup>229</sup> In this way, women were prevented from fulfilling the important duties that could be incumbent on them had they been treated properly, i.e., as responsible, rational, mastered members of society.<sup>230</sup> Instead, women were “politically and legally” sanctioned slaves.

In another context, the idea of human dignity featured in the discussion of the lack of access to education. The suffragettes (like Mary Wollstonecraft<sup>231</sup> earlier) emphasized strongly that lack of access to education was not only damaging to women who as a result lacked knowledge, but also generated problems on the labor market. Therefore, appropriate education was necessary for young women to ensure them finding adequately paid jobs. This in turn would protect their virtue, dignity and self-respect, as well as their financial independence.<sup>232</sup>

The suffragettes also used the idea of dignity as a weapon against the arguments voiced by the opponents of their movement. One of the more common beliefs was that women, because of their natural qualities, could not participate in public life. Participation in elections, and consequently in politics, was believed to have a negative impact on women’s character, as it was believed to damage their

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conventions organized by suffragettes. Researchers in the history of feminism generally consider it a primary source of knowledge about the Anglo-Saxon first wave of feminism.

<sup>226</sup> Elizabeth Cady Stanton, and Susan B. Anthony, and Matilda Joslyn Gage, *History of Women Suffrage*, Volume 1, Rochester – London – Paris, 1889, p. 18. All excerpts come from the electronic version of the second edition of this work, which is placed on the Project Gutenberg platform: *The Project Gutenberg eBook of History of Woman Suffrage* [online], <https://www.gutenberg.org/files/28020/28020-h/28020-h.htm> [22.02.2022].

<sup>227</sup> The revelations of science, too, analyzing and portraying the wonders and beauties of this material world, crowned with new dignity, man and woman,—Nature’s last and proudest work. *Ibidem*, p. 51.

<sup>228</sup> Such a statement was found in the memorial ending the Salem Convention in Ohio, 1850. *Ibidem*.

<sup>229</sup> The above passus is contained in the address directed to the women of the State of Ohio, which was adopted at the end of the 1850 Salem Convention in Ohio; *Ibidem*, p. 108.

<sup>230</sup> *Ibidem*.

<sup>231</sup> Compare Michał Urbańczyk “Od godności...,” p. 183 et seq.

<sup>232</sup> Elizabeth Cady Stanton, and Susan B. Anthony, and Matilda Joslyn Gage, *op. cit.*, p. 224.

honor and feminine dignity. In response to this, during one of the conventions in Worcester in 1852, it was argued that it was absurd to talk of the need to separate two spheres: the woman's and the man's, with the man's sphere including politics. It was further claimed at the same convention that the skill of governing had its roots also in spirituality, therefore there was nothing in the management and administration of the State that would violate "true dignity of woman."<sup>233</sup> The suffragettes also fought against such beliefs in practice. They spoke of this with an awareness of the seriousness of their actions when they organized conventions and congresses, stressing the need to conduct discussions in a dignified manner.<sup>234</sup> Their skills and style and behavior were also accentuated by the participants in the discussion. When describing the Seneca Falls convention, Frederick Douglass recalled that the women who spoke there, even though they were playing what was for them a new role, did so with "marked ability and dignity."<sup>235</sup>

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<sup>233</sup> *Ibidem*, p. 355.

<sup>234</sup> About the Salem Convention (1850): "Though the women in this Convention were unaccustomed to public speaking and parliamentary tactics, the interest was well sustained for two days, and the deliberations were conducted with dignity and order." *Ibidem*, p. 111. About the Ohio Convention (1853): "Parliamentary rules prevailed in governing the assembly, and were enforced with much promptness and dignity." *Ibidem*, p. 120.

<sup>235</sup> *Ibidem*, p. 74.

## BLACK CODES AND YEARS OF REGRESSION

The nineteenth century and the first half of the twentieth century was a difficult period for the development of the American doctrine of human dignity. After the adoption of the Constitution and the Bill of Rights, there followed a tedious time of State building, where the interests of the Federation and of individual States played an extremely important role. The issue of slavery remained the most important challenge for the United States. Slavery in its essence was contrary to the idea of dignity – and yet, slaves by definition did not deserve to be treated as humans because of their skin color. They were seen as objects, deprived not only of human rights or dignity, but above all of humanity itself. Slavery made it possible to “disgrace, humiliate, demean, and dehumanize black people on some perverted scale of humanity.”<sup>236</sup>

Attempts to solve this problem led to a Civil War and the destruction of vast areas of the young State. However, even the Civil War did not resolve the problem of slavery completely – the end of the nineteenth century brought the beginning of racial segregation based on the doctrine of *separate but equal* in which the perception of African Americans as inferior survived in a veiled form. Only the fifties and sixties of the twentieth century brought some positive changes in the racial issue.

In the absence of the possibility of resolving the dispute about slavery by means of the available peacekeeping tools, it turned out that the only way to do this was by force. The Civil War that broke out brought about the final defeat of the Southern States. This victory represents an important milestone in the history of the United States and the history of slavery. It was also of significant importance for the evolution of the understanding of human dignity and its impact on the legal system, even if it was not a real breakthrough. Although slavery was abolished in some States by Abraham Lincoln’s 1862 Emancipation Proclamation, it was not an unambiguous event from the point of view of the development of the idea of human dignity. There is no direct mention of human dignity in the Proc-

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<sup>236</sup> Ira Berlin, *op. cit.*, p. 20.

lamation, or in the post-war Reconstruction amendments, nor in the case law of the Supreme Court. There are, however, references to the idea of human dignity in the abolitionist literature.

Slavery itself was abolished in the whole country by (virtue of) the Thirteenth Amendment. Its Section 1 provided that there shall be no slavery or forced labor in the United States or any place subject to its authority, unless when administered as punishment for an offence for which the perpetrator has been properly convicted. Under Section 2, Congress might secure the execution of Section 1 by appropriate legislation.

It soon became apparent, however, that neither the Thirteenth Amendment nor the victory in the Civil War brought about the desired results. In the South, so-called Black Codes began to be adopted. These were laws aimed at restricting the freedom of Afro-Americans and forcing them to work for low wages or even on money owed and in need to be repaid. The Black Codes sought to suppress the new freedom of former slaves who were also known as freedmen. The literature often stresses that the Codes were an open manifestation of white supremacy. The regulations contained in them were perceived critically in the North, being considered to be an attempt to create a form of a new quasi-slavery system in order to deny the effects of the war. An attempt to counteract these laws was made by the Fourteenth Amendment and the Civil Rights Act of 1866.

The full text of the Fourteenth Amendment reads as follows:

#### Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

#### Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

### Section 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

### Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

### Section 5

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.<sup>237</sup>

The Thirteenth, Fourteenth and Fifteenth Amendments were also termed the Reconstruction amendments.<sup>238</sup> Section 1 of the Fifteenth Amendment states that neither the United States, nor any State may deny or restrict any right of citizens to vote on account of their race, color, or the fact that they were formerly slaves. Section 2 provides that Congress shall have the right to enforce these provisions by appropriate legislation. In the context of the idea of human dignity, the most significant is Fourteenth Amendment, particularly Section 1, which contains, among other things, due process clause and equal protection clause.

After the election of 1866, the winning Republican majority adopted so-called Reconstruction Acts. In historiography, the period until 1877 is referred to as the period of *Reconstruction*. A compromise agreed in 1877 initiated the Jim Crow epoch.<sup>239</sup> Jim Crow laws were local and governed by State legislation which enforced

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<sup>237</sup> Constitution of the United States [online], <https://constitution.congress.gov/constitution/amendment-14/> [22.02.2022].

<sup>238</sup> The Fifteenth Amendment: Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. Section 2. The Congress shall have power to enforce this article by appropriate legislation.

<sup>239</sup> Jim Crow is a fictitious figure, present in the American popular culture of that period, depicting a caricatured African American figure with exaggerated facial features and behaviors that were supposed to ridicule black people in the eyes of the white majority.

a *de facto* racial segregation in the southern States, adopted by mostly conservative, white democrat-dominated State legislatures of the South.

Even such a sketchy presentation of the legal and political background shows clearly that in the period under discussion there was hardly any significant direct influence of the idea of human dignity.

As noted at the beginning of this essay, the problems with the understanding of the idea of dignity as a priceless value of every individual are particularly evident in the context of slavery. A slave was not treated subjectively as a person, but objectively as a tool. One of the most important judgments in this area was the ruling of the Supreme Court of North Carolina in the case of *North Carolina v. Mann*<sup>240</sup> of 1829.

The case concerned John Mann who had borrowed a slave named Lydia to work in his house. When Lydia committed a minor offence, Mann decided to punish her with flogging. When she was being flogged, she tried to escape. Mann shot her and injured her badly. He was accused and then convicted of beating the slave. Mann appealed against the verdict, arguing that assaulting a slave could not be punishable, because as the owner of the slave, he had full power over her. Justice James Ruffin, overruled his conviction. He stated that the owner's power must be absolute in order to ensure the perfect submission of the slave. Ruffin found that even cruel and unreasonable treatment of a slave was acceptable. The purpose of slavery was for the owners to benefit from it. However, in order to ensure profit, security and public order at the same time, slaves must be completely subordinated to the power of their owners. As Justice Ruffin wrote, slaves must work like someone who had no will of his own, who gave his will completely to another person. And such obedience is the consequence only of uncontrolled power over the body. And although the Justice was aware of the severity of this position, he stressed that there was no other way to achieve these social goals accordingly.<sup>241</sup>

However, most important in this context was the judgment in the case of *Scott v. Sandford*<sup>242</sup> of 1857 which was a victory of the supporters of maintaining slavery. It was also an expression of a halt in the development of the American doctrine of human dignity, and even of a significant regression of it. Dred Scott was a slave living in Missouri. Earlier, between 1833 and 1843, he had lived in Illinois where there was no slave system, and in Louisiana where slavery was prohibited under the Missouri compromise of 1820. Upon his return to Missouri, Scott filed a lawsuit seeking to be declared a free man, arguing that his living in territories where slavery was prohibited made him a free man. After losing his case, Scott filed a new lawsuit, that time with a federal court. At the time of the trial, Scott's former owner claimed that no Negro or descendant of a slave could be a citizen

<sup>240</sup> *North Carolina v. Mann (State v. Mann)*, 13 N.C. 263.

<sup>241</sup> *Ibidem*.

<sup>242</sup> *Scott v. Sandford*, 60 U.S. 393 (1856).

within the meaning of Article III of the Constitution. The Supreme Court had to decide whether Scott was a slave or a free man.

The majority opinion was drawn up by Supreme Court Chief Justice Roger B. Taney.<sup>243</sup> The Supreme Court, by a 7–2 majority, held that “a free negro of the African race, whose ancestors were brought to this country and sold as slaves, is not a *citizen* within the meaning of the Constitution,” and therefore could not effectively sue in a federal court. Accordingly, the Court dismissed the case on procedural grounds, deeming it inappropriate to hear this case.

Equally important were subsequent representations of the Supreme Court. Justice Taney stated that the 1820 compromise was unconstitutional and he denied the power of Congress to free slaves on federal territories. This opinion was based on respect for the scope of jurisdiction of the State courts in Missouri, which, in earlier rulings, had concluded that moving to a free State did not make Scott free. Finally, Taney ruled that under the Fifth Amendment, slaves were the property of their owners and that any law that would deprive the owner of the slaves of his property (i.e., slaves) would be unconstitutional.

The verdict caused great controversy. The American literature suggests that together with the suppression of the John Brown uprising, it was one of the direct causes of the Civil War, which makes it of historical significance, but it was also an expression of the victory of reactionary political and legal thinking, completely contrary to the doctrine of the universal and egalitarian dignity of all people, regardless of their skin color. What is more, even the Justices who delivered dissenting statements did not refer to the idea of human dignity in their deliberations. Justice Benjamin Robbins Curtis was critical of Taney for dealing with the substance of the claim after he had found that the Court lacked jurisdiction. He pointed out that the annulment of the Missouri compromise was not necessary to solve the case and challenged Taney’s claim that the Founding Fathers were firmly opposed to abolitionist rights. Justice John McLean, on the other hand, repeated Curtis’s opinion and pointed to the wrong choice of most of the arguments made by the Founding Fathers, while the resolution of the matter should have been limited to the procedure. He also argued that men of African origin could be citizens because they already had voting rights in five States.<sup>244</sup>

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<sup>243</sup> Roger B. Taney (1777–1864) the fifth Chief Justice of the Supreme Court of the United States appointed by President Andrew Jackson, remembered principally for the Dred Scott decision (1857). He was the first Roman Catholic to serve on the Supreme Court. Paradoxically, Taney – as a profound believer – saw slavery as an evil in moral terms, which he put into practice – because before he came to the Supreme Court, he freed the slaves he had inherited. However, he believed that slavery was a problem that had to be solved gradually and mainly by the States in which it existed; For more see *Roger B. Taney. Chief Justice of United States* [online], *Encyclopaedia Britannica*, <https://www.britannica.com/biography/Roger-B-Taney> [22.02.2022].

<sup>244</sup> *Scott v. Sandford*, 60 U.S. 393 (1856).

Changes in the question of slavery took place after the end of the Civil War and the adoption of reconstructive amendments. It is indicated in the literature that it was the Fourteenth Amendment which was primarily concerned with the question of dignity. Although judicial decisions did not contain direct references to the idea of human dignity, they nevertheless regulated the rights and freedoms that today are either directly linked to human dignity or concern discrimination against specific social groups, prohibited today precisely because of the recognition of human dignity. Such values include the prohibition of discrimination on racial grounds broadly understood.

The values associated with the idea of human dignity which accompanied the reconstruction amendments, were the subject of consideration in the first judgment, in which the Supreme Court had to interpret the norms contained in them. The verdict was issued in three related cases, jointly called the Slaughter-House cases from 1873.<sup>245</sup> And although the ruling in this case made no direct reference to human dignity, from the point of view of research into the idea of human dignity it was one of the most important decisions of the Supreme Court in that period. This was not only because of the arguments contained in the judgment, which primarily linked the content of the amendments to the fight against slavery, but also because of the later interpretation of the Fourteenth Amendment in the late twentieth century, the origins of which can be found in the dissenting opinion of Justice Field.

The matters raised before the Court were the result of the law that the State legislature of Louisiana adopted in 1869. Under its provisions, one specially established company (Crescent City Live-stock Landing and Slaughter-House) was granted a monopoly to operate a slaughterhouse in New Orleans. For 25 years, animals could only be slaughtered on premises belonging to this company and all slaughterhouses operating outside these locations were to be closed. Butchers who had until that date run their businesses in New Orleans (mainly black former slaves and their descendants) claimed in the lawsuit that the law deprived them of the right to pursue their trade and made it impossible for them to continue earning a living. In particular, they argued that the monopoly of one company created involuntary servitude, prohibited by the Thirteenth Amendment, limited the privileges and immunities contained in the Constitution and denied equal protection of rights, and also deprived them of freedom and property without due process as guaranteed under the Fourteenth Amendment. The Supreme Court had to answer the question of whether the creation of a butcher's monopoly violated the Thirteenth and Fourteenth Amendments.

The Supreme Court by a majority of 5–4 found no violation of the Thirteenth and Fourteenth Amendments. Justice Samuel F. Miller,<sup>246</sup> the author of the majority

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<sup>245</sup> Slaughterhouse Cases, 83 U.S. 36 (1872).

<sup>246</sup> Samuel Freeman Miller (1816–1890) – Justice of the Supreme Court between 1862 and 1890, nominated by President Abraham Lincoln, see more broadly *Samuel Freeman Miller: United States*

opinion stressed that the reconstructive amendments should be interpreted primarily in the context of the purpose for which they had been adopted, i.e., the introduction of freedom for slaves, their security, a certain definition of this freedom and the protection of the “newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.”<sup>247</sup> In view of the above, the Fourteenth Amendment prohibited States from depriving black citizens of their equal rights. However, it did not guarantee that all citizens, regardless of race, would receive the same economic privileges from the State. The Justice pointed out that all rights guaranteed in the privileges and immunities clause were limited to areas controlled by the federal government and concerned narrow issues such as access to ports and waterways, the right to stand for election to federal office and certain rights affecting maritime safety. In addition, the Court ruled that the butchers had not been deprived of their property without due process, as they were still able to live and work legally in their town, slaughtering on the premises of the company managed by the monopoly.

The Supreme Court stressed that the amendment to the Constitution did not transfer supervision over all civil rights from the States to the federal government. The States continued to retain legal jurisdiction over their citizens, and federal protection of civil rights did not extend to the property rights of entrepreneurs. The Supreme Court based this distinction on the distinction between State and federal citizenship, which it interpreted directly from the content of the Fourteenth Amendment. Its Section 1 provides for citizenship of the United States and the citizenship of the State in which one resides.

The ruling in this case had an important effect. Owing to accepted interpretations of citizenship and the division of power between States and the federal government, the protection of the privileges and immunities clause contained in the Fourteenth Amendment was limited. The verdict in the slaughterhouse cases stopped the trend towards centralizing power in the hands of the federal government. More importantly, by limiting the protection of the privileges and immunities clause, the Supreme Court unwittingly weakened the possibility of applying the Fourteenth Amendment in protection of civil rights cases.

The verdict of the Supreme Court, passed several years later, is also important. The issue of discrimination and deprivation of public rights was also addressed in the ruling on *Strauder v. West Virginia*<sup>248</sup> of 1880. The case concerned the laws of the State of West Virginia, which prohibited black and other persons of color from sitting as members of the jury in court. The Supreme Court had to answer

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*Jurist* [online], *Encyclopaedia Britannica*, <https://www.britannica.com/biography/Samuel-Freeman-Miller> [22.02.2022].

<sup>247</sup> *Slaughterhouse Cases*, 83 U.S. 36 (1872).

<sup>248</sup> *Strauder v. West Virginia*, 100 U.S. 303 (1880).

the question of whether a trial of a citizen of color involving a jury composed exclusively of white citizens<sup>249</sup> violated or not the equal protection clause.

In the majority opinion prepared by Justice Strong,<sup>250</sup> the Supreme Court found state regulations unconstitutional. It was emphasized that the aim of the Fourteenth Amendment and of a number of other provisions was to ensure the protection of the rights of members of “a recently emancipated race, which had been held in slavery through many generations.” The Fourteenth Amendment was intended to ensure that former slaves would be granted all the rights enjoyed so far by free citizens. At the same time federal authorities were allowed to interfere in the event of state authorities wishing to deny these rights. The Amendment not only granted citizenship and civic privileges to persons of color, but also denied any of the States the right to deny the equal legal protection of their rights. Furthermore, it gave Congress power to enforce the provisions of the Amendment by means of appropriate legislation.<sup>251</sup>

The essence of the effects of the Amendment was highlighted in *ratio decidendi*. The Supreme Court held that although its content was of a prohibitory nature, it granted a positive immunity, or right, in the form of protection against discrimination by public authorities. Such protection was considered extremely valuable to persons of color because it negated actions of the authorities that would mean the inequality and subordination of people of color in society. This, in turn, would mean a loss of security of their rights and freedoms and would be a step towards reducing persons of color back to the level of members of a lower race.<sup>252</sup>

State regulations, which in practice distinguished negatively and denied citizens of color the right to participate in the application of the law as members of a jury, were considered by the Supreme Court as stigma and discrimination prohibited by the Fourteenth Amendment. Such regulations undermined the equal protection of citizens owing to the fact that the formation of a jury is a fundamental element of the judicial process; the main rule for its completion is that a jury must be composed of persons equal to the accused, i.e., persons having the same legal status in society. The Court held that where the law provides for the right of every white man to be tried before a jury chosen from among representatives of his race and without discrimination on grounds of race, while allowing or requiring discrimination in this respect against a man of color on grounds of race, the man of color would not have equal protection under the law with the white one.<sup>253</sup>

<sup>249</sup> It is worth adding that of course they could only be men.

<sup>250</sup> William Strong (1808–1895) – Justice of the Supreme Court from 1870 to 1880, nominated by President Ulysses S. Grant, one of the most respected justices of the nineteenth century, for more information see *William Strong. United States Jurist* [online], *Encyclopaedia Britannica*, <https://www.britannica.com/biography/William-Strong> [22.02.2022].

<sup>251</sup> *Strauder v. West Virginia*, 100 U.S. 303 (1880).

<sup>252</sup> *Ibidem*.

<sup>253</sup> *Ibidem*.

It is worth pointing out straight away (especially in the context of the further development of the doctrine and interpretation of the Fourteenth Amendment) that while the main purpose of the Fourteenth Amendment (protection of former slaves) was emphasized in this judgment, there was no longer any cause to refrain from interpreting a broader protection resulting from the Fourteenth Amendment and concerning the rights of citizens other than exclusively former slaves or their descendants.<sup>254</sup>

The direct protection of equal rights of persons of color, as they were referred to in the verdict, had two consequences for defendants in criminal proceedings. It clearly protected them against discrimination in the form of being tried only by a white jury. This should be seen as an indirect protection of the human dignity of the accused person. At the same time, however, it resulted in an indirect protection of the human dignity not only of the accused, but of all Americans of color – because it protected their equal rights to be members of a jury. Finally, it is worth noting how the legal language of the Supreme Court changed. It now contained a reference to discrimination, so important especially for the development of the doctrine of human dignity in the twentieth century.

This ruling based on the Fourteenth Amendment was important for the subject matter of human dignity, even though it contained no direct reference to it. It did contain though an expression of care for *dignitary interests* and a sign of support for people who had so far been systematically treated as inferior. Equally importantly, it was the Fourteenth Amendment that became in the 1990s an element of the development of the doctrine of human dignity in judicial decisions of the Supreme Court. Also, in relation to other discriminated persons and groups – legally deprived of certain rights and thus treated unequally (worse). Hence, there can be seen in these provisions a significant potential for the development of the normative character of dignity.

However, the evolution and elimination of all forms of social hierarchy was not simple. Another judgment that expressed the regression of the influence of the idea of human dignity in the rulings of the Supreme Court was given in Civil Rights Cases<sup>255</sup> of 1883 where, in five separate cases, African Americans sued hotels, theatres and railway lines for refusing access to places marked as “whites only.”

In its judgment, the Supreme Court distinguished between public (e.g., State) and private actions. Based on this distinction, it was held that the Fourteenth Amendment did not authorize the federal authorities to prohibit discriminatory behavior displayed by private entities. It is clear that the judicial decision was based on a literal interpretation of the text of the Amendment, and indeed the Court found that the power it conferred on Congress could only be exercised against States, not private entities.

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<sup>254</sup> *Ibidem*.

<sup>255</sup> Civil Rights Cases, 109 U.S. 3 (1883).

Justice Harlan delivered a dissenting opinion. Opting for a broader interpretation of the Amendment, Harlan drew attention to the public functions that the defendant companies performed in practice. His interpretation aimed at blurring the distinction (between public and private actions) that was favored by the majority Justices, and one of the examples he gave was private railways that fulfilled the government's function of facilitating travel. Harlan considered that restrictions on the right to travel would violate the prohibition of the Thirteenth Amendment on compulsory service and suggested that the clause on privileges or immunities in the Fourteenth Amendment could also be considered.

This judgment, delivered in 1883, was one of the first which limited the application of the Fourteenth Amendment to actions to be taken by an individual State. At the same time this judicial decision was responsible for a period of over 70 years of discrimination and segregation which continued until the 1950s and the beginning of the 1960s.

A significant event that stalled the process of emancipation of Afro-Americans and obstructed the struggle for the recognition of human dignity as a universal value independent of race and skin color for more than half a century was the judgment of 1896 in *Plessy v. Ferguson*.<sup>256</sup> It is also worth noting that there was no reference in it to the idea of human dignity (although the term dignity appeared in a slightly different context).

In 1890, the Louisiana State legislature passed a law that required the introduction of separate train carriages for blacks and whites. In 1892, Homer Plessy agreed to take part in a protest against this law. The protest was organized by the Citizens' Committee, founded by the people of New Orleans. The protesters were supposed to buy a train ticket for a carriage for whites only and refuse to leave it if requested to do so, which would obviously result in their arrest. Incidentally, Plessy had only one black great-grandfather (i.e., he was 7/8 white), and his racial affiliation was unnoticeable (thanks to which he could buy a ticket for the whites only carriage). During the trial in New Orleans, Plessy's lawyers claimed that the law violated the Thirteenth and Fourteenth Amendments. However, the court held that Louisiana could enforce this law as far as the railways within its borders were concerned and Plessy was convicted. The case went to the Supreme Court which had to determine whether Louisiana's law on separate railway carriages violated the Fourteenth Amendment.

The Supreme Court, by a 7–1 majority ruled that equal but separate travel conditions for whites and blacks did not violate the equal protection clause of the Fourteenth Amendment, let alone the Thirteenth Amendment.

In the majority opinion delivered by Justice Henry B. Brown<sup>257</sup> the plea of an infringement of the Thirteenth Amendment was rejected. It referred to the

<sup>256</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>257</sup> Henry Billings Brown (1836–1913) – Justice of the Supreme Court in years 1890–1906; for more see *Henry Billings Brown. United States Jurist* [online], *Encyclopaedia Britannica*, <https://www.britannica.com/biography/Henry-Billings-Brown> [22.02.2022].

findings made in the case concerning the slaughterhouses in New Orleans, where involuntary servitude as mentioned in the Thirteenth Amendment was defined. Next, referring to the civil rights judgment, it was pointed out that the action of an ordinary person who owns a restaurant, a transport company, a hotel or another establishment could not be regarded as an action covered by the Fourteenth Amendment. A refusal to provide a service is not an act that would deprive of their rights those who are refused that service. At the same time, however, it may be an act that causes damage within the meaning of civil law and, consequently, may result in a possible action for damages.<sup>258</sup>

The Supreme Court held that laws that were based on differentiating between the white and colored races did not tend to negate the equality of both races before the law, let alone seek to restore slavery. Such a real difference between persons belonging to different races will always exist as long as the races exist. With regard to the plea of infringement of the Fourteenth Amendment, the Court stressed that its provisions were intended to establish absolute equality of races before the law, but separate treatment did not mean less favorable treatment of other races. It also noted that there was no significant difference in quality between the carriages for different races. The Court pointed out that the fundamental error of the claimant's argument was that he automatically assumed that the obligatory separate treatment of two races meant less favorable treatment for persons of the colored race. If that had been the case, it was not because of something in the legislation, "but solely because the colored race chooses to put that construction upon it."<sup>259</sup>

Finally, the Court also pointed out that the claimant had presumed that social prejudices could be overcome by legislation and that equal rights for members of the black community could only be guaranteed by a forced mixing of the two races. The Supreme Court denied such actions. It recognized that both races might be treated on the basis of social equality, but this had to be the result of a spontaneous understanding, the mutual recognition of merit and the voluntary consent of individuals.<sup>260</sup>

As in the civil rights cases, there was a dissenting opinion delivered by Justice John M. Harlan.<sup>261</sup> He admitted that he was aware of the fact that the white race was considered to be the dominant race in the country and that this dominance was justified on issues such as prestige, achievement, education, wealth and power. This would continue to be the case if it remained true to its great heritage and

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<sup>258</sup> Plessy v. Ferguson, 163 U.S. 537 (1896).

<sup>259</sup> Ibidem.

<sup>260</sup> Ibidem.

<sup>261</sup> John Marshall Harlan (1833–1911) – Justice of the Supreme Court from 1877 to 1911; nominated by President Rutherford B. Hayes, one of the most active justices, author of 1,161 opinions (of which 316 were dissenting opinions), a keen civil rights defender; for more see *John Marshall Harlan. United States Jurist* [online], *Encyclopaedia Britannica*, <https://www.britannica.com/biography/John-Marshall-Harlan-United-States-jurist-1833-1911> [22.02.2022].

respected the principles of constitutional freedom. At the same time, however, he stressed that the Constitution was color-blind and that American society was not based on a system of social classes. In the light of the Constitution and the law in force, there was no superior, dominant, ruling class of citizens in America. The Constitution neither knew nor tolerated classes among citizens. When it comes to civil rights, all citizens are equal before the law.<sup>262</sup>

Justice Harlan wrote metaphorically that “[t]he humblest is the peer of the most powerful.” The law recognizes a human being as human and does not take into account his skin color when it comes to his civil rights guaranteed by the supreme law of the land. It is therefore regrettable that the Supreme Court, as the ultimate interpreter of the supreme law of the land, concluded that States were competent to regulate the exercise of their civil rights by citizens solely on the basis of race. Justice Harlan recalled that the Thirteenth Amendment was considered insufficient to protect the rights of those who were enslaved. Therefore, the Fourteenth Amendment was enacted, which significantly increased the dignity and glory of the American citizenship and raised the security of personal liberty, indicating that all persons born or naturalized in the United States and subject to their jurisdiction were citizens of the United States and the State in which they resided.<sup>263</sup>

Analyzing Justice Harlan’s position, one must consider the statement that the law, in the context of civil rights, recognizes a human being as human regardless of his or her skin color or other differences as an important statement. This is a fundamental statement for the essence of the contemporary understanding of human dignity. However, this opinion was in the minority, and the rulings in the Civil Rights Cases and *Plessy v. Ferguson* triggered off racial segregation and consolidated the regulations contained in Black Codes that were discriminating against African Americans.

While the case law of the Supreme Court on issues related to the legal position of former slaves was a blatant denial of the recognition of human dignity (with some exceptions such as *Strauder v. West Virginia*), certain indirect traces of the idea of human dignity may be found in judgments relating to other legal areas.

The reference to the idea of human dignity in the case *Skinner v. Oklahoma ex rel. Williamson*, would appear to be important, as it appeared not in the dissenting opinion but in the opinion that was concurring to the unanimous verdict. In 1935, Oklahoma passed the Habitual Criminal Sterilization Act under which a person could be sterilized if he or she had been convicted three times for crimes of *moral turpitude*.<sup>264</sup> After *Skinner*’s third conviction, he was deemed to be a repeat

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<sup>262</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>263</sup> *Ibidem*.

<sup>264</sup> It is a legal concept under U.S. law that refers to an act or conduct that seriously compromises the feelings or accepted standards of a community. *Merriam-Webster* [online], <https://www.merriam-webster.com/legal/moral%20turpitude> [22.02.2022].

offender and was ordered to be sterilized under state law. Skinner appealed against the judgment by invoking the equal protection clause of the Fourteenth Amendment, since sterilization was only envisaged for certain crimes.

The court unanimously declared the contested provisions unconstitutional. The majority opinion was drawn up by Justice Douglas, who pointed out that the right to procreation is a fundamental right, so any state can't require the sterilization of criminals convicted of certain crimes: "[m]arriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands, it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty."<sup>265</sup>

A reference to the idea of dignity was contained in the concurring opinion of Justice Jackson who expressed his general doubts about eugenic projects envisaging the sterilization of selected individuals in order to eliminate features that are only vaguely identified and which, in the current state of knowledge, there was uncertainty as to whether they are hereditary. At the same time, he recalled that the Supreme Court recognized the constitutionality of such actions in the case of mentally handicapped persons, i.e., with regard to persons with specific and observable traits, where this condition survived for three generations and gave rise to the belief that it was contagious and would manifest itself in future generations.<sup>266</sup> However, Justice Jackson emphasized that there were limits on the extent to which the majority represented by the legislature might carry out biological experiments at the expense of the dignity and personality and natural powers of a minority – even those who were guilty of what the majority described as crimes.<sup>267</sup>

According to Justice Jackson, the idea of human dignity appeared to be a natural boundary to curb legislative action which, although supported by the majority, could violate minority rights. This was an important statement which is today at the very center of the definition of a modern form of democracy, i.e., liberal democracy. And although Justice Jackson used the notion of dignity to refer to a group rather than an individual, it was undoubtedly intended to protect the rights of individuals.

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<sup>265</sup> Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942).

<sup>266</sup> Justice Jackson referred here to the case of Buck v. Bell of 1927. In this case the Court found that sterilization of inmates in state-supported institutions who were deemed to be affected by an inherited form of insanity or imbecility for which the Virginia Statute provided, deeming it to be constitutional, was pursuant to the Fourteenth Amendment a matter within the State's jurisdiction. Buck v. Bell, 274 U.S. 200 (1927). This ruling has been the subject of much controversy and is nowadays one of the most criticized judgments of the Supreme Court.

<sup>267</sup> Ibidem.

To sum up these considerations, it must be noted that the case law of the Supreme Court in the nineteenth century does not show any systematic influence of the idea of human dignity. The Supreme Court generally failed to take much interest in the civil rights contained in the Bill of Rights and their interpretation. As is stressed in the American legal science of the nineteenth century, the first decades of the twentieth century witnessed a surprisingly low use of judicial review in relation to civil rights. In the context of values important for modern liberal democracy, the case law of the *Old Court* had its “blind spots,” mainly in the form of inequality on the grounds of race and gender (as well as on American citizenship).<sup>268</sup> It was not until the 1930s that the Supreme Court’s approach to its role in the context of civil rights changed, and the change is even referred to as the “constitutional revolution of 1937.”<sup>269</sup> The Supreme Court began to treat the Constitution as a living document in accordance with the doctrine of the living Constitution which began to be perceived as a legislative act that should respond to changing social needs. In economic terms, the Court allowed the introduction of great new social projects: the New Deal, the New Society and elements of a welfare state. For the idea of human dignity though, until 1943, it had been a period of stagnation.

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<sup>268</sup> John Braeman, “Preface,” in idem, *Before the Civil Rights Revolution: The Old Court and Individual Rights*, New York – Westport – Connecticut – London, 1988, p. viii.

<sup>269</sup> A. E. Dick Howard, “Foreword,” in *Creating the Bill of Rights: The Documentary Record from the First Federal Congress*, Veit, Helen E., and Bowling, Kenneth R., and Bangs Bickford, Charlene (eds.), Baltimore – London, 1992, p. vii.

## CHAPTER 9

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# FORERUNNERS OF MODERN HUMAN DIGNITY

In the American doctrine of constitutional law there is general consensus<sup>270</sup> that the first time that the term human dignity appeared after 1945 was in the verdict of the Supreme Court of 1946<sup>271</sup> in the Yamashita case (although as mentioned this term was used in the case law of State and Federal courts as early as in the 1930s). It is worth stressing, however, that in the sense of a natural, inalienable and priceless value belonging to every human being equally, the idea of human dignity had already been referred to by the Supreme Court in 1943 in the case *McNabb v. United States*<sup>272</sup> as well as in a number of other cases in the 1940s, before the judgment in the case of General Yamashita. These precursor cases, which heralded the references to human dignity, fell into two categories. One consisted of judgments in cases involving an abuse of power (infringements of civil rights), usually during the performance of duties by police officers or other services. In those cases, what was important was the vertical relationship between the State and the citizen, whereas the individual's rights were not protected.

The other category of judgments, on the other hand, concerned cases related to violations of civil rights (or, more generally, human rights) which were happening in the circumstances caused by the Second World War. These were cases resulting from the uniqueness of a situation dictated by the war and involved restrictions on the civil rights of citizens of Japanese origin, and the problem of the proper trial of Japanese war criminals. In both categories the State – through its institutions or its representatives – either abused its powers in relation to its citizens or directly violated their rights and freedoms, exhibiting oppressive tendencies or even displaying the characteristics of a police state.

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<sup>270</sup> In *inter alia* Vicky C. Jackson who quotes data collected from American databases LEXIS and WESTLAW, in Vicky C. Jackson, "Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse," *Montana Law Review* 65(1), 2004, p. 17.

<sup>271</sup> *In re Yamashita*, 327 U.S. 1 (1946).

<sup>272</sup> *McNabb v. United States*, 318 U.S. 332 (1943).

These judgments and problems – particularly those arising in consequence of the Second World War – did not pass without notice to the American judiciary, particularly in the doctrine of constitutional law. The new international system for the protection of human rights stimulated discussion, and the relationship between the new system and the then already developed American system for the protection of civil rights aroused particular controversy. In these discussions, too, in which the rulings of the Supreme Court were deliberated, the issue of human dignity played a significant role.

As has already been mentioned, one of the first cases of this type is the judgment of 1943 in the *McNabb v. United States* case. The complainants, two brothers, Freeman and Raymond McNabb and their cousin Benjamin, were sentenced to 45 years imprisonment for killing an officer of the federal alcohol tax authority. The murder took place during an attempt to sell untaxed alcohol produced by the McNabb family, and the suspected murderers were arrested.

What is important is that all three members of the McNabb family were uneducated (their education ended with the first grade of primary school), and they lived their whole lives in the mountains, without moving further away from their forest premises than the town of Jaspers, which was 21 miles from their settlement. In detention, they were not allowed to see their relatives. Neither did they have a lawyer – as the Supreme Court noted, “[t]here is no evidence that they requested the assistance of counsel, or that they were told that they were entitled to such assistance.”<sup>273</sup> In contravention of the law in force at the time, they were not brought before a judge for the purpose of a preliminary hearing, or to plead guilty or have bail set. Before the first hearing, they were held in custody for almost 24 hours, and the hearings themselves lasted more than two days with very short intervals. Their testimony, given without the participation of a lawyer, gave rise to a trial and conviction for murder. In view of these circumstances, the Supreme Court had to answer the question of whether these testimonies were given in the right circumstances.<sup>274</sup>

The Supreme Court found that incriminating testimonies were obtained in violation of the Constitution and the applicable regulations. On the basis of this judgment, the doctrine of constitutional law established the *McNabb-Mallory* rule, according to which the proof of confession is deemed inadmissible if it occurred during an *unreasonable delay* between the detention and the preliminary hearing.<sup>275</sup>

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<sup>273</sup> *Ibidem*.

<sup>274</sup> The line of rulings of the Supreme Court in force at the time overturned convictions in federal cases based on evidence obtained in violation of freedoms recognized as fundamental in the Constitution (including precedent cases *Boyd v. United States*, 116 U.S. 616 (1886) and *Weeks v. United States*, 232 U.S. 383 (1914)).

<sup>275</sup> This rule was replaced with the *Miranda* rule.

In the rationale for the judgment presented by Justice Felix Frankfurter,<sup>276</sup> there was an important reference to the idea of human dignity. The Justice stressed that respect for the dignity of all men is the main value of a democratic society. A natural element of such a community is protection against the misuse of the law. Justice Frankfurter also referred to important issues relating to the enforcement of criminal law. He pointed out that severity in prosecuting crimes is not in itself a guarantee of the authority of the judgment, and that the principle of the impartiality of the law is not in itself an obstacle to the disregarding of valued liberties. The Justice concluded that experience shows that protection should be provided against dangers of “the overzealous, as well as the despotic” law enforcement of officers.<sup>277</sup>

Furthermore, the Justice stressed that criminal law rules, according to which the police must demonstrate with *reasonable promptness* the legal basis for arresting a suspect, are an important element of criminal procedure, not only in ensuring the protection of the innocent, but also in ascertaining that the guilty are convicted with the use of methods characteristic of a “progressive and self-confident society.”<sup>278</sup>

In the American doctrine of constitutional law, this judgment is considered to be the leading case for establishing rules for the invalidation of the guilty plea,<sup>279</sup> as it provided appropriate measures against attempts that had been earlier too elusive to disregard the privilege against self-incrimination.<sup>280</sup> It was also stressed that it was an expression of the raising of pre-trial standards and an element of a certain trend that was more favorable as regards individuals’ interpretation of their rights.<sup>281</sup> At the same time, it is pointed out that by referring to the idea of dignity, the Supreme Court was able to grasp more precisely the aspects of the relationship between individuals and representatives of public authorities in the context of the defendants’ right to a lawyer, and in explaining why detainees had the right to be brought before a neutral body adjudicating on their guilt.<sup>282</sup>

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<sup>276</sup> Felix Frankfurter (1882–1965) – Justice of the Supreme Court (1939–62), a noted scholar and teacher of law, who was in his time the high court’s leading exponent of the doctrine of judicial self-restraint. He held that justices should adhere closely to precedent, disregarding their own opinions, and decide only “whether legislators could in reason have enacted such a law.” For more see *Felix Frankfurter. United States Jurist* [online], *Encyclopaedia Britannica*, <https://www.britannica.com/biography/Felix-Frankfurter> [22.02.2022].

<sup>277</sup> *McNabb v. United States*, 318 U.S. 332 (1943).

<sup>278</sup> *Ibidem*.

<sup>279</sup> O. John Rogge, “Concept of Ordered Liberty: A New Case,” *California Law Review* 47(2), 1959, p. 250.

<sup>280</sup> *Ibidem*, p. 265.

<sup>281</sup> James A. Gardner, “A Re-Evaluation of the Attorney-Client Privilege. Part II,” *Villanova Law Review* 8(4), 1963, p. 467.

<sup>282</sup> Judith Resnik, “Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry,” *Yale Law Journal* 115(7), 2006, pp. 132–3.

When characterizing this judgment, a few points should be noted. First, it must be pointed out that the reference to human dignity was included in the majority opinion, and not just in a dissenting opinion. What is more, it was a verdict that overruled an earlier conviction. Furthermore, the idea of human dignity appeared on its own and was recognized as a central element of a democratic and progressive society. In addition, considerations emerged in this context concerning the application of criminal procedure and the enforcement of the rights of defendants and the objectives of criminal law. It should therefore be recognized that, in this case, references to the idea of human dignity influenced significantly the application of the provisions of criminal law.

The judgment in the case *United States v. White*<sup>283</sup> of 1944 ought to be treated in a similar way. The case was the result of an investigation into irregularities in the construction of (supply) warehouses for the navy. During the investigation, the court ordered the trades union of the workers engaged on the construction site to deliver certain documents (including account books, records and work regulations). White, as a person with them in his possession, refused to hand them over to the court, citing the Fifth Amendment and arguing that disclosing the information contained in them could expose him as a trade union officer and the trades union itself to criminal liability.

The Supreme Court rejected White's argument, unanimously considering that the clauses of the Fifth Amendment did not apply to organizations or institutions. Justice Murphy who drafted the majority opinion pointed out that the constitutional privilege against self-incrimination was essentially a personal privilege, applicable only to natural persons. The documents and objects which the privilege protected were to protect private property of the person seeking the privilege, or at least property in his or her possession in a purely personal interest.

At the same time, Justice Murphy outlined the essence of the prohibition on self-incrimination in which respect for the dignity of the individual played an important role. He considered that it grew out of the deep sentiment and respect of the U.S. judiciary for the conduct of criminal investigations and trials and proceedings having regard to dignity, humanity and impartiality. Its aim was to prevent the use of criminal law procedures to coerce evidence from the accused that would subsequently facilitate his or her conviction. Justice Murphy went on to say that it also included the prohibition on compelling a suspect to produce or certify any documents or things that might incriminate him. In this way, such a prohibition would not only have prevented torture but also other equally reprehensible methods of forcing a defendant to produce incriminating evidence.<sup>284</sup>

Justice Murphy stressed that the direct and potential evil that results from the obligation to disclose self-incriminating evidence was many times greater than

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<sup>283</sup> *United States v. White*, 322 U.S. 694 (1944).

<sup>284</sup> *Ibidem*.

any difficulties that the existence of that privilege might bring to society when it came to fighting crime. And while that privilege was abused, which Justice Murphy condemned, it was firmly rooted in American constitutionalism as “a bulwark against iniquitous methods of prosecution.”<sup>285</sup>

It is therefore clear that the idea of dignity, understood as a value associated with humanity itself, was recognized as a fundamental element in the justification of the Fifth Amendment. This was extremely important, as will be confirmed by subsequent rulings on individual rights in this context. And, the idea of human dignity in the context of impartiality will subsequently become a key value for the interpretation of the Fourteenth Amendment.

Another judgment that laid foundations of the human dignity doctrine of the 1940s was the ruling in the *Screws v. United States* case<sup>286</sup> of 1945. The complainant was Claud Screws, Sheriff of Baker County, Georgia. Together with two other police officers, he arrested Robert Hall, an African American, suspected of having stolen a tire. According to Screws, Hall resisted arrest. He was handcuffed and taken to court. As per the testimony of law enforcement officers, when Hall got out of the car, he verbally insulted them and reached for his gun. Therefore, police officers used force against him (as was established during the trial, they started beating him with their fists and police truncheons, which lasted for about half an hour). Beaten up, he lost consciousness and, in that condition, he was locked in custody. It was only after some time that an ambulance was called, which took Hall to the hospital, where he died without regaining consciousness. Screws was accused under the provisions of the Criminal Code which prohibited “under the color of any law” to deprive anyone of the rights, privileges and immunities protected by the Constitution and by law, or to cause harm and suffering because of skin color or race. The prosecution found that Screws deliberately deprived Hall of his right not to have his life taken without due process of law.<sup>287</sup> In both the first and second instance, Screws was found guilty and sentenced to a fine and imprisonment. Incidentally, it may only be added that during the trial the election of the county sheriff was in progress and Screws won it again.

When the case came before the Supreme Court, it had to decide on the constitutionality of the provisions under which Screws had been convicted. While recognizing their constitutionality, the Supreme Court, by a majority of 5–4 votes, held that there were procedural errors during the trial in the first instance that were so serious that the sentence had to be overturned.<sup>288</sup> At the same time, the ac-

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<sup>285</sup> *Ibidem*.

<sup>286</sup> *Screws v. United States*, 325 U.S. 91 (1945).

<sup>287</sup> *Ibidem*.

<sup>288</sup> “The trial court erred in not instructing the jury that, in order to convict, they must find that the defendants had the purpose of depriving the prisoner of a constitutional right. In determining

tions of Screws and his helpers were clearly condemned. Justice William O. Douglas<sup>289</sup> who drafted the majority opinion began his reasoning by saying that the case concerned a shocking and revolting episode of law enforcement. Referring to Screws's actions, the Supreme Court found that the complainant and his helpers were acting under the guise of the law. Screws and the other complainants were performing their duties as police officers effecting arrest. Their duty was to bring the suspect to court effectively. According to their own testimony, they used physical force to prevent the arrested person from escaping. However, as Justice Douglas pointed out, there was evidence that Screws disliked Hall and had threatened to "get" him.<sup>290</sup>

Among the Justices who objected overturning the previous judgments was Justice Frank Murphy<sup>291</sup> who put forward an argument that referred extremely strongly to the concept of the inherent human dignity belonging to every human being. The Justice stressed that Hall was not only deprived of the right to be tried in court. Above all, he was deprived of his right to life. This right was due to him not because he "was a Negro or a member of any particular race or creed. That right was his because he was an American citizen, because he was a human being." He was entitled to respect and a treatment that was fair and appropriate to the dignity of a man.<sup>292</sup> Justice Murphy stressed further that dignity was recognized and guaranteed by the Constitution. He claimed passionately that Hall had not even been given the appearance of a due process, because he was cruelly and unjustly beaten to death by representatives of the law who were acting under the sole guise of the duty to enforce law.<sup>293</sup>

As early as the early 1950s, the case of *Screws v. United States* was cited as the most important case before the Supreme Court that was concerned with federal

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whether that requisite bad purpose was present, the jury would be entitled to consider all the attendant circumstances – the malice of the defendants, the weapons used in the assault, the character and duration of the assault, the provocation, if any, and the like. Although no exception was taken to the trial court's charge, the error was so fundamental – failure to submit to the jury the essential elements of the only offence on which the conviction could rest – that this Court takes note of it *sua sponte*." Ibidem.

<sup>289</sup> William O. Douglas (1898–1980) – Justice of the Supreme Court in 1939–75 (this was one of the longest terms of office of a justice of this court – 36 years and six months), known for his consistent and uncompromising attitude as a defender of civil rights and freedoms; for more see *William O. Douglas. The United States Jurist* [online], *Encyclopaedia Britannica*, <https://www.britannica.com/biography/William-O-Douglas> [22.02.2022].

<sup>290</sup> *Screws v. United States*, 325 U.S. 91 (1945).

<sup>291</sup> Frank Murphy (1890–1949) – Justice of the Supreme Court in 1940–49; he went down in history as a fierce defender of the freedom of the individual and civil rights, noted for his militant defense of individual liberties and civil rights and for his insistence on doing substantial justice irrespective of legal technicalities, for more see *Frank Murphy. United States Jurist* [online], *Encyclopaedia Britannica*, <https://www.britannica.com/biography/Frank-Murphy> [22.02.2022].

<sup>292</sup> *Screws v. United States*, 325 U.S. 91 (1945).

<sup>293</sup> Ibidem.

human rights protection.<sup>294</sup> Its importance was, among other things, that it was an example of an increasingly broad interpretation of the term “state authorities,” which was covered by the Fourteenth Amendment. In the case in question, such actions were also considered “illegal activities of public officials”<sup>295</sup> which was a significant step on the path to ensuring civil rights.

The *Screws* case clearly shows the normative influence of the idea of human dignity, and it must be stressed that the above dissenting opinion was very important. Dignity is linked to the most important human right which is the right to life, and it also appears in the context of the right to a due process. Justice Murphy’s dissenting opinion was important inasmuch as it was he, as a Supreme Court Justice, who explicitly defined human dignity as an idea recognized and guaranteed by the Constitution. And yet, although considered as constitutionally guaranteed, it cannot pass unnoticed that the fact that human dignity was provided for in the Constitution was only pointed out in the dissenting opinion of one Justice, and that the other Justices did not share his views.

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<sup>294</sup> Zechariah Jr. Chafee, “Federal and State Powers Under the UN Covenant on Human Rights,” *Wisconsin Law Review* 3, 1951, p. 414.

<sup>295</sup> Myres S. McDougal, and Gertrude C. K. Leighton, “The Rights of Man in the World Community: Constitutional Illusions versus Rational Action,” *The Yale Law Journal* 59(1), 1949–1950, p. 111.

## HUMAN DIGNITY AND JAPANESE AMERICAN

One of the best well known cases of the 1940s, and at the same time one of the most important from the point of view of the place and role of human dignity in American jurisprudence was the judgment in the case of *Korematsu v. United States*<sup>296</sup> of 1944. It should be pointed out that this case was one of those resulting from the laws introduced after the start of the war with Japan, restricting the rights and freedoms of people of Japanese ancestry living in America.<sup>297</sup> These restrictions, ranging from the introduction of curfew to the forced relocation and detentions of people of Japanese descent in specially designated camps, are still a source of dispute and controversy today. On the one hand, they are considered necessary and justified when occurring in times of war, while, on the other, they are regarded as an example of discrimination on grounds of origin and the application of collective responsibility.<sup>298</sup>

With regard to the specific issues that were the background to the verdict in the *Korematsu v. United States* case, it should be pointed out that on 19 February 1942 President Roosevelt issued Executive Order No 9066, which stated that “persons of Japanese ancestry” were to be under curfew and other travel restrictions. On 21 March, 1942, Roosevelt supported Congress by issuing further regulations, justifying this by the need to counter any potential act of sabotage. On this basis, the military authorities could evict (or, as it was euphemistically termed, relocate) people of Japanese descent from areas considered important for defense purposes. What is very important is that the regulations applied not only to non-U.S. citizens, but also to “American citizens of Japanese descent.” The only reason that was taken into account was the Japanese origin (issues such as individual

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<sup>296</sup> *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>297</sup> Other matters that came before the Supreme Court included: *Hirabayashi v. United States*, 320 U.S. 81 (1943) and *Ex parte Mitsuye Endo*, 323 U.S. 283 (1944).

<sup>298</sup> In 1988, the U.S. authorities issued a legislative act that officially apologized to the internees. Under its provisions, they could claim compensation.

suspicious or possible conflicts with the law to date were not taken into account at all). The internees were placed in camps specially designed for this purpose. It is estimated that by the spring of 1942, the authorities had moved more than one hundred thousand people of Japanese origin to the internment camps, of whom more than 70,000 stayed there for more than four years.<sup>299</sup>

Fred Toyosaburo Korematsu, who opposed these regulations, remained in his place of residence in San Leandro, California, thereby breaching the military evacuation orders. He was convicted and his case was brought before the Supreme Court which had to decide whether the President and Congress had exceeded their powers when restricting the civil rights of people of Japanese descent. By a decision of 6–3 votes, the Supreme Court sided with the government and concluded that the state of war and the need to protect the citizens and the State against acts of sabotage and espionage outweighed the protection of civil rights and therefore justified the legal action taken.<sup>300</sup>

However, three Justices submitted dissenting opinions. One of them, Justice Murphy, appealed to the idea of human dignity. He pointed to the fact that among the citizens of Japanese descent there were indeed those who actively helped the enemy (Japan) of the United States. However, he argued that individual disloyalty could not be used to draw conclusions about the collective responsibility and collective loyalty of Japanese Americans towards their homeland. Such collective discrimination was a denial of the foundation of the American justice system, according to which only individual guilt could be the ground for depriving an individual of his or her civil rights. Even more importantly, Justice Murphy considered the fact that such a conclusion, based solely on race-based responsibility, “support of the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy.”<sup>301</sup>

Justice Murphy said that considering such actions to be constitutional, even if the intentions of their adoption were positive, would have been tantamount to accepting one of the cruelest reasons that Nazi Germany and imperial Japan used to destroy the dignity of the individual. Finally, it would also mean accepting, and even encouraging, similar “discriminatory actions against other minority groups.”<sup>302</sup>

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<sup>299</sup> *Student's Guide to the Supreme Court*, Washington, 2010, p. 165.

<sup>300</sup> An interesting analysis of the justification for such restrictions on civil rights based on a utilitarian philosophy has been presented by William E. Conklin, “The Utilitarian Theory of Equality Before the Law,” *Ottawa Law Review* 8(3), 1976, pp. 485–517; see in particular his remarks concerning the Korematsu case, p. 496, p. 499, pp. 509–10. The problem of acceptable security measures in a democratic system in the context of the threat of Islamic terrorism was also analyzed by András Sajó in “From Militant Democracy to the Preventive State?,” *Cardozo Law Review* 27(5), 2005–2006, pp. 2255–94; see especially his remarks regarding the Korematsu case on p. 2267, p. 2270, p. 2276.

<sup>301</sup> *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>302</sup> *Ibidem*.

In the majority opinion, a reference was made directly to the previous judgments of the Supreme Court delivered in cases where the complainants were citizens of Japanese descent, and particularly in the 1943 case *Hirabayashi v. United States*.<sup>303</sup> Gordon Kiyoshi Hirabayashi was convicted of breaching curfew and relocation regulations. Despite some reservations, the Supreme Court recognized the constitutionality of the contested regulations due to exceptional circumstances dictated by the state of war.

It is worth noting a few points here. First, human dignity had not been mentioned in earlier judgments of this kind (for example, it was not referred to in the judgment of *Hirabayashi v. United States*). What is more, although the idea of human dignity appeared in the case of Fred Korematsu, the reference to that idea did not affect the final verdict. Nevertheless, it should be stressed that it was an important element of one of the dissenting opinions, where it was described as a value whose essence was violated by actions such as collective responsibility or racial discrimination. It was therefore another element of an important trend in the characteristics of human dignity, i.e., treating the phenomena denoted as discrimination as incompatible with human dignity. The seriousness of Justice Murphy's dissenting opinion was indeed very significant, particularly since the judgment in the Fred Korematsu case is generally assessed negatively in American legal doctrine.

Another verdict relating to discrimination on racial grounds was delivered in the case *Oyama v. California*<sup>304</sup> of 1948. The complainant, Fred Oyama, who was an American citizen of Japanese descent, challenged the constitutionality of the provisions of the Californian land laws. The Supreme Court ruled that the provisions of California's Alien Land Law of 1913 and 1920 limited his rights and privileges guaranteed by the Fourteenth Amendment. Under these laws, inhabitants of U.S. territory who were not eligible for the United States citizenship were prohibited from owning land. The 1913 Act did not explicitly mention the Japanese population of America, but this was nonetheless the main objective of the law in question. The Act was adopted, among other things, to calm the protests of Californian farmers who feared Japanese competition. In turn, its entry into force triggered protests among Californian residents of Japanese descent, and even the Japanese Government issued an official protest.<sup>305</sup>

The Japanese Americans used various ways to circumvent the law. One was the purchase of land that was formally for the benefit of their children born in the USA (who, when born on U.S. territory, were granted American citizenship under the land law). The second step in this procedure was the appointment of

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<sup>303</sup> *Hirabayashi v. United States*, 320 U.S. 81 (1943).

<sup>304</sup> *Oyama v. California*, 332 U.S. 633 (1948).

<sup>305</sup> More on this in Brian J. Gaines, and Wendy K. Tam Cho, "On California's 1920 Alien Land Law: The Psychology and Economics of Racial Discrimination," *State Politics and Policy Quarterly* 4(3), 2004, pp. 271–93.

a parent as the guardian of the property. As a result, the Japanese who did not have American citizenship became the *de facto* owners and managers of the land. In response to these practices, in 1920, a stricter rule was passed, which proved to be fundamental to the Oyama case. Pursuant to this provision, if someone acquired land on behalf of another person, it could automatically be assumed that they were doing so with the intention of circumventing the law. This represented a significant change in the provisions on the burden of proof. Another provision prohibited the designation of persons not eligible for naturalization as *guardians of estate*.<sup>306</sup> The Act provided for a sanction in the form of forfeiture of property without compensation.

The Supreme Court ruled that the contested legislation discriminated against the applicant – an American citizen. The only basis for these legal restrictions in the Oyama case was the fact that Oyama’s father was Japanese. The majority opinion stressed that this type of discrimination against a citizen on the basis of racial descent could not be justified by the fact that it was necessary to prevent the evasion of state law prohibiting foreigners not eligible for citizenship from owning agricultural land.<sup>307</sup>

Justice Murphy (later joined by Justice Wiley B. Rutledge<sup>308</sup>) delivered a concurring opinion and stressed that according to the Constitution, foreigners of Japanese descent not eligible for citizenship had to be given the same protection as other individuals in this regard. Both Justices found it unquestionable that the principles which provided for equal protection also included provisions protecting the right to exercise professions and to carry out agricultural activities, and in addition provisions on the use and ownership of agricultural land. At the same time, they provided that the concept of equal protection might, although in rare cases, allow the State to discriminate between categories of persons, such as foreigners, for special treatment. In such exceptional cases, the decisive test was whether there were reasonable grounds for such exceptional discrimination. In such a situation, the legislator had to answer in the affirmative the question of whether the characteristics of a particular social group constituted a rational justification for the difference in treatment.<sup>309</sup>

Further on in his considerations, Justice Murphy pointed out that such a rational basis was completely absent in the case in question, where discrimination resulted directly from racial hatred and intolerance. The U.S. Constitution, as Justice Murphy continued, embodied the highest political ideals that man was capable

<sup>306</sup> *Ibidem*.

<sup>307</sup> More on this in Rose Cuison Villazor, “Rediscovering *Oyama v. California*: At the Intersection of Property, Race and Citizenship,” *Washington University Law Review* 87(5), 2010, pp. 979–1042.

<sup>308</sup> Wiley Blount Rutledge (1894–1949) – the Supreme Court Justice in 1943–1949; more in *Wiley Blount Rutledge. The United States Jurist* [online], *Encyclopaedia Britannica*, <https://www.britannica.com/biography/Wiley-B-Rutledge-Jr> [22.02.2022].

<sup>309</sup> *Oyama v. California*, 332 U.S. 633 (1948).

of professing. The rules of the Constitution required both the State and Federal governments to recognize and respect the dignity of each individual, regardless of his or her race, skin color or beliefs. Hence, and for the sake of human dignity, it was unacceptable to introduce discriminatory rules into the law based on racial considerations because such factors constituted the basis for discrimination, which was immediately apparent upon a closer examination of the legal, social and economic justifications for the regulations introduced.<sup>310</sup>

Although the reference to dignity was not in the majority, but only in the concurring opinion, the end result of both was identical. Discrimination is unconstitutional, also in the context of the equal dignity of all – including those who did not have American citizenship. Their equal treatment was recognized as part of the constitutional order of America. Human dignity was defined as a value that belonged to everyone “whatever may be the name of his race, the color of his skin or the nature of his beliefs,” and was, in addition, part of the highest political ideals contained in the Constitution.<sup>311</sup>

The principle of human dignity was equally important in the Yamashita case. In 1946, General Tomiyuki Yamashita of the Imperial Japanese Army was sentenced by the American military tribunal in Manila. He was accused of war crimes committed on the civilian population in Singapore and the Philippines by his subordinate units. However, primary charge against General Yamashita was not so much for his active involvement in the implementation of the acts that were the subject of the charge, but for his lack of reaction and his inability to stop the atrocities committed by the military under his command. The Court sentenced him to death. Yamashita appealed to the U.S. Supreme Court, accusing the military trial of a failure to observe the principles of a due process and pointing out that there were no legal grounds for prosecuting him. The Supreme Court rejected his appeal and Yamashita was executed.<sup>312</sup> It was pointed out that Yamashita had failed to fulfil his duties as commander, which resulted in a lack of control over the actions of the units under his command. He simply allowed the commitment of crimes against civilians and captured prisoners of war.

However, the verdict was not unanimous. In a dissenting opinion Justice Murphy made an important reference to human dignity both in the context of American civil rights and in the context of the international community and international law and the foundations underpinning them. First of all, he noted that individual rights, including those guaranteed by the constitutional due process clause, were common and universal. They did not belong only to members of “those nations

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<sup>310</sup> Ibidem.

<sup>311</sup> Ibidem.

<sup>312</sup> This verdict is also important for war law. The Supreme Court established a so-called Yamashita standard (*command responsibility*), providing for the commander’s responsibility for crimes committed under his command.

that excel on the battlefield or that subscribe to the democratic ideology. They belong to every person in the world, victor or vanquished, whatever may be his race, color, or belief." More importantly, "no court, legislature or executive power, not even the most powerful army in the world, may ever annihilate them. This is the universal and indestructible nature of the rights" protected by the constitutional clause in the Fifth Amendment."<sup>313</sup>

Unfortunately – as Justice Murphy admitted – the existence of these rights was not always respected as they were often violated by those "motivated by hatred, aggression or fear." Yet the U.S. legal system protected the rights of individuals, which could not be ignored by any segment of public authority, even the military, except under the most extreme and urgent circumstances. The Justice concluded that the military court had failed to fulfil its obligations in the case in question, among other things, by making wrong accusations, giving too little time for the preparation of a proper defense, depriving the accused of the essential rights guaranteed by the established rules of evidence.

Justice Murphy stressed that building an organized international community based on the recognition of human dignity required that the punishment for war crimes be as free as possible from the "ugly stigma of revenge and vindictiveness" for "[j]ustice must be tempered by compassion, rather than by vengeance."<sup>314</sup> At the same time he stressed the importance of the above, especially where those challenges were first brought before the Court. Otherwise, the harsh revenge would have been hidden under the cloak of false legalism, and "the hatred and cynicism engendered by that retribution will supplant the great ideals to which this nation is dedicated."<sup>315</sup>

Further on, Justice Murphy stated that at a time when emotions were understandably very high, it was difficult to be impassive in a such a case as the one in question. However, that was precisely why that attitude was the most important. The United States had a duty to emphasize its commitment to such fundamental principles as the right to the due process of law and the dignity of the individual. Emotions and a reckless disregard for the rights and freedoms of others could not be given priority.<sup>316</sup>

In that dissenting opinion, human dignity was linked to the due process clause. Furthermore, dignity was linked to features of human rights such as universality and commonness. Justice Murphy emphasized that the right to a due process was a right due to all, irrespective of their nationality, race or origin. As can be seen, the language of dignity was starting to emerge. Another important feature indicated in the opinion and which is characteristic of the modern system of human

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<sup>313</sup> In re Yamashita, 327 U.S. 1 (1946).

<sup>314</sup> Ibidem.

<sup>315</sup> Ibidem.

<sup>316</sup> Ibidem.

rights was the inalienability of rights which, however, as Murphy noted, could be violated, especially by those motivated by hatred. There were also references to the international system for the protection of human rights just created, stressing that human dignity constituted its foundation. It is hard not to agree with Jordan Paust, who, when writing about Justice Murphy's opinion, stressed that he was probably aware of the terms of the Treaty signed in San Francisco.<sup>317</sup>

A similar decision was made by the Supreme Court in the General Masaharu Homma case<sup>318</sup> of 1946. As one of the commanders of the Imperial Army in the Philippines, Homma was considered to be responsible for the organization of the Batista death march. The military tribunal in Manila sentenced him to death, holding him responsible for the crimes committed by his subordinates. General Homma asked the U.S. Supreme Court to hear his case, but his application was rejected.

Justice Murphy delivered a dissenting opinion. He pointed out that the life of a leader of enemy forces defeated on the battlefield would have been taken without the due process of law. And while he admitted that few would protest against that sentence, this precedent might turn against others. Justice Murphy called this a "judicial lynching without due process of law." It was all the worse because it was happening at the birth of "our high hopes of a new world." For that reason, Justice Murphy stressed that the "nation must not perish because, in a natural frenzy of the aftermath of war, it abandoned its central theme of the dignity of the human personality and a due process of law."<sup>319</sup>

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<sup>317</sup> Jordan J. Paust, "Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content," *Howard Law Journal* 27, 1984, p. 151.

<sup>318</sup> Application of Masaharu Homma. *Homma v. Patterson Secretary of War, et al.*, 327 U.S. 759 (1946).

<sup>319</sup> *Ibidem*.

## HUMAN DIGNITY AND AFRICAN AMERICAN

One of the elements that make up the unique history of the American State, law and society is that in many places and contexts, economic inequality overlaps with racial differences. In this way, American society and its government have throughout the entire history of the State faced a doubly-complicated problem. This complexity, taking the form of an accumulation of racial and economic issues, is also evident in the case law of the Supreme Court in the context of the evolution of the idea of dignity. Just as in the nineteenth century these issues were seen in the context of slavery, so in the twentieth century this overlapping of racial and economic issues may be seen in instances of racial discrimination in the workplace.

The earliest reference to human dignity in the context of racial prejudices and discrimination on grounds of skin color was made in 1944 by Supreme Court Justice Murphy in relation to the case *Steele v. Louisville & Nashville Railroad Co.*<sup>320</sup> The case concerned statutory obligations imposed on trade unions operating in railway undertakings. Under the provisions of the Railway Labor Act, the trades union was obliged to represent all employees of the entity regardless of their race. The Supreme Court had to answer the question as to whether the courts, in the event of non-compliance with these provisions, had jurisdiction to protect minorities from the violation of their rights. The complainant (an African-American working on the railways) brought a lawsuit against his employer and a trades union Brotherhood of Locomotive Firemen and Enginemen, which, among other things, stipulated in its statute a ban on taking on African-Americans. However, in both instances, the courts including the Supreme Court of Alabama) recognized the defendants' arguments. The case came before the Supreme Court, which overturned the judgment, finding a breach of the Railway Labor Act.

Justice Murphy drew up a concurring opinion, in which he stressed that the economic discrimination against black workers practiced by both the employer

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<sup>320</sup> *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944).

and the trades unions was a serious constitutional problem which had to be resolved. He found the provisions of the statute to be a manifestation of total disregard for the dignity and wellbeing of citizens of color, requiring condemnation on the grounds of the Constitution. He stressed that the matter could not be examined solely on the basis of, as he wrote, formal legal subtleties, being blind to the evident deprivation of constitutional guarantees of rights, which was obvious in the case under consideration. In his view, the actions of the trade union, whether racially motivated or otherwise discriminatory, were racist. As Justice Murphy stressed, "No statutory interpretation can erase this ugly example of economic cruelty against colored citizens of the United States. Nothing can destroy the fact that the accident of birth has been used as the basis to abuse individual rights."<sup>321</sup>

The Justice made his condemnation clear in the conclusion of his opinion, stressing that the principles of the Constitution express disapproval of economic discrimination against persons on the ground of race, religion or color. A solid democracy must question any attempt of such action. As Justice Murphy noted, the doctrine of racism was too ominous to allow itself to be unresponsive and not to condemn such actions, especially in the light of the Constitution, which finds it repulsive.<sup>322</sup>

It should be stressed that there were important elements in this ruling which played a significant role in subsequent years not only in the case law of the Supreme Court in the context of discrimination ("dignitarian" language in the case of *Brown v. Board of Education*), including discrimination of an economic nature (the case *Goldberg v. Kelly*). While linking dignity with concern for certain social standards became apparent in the 1970s, dignity as a tool for combating racial discrimination in the form of segregation emerged much earlier and was present in Martin Luther King's political and social thinking. The doctrine of American law indicates that the judgment in this case was one of the earlier examples of the Supreme Court's activity against judgments of lower federal courts relating to the fight against racial discrimination.<sup>323</sup> It represented a recognition of the fact that, although dignity is an intrinsic feature of all people, the prevention of its violation is particularly necessary in the case of minorities.<sup>324</sup>

In the same year of 1949, in the case *AFL v. American Sash & Door Co.*,<sup>325</sup> the Supreme Court examined the question of the constitutionality of the amendment

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<sup>321</sup> *Ibidem.*

<sup>322</sup> *Ibidem.*

<sup>323</sup> *The Constitution of the United States of America. Analysis and Interpretation. Analysis of Cases Decided by The Supreme Court of the United States to June 28, 2002 Prepared by the Congressional Research Service Library of Congress*, Killian, Johnny H., and Costello, George A., and Thomas Kenneth R. (eds.), Washington, 2004, p. 1448.

<sup>324</sup> Erin Daly, "Human Dignity in the Roberts Court: A Story of Inchoate Institutions, Autonomous Individuals, and the Reluctant Recognition of a Right," *Ohio Northern University Law Review* 37(2), 2011, p. 393.

<sup>325</sup> *AFL v. American Sash & Door Co.*, 335 U.S. 538 (1949).

to the Arizona Constitution of 1912 introducing the prohibition of discrimination at work. The 1946 amendment provided that no person should be prevented from obtaining or continuing employment by reason of not being a member of a labor organization and prohibited the conclusion of contracts for that purpose. The amendment was challenged by employers and some trades union members. They pointed out that it restricted their civil rights and was incompatible with the due process clause provided in the Fourteenth Amendment.

The Court found the amendment to the Arizona Constitution to be compatible with the federal constitution. It rejected the argument that the amendment deprived the employers, trades unions and trades union members themselves of such civil rights as freedom of expression, assembly or petition. Furthermore, the Court stated that the amendment did not violate the obligations arising from their contracts or deprive them of the rights arising from the Fourteenth Amendment.

Justice Frankfurter drew up a concurring opinion in which he noted in his original style that “[t]he coming of the machine age tended to despoil human personality. It turned men and women into *hands*.” The industrial history of the early nineteenth century showed the powerlessness of individual workers in the pursuit of human dignity in a society so adversely affected by technological progress. The trade union was therefore becoming increasingly necessary, not only as an irreplaceable weapon for the self-defense of workers, but as “an aid to the wellbeing of a society in which work is an expression of life, and not merely the means of earning subsistence.”<sup>326</sup>

The ruling itself was important from the point of view of the then ongoing debate on the function of law and judicial review of law as a social engineering tool.<sup>327</sup> In this context it was pointed out that that the ruling was in line with a series of rulings which were an example of “alternative methods of formulating and perfecting the many and varied processes of social control and social policy-making, so that the law was not “blind” to the specific needs of the times.”<sup>328</sup> As was pointed out, apart from invoking the idea of human dignity, Justice Frankfurter referred to the very content of the Universal Declaration of Human Rights, indicating that no one could be forced to belong to any association. On the one hand, doubts were ex-

<sup>326</sup> *Ibidem*.

<sup>327</sup> In this context, it is worth mentioning the ideas of Roscoe Pound (1870–1964) who claimed that the interpretation of the law should be more pragmatic and take into account the social interest and not only individual interests. Pound saw the law as social engineering tool to support social development and the creation of an industrial society. Among his most important works are: *Criminal Justice in America* of 1929, *Social Control through Law* of 1942, *Introduction to the Philosophy of Law* of 1954 and the 5-volume work *Jurisprudence*. In with a translation of his *Law in books and law in action* of 1910.

<sup>328</sup> Anton-Hermann Chroust, “The Managerial Function of Law,” *Boston University Law Review* 34(3), 1954, pp. 262–3.

pressed because Article 20(2) referred specifically to trade unions,<sup>329</sup> while on the other hand it was shown that it was an expression of support of employees' rights.<sup>330</sup>

It is important to emphasize the fact that the idea of human dignity was referred to not in the dissenting, but in a concurring opinion, i.e., an opinion that was in line with the final verdict but simply one that was argued differently. Human dignity emerged in that context against the background of economic inequalities and discrimination in the workplace and the fight against these phenomena.

One of the most important judgments in the history of the fight against racial discrimination in the United States was delivered in the *Brown v. Board of Education of Topeka* case<sup>331</sup> of 1954. This precedent judgment began the process of racial desegregation, thus partially repealing the *separate but equal* principle laid down in the *Plessy v. Ferguson* ruling. What is more, it not only concerned the education of children, but also initiated a process of moving away from discrimination against African Americans in all other areas of social, political and legal life.<sup>332</sup>

The case arose as an effect of the struggle against racial discrimination carried out by The National Association for the Advancement of Colored People (NAACP).<sup>333</sup> On the initiative of this organization, African-American parents sought to place their children in schools for whites only and submitted relevant applications to that end. Upon refusal of their requests, they decided to take legal action. One complainant was Oliver Brown, an African-American whose daughter Linda Brown, owing due to racial segregation in Kansas, instead of going to the nearest school to her home had to attend a school for blacks in a remote part of town.

Oliver Brown, together with other parents of black children (a total of 13 complainants representing 20 children) filed a lawsuit against the city school board claiming<sup>334</sup> that racial segregation deprived their children of equal protection of rights contained in the Fourteenth Amendment. The case was considered by the federal court which took the side of the defendants and concluded in the judgment

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<sup>329</sup> Egon Schwelb, "The Influence of the Universal Declaration of Human Rights on International and National Law," *American Society of International Law Proceedings* 53, 1959, p. 226.

<sup>330</sup> Quincy Wright, "The United States and Human Rights," *University of Detroit Law Journal* 36(3), 1958-1959, p. 288.

<sup>331</sup> *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

<sup>332</sup> The impact and significance of this judgment are evidenced, for example, by the number of citations in other court judgments. According to the data of the CASETEXT portal (as at 22 August 2018), it was quoted in 2,349 court judgments. For comparison, the judgment of *Plessy v. Ferguson* was quoted only 616 times.

<sup>333</sup> NAACP – one of the civil rights organizations defending the rights of racial minorities, founded in 1909 by W.E.B. Du Bois, Ida Bell Wells-Barnett and Mary White Ovington, among others; the direct cause of its creation was the race riots of 1908 in Springfield, Illinois (Springfield Race Riot).

<sup>334</sup> It is worth mentioning that one of the NAACP lawyers representing parents was Thurgood Marshall who was appointed a Supreme Court Justice in 1967, thus becoming the first African American Supreme Court Justice.

that the rules established in previous cases (*Plessy v. Fergusson* and *Gong Lum v. Rice*<sup>335</sup>) had not been annulled and that they continued to be a valid law maintaining racial segregation in the lower grades of primary schools.<sup>336</sup> Interestingly, however, it admitted that social segregation might have had a negative influence on African-American children. Justice Walter Huxman,<sup>337</sup> who drafted the judgment on behalf of the court noted however that it was very difficult to provide evidence for the above suggestion and stated evasively that the court must be guided by earlier rulings on similar matters. At the same time, however, applying the standard of the *Plessy v. Fergusson* case, he determined that white and African American schools offered a sufficiently equal level of education, provided equally for transport to school and ensured other facilities.<sup>338</sup>

The case came before the Supreme Court and was handled together with four others ones<sup>339</sup> from other States (South Carolina, Virginia, Delaware and the District of Columbia). All matters concerned race-based segregation in State schools. Two points are worth highlighting. First, the Topeka case was exceptional because there was no dispute between the litigants as to the absence of equal conditions. The complainants argued that segregation in itself violated civil rights and the equal protection clause. The Court did not reject this argument and, moreover, as mentioned earlier, held that segregation at school might have had negative consequences for African-American children. Similar important statements were made earlier in the *Gebhart v. Belton* case where the court of the first instance recognized that segregation *per se* resulted in African-Americans receiving a poorer education. It therefore expressed the opinion that the *separate but equal* doctrine should be rejected (these arguments, however, were not considered essential from the legal point of view).<sup>340</sup> However, the Delaware Supreme Court ruled that Afri-

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<sup>335</sup> *Gong Lum v. Rice*, 275 U.S. 78 (1927). In this ruling, the Supreme Court held that a child of Chinese descent, born in the United States and a U.S. citizen, is not deprived of the equal protection of rights under the Fourteenth Amendment, in that he or she is classified by state law as belonging to the colored races, and is therefore assigned to a state school other than one for whites, as long as equal conditions for educational activities are ensured for both types of school.

<sup>336</sup> *Brown v. Board of Education of Topeka*, 98 F. Supp. 797 (D. Kan. 1951).

<sup>337</sup> Walter Huxman (1887–1972) – an American lawyer and politician, from 1936 to 1938, he was the Democratic Party governor of Kansas, after losing the elections in 1938, appointed by President Roosevelt as a justice at the 10th United States District Court in Topeka, where he adjudicated until 1962. For more see *Walter A. Huxman* [online], <https://www.kshs.org/kansapedia/walter-a-huxman/17117> [22.02.2022].

<sup>338</sup> *Brown v. Board of Education of Topeka*, 98 F. Supp. 797 (D. Kan. 1951).

<sup>339</sup> *Briggs v. Elliott* (South Carolina), *Davis v. County School Board of Prince Edward County* (Virginia), *Gebhart v. Belton* (Delaware) and *Bolling v. Sharpe* (District of Columbia).

<sup>340</sup> “I conclude from the testimony that in our Delaware society, State-imposed segregation in education itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated.” *Belton v. Gebhart*, 87 A.2d 862 (1952).

can-American students must be admitted to a State school for whites only since it offered a higher standard of education than that for the blacks.<sup>341</sup>

The Supreme Court was unanimous that racially motivated segregation in State schools violates the constitutional principle of equal protection established by the Fourteenth Amendment. As was noted, “in the field of public education the doctrine of *separate but equal* has no place.” In the rationale underlying the judgment, it was emphasized that separate educational establishments were inherently unequal.<sup>342</sup>

It is a great paradox that in the *ratio decidendi* for the judgment no direct reference was made to the idea of human dignity. However, it is generally recognized in the literature on the subject that the idea of human dignity was at the heart of the judgment, and that the reasoning was written in what is known as dignitary language, and that the ruling itself protects dignitarian interests.<sup>343</sup> In fact, the very language in which the majority opinion was written is very specific. Justice Warren who drafted the opinion could not have drawn on the legal arguments and the existing line of rulings as had been shaped by the *Plessy v. Ferguson* judgment. Therefore, instead of using court precedents, he decided to refer to non-legal arguments and based his opinion largely on the findings of the social sciences, substantiating his argumentation with numerous references to the sociological literature (recalling the views of Gunnar Myrdall contained in his “American Dilemma”<sup>344</sup>). The *ratio* was written in simple language that every American

<sup>341</sup> “We have reviewed in detail the facts bearing upon the comparative educational facilities afforded by the two schools. We have found that the physical plant of Howard-Carver, including the sites, is substantially unequal to that of Claymont; that the classes in physical education at Howard are so large as probably to jeopardize satisfactory education; and that the plaintiff Belton is subjected to unequal and discriminatory treatment in respect of travel. We think that these findings compel the conclusion that the plaintiff Belton is not afforded educational facilities substantially equal to those afforded white pupils at Claymont, and has suffered injury therefrom.” *Gebhart v. Belton*, 91 A.2d 137 (Del. 1952).

<sup>342</sup> *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

<sup>343</sup> Maxime Goodman stated that in the *Brown v. Board of Education of Topeka* case ruling, the Supreme Court protected the dignity of black school children; Maxine Goodman, “Human Dignity in Supreme Court Constitutional Jurisprudence,” *Nebraska Law Review* 84(3), 2003, p. 762. Similarly, Justice Brennan argued, writing about the shared values that justices must protect as justices strive for social equality, *inter alia*, in William J. Brennan, “Equality Principle in American Constitutional Jurisprudence,” *Ohio State Law Journal* 48(4), 1987, p. 921; *idem*, “Color-Blind, Creed-Blind, Status-Blind, Sex-Blind,” *Human Rights* 14(1), 1987, p. 31. Agreeing with Justice Brennan, Jordan J. Paust also considered that the idea of dignity was at the heart of the reasoning behind this judgment; Jordan J. Paust, *op. cit.*, p. 172. Christopher Bracey, on the other hand, stressed that this judgment placed *the issue of dignity* at the forefront of the movement for racial justice; Christopher Bracey, “Dignity in Race Jurisprudence,” *University of Pennsylvania Journal of Constitutional Law* 7(3), 2005, p. 696. Naomi Rao also stressed the importance of the ruling in terms of human dignity. In the context of understanding human *dignity as recognition*, she pointed out that it was in this judgment that the Supreme Court stressed the importance of racial equality; Naomi Rao, “Three Concepts of Human Dignity in Constitutional Law,” *Notre Dame Law Review* 86(1), 2011, p. 263.

<sup>344</sup> Gunnar Myrdall, *American Dilemma*, New York – London, 1944. Myrdall’s considerations on the essence and interpretation of the American Creed are extremely intriguing. Myrdall wrote that

could understand. What is also very important, the verdict of the Supreme Court Justices was unanimous, there was no dissenting opinion that might have been used by supporters of racial segregation in the future. The procedure adopted for issuing the judgment itself is also worth closer consideration. The first hearing took place between 9 and 11 December 1952 and the next hearing was between 7 and 9 December 1953, a year after the first one, while the judgment itself was not announced until 17 May 1954. Probably both the second hearing and the relatively long (for American practice) trial time was a deliberate action by Justice Warren who used the time to reach a consensus of all Justices.

It is emphasized in the literature on the civil rights movement and the fight against racial segregation that the composition of the court itself was extremely important because, contrary to the unanimity finally achieved, the Justices had very different views on segregation. Some were not against the very idea of racial segregation (Justice Reed and Justice Clark). Justices Frankfurter and Jackson were more concerned about the difficulties involved in enforcing a radical decision. Justices Black, Douglas, Burton and Minton, in turn, were prepared to reject the segregation standard set in 1893 right from the start. In view of these differences within the court itself, the person of Justice Warren, the Chief Justice of the court, should be considered the key figure. He was appointed by President Dwight D. Eisenhower to replace the former Chief Justice of the Supreme Court, Justice Vinson who died in September 1953.<sup>345</sup>

First of all, the Court considered the historical arguments referring to the circumstances of the adoption and introduction of the Fourteenth Amendment to be insufficient. It also assessed in a similar way the arguments referring to the then existing practices of racial segregation. It stressed that both their supporters and opponents were able to present a number of arguments in support of their own position. Therefore, despite the fact that those issues were relevant to the problem, they could not provide conclusive arguments. The Court held that supporters of the widest possible application of the reconstructive amendments sought to remove any legal differences between – as the Fourteenth Amendment stated – “all persons born or naturalized in the United States,” while the opponents of that view,

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“The American Negroes (...) actually believe, as do the whites, that the Creed is ruling America,” and that the components of that creed are “of the essential dignity of the individual human being, of the fundamental equality of all people and of certain inalienable rights to freedom, justice and a fair opportunity;” Gunnar Myrdall, *op. cit.*, p. 4.

<sup>345</sup> *Inter alia* in Bernard Schwartz, *A History of Supreme Court*, New York – Oxford, 1993, pp. 291–5; Jeffrey D. Hockett, *A Storm over This Court: Law, Politics, and Supreme Court Decision Making in Brown v. Board of Education*, Charlottesville, 2013, pp. 36–58; Gerald T. Dunne, “Justice Hugo Black and the Brown Decision: A Speculative Inquiry,” *Missouri Law Review* 39(1), 1974, pp. 1–26; John David Fassett, et al., “Supreme Court Law Clerks’ Recollections of Brown v. Board of Education,” *St. John’s Law Review* 78(3), 2004, pp. 515–67.

were seeking to limit “both the letter and the spirit” of post-War amendments as much as possible and to apply them as narrowly as possible.<sup>346</sup>

Similarly, Justice Warren found references to the historical experience of public education during the Reconstruction period insufficient to resolve the dispute. He recalled that in the second half of the nineteenth century, universal education in the American South practically did not exist owing to the absence of funding from state taxes for that purpose. As a result, the education of white children was mainly provided by private schools, whereas the education of black children was virtually non-existent, and practically all African-Americans were illiterate. The Justice pointed out that in fact “any education of Negroes was forbidden by law in some states.” In the North, too, universal education faced many problems. Although its level was higher, it was far from the standards of the twentieth century. As Justice Warren wrote: “[t]he curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states” and compulsory education up to a certain age was practically unknown. That is why, as Justice Warren concluded, it was not surprising that, in the history of the validity and application of the Fourteenth Amendment, there had been so few issues relating to general public education so far.<sup>347</sup>

These arguments enabled Justice Warren to reject the arguments of the originalists and demonstrate that both at the time of the drafting of the Constitution and when the Fourteenth Amendment was adopted, the social circumstances were completely different (education was for white children only, and only for the richer part of society, and mainly private).<sup>348</sup> In 1954, on the other hand, education was universal and public, and above all, it was offered to members of different races. The line of argumentation adopted by Justice Warren made this judgment widely regarded in American legal science as an example of reasoning in which the concept of *judicial activism* played a key role and was fully adopted to adjudicating.<sup>349</sup>

Referring to the judicial practice to date, Justice Warren pointed out that in the first judgments, the Fourteenth Amendment was interpreted by the Supreme Court as prohibiting any discrimination against Afro-Americans imposed by public authorities.<sup>350</sup> On the other hand, in the cases that had so far been decided on with

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<sup>346</sup> *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

<sup>347</sup> *Ibidem*.

<sup>348</sup> Only as a supplement and to confirm the validity of Justice Warren’s reasoning, it is worth recalling the difficulties encountered by Thomas Jefferson in implementing the idea of a public library and university in his home country of Virginia, for more see Michał Urbańczyk, “Tomasz Jefferson...,” pp. 27–44.

<sup>349</sup> In addition to subsequent precedent cases such as *Roe v. Wade*, *Bush v. Gore*, *Citizens United v. Federal Election Commission*, *Obergefell v. Hodges*. It is interesting to note that in some cases of this type of case, arguments based on the idea of human dignity played an important role.

<sup>350</sup> What Justice Warren had in mind were the matters covered by the Slaughter-House Cases of 1873. Compare essay entitled *Black Codes. Years of Regression*.

respect to the application of the doctrine *separate but equal* in the field of education, the only inequalities noted, if any, were found to exist as a result of the fact that certain benefits enjoyed by white pupils were denied to black pupils with the same qualifications.<sup>351</sup> However, in none of these cases was the relevance of the very essence of the rule or its legitimacy and constitutionality questioned. Apart from that, Justice Warren observed that “elsewhere in the North segregation in public education has persisted in some communities until recent years. It is apparent that such segregation has long been a nationwide problem, not merely one of sectional concern.”<sup>352</sup>

Justice Warren concluded that, for these reasons, the focus should not only have been on the issue of levelling out the differences in schools. A much more important issue was the impact of racial segregation on education itself. He stressed that it was necessary to reflect on public education in the light of its current development and the role it played in the life of the whole nation, saying that “[t]oday, education is perhaps the most important function of state and local governments” and then went on to describe in great detail the function of education in relation to the individual and American society as a whole.<sup>353</sup> At the same time, he recognized there was no rational way to expect anyone to succeed in life if they had not received education at the right level. This opportunity that the state has committed itself to provide, is a right that must be exercised on equal terms for all.<sup>354</sup>

In view of the role of education in the life of the State, society and the citizen, Justice Warren confirmed that “[s]egregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental develop-

<sup>351</sup> It is worth recalling at least some basic information on: *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337; *Sipuel v. Oklahoma*, 332 U.S. 631; *Sweatt v. Painter*, 339 U.S. 629; *McLaurin v. Oklahoma State Regents*, 339 U.S. 637.

<sup>352</sup> But elsewhere in the North segregation in public education has persisted in some communities until recent years. It is apparent that such segregation has long been a nationwide problem, not merely one of sectional, local concern. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

<sup>353</sup> “Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.” *Ibidem*.

<sup>354</sup> *Ibidem*.

ment of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.”<sup>355</sup>

In conclusion, Justice Warren said that there was no room for the doctrine of *separate but equal* in public education. Separate educational establishments are unequal by nature. Therefore, owing to racial segregation, the complainants were deprived of the equal protection of rights guaranteed by the Fourteenth Amendment.

The literature on the subject emphasizes that this decision is one of the most revolutionary opinions issued by the Supreme Court. In the political context, it meant that the Court granted itself the right to end racial segregation without the consent of Congress. The dominance of non-legal arguments rather than legal ones used by the justices of the federal court which issued the contested judgment to justify the final decision were met with similar criticism. However, those issues belong to the more general question of the scope of the Supreme Court’s concept of judicial activism. The reasoning of Justice Warren, the President of the Court, was criticized by theorists as well as practitioners of law. For example, B. Learned Hand<sup>356</sup> whom the Supreme Court most frequently quotes,<sup>357</sup> pointed out that the Supreme Court had assumed the role of the “third legislative chamber,”<sup>358</sup> while Herbert Wechsler,<sup>359</sup> Director of the American Law Institute argued that it was impossible to justify the ruling on principles of neutrality.<sup>360</sup>

Despite legal doubts, the judgment played a significant role in the social, legal and political life of the United States. It constituted the legal foundation of the civil rights movement and was also of considerable political significance, extending beyond the borders of the United States.<sup>361</sup> It initiated a process of racial desegregation, although that process was slow and progressed with great difficulty. Justice

<sup>355</sup> *Ibidem*.

<sup>356</sup> Billings Learned Hand (1872 – August 18, 1961) was an American judge and judicial philosopher. He served on the United States District Court for the Southern District of New York and later the United States Court of Appeals for the Second Circuit.

<sup>357</sup> *Inter alia* in Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism*, New York, 2004, p. 200, and *Great American Judges: An Encyclopedia*, vol. 1, John R. Vile (ed.), Santa Barbara, 2003, p. 319.

<sup>358</sup> Learned Hand, *The Bill of Rights, (Oliver Wendell Holmes Lecture)*, Cambridge, 1958, p. 55.

<sup>359</sup> Herbert Wechsler (1909 –2000) was a legal scholar and former director of the American Law Institute (ALI). He is most widely known for his constitutional law scholarship and for the creation of the Model Penal Code. The Journal of Legal Studies has identified Wechsler as one of the most cited legal scholars of the twentieth century.

<sup>360</sup> For more on the debate among lawyers on that ruling see i.e., Michael J. Klarman, “Windsor and Brown: Marriage Equality and Racial Equality,” *Harvard Law Review* 127(1), 2013, pp. 127–60; Pamela S. Karlan, “What Can Brown® Do for You? Neutral Principles and the Struggle over Equal Protection Clause,” *Duke Law Review* 58(6), 2009, pp. 1049–69.

<sup>361</sup> Mary L. Dudziak, *Brown as a Cold War Case* [online], <http://www.scotusblog.com/2010/02/the-global-impact-of-brown-v-board-of-education/> [22.02.2022]; Paweł Laidler, “The International Aspect of the Brown Case and the National Aspect of Communism: Foreign Policy and the U.S. Supreme

Jackson's fears about the possibility of enforcing the law proved to be prophetic. The judgment did not really end segregation but was the beginning of a legislative battle for desegregation. And yet, the Supreme Court did not specify any way of ending racial segregation in schools, which was done in the earlier case of *Brown v. Board of Education of Topeka II*<sup>362</sup> of 1955.

The importance of this case for the recent history of the USA is beyond doubt. However, it is worth devoting some time to explaining its significance in the context of the history of the idea of human dignity in the USA. First, it should be stressed that this judgment represents a breakthrough for the issue of racial discrimination, one of the most crucial violations of human dignity. Second, it should be pointed out that Justice Warren focused on the negative impact of segregation on the education of Afro-Americans. Thus, education became recognized as a prerequisite for the full realization of one of the fundamental natural rights, i.e., the right to the pursuit of happiness and self-fulfillment in personal and social life. This is all the more important because American culture puts strong emphasis on individual autonomy on the one hand and the achievement of success in life on the other. Achieving both is not possible without proper education, which is justified by arguments based on *dignitary language*. Therefore, the idea of dignity plays a dual role here. On the one hand, it promotes the autonomy of the individual as a kind of concept of autonomy and sovereignty,<sup>363</sup> but on the other hand, it justifies the need for proper education which subsequently enables one to take advantage of that autonomy, leading to the exercise of the individual rights and freedoms (as may also be seen in the philosophical thinking of Martha Nussbaum). Thus, the impact of human dignity can be seen on two levels – primary and secondary. Primarily, it supports autonomy, and secondarily, by supporting the creation of conditions for the full exercise of that autonomy. Everyone has a right to equal conditions for education, and it is a duty of the State to create opportunities for this right to be enjoyed. As has already been emphasized, the ruling in the *Brown v. Board of Education of Topeka* was the beginning of the fight against racial segregation. The adoption of the Citizens' Rights Act by Congress on 9 September 1957 was an important legislative step in this area. It was the first federal law on civil rights since 1875. Its purpose was to show the support of the federal authorities

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Court during the First Years of the Cold War," in *U.S. Foreign Policy: Theory, Mechanisms, and Practice*, Mania, Andrzej, and Laidler, Paweł, and Wordliczek, Łukasz (eds.), Kraków, 2008, pp. 389–400.

<sup>362</sup> *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955). The literature on the subject emphasizes that the Supreme Court used this decision to delegate responsibility for implementing the judgment on the first case to the administrative authorities. A few decades later, many observers claimed that those efforts failed or produced only short-term results. In addition, a number of unexpected phenomena, such as "white flight" led to the re-segregation of state schools in many areas, often in situations where there had previously been no problem of racial discrimination.

<sup>363</sup> This is apparent in a number of other Supreme Court rulings, but also, for example, in Alan Gewirth's human rights philosophy and the thinking of Ronald Dworkin.

for measures aimed at ensuring racial equality. The Act concerned issues relating to elections and the exercise of the right to vote and underlaid the appointment of the U.S. Commission on Civil Rights. The task of this institution was to investigate, report on and make recommendations for further action on civil rights issues in the United States. Another Act of this kind was passed on 6 May 1960. It established federal control of State polling stations and introduced penalties for anyone who obstructed the voter registration procedure. The aim of that Act was to counteract discriminatory practices occurring mainly in the states of the South, as a result of which African-Americans and Latin Americans were effectively deprived of their electoral and other related civil rights. Furthermore, its provisions extended the period of operation of the Commission on Civil Rights (previously limited to two years). The next Citizens' Rights Act was passed in 1964.<sup>364</sup> Its regulations prohibited discrimination on the grounds of race, color, religion, sex and ethnic origin in public places.

It was precisely the violation of the provisions of this civil rights Act that was the subject of the judgment in the *Heart of Atlanta Motel, Inc. v. United States* case.<sup>365</sup> Section 201(a) of Title II provided that everyone had the right to the full and equal benefit of goods, services, buildings, facilities, privileges, advantages and accommodation in every hotel establishment. Discrimination or segregation of customers by race, color, religion or ethnic origin was directly prohibited. Meanwhile, the Heart of Atlanta Motel refused to serve black customers. Moreton Rolleston, the owner of the motel, challenged the Act, pointing out that by enacting such legislation, Congress deprived entrepreneurs of their basic right to choose their customers. Additionally, he pointed to the violation of the Fifth and Thirteenth Amendments. Regarding the latter, he claimed that he was subject to involuntary servitude, being obliged by law to rent part of his property (motel rooms) to people he had not chosen. Invoking the Fifth Amendment, on the other hand, he argued that the federal legislation deprived him in practice of the possibility of exercising his rights in his capacity as the owner, which was tantamount to the deprivation of property or freedom without a due process which that Amendment prohibited. However, the court did not accept his arguments and Rolleston appealed to the Supreme Court.

The Supreme Court had to answer the general question of whether Congress, by enacting the provisions of the Civil Rights Act, deprived entrepreneurs of their rights, and at the same time exceeded its rights under the Commerce Clause contained in the Constitution.<sup>366</sup> The court unanimously confirmed the constitutionality of the provisions of the Civil Rights Act, rejecting the complainants' claims.

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<sup>364</sup> Civil Rights Act 1964 [online], <https://www.archives.gov/milestone-documents/civil-rights-act> [22.02.2022].

<sup>365</sup> *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

<sup>366</sup> "The American standards of commercial law have their constitutional sources in Article I § 8 (3rd sentence) of the Constitution, called the Commerce Clause. It confers exclusive power

The court's opinion was drawn up by Justice Clark. He first addressed the allegations of violation of the Fifth and Thirteenth Amendments. He categorically rejected the allegation of a breach of the latter. He stressed that it was difficult to imagine that this particular Amendment could be used to limit legislation on civil rights as it was directly linked to the abolition of slavery and the negative political and social consequences that it entailed. Furthermore, the Court stated that forcing Rolleston to offer motel rooms to African Americans was not the same as "a taking of property without just compensation," which was constitutionally forbidden.<sup>367</sup>

With regard to the basic plea, the Court's reasoning went in two directions: focusing on the objectives of the Act and on the substance of the commerce clause itself. Regarding the latter, the Court stressed that the meaning of that clause had already been established 140 years before in the judgment in the *Gibbons v. Ogden* case<sup>368</sup> of 1824. It was undisputed that the commerce clause conferred powers on the federal authorities to issue regulations governing business activities if they were of an inter-state nature. In the disputed matter, the complainant was a tourist motel operator. The court established that most of his clients were travelers from other states, and the motel itself was located on two inter-state motorways. In practice, the only real question to be answered was whether the commerce clause complied with paragraph 5 of the Fourteenth Amendment (under relevant legislation Congress had the right to enforce the provisions of this paragraph) and whether it was in compliance with the content of the equal protection clause itself.<sup>369</sup>

It is interesting to examine the purpose of the Civil Rights Act. As Justice Clark stressed, it was not the first Act in the history of the legislative activity of Congress which, apart from its specific objectives, was intended to counteract moral wrongs. The disputed provisions of the Act regulated phenomena which Congress considered to be problematic not only from a business point of view, but above all as a moral problem. The Justice emphasized that the problems faced by African Americans when travelling between states were not only destructive in the context of business activity.<sup>370</sup> They were also "a moral and social wrongs" stem-

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over interstate, trade on Congress. The powers of Congress form the basis for the entire federal and State legislation in the sphere of broadly understood commercial law," in Roman Tokarczyk, *Prawo amerykańskie*, Kraków, 2003, p. 172.

<sup>367</sup> *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

<sup>368</sup> *Gibbons v. Ogden*, 22 U.S. 1 (1824).

<sup>369</sup> *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

<sup>370</sup> How important the problem of racial segregation in the context of inter-state travel was in the context of inter-state travel is shown, for example, by the initiative of Victor Hugo Green, who since 1937 published regularly a guide entitled *The Negro Motorist Green Book*. In this book he indicated places where African Americans could count on service, shopping and overnight stays during the journey. The guide was published until 1962 – its digital copies can be viewed on the New York

ming from discrimination, additionally related to racial inequalities rooted in the times of slavery.<sup>371</sup>

In the *ratio decidendi* of the judgment, reference was made to the opinion of the Senate Commerce Committee which stressed that the fundamental objective of the provisions of the Act was to ensure respect for personal dignity. Obviously, a refusal to grant equal access to public establishments, in this case hotel services, was a clear violation of such dignity. The Supreme Court stressed that the operators of such establishments did not have the right to choose the persons whom they would wish to serve.<sup>372</sup>

The Court even recalled the content of President Kennedy's 1963 call, which, in justifying the need for a new citizens' rights Act, stressed that the Preamble to the Constitution promoted the general welfare, which also implied the elimination of discrimination on the grounds of race, color, religion or ethnic origin.<sup>373</sup>

Justice Goldberg expressed a similar view in his concurring opinion, pointing out that the primary objective of the Civil Rights Act was not economic issues, but the vindication of human dignity. He also quoted extensively the rationale behind the bill from the Senate committee, which was mentioned earlier, where it was emphasized that "[d]iscrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color. It is equally the inability to explain to a child that regardless of education, civility, courtesy, and morality he will be denied the right to enjoy equal treatment, even though he be a citizen of the United States and may well be called upon to lay down his life to assure this Nation continues."<sup>374</sup>

The judgment in that case played an important role in the process of racial desegregation and the fight against racial discrimination in the context of the exercise of freedom of movement, so important for the Americans. Summarizing the judgments in the two cases referred to above, we may say that the ruling in the *Brown v. Board of Education of Topeka* was a breakthrough. Although it made no direct reference to the idea of human dignity, the language in which it was written shows clearly that it was founded on the protection of the fundamental value, which is the equal and priceless value of every human being. The very idea of segregating people by skin color was also called into question. However, in the *Heart of Atlanta Motel, Inc. v. United States* case, the fact that both Congress and the Supreme Court recognized human dignity as a fundamental value justifying

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Public Library's website: *The Green Book* [online], <https://digitalcollections.nypl.org/collections/the-green-book#/?tab=about&scroll=10> [22.02.2022].

<sup>371</sup> *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

<sup>372</sup> *Ibidem*.

<sup>373</sup> *Ibidem*.

<sup>374</sup> *Ibidem*.

the fight against racial discrimination was emphasized strongly. The protection of human dignity became more important than freedom and property. It also outweighed the freedom of the individual in the area of commerce and services, and it outweighed the freedom to dispose of one's property and the freedom to conduct business. After all, entrepreneurs were denied the "right" to choose their clients or customers at their own discretion, not being governed by government regulations. The protection of human dignity, even if implemented indirectly and without direct reference to this idea, became an important task facing the entire legal system. In both judgments, it was regarded as an important element from the point of view of the whole of society, and in such important areas of life as education and business. The normative nature of dignity in the fight against segregation and racial discrimination was most clearly expressed in Martin Luther King's political and legal doctrine, where the idea of human dignity played a central role.<sup>375</sup>

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<sup>375</sup> For more see Michał Urbańczyk, "Przeciw segregacji rasowej. Idea nonviolence i jej filozoficzne korzenie w myśli społecznej Martina Luthera Kinga," *Filo-Sofija* 15(29), 2015, pp. 177–91; idem, "Idea godności człowieka w amerykańskiej kulturze i doktrynie prawnej," in *Miscellanea Historico-luridica* 15(2), 2016, pp. 193–213.

## HUMAN DIGNITY AND JUSTICE WILLIAM J. BRENNAN<sup>376</sup>

Justice William J. Brennan Jr. is commonly regarded as the most influential Justice of the twentieth century, and his views have had a ground-breaking impact on the direction of Supreme Court case law.<sup>377</sup> Hence, when dealing with the history and evolution of the perception of the idea of human dignity as it can be observed in

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<sup>376</sup> Among numerous biographies and books devoted to Justice William Brennan, the following are worth mentioning: Seth Stern, Stephen Wermiel, *Justice Brennan: Liberal Champion* (Boston, 2010) which is particularly special because Justice Brennan permitted Wermiel to examine his personal archives, and also allowed him to carry out more than 60 hours of interviews conducted over six years. However, the book which should be regarded as the most representative of Justice Brennan's views is *Reason and Passion: Justice Brennan's Enduring Influence*, Rosenkranz, E. Joshua, and Schwartz, Bernard (eds.) (New York – London, 1997). It is a collection of commentaries authored by a number of eminent personalities of American jurisprudence on Brennan's views. Other monographs that are worthy of note include: Roger Goldman, David Gallen, *Justice William J. Brennan, Jr.: Freedom First* (New York, 1994) which consists of 12 essays published at an earlier date, written largely by American lawyers, and whose opinions document the exceptionally influential position of Justice Brennan among the justices of the Supreme Court; Hunter R. Clark, *Justice Brennan: The Great Conciliator* (New Jersey, 1995) – the author of this monograph is at the same time the author of the biography of Justice Thurgood Marshall; Peter H. Irons, *Brennan vs. Rehnquist: The Battle for the Constitution* (New York, 1994) presents two eminent adversaries: Brennan and Rehnquist and their biographies and views are depicted against the background of their discourse. Another recommended reading is a book by Frank I. Michelman, *Brennan and Democracy* (Princeton, 2005) in which Brennan's views are discussed in the context of the idea of constitutional democracy; judicial activism has been also evaluated through the same prism; Kim Isaac Eilser, *A Justice for All: William J. Brennan, Jr., and the Decisions That Transformed America* (New York, 1993) – focuses on the characteristics of those judicial cases in which Brennan drafted majority opinions, and which became the cornerstone of the judicial decisions delivered by the Supreme Court. The earliest one of these was David E. Marion, *The Jurisprudence of Justice William J. Brennan, Jr.: The Law and Politics of 'Libertarian Dignity'* (Lanham, 1997) gives an overview of Brennan's opinion, explaining his defense of Libertarian dignity and illustrating the profound political and constitutional influence of Brennan's opinion on public discourse and government policy; *The Conscience of the Court: Selected Opinions of Justice William J. Brennan JR. on Freedom and Equality*, Sepinuck, Stephen L. (ed.) (Carbondale, 1999), W. Wat Hopkins, *Mr. Justice Brennan and Freedom of Expression* (Westport, 1991).

<sup>377</sup> For instance, Deborah A. Roy, "Justice William J. Brennan, Jr., James Wilson, and the Pursuit of Equality and Liberty," *Cleveland State Law Review* 61(3), 2013, p. 665.

the decisions of the Supreme Court, Justice Brennan's role cannot be overestimated. He himself had often stressed that the fundamental value at the center of American law was the constitutional idea of human dignity.<sup>378</sup> The obvious fact of his commitment to the protection of this idea in the American legal system and its promotion is beyond doubt and has been widely emphasized in American legal science.<sup>379</sup> William A. Parent focused his deliberations on the idea of human dignity on the views of Justice Brennan and wrote about Brennan's commitment "the age old dream for recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family."<sup>380</sup> Similarly, when describing Justice Brennan, Stephen J. Wermiel wrote about a "legendary judicial career."<sup>381</sup>

Justice Brennan was not the first Justice to refer to the idea of human dignity and its place in the context of the American constitutional order (others included Justice Murphy, Douglas or Warren for example). In later years, there were Justices who anchored their opinions largely in the idea of human dignity (like Justice Stevens, Breyer or Kennedy), it was undoubtedly Justice Brennan who deserves to be considered as having the greatest impact on promoting the importance of human dignity in the American system of human rights. His views are fundamental to the American perception of human dignity and the concepts that have developed in the American system. Before he became a Supreme Court Justice, the references he made to the idea of human dignity were only sporadic and did not form any coherent doctrine. It was only the years 1956–1990, when Brennan sat on the Supreme Court, which were undeniably one of the most important periods for the development of the dignitary doctrine. After he had retired, his successors could draw on certain rules that were already formulated and developed, thus continuing the development of the doctrine of dignity. This is why it is necessary to present his views here.

Justice Brennan's political and legal thought may be reconstructed from two types of sources. First, Brennan referred to the idea of human dignity in the judicial decisions delivered by the Supreme Court. In them, human dignity was an essential part of the understanding of the constitutional clauses and guarantees of civil liberties. In this way the idea of human dignity became part of the core of the modern American system of constitutional values.<sup>382</sup> Second, it may be reconstructed from his articles and speeches, which he often delivered at universities,

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<sup>378</sup> Bernard Schwartz, "How Justice Brennan Changed America," in *Reason and Passion...*, p. 31 and p. 41.

<sup>379</sup> See Deborah A. Roy, *op. cit.*, p. 667.

<sup>380</sup> W. A. Parent, "Constitutional Commands of Human Dignity: A Bicentennial Essay in Honor of Mr. Justice William J. Brennan, Jr.," *Canadian Journal of Law and Jurisprudence* 5(2), 1992, p. 256.

<sup>381</sup> Stephen J. Wermiel, "Gazing into the Future: The 100-Year Legacy of Justice William J. Brennan," *The Journal of Appellate Practice and Process* 13(2), 2012, p. 173.

<sup>382</sup> *Idem*, "Law and Human Dignity: The Judicial Soul of Justice Brennan," *William and Mary Bill of Rights Journal* 7(1), 1998, p. 230.

at prestigious scholarly conferences or when invited by American law corporations. The idea of human dignity was a universal theme which brought together the legal issues he raised, and in the context of which he tried to interpret the constitutional regulations. It is pointed out in the legal doctrine that Brennan had a significant role in expanding the use of the concept of human dignity in American jurisprudence.<sup>383</sup> This chapter focuses primarily on the second type of sources, as Justice Brennan's opinions have already been discussed in detail in other parts of this book. Furthermore, the author believes that it was Brennan's public activities, his speeches, lectures and readings that were at the heart of his political and legal thinking, as it could not always be properly reflected in the rigid framework of Supreme Court rulings. Brennan's views expressed in the context of his out-of-court activities are a clear justification for the assertion that the idea of dignity was for Brennan a basic signpost not only for the activities of the courts, but for the entire political system and American society within it. These views could be arranged according to certain problems in the context of which he spoke of human dignity. First of all, it was about the place of human dignity in the American political and legal tradition. Second, it was about its role in the entire U.S. political system. Third, was its place, role and functions in the context of the Constitution and the Bill of Rights. Finally, it was his influence of human dignity on the understanding of individual civil rights.

The question of the place of human dignity in the American political and legal tradition was obvious to Brennan. In this context, he spoke of dignity even before becoming a member of the Supreme Court. In a speech made in Boston in 1954, he stressed that there was no doubt that all the guarantees of justice and the right to a due process as well as simple human dignity that shaped America had to be preserved.<sup>384</sup> According to Brennan, the American Constitution and the Bill of Rights embodied "the aspiration to social justice, brotherhood, and human dignity that brought this nation into being." With the Declaration of Independence, the United States "solemnly committed the United States to be a country where the dignity and rights of all persons were equal before all authority."<sup>385</sup> He was convinced that his views on this issue corresponded to those of the Founding Fathers. His assessment of James Madison's proposal for the additional protection of freedom of expression, made during the work on the Constitution, may serve as an example of such thinking. Even if unsuccessful, this attempt to add to the Constitution an equivalent of the First Amendment in order to put restrictions on state authorities in matters concerning freedom of conscience, freedom of speech and the freedom of the press, was, according to Brennan, a clear sign of Madison's

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<sup>383</sup> *Ibidem*.

<sup>384</sup> Quotation [from:] *ibidem*, pp. 229–30.

<sup>385</sup> William J. Brennan, "The Constitution of the United States: Contemporary Ratification," *The Guild Practitioner* 43, 1986, p. 1.

concern for the full protection of these freedoms. This, in turn, was undoubtedly the result of the conviction that “the suppression of individuality was the deadly enemy of the spirit, making a mockery of the dignity of man.”<sup>386</sup>

Of dignity as a value deeply rooted in the American tradition he also spoke in the context of the role of criminal procedure. He admitted that the traditional function of the procedural regulations lay in the protection of the rights of the accused and that this “noble tradition” had been forgotten by too many people, especially by some in the legal profession, and he expressed a concern that in the course of criminal proceedings “many of our most precious guarantees of liberty and human dignity” were under threat.<sup>387</sup> He then pointed to legal education aimed at respecting individual rights as an important tool to counteract this situation.

Of course, Brennan presented his own vision of the American political-legal tradition.<sup>388</sup> His progressive views often stood in contradiction to the attitudes of more conservative Justices whose views were manifested in their choice of traditionalist interpretations of the Constitution (such as originalism or textualism). Brennan opposed this. He believed that what the constitutional foundations meant in the past could no longer be a measure of “the vision of our times,” just as his contemporary understanding of the foundations of the Constitution might not be conclusive for future generations. He saw the permanence of the American tradition in something completely different. He observed, in one of his lectures, that there should be an unchanging commitment and dedication to the “constitutional ideal of libertarian dignity protected through law”<sup>389</sup> for all generations of Americans, and stressed that this was a vision that had guided people throughout history, although the exact principles with which people protected fundamental human dignity evolved over time in response to both changes in social conditions and the evolution of our concept of human dignity.<sup>390</sup>

Describing the American political system, Brennan devoted much attention to proving the thesis that it was founded on the desire to protect human dignity. He believed that both freedom and the dignity of the individual were the concern at the dawn of the American State, which was possible owing to social and econom-

<sup>386</sup> *Idem*, “Bill of Rights and the States,” *New York University Law Review* 36(4), 1961, p. 771. The article was delivered as part of the James Madison lectures at the University of New York on 15 February 1961.

<sup>387</sup> *Idem*, “The Criminal Prosecution: Sporting Event or Quest for Truth?,” *Washington University Law Quarterly* 3(June), 1963, p. 281. The article is based on a lecture given during the Tyrrell Williams Memorial Lectureship at the University of Washington on 13 March 1963.

<sup>388</sup> It may be interesting to note that in the 1959 judgment, the majority of justices under Brennan’s leadership rejected the arguments contained in a separate opinion of Justice Black, who based his argument on a reference to the idea of the dignity of a human being (*Abbate v. United States*, 359 U.S. 187 (1959)).

<sup>389</sup> William J. Brennan, “Constitutional Adjudication,” *Notre Dame Lawyer* 40(6), 1965, p. 569. The article was delivered as part of Cardinal O’Hara’s lectures at Notre Dame University on 21 April 1965.

<sup>390</sup> *Idem*, “The Constitution...,” p. 9.

ic relations and the social structure itself. Brennan emphasized that in the early days of American statehood, freedom and dignity found significant protection in real estate (ownership) law. As he claimed: “[i]n a society still largely agricultural, a piece of land provided men with the means of economic independence, the necessary precondition of political independence and expression.”<sup>391</sup> He also stressed the inseparable link between the permanence of power based on freedom and the need to respect human dignity. He believed that if such power is to survive, “those who govern must recognize human dignity and accept whatever limitations on their power are necessary to preserve that dignity and the air of freedom which is our proudest heritage.”<sup>392</sup> As he himself admitted, he absolutely believed that for American society “the quest for the freedom, the dignity and the rights of men will never end.”<sup>393</sup> This important role of human dignity was reflected most fully in the political system created. Brennan believed that the entire system is founded on “the dignity and inviolability of the individual soul.”<sup>394</sup>

Similarly, Brennan attached great importance to the idea of human dignity in relation to the Constitution itself, which he considered to be a “sublime oration on the dignity of man, a bold commitment by a people to the ideal of libertarian dignity protected through law.”<sup>395</sup> In particular, it was the Bill of Rights that expressed the “bold commitment by a people to the ideal of dignity protected through law.”<sup>396</sup> Brennan repeatedly presented this conviction about human dignity as the foundation of the Bill of Rights and on various other occasions. He stressed that the American Bill of Rights, which guaranteed, among other things, freedom of speech, religion, assembly and the press, together with other important means of protection against arbitrary or repressive government activities, constituted both a noble expression of human dignity and its protection.<sup>397</sup> Constitutional provisions, supplemented in particular by reconstruction amendments, were described poetically by Brennan as “a sparkling vision of the supremacy of the human dignity of every individual.”<sup>398</sup>

<sup>391</sup> Idem, “Centennial Address,” *George Washington Law Review* 43(2), 1965–1966, p. 191. The article is based on a speech given on the occasion of the 100th anniversary of the School of Law of the University of Washington on 12 October 1965.

<sup>392</sup> Ibidem, p. 192. The same statement was repeated more than 20 years later in a speech in honour of Ruggero J. Aldisert, a justice of the Federal Court of Appeal (3rd Circuit). When praising the justice, Brennan stressed that Aldisert was particularly interested in the protection of human dignity and freedom. William J. Brennan, “Tribute to the Honorable Ruggero J. Aldisert,” *University of Pittsburgh Law Review* 48(1), 1986–1987, p. XIV.

<sup>393</sup> William J. Brennan, “How Goes the Supreme Court?,” *Mercer Law Review* 36(3), 1984–1985, p. 794.

<sup>394</sup> „[...] a system of government based upon the dignity and inviolability of the individual soul” – quotation [from:] Stephen J. Wermiel, *Law and Human Dignity...*, p. 230.

<sup>395</sup> William J. Brennan, “The Constitution...,” p. 8.

<sup>396</sup> Idem, “My Life on the Court,” in *Reason and Passion...*, p. 18.

<sup>397</sup> Idem, “Why Have a Bill of Rights?,” *Oxford Journal of Legal Studies* 9(4), 1989, p. 425.

<sup>398</sup> Idem, “My Encounters with the Constitution,” *Judges’ Journal* 26(3), 1987, p. 10.

Just as the political system was built with respect for, among other things, human dignity, the same respect must be shown by the entire legal system. Brennan stressed many times the need to keep the issue of human dignity at the heart of the law, especially in an era of an increasing complexity of laws and government regulations.<sup>399</sup> In his opinion the recognition of human dignity as one of the key values that were to be protected by the law could not be limited to the creation of proper law(s) or the application of the law in an appropriate manner by the authorities in general. The judicial authority had an equally if not more important role to play in protecting the individual dignity of each person. As Brennan stressed, “[b]oth state and federal courts, therefore, must be committed to the constitutional ideal of liberty and individual dignity protected through law. This free society cannot tolerate a default by either federal or state judges in that sacred trust.”<sup>400</sup> Brennan was of course aware that his concept of human dignity would not always predominate nor his views and opinions always prevail. He believed, however, that despite, as he called them, sporadic deviations the decisions of the Supreme Court proved the continued interpretation and application of the Constitution in order to carry out “its great design, to foster and protect the freedom, the dignity and the rights of all citizens.”<sup>401</sup>

Brennan regarded the protection of civil rights as a fundamental function of the idea of human dignity. It was in this idea that he saw the fullest reflection of the complex system of the protection of human rights and freedoms in practice and in every aspect of the way in which it functioned. He believed that in the process of applying the law, human dignity was to be a signpost constantly reminding us of the need to safeguard individual rights, especially in times which, together with ideological, cultural, political and technological changes, brought about changes at the level of constitutional protection. He claimed that such a signpost was indispensable when concern was expressed that certain constitutional changes were taking place too quickly and were going too far. He saw political and legal crises as a real threat to the protection of human dignity. These threats manifested themselves in the increasingly frequent conflicts between the powers of the individual and the regulations of the executive. Brennan emphasized the need for vigilance on the part of the judiciary in order to protect the American idea of human dignity.<sup>402</sup>

He considered certain rights contained in the Bill of Rights as fundamental for the protection of human dignity. These individual rights were at the same time rights limiting the power of the authorities. The problem, however, as he repeat-

<sup>399</sup> *Idem*, “Centennial...,” p. 195.

<sup>400</sup> *Idem*, “How Goes...,” p. 785.

<sup>401</sup> *Ibidem*.

<sup>402</sup> In this context Justice Brennan used the expression “the constitutional ideal of libertarian dignity protected through law.” *Idem*, “Some Aspects of...,” p. 960. This article is the text of a speech given before the Conference of the Presidents of the Federal Courts, held in New York on 7 August 1964.

edly pointed out, was the exercise of these rights not only with regard to the federal but also to the state authorities. Among them, Brennan identified cruel and unusual punishments that should be prohibited, the right of the accused to remain silent, the right to an attorney at law during criminal proceedings, the right to confront witnesses, the institution of the jury, and the prohibition of the use of evidence obtained in an unlawful manner.<sup>403</sup>

Brennan emphasized the fact that human consciousness was developing, along with social development, views on the scope and content of civil rights could also develop. He considered this to be a natural thing. Just as he saw the exceptional importance of the English *Magna Carta*, he stressed that its provisions today would not constitute a complete catalogue of universally recognized civil rights and liberties. However, even those civil rights that are only recognized today are firmly rooted in the spirit of *Magna Carta*. When it was acknowledged that an individual had certain powers against an authority and that there existed an area of personal autonomy and dignity in which no authority had the right to interfere, it was only a matter of time before the full range of civil rights and freedoms were recognized, precisely in the service of the same ideal.<sup>404</sup>

One of the key issues in which the idea of human dignity played a significant role was the fight against racial discrimination. In this context, Brennan stressed the key role of the equal protection clause, the proper application of which should prevent the State from discriminating against citizens on the basis of their skin color. Brennan stressed that "equal protection of rights means equal protection today, whatever else the phrase may have meant at other times." He believed that the Supreme Court could not escape its responsibility to finally define and apply this guarantee.<sup>405</sup> Such an application of this clause was therefore necessary, in Brennan's opinion, to protect the constitutional ideal of libertarian dignity.<sup>406</sup>

In the provisions of the Fourteenth Amendment, especially as regards the equal protection of rights, Brennan saw a key element of the modern legal system which had a considerable impact on American society. He claimed that it was a legal instrument of the egalitarian revolution, whose main task was to protect every American from interference by public authorities that was contrary to national conceptions of human dignity and liberty.<sup>407</sup>

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<sup>403</sup> Idem, "The Constitution...", p. 122.

<sup>404</sup> Idem, "Rededication Address: The American Bar Association's Memorial to the *Magna Carta*," *Loyola of Los Angeles Law Review* 19(1), 1986, p. 57. This was a speech delivered on 13 July 1985 in Runnymede, England, on the occasion of the rededication of a monument in honor of the *Magna Carta* founded by the American Bar Association (ABA).

<sup>405</sup> Idem, "Some Judicial Aspects of Federalism," *Revista Juridica de la Universidad de Puerto Rico* 52(2), 1983, p. 8.

<sup>406</sup> Ibidem, p. 12.

<sup>407</sup> William J. Brennan, "Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights," *New York University Law Review* 61(4), 1986, p. 536.

To Brennan, one of the key elements in the development of U.S. human rights doctrine was the day when the Supreme Court recognized that every person had a sphere of personal autonomy and dignity in which neither the state authorities nor the federal government had the right to interfere. This naturally led to the Fourteenth Amendment becoming a tool to protect “a broad range of civil rights and liberties.”<sup>408</sup> In other words, he believed that its provisions could function as an essential tool with which the citizens of the United States might shape the society in which they lived. The aim of this was to create a community that genuinely guarded the dignity and worth of the individual as its supreme values.<sup>409</sup>

Brennan believed that the equal treatment of all by the law was a cornerstone of the American concept of justice. However, it will remain so only as long as all courts implement these rules in their case law practice. This can only be guaranteed by “lawyers’ ceaseless pursuit of the constitutional ideals of human dignity.” Brennan saw this constant process as the adaptation of institutions and legal regulations to constantly changing social and political conditions, both in individual states and internationally. These processes must, however, be guided by the above-mentioned ideals of human dignity that will continue to “inspire and guide us, because they are entrenched in our Constitution.”<sup>410</sup>

Another important issue in Brennan’s statements was the broad field of the application of criminal law where there occurred numerous abuses owing to a lack of respect for human dignity. Brennan tried to counteract this not only with regard to the decisions delivered by the Supreme Court. In Newark, he devoted to human dignity a speech entitled *The Essential Dignity of Man*. Describing the rights of detainees and convicts, he stressed that all procedural guarantees for defendants had their origin in a firm image of a free society and were fundamental to the protection of human dignity. That was why human dignity had become more valued than ever before, and the role of every court was to protect dignity as an invaluable value and importance of the individual.<sup>411</sup> He also proposed changes (to be implemented) in legal education, that should focus to a greater degree on the aspect of respect for the individual, precisely because of the dignity of the individual.<sup>412</sup> Brennan was critical of a number of practices that existed regarding this issue in America.

Justice Brennan argued that there was no better test for a society than how it treats crime suspects. Since imprisonment and deprivation of liberty “strips a man of his dignity,” it is essential that the rules of fairness be strictly observed in court

<sup>408</sup> Idem, “Color-Blind...,” p. 30.

<sup>409</sup> Ibidem, p. 32.

<sup>410</sup> William J. Brennan, “Equality Principle...,” p. 924. These remarks were made during the inauguration of the new semester at the Ohio State University College of Law on 24 May 1987.

<sup>411</sup> Stephen J. Wermiel, “Law and Human...,” p. 231.

<sup>412</sup> William J. Brennan, “Centennial...,” p. 192.

and that guilt be proven beyond any doubt.<sup>413</sup> Justice Brennan emphasized strongly that depriving people of their dignity through an unjust conviction is one of the worst types of injustice. He believed that the law and the courts demonstrated their attachment to the American constitutional vision of human dignity and therefore, even after a conviction, it was required that dignity be violated only to the extent appropriate to the crime, and never through “wanton infliction of pain or deprivation.”<sup>414</sup>

A particular aspect of the importance and role of human dignity was Brennan’s attitude to the death penalty of which he was a committed opponent. He consistently expressed his opposition on all matters relating to the death penalty. Before his retirement, he had drawn up dissenting opinions on this issue. As he repeatedly said, even the worst murder did not release the State from the constitutionally imposed restrictions on the limits to the destruction of human dignity. He believed that punishment should not be so severe as to completely and irreversibly degrade the very essence of human dignity, and all sentences should develop and not degrade human dignity.<sup>415</sup> Brennan was a great opponent of capital punishment, consistently taking the view that it contradicted both the clause prohibiting cruel and unusual punishments and the idea of human dignity underlying the Eighth Amendment. It was this theme that he chose as the leitmotif of his lecture, which he gave in 1986 as part of a series of the extremely prestigious Oliver Wendell Holmes lectures. In it, he stressed that the real purpose of all instruments of torture was that they treated “members of the human race as nonhumans,” as objects to be injured and then rejected. According to Brennan, such beliefs were the reasons for abandoning public executions, which directly indicated that a human being was losing his or her qualities as a person, becoming merely an object in a public performance.<sup>416</sup>

Brennan stressed that all kinds of penalties involving mutilation and torture were not unconstitutional simply because they caused pain. They would not become acceptable even if the convicted person had been given anesthesia so that he would feel no pain. They were unconstitutional because they were incompatible with the basic premise of the Eighth Amendment, according to which the most despicable offender remained a human being with a common human dignity. Punishment is *cruel and unusual* if it is not compatible with human dignity. The deliberate killing of a human being by a State by its very nature means the complete denial of the humanity of the executed person and thus violates the provisions of the Eighth Amendment.<sup>417</sup>

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<sup>413</sup> *Idem*, “My Encounters...,” p. 58.

<sup>414</sup> *Ibidem*, p. 59.

<sup>415</sup> William J. Brennan, “In Defense of Dissents,” *Hastings Law Journal* 50(4), 1998–1999, p. 680.

<sup>416</sup> *Idem*, “Constitutional Adjudication and the Death Penalty: A View from the Court,” *Harvard Law Review* 100(2), 1986–1987, p. 330.

<sup>417</sup> *Ibidem*.

He concluded his lecture with a fiery confession that he believed that one day a majority of the Supreme Court would accept the fact that, when the State punishes with death, it denies the humanity and dignity of the victim and violates the prohibition on cruel and unusual punishments. This day – according to Brennan – “will be a great day for our country, for it will be a great day for our Constitution.”<sup>418</sup>

Since Brennan spoke and wrote about the constitutional vision of human dignity contained in the American Constitution, a correct interpretation of its provisions taking into account the idea of human dignity was also important. In this context, Brennan called for a proper understanding of the term “liberty” contained in the Fourteenth Amendment. He insisted that eventually concepts of liberty that recognized the fact that prisoners and persons on parole retain some vestiges of human dignity did appear, and therefore penal provisions and parole procedures must take into account the principle of respect for prisoners’ dignity. This recognition must have certain practical effects, if only in the form of additional responsibilities for the authorities and changes to procedures; for example, there must be specific forms of notification and interrogation before confinement in isolation.<sup>419</sup>

According to Justice Brennan, respect for human dignity, which was the result of the new concepts of “liberty” and “property” appearing in the context of the new interpretations of the Fourteenth Amendment, also became apparent in other branches of law, for example in labor law (he pointed to the rights of public sector employees) or administrative law (especially in the sphere of public education).<sup>420</sup> Brennan saw one of the most important contexts where references to the idea of human dignity should be made in the wider sphere of economic and social rights. He stressed that American society suffered from serious shortcomings in this area, as he noted that hundreds of thousands of Americans were living their lives without any real prospect of the dignity and autonomy that real estate ownership could offer. Protecting the human dignity of such citizens required a significantly modified view of the proper relationship between the individual and the State.<sup>421</sup> Here, Brennan saw a huge task facing the Supreme Court as well. He believed that every authority – the executive, the legislative, but also the judiciary – must recognize human dignity and accept the constitutional limitations of power enshrined in the Constitution by its creators precisely in order to preserve that dignity and atmosphere of liberty, which, according to Brennan, represented America’s “proudest heritage.”<sup>422</sup>

<sup>418</sup> *Ibidem*, p. 331.

<sup>419</sup> William J. Brennan, “Guardians of Our Liberties – State Courts No Less than Federal,” *Judges’ Journal* 15(4), 1976, p. 99. Brennan made this speech before the members of the New Jersey State Bar Association in McAfee, New Jersey.

<sup>420</sup> *Idem*, “State Constitutions and the Protection of Individual Rights,” *Harvard Law Review* 90(3), 1977, p. 492.

<sup>421</sup> *Idem*, “My Encounters...,” p. 11.

<sup>422</sup> *Idem*, “The Constitution...,” p. 10.

Thus, the idea of human dignity is not only at the heart of the entire political system, but is also a fundamental value that the law must protect. This task should be a basic guideline for the application of the law. In the context of the development of the awareness of American society and the corresponding process of changing laws, Brennan considered the key challenge to be precisely “the capacity of our constitutional structure to foster and protect the freedom, the dignity and the rights of all persons” living in the United States.<sup>423</sup> He claimed that the changes that coexisted in both areas – awareness and law – went far beyond criminal procedure. An excellent example of this, although not the only one, was, in his opinion, the economic and social rights referred to above. The recognition of new property law for those who rely on government benefits, confirmed “the essential dignity of the least fortunate among us” demanding that the government treat those dependent on its benefits for their survival with consistency, decency and honesty.<sup>424</sup>

A different case was the earlier recognition of the *one person, one vote* rule, as a constitutional principle, which made the promise of self-government and the political independence of the individual made in the Constitution and the Declaration of Independence a reality. According to Brennan, this recognition of equality also in regard to elections, which are the most important political procedures for democracy, was also a confirmation of the idea of the essential dignity of every citizen. Brennan assessed changes in the sphere of women’s rights in a similar way. The recognition of full equality for women provided a guarantee of equal human dignity regardless of gender.<sup>425</sup> Brennan also saw the broad recognition of the rights of expression and freedom of conscience as (a) confirmation in many ways of the American vision of human dignity.<sup>426</sup> He stressed that “[t]he constitutional vision of human dignity rejects the possibility of political orthodoxy imposed from above; it respects the right of each individual to form and to expresses political judgments, however far they may deviate from the mainstream and however unsettling they might be to the powerful or the elite.”<sup>427</sup>

Brennan also saw the idea of human dignity as an instrument of legal education. He noted with satisfaction the changes in the school curriculum aimed at raising the awareness of future lawyers of the legal disadvantages of people with lesser means. That is why, he claimed, lecturers should place greater emphasis

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<sup>423</sup> Idem, “My Encounters...,” p. 11.

<sup>424</sup> Ibidem, p. 59. As he wrote further, this did not occur without complications: “After all, a legislative majority initially decides to create governmental entitlements; the Constitution’s Due Process Clause merely provides protection for entitlements thought necessary by society imposing the devil’s bargain of bartering away human dignity in exchange for human sustenance” – ibidem.

<sup>425</sup> William J. Brennan, “The Constitution...,” p. 13.

<sup>426</sup> Idem, “My Encounters...,” p. 59.

<sup>427</sup> Idem, “The Constitution...,” p. 13.

on making law students aware of such important ideas as the dignity of the individual and impartiality and justice arising from the rule of law.<sup>428</sup>

There are two other areas that were important for Brennan in the context of his vision of human dignity. However, he did not use the term human dignity in his rulings on these issues. It was rather about the individual's right to compensation from public authorities for damage caused by officials, for example in cases such as *Bivens v. Six Unknown Named Agents*, *Davis v. Hassman* and *Monell v. Department of Social Services*.<sup>429</sup> As is pointed out in the literature, the recognition of the rights of each citizen capable of seeking individual compensation from the authorities for the damage caused to them was for Brennan an important part of the dignity of the individual in a democratic society.<sup>430</sup>

At this point, it is worthwhile to attempt to summarize in a few words Brennan's political and legal doctrine. It was not an abstract freedom or formal equality that he placed at the heart of the American political and legal tradition, but the true human being, precisely by emphasizing the importance of human dignity. And yet, he did not place these ideas in opposition to one other, but rather treated them as complementary, as often evidenced by his use of the phrase "the ideal of libertarian dignity protected through law," or when he emphasized that the ideals of human dignity were freedom and equality. His concept of human dignity was characteristic of the American tradition which included care for human dignity, especially in the context of individual autonomy, or the need to respect and protect it in exceptional situations in the individual's relationship with the authorities. However, an important innovation that Brennan brought to the case law of the Supreme Court, and consequently to the entire legal system, was the focus on man as an individual facing the institutions of the State, a relationship in which such an individual automatically stands at a disadvantage owing to the predominance of power. This inequality is further exacerbated by the position of the individual who is, for example, accused of having committed a crime, or who is a convicted prisoner, or a poor person who, in order to ensure his or her minimum subsistence, is forced to ask for State aid. It might also be a man standing at the threshold of death, who, in order to preserve the rest of his or her self-respect, is forced to ask for State aid to speed up the inevitable end of his or her life, and many other situations which depart from the standard position of the happy citizen.

There was also criticism of Brennan's legal thinking and it can be found in legal science. Opponents of abortion criticized him and claimed that as a defender of human dignity he ignored the dignity of the unborn. However, Brennan stood up for the dignity of pregnant women considering a possible abortion. At the same time, he stressed that the fetus was not a person in the constitutional sense of

<sup>428</sup> *Idem*, "Centennial..." p. 192.

<sup>429</sup> Stephen J. Wermiel, "Law and Human..." p. 235.

<sup>430</sup> *Ibidem*.

the law.<sup>431</sup> The other sphere in which Brennan's concept of human dignity were criticized was freedom of speech. Supporters of the prosecution of hate speech claimed, contrary to Brennan, that the First Amendment, by allowing such statements was not a tool to protect human dignity.<sup>432</sup> For Brennan, however, the ability to speak freely was at the heart of his idea of human dignity.<sup>433</sup>

The judicial opinions that Brennan drew up were an expression of his belief in the freedom of expression concerning human dignity formulated in legal language. His views expressed in other forms are a manifestation of a beautiful philosophy of love for a human being as an individual and a unique product of nature. They reflect the political conviction of the need to ensure man's autonomy not only before the law, but also in real situations that the law often cannot predict. In such situations, it is precisely the awareness that every human being has a priceless, equal, inherent value that must serve as the first and final instance in the resolution of any controversy. In one of his rulings (*United States v. Stanley*), Brennan pointed out that soldiers should not be obliged to defend the Constitution if it is indifferent to their human dignity.<sup>434</sup>

It is also worth noting that Brennan's views on these issues were not only extremely specific but also unchanging. He was passionate about presenting his views throughout the whole period of his public life (activity), and he stressed exactly the same thing in the 1960s and two decades later – at the end of the 1980s. However, as he said many times, he had “no intention of implying that in the last quarter of a century we have reached a comprehensive definition of the constitutional idea of human dignity,” because the requirements of the idea of human dignity will never stop evolving.<sup>435</sup> It seems that Brennan's vision of the idea of human dignity was similar to the European concept of it, at least because it made this idea serve as the foundation of the entire system of rights and freedoms, of the objection to the death penalty and the particular emphasis on basing economic and social rights on the idea of human dignity.

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<sup>431</sup> *Ibidem*, p. 236.

<sup>432</sup> *Ibidem*, pp. 236–7.

<sup>433</sup> *Ibidem*, p. 237.

<sup>434</sup> *Ibidem*, p. 234.

<sup>435</sup> William J. Brennan, “The Constitution...,” p. 14.

## HUMAN DIGNITY AND SOCIAL WELFARE

Both in the literature and in American legal and political thinking (i.e., Justice Brennan) it is believed that human dignity also played an essential role in the sphere of social policy and social welfare. One of the crucial judgments here was the one in the *Goldberg v. Kelly*<sup>436</sup> case of 1970. The case was the result of the withdrawal of social benefits for subjects suspected of extortion. The complainant was John Kelly who acted on behalf of the people of New York who were receiving social security benefits under federal<sup>437</sup> and state<sup>438</sup> programs and questioned the constitutionality of the procedures for ending the payment of social benefits. The regulations in force allowed this to happen without first hearing the recipients of the benefit. The complainants pointed to the lack of any regulations concerning the appearance of the recipient in person before the official who decided about the withdrawal of the benefit, the lack of the possibility of submitting oral evidence or the lack of an opportunity to submit it, and the impossibility of confronting the witnesses and evidence gathered by the officials, testifying against the recipients of social assistance.

The federal court agreed with Kelly's position, but the New York administration appealed against this judgment. During the trial, it was argued that the procedure in force was sufficient. Under that procedure, the office was obliged to inform recipients of the expected date of the end of benefits payment and the reasons for the decision in writing seven days before they were ended. In such a situation, recipients of the benefits had the right to apply to a competent official for recon-

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<sup>436</sup> *Goldberg v. Kelly*, 397 U.S. 254 (1970).

<sup>437</sup> Aid to Families with Dependent Children; see more Robert H. Mugge, *Aid to Families with Dependent Children: Initial Findings of the 1961 Report on the Characteristics of Recipients* [online], <https://www.ssa.gov/policy/docs/ssb/v26n3/v26n3p3.pdf> [20.02.2022].

<sup>438</sup> The Home Relief Program of the New York State; see more Howard Chernick, Cordelia Reimers, "Welfare Reform and New York City's Low-Income Population," *Federal Reserve Bank of New York Economic Policy Review* 7(2), 2001, pp. 83–97.

sideration of the matter by a senior social service official, and to submit a written statement in support of their position that the benefits should not be withdrawn.

The Supreme Court had to answer the question of whether ending the payment of social welfare benefits without hearing the beneficiary violated the procedural aspect of the due process clause of the Fourteenth Amendment.

By a majority of 5–3<sup>439</sup> the Court upheld the judgment of the court of lower instance and challenged the existing procedures as being incompatible with the Fourteenth Amendment. Justice Brennan drew up the grounds for the judgment, and he considered it to be the most important for the protection of human dignity when he was a Justice of the Supreme Court. Although human dignity appeared in the content of the *ratio decidendi* only incidentally, the literature on the subject (as in the case of *Brown v. Board of Education of Topeka*'s ruling) points to this judgment because of the dignified language in which it was written and the dignity interests of the individual it protected. In fact, the content of the judgment makes it one of those judgments which show the impact of the general idea of human dignity on detailed legal regulations.

Justice Brennan considered it necessary to strike a balance between two values in the assessment of this case. On the one hand, there was a legitimate need to protect public funds, as the representatives of New York had argued. On the other hand, it was necessary to take into account the needs of an individual who was in an exceptional financial situation and to ensure that he or she was not unduly deprived of social assistance. However, as he noted, the protection of public funds could not justify depriving the beneficiary of access to the ordinary rules of a due process. No matter in what circumstances the payment of benefits would have been terminated (in this case, the beneficiaries were suspected of an extortion of benefits), the basic principles of a due process require, for example, that the beneficiary should be heard before the payment of social benefits is discontinued, and the mere right of appeal against a decision made, which had already taken effect, was not a sufficient guarantee.<sup>440</sup>

Justice Brennan redefined welfare benefits to justify his position. He considered that such benefits were of statutory entitlements for persons eligible to receive them. He stressed that it would have been more appropriate and realistic to treat social benefits as “property” rather than as a “gratuity.” In doing so, Brennan extended the definition of ownership to social security benefits, extending to them at the same time the rights of the individual in relation to ownership. This also meant a departure from the distinction between “rights,” and “privileges” present in the case law of the Supreme Court until that date. In support of his position, Brennan argued that a number of contemporary entitlements took forms that did

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<sup>439</sup> Following the resignation of Justice Abe Fortas, the post of Supreme Court Justice remained vacant at that time.

<sup>440</sup> *Goldberg v. Kelly*, 397 U.S. 254 (1970).

not fit into the traditional division derived from English common law. An example was the right to establish trades unions and other employee rights, managerial contracts or the special rights to which managers were entitled (e.g., stock options), pensions and disability pensions.<sup>441</sup>

Justice Brennan went on to say that the examples of entitlements which he mentioned, which in practice were “sources of security” for individuals, could not be regarded as “luxuries or gratuities.” For those who received them, they were necessary, fully deserved and in no case were a form of charity. This definition of social benefits meant that they were to be paid in accordance with the procedures that applied to other property contracts, i.e., protecting the parties against the unjustified termination of the legal relationship.<sup>442</sup>

At the same time, Justice Brennan drew attention to the actual consequences of the discontinuation of social benefits. He stressed that social care provided funds for the purchase of necessary food, clothing, housing and medical care, while withholding assistance pending resolution of the dispute concerning the legitimacy of further payment might have deprived the entitled recipient of the means to live. Since such a person usually had no other sources of subsistence, his or her situation became “immediately desperate.”<sup>443</sup>

In this context, Justice Brennan referred to American history when he wrote that “[f]rom its founding the Nation’s basic commitment has been to foster the dignity and well-being of all persons within its borders.” However, experience to date had changed the perception of how to achieve these goals. According to Justice Brennan, practice showed that what contributed to poverty was often beyond the control of those affected by poverty. This observation – which goes across the American tradition – had a significant impact on the development of the modern American social assistance system. Welfare, by providing the means necessary to guarantee a minimum level of subsistence, could guarantee the poor the same opportunities that were available to others. Thus, when they emerge from poverty, they may, like others, make an important statement regarding the part in the life of the American nation. At the same time, social welfare protects against the societal malaise that may result from a sense of unjustified frustration and insecurity in wider society.<sup>444</sup>

The key statement in this case was a recognition that social assistance was therefore not simply a charity, but a means of serving the objectives already identified in the Preamble to the Constitution, that were “to promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.”<sup>445</sup>

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<sup>441</sup> *Ibidem.*

<sup>442</sup> *Ibidem.*

<sup>443</sup> *Ibidem.*

<sup>444</sup> *Ibidem.*

<sup>445</sup> The excerpt which Justice Brennan referred to reads: “(...) promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.”

In this way, somewhat pathetically, Justice Brennan described State aid as a tool for achieving the fundamental objectives of the Constitution. Hence, the same public interest that spoke for the transfer of social welfare funds spoke for this to be done within interruption for those who qualify for it. Thus, hearing the beneficiary before the potential withdrawal of the payment of benefits was essential for the achievement of the intended objectives of social assistance.<sup>446</sup>

Furthermore, Justice Brennan set out the rules that in his view had to be met in order for the procedure to be considered as complying with the due process clause. He considered that the beneficiary's hearing did not have to take the form of a judicial or even quasi-judicial trial. It would have been sufficient to create the opportunity to present the premises that prompted the withdrawal of the payment of social benefits. In this way, it would protect the recipient of benefits from being unduly deprived of those funds. The fact that there was no need to formalize this stage of the procedure stemmed from the fact that both social welfare bodies and beneficiaries would have been interested in a relatively quick solution to the issue of their eligibility for assistance. Justice Brennan stressed that there was no need for any procedural requirements beyond the absolute basis of a due process to be imposed on state or federal social welfare offices (as Justice Brennan put it – in this evolving field of law). Pointing to such rules established in previous rulings, he recalled, first, the right to “be heard,”<sup>447</sup> and, second, the requirement that the hearing be held in a “timely and adequate notice.”<sup>448</sup> In the context of the withdrawal of social benefits on suspicion of fraud, those being the rules required the recipient to be informed properly and in a timely manner of the reasons for termination. Furthermore, the recipient of benefits required a real opportunity to defend himself or herself by confronting hostile witnesses and presenting arguments and evidence orally.

Here too, many aspects attest to Justice Brennan's “dignitarian” approach to this issue. He considered it crucial that the hearing should be adapted to the circumstances and the capacity of the beneficiaries. It would not have been enough for such a person to be able to make his or her views known to the decision maker only in writing or through another official. The recipient of social benefits must be given the opportunity to make his or her views known orally. As Justice Brennan pointed out, written explanations are an unrealistic requirement for the majority of beneficiaries who, owing to a lack of educational attainment, are not able to make their views known effectively and, at the same time, cannot obtain professional assistance. It would have been sufficient to carry out an informal

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<sup>446</sup> *Goldberg v. Kelly*, 397 U.S. 254 (1970).

<sup>447</sup> The fundamental requisite of due process of law is the opportunity to be heard. *Grannis v. Ordean*, 234 U.S. 385, (1914).

<sup>448</sup> It is an opportunity which must be granted at a meaningful time and in a meaningful manner. *Armstrong v. Manzo*, 380 U.S. 545, (1965).

investigation; there was no need to require a detailed procedure or a specific way of presenting evidence. However, it had to be guaranteed that beneficiaries could confront and question witnesses brought forward by the office. Beneficiaries who were suspected of benefit fraud had to be given a realistic opportunity to defend themselves. Brennan also considered it important that a social welfare beneficiary had the right to have an attorney, not necessarily a professional lawyer. Such a person might help to present the disputed circumstances in an orderly manner and generally safeguard the interests of the social welfare recipient. Finally, the decision taken by the official must be based solely on legal provisions and evidence presented at the official hearing.<sup>449</sup>

Justice Brennan's judgment provided significant protection of the interests of the poorest people, who were often also the least educated. In practice, it meant that a person held a property interest in the social benefits granted to him or her. The rules which Justice Brennan pointed out had the real objective of protecting the dignity of the most disadvantaged. It must, however, be remembered that the ruling provoked discussion and disputes over whether the rules established had not unduly extended the scope of social assistance.<sup>450</sup>

The detailed rules for the provision of social assistance were repeatedly examined by the Supreme Court in subsequent cases, among others in the *Dandridge v. Williams* of 1970,<sup>451</sup> the *United States v. Kras* of 1973,<sup>452</sup> or *Harris v. McRae* of 1980.<sup>453</sup> These rulings, however, went in the opposite direction, i.e., restrictions on social assistance, and therefore did not refer to the economic and social aspects of human dignity.

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<sup>449</sup> *Goldberg v. Kelly*, 397 U.S. 254 (1970).

<sup>450</sup> Some of its critics even said that this was the main cause of the collapse of the New York budget in 1975.

<sup>451</sup> *Dandridge v. Williams*, 397 U.S. 471 (1970).

<sup>452</sup> *United States v. Kras*, 409 U.S. 434 (1973).

<sup>453</sup> *Harris v. McRae*, 448 U.S. 297 (1980).

## CHAPTER 14

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# HUMAN DIGNITY AND ABORTION<sup>454</sup>

In the American political and legal tradition, the protection of private life is implemented in the form of the right to privacy. This is one of the civil rights that does not appear directly in the Constitution or the Bill of Rights, but has been interpreted by the Supreme Court. In determining the essence, scope and detailed aspects of this right, the idea of human dignity played an important role. It was reflected in the case law of the Supreme Court primarily in two fundamental contexts: the right to terminate a pregnancy and the legalizing of same-sex unions.

The right to terminate a pregnancy is one of the most contentious issues in ethical, legal and political terms. For the American experience, the key judgment on this issue was in the *Roe v. Wade* case<sup>455</sup> in which, however, the idea of human dignity did not appear directly, although some U.S. constitutionalists point to indirect traces of its influence. Direct references to human dignity, however, may be found in the subsequent landmark rulings of the Supreme Court on this issue.<sup>456</sup>

The recognition of the legality of same-sex unions and their equality with traditional marriage in terms of the rights and duties of spouses is one of the elements in the fight for recognition of the civil rights of gays and lesbians. Some of the most important issues in this context include the decriminalization of homosexual relations, recognition in the law of these relationships and subsequently same-sex marriages, adoption of children by homosexual couples, military service of LGBTs, legislation against discrimination on grounds of sexual orientation, and gender identity regulations. In this area too, the idea of human dignity has had a strong impact on the legal regulations.

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<sup>454</sup> This essay does not take into account the recent Supreme Court ruling on abortion, as its text went to print before *Dobbs v. Jackson Women's Health Organization*, 597 U.S. \_\_\_ (2022).

<sup>455</sup> *Roe v. Wade*, 410 U.S. 113 (1973)

<sup>456</sup> The history of the dispute over the right to terminate a pregnancy in the form of a commentary on the most important events and legislative acts is contained in Melody Rose, *Abortion: A Documentary and Reference Guide: A Documentary and Reference Guide*, Westport, 2008, p. 258.

In 1992 the Supreme Court ruled in the *Planned Parenthood*<sup>457</sup> of Southeastern Pa. v. Casey case.<sup>458</sup> It examined the constitutionality of certain provisions of the Pennsylvania State Abortion Control Act of 1982, amended in 1988 and 1989. These provisions imposed certain obligations on a woman who wished to terminate her pregnancy. In the case of a minor, consent for an abortion was required from at least one parent or legal guardian. A married woman was required to prove that she had informed her husband about her intention to have an abortion. Once a decision on an abortion was made, a 24-hour period was required from the time of the decision to undergo the procedure, during which doctors were required to inform the woman of any potential negative impact on her health. In addition, additional reporting and record-keeping obligations were introduced for abortion clinics.<sup>459</sup>

These provisions were challenged by, among others, five abortion clinics, supported by the Planned Parenthood of Southeastern Pennsylvania Association, which questioned their constitutionality. The U.S. District Court for the Eastern District of Pennsylvania agreed with the applicants' position, but the Court of Appeals for the Third Circuit overturned the judgment and upheld all regulations except the obligation to inform the husband. The case went to the Supreme Court, which had to answer not only the question of whether the regulations that were challenged were constitutional, but also to decide whether to uphold the rules contained in the ruling in the case of *Roe v. Wade*, which constituted a precedent.

The Supreme Court confirmed by a majority of 5–4 the constitutionality of the right to terminate a pregnancy, but at the same time ruled on the constitutionality of the disputed regulations, except for the obligation to inform the husband. How exceptional this opinion was, may be seen by the fact that it was drawn up by a majority consisting of three Justices (Justices O'Connor, Kennedy and Souter) who agreed with it fully, while the other two who belonged to the majority agreed with it only partially, having submitted partially concurring and partially dissenting opinions (Justice Stevens and Justice Blackmun). Justices Rehnquist and Scalia lodged a dissenting opinion, rejecting the precedent of *Roe v. Wade*, and were joined by the other Justices (White and Thomas). It should be stressed that, in the majority opinion, the reference to the normative nature of human dignity played an extremely important role.

First of all, the Supreme Court stressed that the constitutional protection of a woman's decision to terminate her pregnancy stemmed from the due process clause contained in the Fourteenth Amendment. The Justices also explained how

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<sup>457</sup> Planned Parenthood – an American non-governmental organization for women's reproductive rights.

<sup>458</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>459</sup> 18 PA Cons Stat § 3206 (2017) or: 2017 Pennsylvania Consolidated Statutes Title 18 – CRIMES AND OFFENSES Chapter 32 – Abortion Section 3206 – Parental consent.

they interpreted the Fourteenth Amendment, indicating that it did not only refer to procedures but also to substantive law. Therefore, the fundamental rights contained in the concept of liberty were protected by the federal constitution against interference by the legislation of individual states. The best-known substantive liberties protected by the Fourteenth Amendment are those declared in the Bill of Rights. However, they are not the only rights protected by the Fourteenth Amendment which is poetically described as a promise of the Constitution that there is an area of personal liberty to which the government has no access. An example of such liberties is the freedom to marry.<sup>460</sup>

The Justices then highlighted the relationship between their moral convictions and their role as Justices. It was pointed out that the fact that some of the Justices considered abortion to be an insult to the most fundamental moral principles could not have affected the decisions of the Court, because it is the Justice's duty to define *the liberty of all*, and not to impose his or her own moral code.

The Court further emphasized, based on previous judgments, that the law provides constitutional protection for personal decisions concerning marriage, procreation, contraception, family relationships, raising children and education.<sup>461</sup> It recalled that there was a right for individuals, irrespective of their marital status, to be free from undue interference by the authorities in matters of fundamental importance to them, such as conception and childbirth, and that right had been confirmed by earlier Supreme Court verdicts.<sup>462</sup> It was also argued that American precedents respect the private sphere of family life, which the State should not enter.<sup>463</sup>

The Supreme Court considered that "[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."<sup>464</sup> In this way, the Supreme Court linked the areas of human autonomy, privacy and dignity with one another, thus establishing the foundation of the rights protected by the substantive aspect of the due process clause. As the Justices stressed "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood where they formed under the compulsion of the State."<sup>465</sup>

On this basis, the Justices confirmed the right of a woman to terminate her pregnancy, as established in the *Roe v. Wade* case. However, the need to protect

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<sup>460</sup> In the states of the South, inter-racial marriages were illegal until 1967, when the unconstitutional nature of such provisions was recognized by the Supreme Court in its ruling in the *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>461</sup> *Carey v. Population Services International*, 4.31 U.S. 678 (1977).

<sup>462</sup> *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

<sup>463</sup> *Prince v. Massachusetts*, 321 U.S. 158 (1944).

<sup>464</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>465</sup> *Ibidem*.

an important public interest such as the protection of the life of the unborn child meant that the state authorities could prohibit the termination of a pregnancy in all circumstances, except when the health of the mother would be at risk. Incidentally, it should be noted that in this judgment, the Justices set a new standard for assessing the constitutionality of state legislation restricting the termination of a pregnancy. Instead of the previous *strict scrutiny* standard, they proposed a standard for the concept of *undue burden*.<sup>466</sup>

References to dignity also appeared in dissenting opinions. Justice Stevens focused on the importance of the constitutional interest in liberty of women. He reminded the court that the Supreme Court considered that one of the aspects of this liberty was the right to bodily integrity, the right to control one's own person (defined in the *Rochin v. California* case). At the same time, he quoted another case in which it was stressed that "[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men's minds."<sup>467</sup> The Justice considered that similar rules apply to the power to control women's bodies. He pointed out that the woman's interest which is constitutionally protected in terms of liberty was also linked to her freedom to decide on the most intimate matters of a most personal nature.<sup>468</sup>

He stressed the extremely difficult situation of a woman considering an abortion, and claimed that such a situation meant an extremely difficult choice, with serious and personal consequences and an extremely strong impact on a the future of a woman who, when considering abortion, makes "difficult choice having serious and personal consequences of major importance to her own future—perhaps to the salvation of her own immortal soul"<sup>469</sup> and went on to say that the authority to make such traumatic and yet empowering decisions is an element of basic human dignity. Therefore, a woman's decision to terminate her pregnancy is nothing less than a matter of conscience.<sup>470</sup>

He then characterized his view on the weighing of conflicting interests in the event of termination of pregnancy. Considering the public interest in the protection of potential life, he agreed with the common view that state authorities might express their preference in this regard and, moreover, might take legal steps to ensure that a woman's choice was considered and preceded by reliable information, and that individual states had the right to pass laws that provided a reasonable legal framework for a woman's decision to terminate her pregnancy. However, referring to these considerations about the fundamental human dignity of the right to make decisions, he stressed that it was doubtful that the state authorities were

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<sup>466</sup> *Ibidem*.

<sup>467</sup> *Stanley v. Georgia*, 394 U.S. 557 (1969).

<sup>468</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>469</sup> *Thornburgh v. Amer. Coll. of Obstetricians*, 476 U.S. 747 (1986).

<sup>470</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

attempting to influence the final decision by passing legal regulations and trying to convince a woman to choose childbirth instead of abortion. The state authorities may promote their preferences by subsidizing the costs of childbirth, creating alternatives to abortion and promoting respect for family values. However, they must respect the individual's freedom to make their own decisions.<sup>471</sup>

Referring to human dignity, Justice Stevens also assessed one of the contested provisions, i.e., the mandatory 24-hour period between the presentation of the decision to terminate a pregnancy at the clinic and the procedure itself. He considered that this requirement favored the public interest excessively, placing it above that of a woman. He stressed that no one would have taken a decision of that kind without taking much time to think about it. A woman who decided to terminate her pregnancy cannot be forced to reconsider all her arguments simply because the state authorities believe that she has come to the wrong conclusion. Justice Stevens stressed that a part of the constitutional freedom of choice is "the equal dignity to which each of us is entitled." This dignity belongs as much to the woman who decides to terminate her pregnancy as to the woman who decides to have a baby. Therefore, since there are no restrictions on the freedom of choice of the latter, there should be no such restrictions with regard to the former.<sup>472</sup>

According to the position presented by Justice Stevens, human dignity is part of the constitutionally protected freedom of choice and, at the same time, the most important argument to justify freedom of choice in matters belonging to this most private sphere. The idea of human dignity makes the liberty interests of a woman prevail over the public interest in three respects. First, they allow the possibility of terminating a pregnancy; second, they limit the ability of State authorities to prevent abortion; and third, they enforce the equal treatment of women.

These considerations, and especially the references to such fundamental values as human dignity, were criticized by Justice Scalia whose opinion was contrary to the majority opinion. In expressing his disapproval, he pointed out that the majority opinion in that matter was based on an argumentation that referred to a "collection of epithets" performing "decorative functions" rather than on a rational analysis. The ruling itself was a typical example of a *value judgement* motivated, instead of legal arguments, by a purely political choice.<sup>473</sup>

Dignity linked to liberty or freedom of choice also appeared in an abortion judgment in the *Stenberg v. Carhart* case<sup>474</sup> of 2000. That time, however, its normative impact was much weaker. The matter concerned the provisions in force in the State of Nebraska, which criminalized *partial birth abortion* carried out in

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<sup>471</sup> *Ibidem*.

<sup>472</sup> *Ibidem*.

<sup>473</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>474</sup> *Stenberg v. Carhart*, 530 U.S. 914 (2000).

the second trimester of pregnancy.<sup>475</sup> The only exception was a situation when the woman's life was at stake. The Supreme Court, by a majority of 5–4, continuing the line of rulings presented in the cases of *Roe v. Wade* and *Planned Parenthood v. Casey*, found that the state legislation was unconstitutional. There, the Court applied the standard of excessive obligations, indicating that the contested law imposed an excessive burden on a woman's right to an abortion and did not allow for exceptions in cases of health risk. However, the majority opinion was accompanied by three concurring and as many as four dissenting opinions, which shows how much the opinions of the Justices were divided on this matter.<sup>476</sup>

Justice Breyer delivered the opinion of the Court. In it, the idea of dignity was again linked to freedom. Justice Breyer began his deliberations with a statement on the controversial nature of the abortion dispute. He pointed out that millions of citizens believed that life began with conception and that abortion was equivalent to the death of an innocent child. At the same time, however, the other part of society feared that the law prohibiting abortion would mean to many American women a life that lacked dignity, denying them equal freedom, and forcing the poorest citizens to use the services of the abortion underground, where their lives would be at risk.<sup>477</sup>

However, what seems more important is the place in which the dignity appeared in Justice Kennedy's dissenting opinion and the nature of its expression. Justice Kennedy stressed the extreme brutality of the criminalized method of performing an abortion, pointing as well to the language with which the method was described in the majority opinion, which showed that the Justices took the point of view of supporters of abortion instead of that of "a society shocked when confronted with a new method of ending human life." The Justice quoted Dr. Carhart, who described the two methods he used to terminate a pregnancy, one of which was the partial birth abortion (DX) criminalized by state legislation. Justice Kennedy considered them to be extremely controversial from a medical and moral point of view.<sup>478</sup> He stressed that it was a medical procedure which many decent and civilized people regarded repugnant to the same extent as the most serious crimes against human life.<sup>479</sup>

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<sup>475</sup> The author uses the above term following the Supreme Court Justices (it was used 124 times). The term was also used in the title of the Act of 2003.

<sup>476</sup> The most radical criticism of the majority opinion was presented by Justice Scalia, who, referring to the preamble of the Constitution, stressed that "the view that the Constitution of the United States, which aims, inter alia, to 'establish justice, ensure internal peace (...) and provide the blessings of freedom for ourselves and our offspring,' prohibits the States from simply banning this manifestly brutal way of eliminating our half-born offspring, is simply absurd." *Stenberg v. Carhart*, 530 U.S. 914 (2000).

<sup>477</sup> *Ibidem*.

<sup>478</sup> *Ibidem*.

<sup>479</sup> *Ibidem*.

Recalling the grounds for the adopted legislation, the Justice recalled that the state authorities had pointed out that the protected public interest in that case was concern for the lives of the unborn and “partially born,” preservation of the integrity of the medical profession and the creation of a “barrier to infanticide.” Justice Kennedy stressed that state authorities had the right to take measures to ensure that the medical profession and its practitioners were perceived as persons whose primary task was to cure and offer medical treatment. This process should be accompanied by compassion and rigorous ethics as well as an awareness of the dignity and value of human life, even that which cannot survive without the help of others. The Justice stressed that the greater similarity of the DX procedure to infanticide meant that the authorities of the state of Nebraska might conclude that the procedure posed a greater risk of disrespect for life and, as a consequence, a greater risk to the profession and to society, which are sustained owing to the mutual recognition of dignity and respect. The Justice found that the Supreme Court was not entitled to criticize these conclusions.

He stressed that the decision on the unconstitutional nature of state legislation would mean the annulment of a law that expressed the will of the people of the state of Nebraska, who recognized that medical procedures must be governed by moral principles, based on the intrinsic value of human life, including the life of the unborn.<sup>480</sup>

Owing to the huge controversy surrounding that method of abortion, the Supreme Court ruling caused many protests throughout the United States. In response to the *Stenberg v. Carhart* ruling, in 2003 Congress passed the Partial-Birth Abortion Ban Act. Dr. Carhart and other doctors who performed abortions using that method challenged the law, accusing it of being unconstitutional. The complaint was recognized in three district courts (the U.S. District Courts for the Northern District of California, the Southern District of New York, and the District of Nebraska) which held that the contested law was indeed unconstitutional. These judgments were appealed against by representatives of the federal authorities. Finally, Attorney General Alberto Gonzales appealed against those rulings on unconstitutionality to the Supreme Court. The *Gonzales v. Carhart* case<sup>481</sup> was decided by the Supreme Court in 2007. The court ruled by a 5–4 majority that the law is not unconstitutional. In the justification, it was pointed out that the ban on abortion by partial birth was neither unconstitutional nor an excessive restriction of the right to abortion. The majority opinion was drawn up by Justice Kennedy. It is worth stressing that the Justice referred to human dignity in only one place, but one that was crucial for the whole decision. Justice Kennedy recalled the reasons for the draft law presented during the legislative process. It was stated in Congress that “[i]mplicitly approving such a brutal and inhumane procedure

<sup>480</sup> *Ibidem*.

<sup>481</sup> *Gonzales v. Carhart*, 550 U.S. 124 (2007).

by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life.” In emphasizing this position, the Justice concluded that the law expressed respect for the dignity of human life.<sup>482</sup>

However, on the other hand, in the dissenting opinion lodged by Justice Ginsburg, which was only dissent delivered, it was recalled that in reaffirming the *Roe v. Wade* ruling in the *Planned Parenthood of Southeastern Pa. v. Casey* case, the Court described the centrality of “the decision whether to bear (...) a child,” to a woman’s “dignity and autonomy,” her “personhood” and “destiny,” her “conception of (...) her place in society.”<sup>483</sup>

The right to terminate a pregnancy remains one of the more controversial issues in the United States and represents a challenge to society that is divided on this issue<sup>484</sup> and state legislations vary considerably. Their common element, however, is the general recognition of a woman’s right to terminate her pregnancy.

<sup>482</sup> *Ibidem*.

<sup>483</sup> 505 U.S., at 851–852. Of signal importance here, the *Casey* Court stated with unmistakable clarity that state regulation of access to abortion procedures, even after viability, must protect “the health of the woman.” *Ibidem*.

<sup>484</sup> The opinion poll carried out by Angus Reid in January 2010 showed that:

- 19% of Americans believe that abortion should be allowed in any case,
- 9% of Americans believe that abortion should be allowed, but subject to greater restrictions than at present,
- 30% of Americans believe that abortion should only be allowed in cases of rape, incest or to save a woman’s life,
- 13% of Americans believe that abortion should only be allowed in order to save a woman’s life,
- 16% of Americans believe that abortion should be allowed, but with the same restrictions that are currently applied,
- 13% have no opinion.

See *Angus Reid Public Opinion, Americans Split on Covering Abortion in Insurance Plans that Use Federal Subsidies* [online], <https://www.priestsforlife.org/statistics/10-01-angus-reid-poll.pdf> [20.04.2022].

## THE RIGHT TO DIE WITH DIGNITY

As a result of advances in medical science and the development of biotechnology, people have gained new opportunities to combat disease and the ageing process. At the same time, however, these revolutionary changes have given rise to new challenges and problems, which need to be resolved not only in terms of moral choices, but also at the legal level. The issue of the end of life, combined with the right to decide about oneself, has created the controversial issue of the right to die with dignity. The fundamental dispute concerns whether a human being, as a free person with the freedom to decide on a wide range of issues concerning his or her own life, has the right to decide for himself or herself to end his or her life, or whether this decision lies outside the bounds of his or her autonomy as protected by law.

This is the context in which the idea of human dignity is extremely often invoked, and interestingly enough, practically all the parties involved in this dispute refer to this value. In the case law of the Supreme Court, too, the issue of the right to die is one of the most important contexts in which the idea of human dignity appears, and attempts are made to resolve the challenges and problems in this area on the basis of its normative nature.

It is worth remembering, however, that the phrase “the right to die with dignity” will cover a number of different circumstances, sometimes varying very significantly from one to another. It refers to such diverse situations of the ending of one’s life as suicide, active euthanasia, assisted suicide, passive euthanasia, or palliative care which aims not only at alleviating the symptoms of an incurable disease but also at providing decent conditions for dying, and which may sometimes lead to an acceleration of the process of dying (although in this case, it is difficult to consider it as palliative care in the proper sense of the term). Active euthanasia means ending someone’s life at the person’s request. Assisted suicide is assistance in preparing and carrying out the act of suicide itself. In this case, it may be the assistance of a doctor or a specialist service (such services are provided for example

by the Swiss company Dignitas).<sup>485</sup> Passive euthanasia, on the other hand, means the refusal to provide assistance or the cessation of medical treatment.

There are several basic ethical problems related to the right to die (with dignity). First, there is the question of whether to treat or not persons who have consciously and voluntarily demonstrated their wish to end their lives by committing suicide. Second, there is the question of whether to end the lives of, or not initiate therapy for, permanently and incurably disabled newborn children. Third, there is the risk that analgesic procedures may shorten the patient's life. Fourth, the decision whether to disconnect the patient from life support when the patient is in a permanent vegetative state. Fifth, the problem of the doctor who takes an independent decision to discontinue or not to initiate treatment that is unjustified from the medical point of view. Finally, what must also be resolved is the question of whether to discontinue or not even initiate the treatment of a permanently incapacitated (incompetent) patient who has previously expressed such a wish when he or she had full mental capacity, or for whom in their current state of incompetence, such a wish is expressed by a proxy specifically appointed for that purpose.

Polish law regulates some of these issues. Suicide (and attempted suicide) is not a crime. However, the Penal Code provides for a penalty of 3 to 5 years imprisonment for inciting or assisting in committing suicide, even if this was done at the request of the person.<sup>486</sup>

These issues came before the American Supreme Court rather late, only at the end of the 1980s, because health protection falls within the competence of the State authorities. The precedent case, which was the ruling in the 1990 Nancy Cruzan case, was extremely important in the context of human rights. It was only after this verdict that State regulations on the right to die emerged. The first American State to pass laws on the right to die with dignity was Oregon in 1994.<sup>487</sup> Previous regulations were of an opposite nature – it should be remembered that virtually all States had enacted or were adopting regulations to the contrary, penalizing assisted suicide, including medical assistance.

As stated above, one of the major cases concerning the right to die (with dignity) was *Cruzan v. Director, Missouri Department of Health*<sup>488</sup> of 1990. The case

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<sup>485</sup> The founder of *Dignitas* is Ludwig Minelli, a Swiss lawyer who places the right to die among the fundamental human rights.

<sup>486</sup> Art. 151

Whoever by persuasion or by rendering assistance induces a human being to make an attempt on his own life shall be subject to the penalty of the deprivation of liberty for a term of between 3 months and 5 years.

<sup>487</sup> However, as little as a year later, the constitutionality of some of the provisions of this Act was questioned by the Supreme Court. In the judgment delivered in *Lee v. State of Oregon*, 891 F. Supp. 1439 (D. Or. 1995), it was stated that Oregon's Death With Dignity Act ("Measure 16") violates the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

<sup>488</sup> *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990).

began in 1983, when Nancy Cruzan suffered severe and irreparable injuries as a result of a car accident. One of the most damaged organs was the brain. Consequently, in her vegetative state, she was kept alive artificially in a hospital, and food was administered to her through a gastric tube. After several months, Nancy's parents (Lester and Joyce Cruzan) decided to stop the maintenance of her life support. However, the hospital authorities made the disconnection of the life-supporting apparatus conditional on obtaining judicial approval for such a step. The Court of First Instance ruled that State regulations prohibiting the withholding and/or the withdrawal of nutrition in all circumstances violated Nancy Cruzan's personal right to freedom, the right to a due process and the equal protection clause. Accordingly, the Court ordered the suspension of feeding, indicating three key elements. It stressed that the patient was suffering from irreversible brain damage. It also acknowledged that, in such a state, a person had the fundamental right to reject life-supporting therapy. At the same time, it recognized that Nancy Cruzan had already expressed her opinion on the subject before the accident (as a fully conscious person). In this regard, the court relied on the testimony of a friend of hers, who testified at the trial that Nancy had made a serious claim requesting that her life be ended under the conditions she currently found herself in.<sup>489</sup>

However, the verdict of the district court was overturned in 1988 by the Supreme Court of Missouri<sup>490</sup> which did not share the arguments of the court of lower instance. It stressed that constitutional rights were not sufficient to override an important State interest which was the protection of life, regardless of its quality. The court considered that a conversation with a friend was not clear and convincing evidence of Nancy Cruzan's real intentions.<sup>491</sup> As an example of such a clear and convincing argument, the court cited the case of *Bouvia v. Superior Court*<sup>492</sup> of 1986. Elizabeth Bouvia, having full mental capacity, asked for the removal of the apparatus that kept her alive. In that case, the Court of Appeal was right to consider that the right to live her life in dignity and peace was more important than the public interest, as expressed in the obligations of State authorities to protect life and prevent suicide.<sup>493</sup> References were also made to the 1986 guidelines of the American Medical Association (AMA) according to which, under certain conditions, discontinuation of persistent therapy was not contrary to medical ethics. However, as was stressed, in each case the dignity of the patient must remain intact.<sup>494</sup>

<sup>489</sup> Kazimierz Szewczyk, *Bioetyka*, t. 1: *Medycyna na granicach życia*, Warszawa, 2009, p. 326.

<sup>490</sup> Cruzan by Cruzan v. Harmon, Supreme Court of Missouri, 760 S.W.2d 408 (1988).

<sup>491</sup> Ibidem.

<sup>492</sup> *Bouvia v. Superior Court*, 179 Cal.App.3d 1128 (1986). The case of Elizabeth Bouvia is interesting in that the court ruling also made important references to the idea of human dignity.

<sup>493</sup> Ibidem.

<sup>494</sup> "Even if death is not imminent but a patient's coma is beyond doubt irreversible and there are adequate safeguards to confirm the accuracy of the diagnosis and with the concurrence of those

However, in the case under consideration, the court did not find any legal basis which would allow the parents to come to a decision about the death of their daughter, under their care, who was unable to take a decision on her own. In the absence of such legal grounds, and in view of the existence of an important public interest, the Court decided to respect the right to life of a person who was not able to decide for herself.<sup>495</sup> At the same time, it was held that it would have been necessary to have a statement from Nancy Cruzan herself and, in the absence of such a statement, the Supreme Court of the State of Missouri refused to grant its consent to the disconnection of the life-support apparatus.

A reference to the idea of human dignity was also made in an dissenting opinion given by Chief Justice of the Supreme Court of Missouri, Andrew J. Higgins, who stressed that the decision in this pioneering case for the State of Missouri was based on incorrect premises. He found it incomprehensible that the majority opinion quoted “more than 50 appellate decisions from 16 jurisdictions that support and validate the trial court’s findings of fact, conclusions of law and the judgment in this case,” while revoking the decision of the lower court.<sup>496</sup>

Justice Higgins considered that the correct decision should be based on the reasoning provided in the 1988 judgment of *Gray by Gray v. Romeo*<sup>497</sup> where the court found it lawful to disconnect a patient in a vegetative state from life support equipment at the request of her husband, i.e., her legal representative.<sup>498</sup> Justice Higgins pointed out the following elements of this reasoning, of which the key part was the reference to human dignity.

First of all, the majority of the court was positive about whether there existed a right to refuse life-sustaining treatment. Although the Supreme Court never addressed directly the issue of a person’s constitutional right to refuse life-sustaining treatment, its decisions repeatedly confirmed the principle of individual self-determination. Every person has the right, subject to an important public interest, to take basic medical decisions that affect his or her own body. This right, whether described as the principle of personal autonomy, the right of self-determination or

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who have responsibility for the care of the patient, it is not unethical to discontinue all means of life-prolonging medical treatment.

Life-prolonging medical treatment includes medication and artificially or technologically supplied respiration, nutrition or hydration. In treating a terminally ill or irreversible comatose patient, the physician should determine whether the benefits of treatment outweigh its burdens. At all times, the dignity of the patient should be maintained.” *Cruzan by Cruzan v. Harmon*, Supreme Court of Missouri, 760 S.W.2d 408 (1988).

<sup>495</sup> “We find no principled legal basis which permits the coguardians in this case to choose the death of their ward. In the absence of such a legal basis for that decision and in the face of this State’s strongly stated policy in favor of life, we choose to err on the side of life, respecting the rights of incompetent persons who may wish to live despite a severely diminished quality of life.” *Ibidem*.

<sup>496</sup> *Ibidem*.

<sup>497</sup> *Gray by Gray v. Romeo*, 697 F. Supp. 580 (D.R.I.1988).

<sup>498</sup> In the rationale for the verdict, the Court referred also to the idea of human dignity.

the right of privacy, is duly justified by the freedoms protected by the due process clause of the Fourteenth Amendment. This right is also based on the concept of the dignity of the individual and the interest in bodily integrity.<sup>499</sup>

Second, the court ruled on the question of whether the nutrition and hydration provided by the gastrointestinal tube is a form of treatment that Marcia Gray could effectively refuse. It was rightly considered that there was no legal difference between a mechanical device enabling artificial respiration and a mechanical device enabling artificial feeding. Since every person had the right to be disconnected from the ventilator, the same right applied to the gastrointestinal tube.<sup>500</sup>

Third, the court decided whether the incompetent patient still retained the right to refuse treatment. The right to refuse treatment must also extend to the patient who cannot express himself or herself, because human dignity belongs unconditionally to every human being, and therefore also to patients in both situations. A different position would allow the rights of the patient to be removed simply because the patient could no longer feel a violation of this right. The gastrointestinal tube was initially inserted with the consent of Marcia Gray's husband. However, there is no real difference between withholding and withdrawing treatment. The patient's right to refuse treatment obviously includes both the right to refrain from starting treatment and the right to have it stopped. Finally, the court did not consider that an important public interest outweighed Marcia Gray's rights as expressed by her husband.<sup>501</sup>

However, this position was only contained in the dissenting opinion. This was why Nancy Cruzan's parents appealed against the judgment and the case went to the Supreme Court. The Justices had to answer the question of whether the clause on the right to a due process contained in the Fourteenth Amendment enabled Nancy Cruzan's parents to express a refusal of further life-sustaining treatment on her behalf.

The court passed its judgment by a 5–4 majority and the majority opinion was drawn up by Chief Justice Rehnquist. It is worth noting that the decision was taken by a majority of only one Justice; the other Justices submitted two objections, and Justice O'Connor, who supported the majority, drew up a concurring opinion. There were strong indirect traces of the normative nature of human dignity both in the majority opinion (although it appeared there only as a quotation from an excerpt from Justice Higgins' objection) and in Justice O'Connor's concurring opinion. References to human dignity also appeared in Justice Stevens's dissent. However, for the purpose of our considerations here, the most important is the dissenting opinion of Justice Brennan (joined by Justices Marshall and Blackmun).

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<sup>499</sup> Gray by Gray v. Romeo, 697 F. Supp. 580 (D.R.I.1988).

<sup>500</sup> *Ibidem*.

<sup>501</sup> *Ibidem*.

Justice Rehnquist recalled that most state courts based the right to refuse treatment on the common law right to informed consent, or additionally on the constitutional right to privacy. He stressed that Nancy Cruzan was unable to express her own will regarding her condition because she was in a persistent vegetative state. At the same time, he pointed out that a competent person who was able to shape his or her legal position with his or her own declarations of will had the right to refuse unwanted medical treatment, and this right was a manifestation of the *liberty interest*<sup>502</sup> belonging to an individual under the due process clause.<sup>503</sup>

In the absence of “clear and convincing” evidence that Nancy Cruzan would have wished to stop this type of therapy and would have been against keeping her alive artificially, the Court found the State of Missouri’s actions to protect human life to be constitutional. As there was no guarantee that family members would always act in the best interests of “incompetent patients” and wrong decisions to withdraw treatment were irreversible, the Court confirmed the additional evidentiary requirements imposed by State authorities in the event of the discontinuation of treatment of incompetent persons, and these requirements demanded precisely clear and convincing evidence. Such protection of human life, regardless of the quality of that life, may be regarded as indirect traces of the protection of human dignity.

Meanwhile, direct traces of the normative nature of human dignity can be found in the concurring opinion of Justice O’Connor who agreed that the liberty interest was protected by law, and that in the event of a refusal of unwanted treatment, its content could be derived from the opinions expressed earlier by the person in question. It also included the refusal of artificially supplied food. The Justice stressed that such a procedure gravely violated the patient’s bodily integrity (Justice O’Connor described it in detail). Since the American concept of liberty is inextricably linked to the idea of the physical freedom and self-determination of the individual, the Supreme Court often found interference with the human body by government representatives or officers to have been incompatible with the rights protected by the due process clause. Therefore, requiring a patient who was capable of expressing his or her will to undergo such procedures against his

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<sup>502</sup> :The liberty interest is linked to the concept of the substantive aspect of the due process clause. According to this idea, the fair trial clauses contained in the Fifth and Fourteenth Amendments not only have a formal aspect (relating to due process), but also contain a substantive component which prohibits the government from infringing certain ‘fundamental’ liberty interests in general, regardless of what judicial procedure is provided for, except where interference by the authorities is narrowly tailored to a compelling state interest.” These rules were stated by the Supreme Court in *Reno v. Flores* ruling. *Reno v. Flores*, 507 U.S. 292 (1993). For more on the substantive aspect of the due process clause, see more Paweł Laidler, “Proceduralna i materialna właściwość prawa: XIV poprawka i jej rola w rozwoju amerykańskiego konstytucjonalizmu,” in *Konstytucjonalizm w państwach anglosaskich*, Zięba, Andrzej (ed.), Kraków, 2013, pp. 411–30.

<sup>503</sup> *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990).

or her will violated the patient's freedom, dignity and freedom to shape the direction of treatment himself or herself.<sup>504</sup> In her final sentence, Justice O'Connor stressed the limited scope of the judgment in the case in question. She considered that the decision in the Cruzan case merely affirmed that the Constitution allowed the State authorities to require clear and convincing evidence that Nancy Cruzan wished artificial hydration and nutrition to be withdrawn. This position did not, however, preclude that in the future the Constitution be shaped in such a manner as to require States to respect patients' decisions expressed by a duly appointed statutory representative. Likewise, it did not prevent the State authorities from developing other approaches to the protection of the liberty interests in relation to the refusal of treatment in the case of a patient who lacked competence. The Justice stressed that a national consensus had not yet been reached in such cases (as she put it "[t]oday we decide only that one State's practice does not violate the Constitution.") And it was precisely the authorities of individual States that must solve "this difficult and sensitive problem" by developing appropriate procedures to protect the liberty interests of incompetent patients. As Justice O'Connor put it metaphorically: this would happen in the "laboratory of States."<sup>505</sup>

In his dissent, Justice Brennan referred more strongly to human dignity. From the outset he stressed that modern medical progress created – as he put it poetically – "a twilight zone of suspended animation" between life and death. However, some people wished not to experience a life that was artificially supported. Instead, in such a situation they preferred to see things follow their natural course and wanted to be allowed to die with dignity.<sup>506</sup>

The Justice emphasized the irreversibility of Nancy Cruzan's condition. The doctors asserted that, without any doubt, the brain damage was not only permanent, but continued to worsen to the result of a total lack of awareness. Similarly, there was irreversible damage to her body which was unable to function independently, and its only reactions were automatic reflexes. The judgment of the Court

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<sup>504</sup> *Ibidem*.

<sup>505</sup> Justice O'Connor used here a reference to a quote from Justice Brandeis's dissenting opinion in the case of *New State Ice Co. v. Liebmann* in 1932. He stated there that, to quote: "to stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences for the nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious, or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But, in the exercise of this high power, we must be ever on our guard lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold;" in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

<sup>506</sup> Justice Brennan cited here a fragment of the verdict in the *Rasmussen by Mitchell v. Fleming*, 154 Ariz. 207, 211, 741 P.2d 674 (1987).

meant that a patient in a persistent vegetative state was a “passive prisoner of medical technology.” He indicated that the Supreme Court was right to accept the existence of the constitutional liberty interest consisting of the power to initiate or stop an unwanted therapy. However, Nancy Cruzan was unjustifiably denied this right when the Court upheld the ruling of the Supreme Court of Missouri. The Court stressed that State legislation might require clear and convincing proof that Nancy Cruzan had expressed a desire to give up this type of therapy. Justice Brennan considered both the testimony of Nancy Cruzan’s parents as well as that of her friends as such. He also pointed out that even the *guardian ad litem* appointed at the time of the trial was of the same opinion.<sup>507</sup>

Justice Brennan believed that Nancy Cruzan had a fundamental right to be free of unwanted therapy that artificially supported her life. He explained that the more general right to be free of unwanted medical assistance was the right to assess the potential benefits of treatment and its possible consequences according to one’s own values and to make a personal decision about whether or not to undergo extremely invasive treatment (such as a gastrointestinal tube, often permanently installed, or a nasogastric tube obstructing the normal functioning of the body). Meanwhile, for a patient like Nancy Cruzan, the only benefit of medical treatment (administered) was not the maintenance of life as such, but merely the maintenance of metabolic functions. As Justice Brennan pointed out melancholically, death is an experience that is personal and absolute. For many people, the thought of an end without dignity and a decomposed body was simply terrifying. Many prefer a silent, proud death, and the intact integrity of the body is unquestionably the most important thing for them.<sup>508</sup>

However, as Justice Brennan admitted, this right (the right to be free of unwanted medical intervention) was not absolute either. It might be limited by important social and public interests, such as the duty to protect life, the implementation of which falls within the competence of the State authorities. However, as Justice Brennan firmly acknowledged, no public interest was more important than freedom from unwanted medical intervention in the situation in which Nancy Cruzan found herself. This right must not be denied to those who considered such a state to be degrading and without human dignity. He concluded that the duty of the State to protect life must include the recognition of an individual’s right to avoid circumstances in which he or she would feel that efforts to sustain life humiliate or degrade his or her humanity.<sup>509</sup>

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<sup>507</sup> Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990).

<sup>508</sup> Ibidem.

<sup>509</sup> Here, Justice Brennan referred to the judgment in the Brophy v. New England Sinai Hospital, Inc., 398 Mass. 417 (1986).

In conclusion, Justice Brennan considered the procedural obstacles imposed by the Missouri Supreme Court were biased and unfair, and their effect resulted in an unacceptable restriction of Nancy Cruzan's right to die with dignity.

Another dissent was raised by Justice Stevens. He began by referring to the preamble to the Constitution, pointing out that the U.S. Constitution was the result of a belief that all legitimate governments must ensure every human being an equal right to life, freedom and the pursuit of happiness. As Justice Stevens said, these three objectives were usually compatible, mutually reinforcing and frequently convergent as well. However, in the case of Nancy Cruzan, the court allowed the abstract and general interest of the State to prevail over her best interests as an individual. According to the undisputed findings, these could have been achieved by allowing her legal guardians to exercise her constitutional right to discontinue treatment. In the Justice's view, the Constitution required the State authorities to take care of Nancy Cruzan's life in a way that ensured proper respect for her own interests.<sup>510</sup> In that case, respect for her interests required the discontinuation of procedures which had long been considered by the court to be offensive to human dignity on account of the violation of the integrity and inviolability of the body.<sup>511</sup>

Justice Stevens also drew attention to the issue of the quality of life, pointing out that the Supreme Court wrongly considered the case of Nancy Cruzan to be related precisely to it. Nancy Cruzan was "living" only in the sense that her bodily functions were supported artificially by the life-support apparatus. It was not a question of "living" as in the case of people in other very dramatic situations: with mental disabilities, terminally ill people, those connected to life-sustaining equipment, but nevertheless conscious, or in a coma. Such decisions concerning the "quality of life" of incompetent but conscious patients are based on the recognition that these patients have some interest in continuing their lives, even if, in the view of others, this interest is contrary to the interests of dignity or comfort. This could not be said at all in the case in question.<sup>512</sup>

The Nancy Cruzan case had its epilogue. After the Supreme Court judgment, her parents managed to contact new witnesses who confirmed the testimony of a friend of their daughter's that Nancy had expressed a wish to have her treatment stopped when in the said condition. This time, the court decided to accede to the parents' request, and the hospital decided not to continue the dispute. After turning off the life-sustaining apparatus, seven years after the tragic accident, Nancy Cruzan died in December 1990.<sup>513</sup>

<sup>510</sup> *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990).

<sup>511</sup> Justice Stevens referred to the treatment of the violation of bodily integrity set in the line of jurisprudence, see *Rochin v. California*, 342 U.S. 165 (1952).

<sup>512</sup> *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990).

<sup>513</sup> Kazimierz Szewczyk, *op. cit.*, p. 326.

In 1997, the Supreme Court dealt with two other cases involving concerns about human dignity. Relevant judgments were announced on the same day (26 June). They were: *Washington v. Glucksberg*<sup>514</sup> and *Vacco v. Quill*.<sup>515</sup> In the first of these, the Supreme Court ruled that the right to assisted suicide was not protected by the due process clause contained in the Fourteenth Amendment, and consequently the State authorities could criminalize this type of action. In the second, the Supreme Court pointed out that the right to die was not protected by the equal protection clause, by which State regulations were allowed to prevail. In both of these judgments, references to human dignity played an important role.

The *Washington v. Glucksberg* case of 1997 was the result of an appeal against the State prohibition on assisted suicide which was contained in the Natural Death Act of 1979. The regulations were challenged by five doctors (including Harold Glucksberg), a group of terminally ill patients<sup>516</sup> and the organization known as *Compassion in Dying*, which provided assistance to those considering assisted suicide. The Federal Court of First Instance upheld the applicants' argument that the right to die was part of the liberty interest protected by the Fourteenth Amendment. The judgment was confirmed by the Federal Court of Appeal for the IX District. This decision was challenged by the State authorities. The Supreme Court had to answer the question of whether the prohibition of physician-assisted suicide imposed by the State of Washington violated the due process clause, denying terminally ill people (who were fully in charge of their mental health) the freedom to choose for themselves to continue living or to choose the moment at which to die.

The court unanimously rejected the rulings of the lower instance courts and adjudicated that a State might pass a law prohibiting assisted suicide. It is worth mentioning, however, that the judgment was accompanied by as many as five convergent opinions, in which individual Justices presented their own points of view, justifying the decision they had made. The normative influence of human dignity could be identified in both the majority opinion and the concurring opinion of Justice Stevens (which also applied to the *Vacco v. Quill* judgment) and the concurring opinion of Justice Ginsburg (applicable to the *Vacco v. Quill* judgment as well). However, these appeals must be assessed differently.

The verdict was formulated by the Chief Justice of the Supreme Court, Justice Rehnquist, who focused on two issues. First, he looked at the definition of liberty interests in order to establish whether the right to assisted suicide was protected by the Fourteenth Amendment. Second, he considered whether such a right could be reasonably defined as more important than the legitimate social interests that the State authorities protected.

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<sup>514</sup> *Washington v. Glucksberg*, 521 U.S. 702 (1997).

<sup>515</sup> *Vacco v. Quill*, 521 U.S. 793 (1997).

<sup>516</sup> All died before the Supreme Court delivered its verdict.

Justice Rehnquist began his argument by recalling that for the right to assisted suicide to be protected by the Constitution, it would have to be defined in a number of other objective fundamental civil rights and freedoms. To this end, he referred to the ruling in *Moore v. City of East Cleveland*,<sup>517</sup> where the understanding of freedom interests was limited to those rights and freedoms that were deeply rooted in this Nation's history and tradition. Justice Rehnquist considered that it could not be said of assisted suicide. Until recently, it had been condemned by public opinion and treated as an insult to tradition and custom.

A reflection of this attitude was the State legislation whose provisions prohibited and criminalized such practices. As Justice Rehnquist pointed out, this approach continued to prevail in most states – in the State of Washington, for example, assisted suicide had always been considered a crime.<sup>518</sup> In support of his view, the Justice recalled that similar laws had existed not only during the colonial period, but also in the earlier English *common law*.<sup>519</sup>

Justice Rehnquist admitted that there had been changes taking place concerning this issue in the medical, social and legislative spheres, and stated that the existing regulations concerning suicide, although “deeply rooted” had become the subject of many referenda and new legislation, and the social debate accompanying the case in question essentially justified them.<sup>520</sup> Progress in medical science had brought about longer life expectancy for human beings, but also resulted in people dying from severe and chronic diseases. For this reason, both public opinion and the opinion of citizens' representatives (politicians) were increasingly involved in the discussion on how to protect best the dignity and independence of the individual during an increasingly long process of dying. As an example of such changes, Justice Rehnquist cited the new legal institutions in the form of “living wills” and the right to refuse life-supporting treatment or have it withdrawn. In this context, the Justice even cited foreign experiences, among others those of New Zealand.<sup>521</sup>

Justice Rehnquist then referred to the substantive aspect of the due process clause. He stressed that the case law to date had taken a cautious approach to the

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<sup>517</sup> *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

<sup>518</sup> It has always been a crime to assist suicide in the State of Washington. In 1854, Washington's first Territorial Legislature outlawed “assisting another in the commission of self-murder.” *Washington v. Glucksberg*, 521 U.S. 702 (1997).

<sup>519</sup> “More specifically, for more than 700 years, the Anglo-American tradition of common law has punished or otherwise disapproved of both suicide and assisted suicide. (...) That suicide remained a grievous, though non-felonious, wrong is confirmed by the fact that colonial and early state legislatures and courts did not retreat to prohibiting assisting suicide.” *Ibidem*.

<sup>520</sup> The justice recalled the 1994 regulation of the State of Oregon that was challenged in two cases: *Lee v. Oregon*. Moreover, in California as well in the State of Washington voters rejected an assisted-suicide initiative similar to Washington's in 1993. On the other hand, in 1994, voters in Oregon enacted, also through ballot initiative, that State's “Death With Dignity Act,” which legalized physician-assisted suicide for competent, terminally ill adults. *Ibidem*.

<sup>521</sup> *Ibidem*.

idea that, (and that) apart from formal issues, the clause provided for increased protection of the individual against government interference in certain fundamental rights and liberty interests. However, this applied to a strictly defined set of rights and liberties. Referring to earlier judgments delivered by courts of lower instance<sup>522</sup> (which, in turn, referred to the ruling in the *Planned Parenthood of Southeastern Pa. v. Casey* case), he added that in just the same way as the decision whether or not to undergo an abortion was one of the most intimate and personal choices a person could make in life, so also was the decision to end one's own life, and this decision belonged to the key choices for personal dignity and autonomy. However, as Justice Rehnquist summarized the above considerations, the fact that many rights and freedoms protected by the due process clause had their origin in personal autonomy did not justify the conclusion that all important, intimate and personal decisions were protected in this way. Therefore, the right to assisted suicide could not be regarded as a fundamental liberty interest protected by the due process clause.<sup>523</sup>

Justice Rehnquist recalled the constitutional principle that State legislation restricting citizens' rights must be reasonably linked to legitimate government interests. Referring to previous findings, Justice Rehnquist mentioned six types of such government interests: the protection of life, the prevention of suicide, the avoidance of third-party involvement and arbitrary, unfair or unlawful pressure, the protection of family members and relatives, the protection of the integrity of the medical profession, and the avoidance of broad interpretations of legitimate actions tending towards euthanasia and other abuses in the future. Particularly in the latter context, the author of the majority opinion argued strongly that recognizing the right to die in certain extreme cases would make it difficult to draw a line between the permissible exercise of this right and the unacceptable exercise of euthanasia by the person concerned or his or her family members. Justice Rehnquist considered that in none of these cases could the right to assisted suicide outweigh the important public, or government interests identified above.<sup>524</sup>

References to the normative nature of human dignity also appeared in concurring opinions. In the opinion of Justice Stevens (it should be stressed that he attached the same opinion to the *Vacco v. Quill* case), there was an extremely strong emphasis on the importance and role of human dignity not only in the whole system of law, but also in the moral system that preceded it. The Justice stressed that his concurring opinion was an expression of his conviction that there was room for further debate on the limitations that the Constitution imposed on the right of States to penalize the practices under discussion. At the same time, however,

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<sup>522</sup> Among others, *Compassion in Dying v. State of Wash.*, 79 F.3d 790, 812 (9th Cir. 1995). In this case too there were numerous references to human dignity.

<sup>523</sup> *Washington v. Glucksberg*, 521 U.S. 702 (1997).

<sup>524</sup> *Ibidem*.

he strongly emphasized that the “liberty” protected by the due process clause did not include the categorical right to commit suicide, which in turn would include the right to assistance in committing the act.

He began his opinion by stressing the value of human life and quoting the seventeenth century English poet John Donne who wrote that “no man is an island.”<sup>525</sup> He stressed that it was in the interest of the State to preserve and promote the benefits that every individual might bring to the community. Writing further, he pointed out that the value of a person’s life to others was far too great to allow an individual to invoke completely freely the constitutional right to autonomy in deciding to end his or her life.<sup>526</sup>

Referring to the rules established in the Nancy Cruzan case, Justice Stevens recalled that the refusal of unwanted treatment protected by the due process clause was within Nancy Cruzan’s liberty interest. However, Justice Stevens stressed that, in his view, the right to refuse treatment was not just a normal principle of the common law system. Rather, that right was an aspect of a much broader and more fundamental concept of liberty, even older than the legal system. That liberty included not only a person’s right to refuse a certain type of treatment, but also his or her interest in dignity and, as he put it, metaphorically, “in determining the character of the memories that will survive long after her death.” This is a fundamental right: to make a “deeply personal decision” oneself. And obviously setting limits for this right was not an easy task. Whatever the nature of this power, it certainly included the protection of matters essential to personal dignity and autonomy. Similarly, it was unquestionable that at the very core of the idea of liberty was the right to avoid pain that could not be tolerated, and the question of indignity in the form of an inability to live independently in the last days of one’s life.<sup>527</sup>

In the summary of his position, Justice Stevens pointed out that the verdict delivered by the Court had left a lot of room for debate on other issues related to the issue under discussion. And how such matters concerning individual liberty, human dignity and the end of life would be resolved, depended on specific situations. However, it was clear that the “unqualified” interest in the preservation of human life indicated in the judgments in *Cruzan v. Director, Missouri Dept. of Health* and *Washington v. Glucksberg* was not in itself sufficient to outweigh the

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<sup>525</sup> “No man is an island entire of itself; every man is a piece of the continent, a part of the main; if a clod be washed away by the sea, Europe is the less, as well as if a promontory were, as well as any manner of thy friends or of thine own were; any man’s death diminishes me, because I am involved in mankind. And therefore, never send to know for whom the bell tolls; it tolls for thee.” John Donne, *No Man Is An Island* [online], <https://www.poetry.com/poem/22559/no-man-is-an-island> [22.02.2022].

<sup>526</sup> *Washington v. Glucksberg*, 521 U.S. 702 (1997).

<sup>527</sup> *Ibidem*.

liberty interest which might have justified the application of measures protecting dying patient's dignity and alleviating excessive suffering.<sup>528</sup>

Justice Souter came up with a similar opinion on the question of deciding for oneself to end one's life. In his view, the court's judgment did not mean that the applicants' claims for the recognition of the right to assisted suicide were wrong.<sup>529</sup> The case concerned conscious, adult and terminally ill patients who independently and with full awareness asked their doctors to prescribe drugs that would hasten their death. The Justice pointed out that the State authorities did not deny that those patients had acted with a view to protecting their personal dignity, in the face of imminent death and experiencing painful suffering both physically and mentally. In such exceptional circumstances, the Justice considered it compatible with the standards of medical practice to provide them with prescriptions for medicines which, in addition to relieving pain, might accelerate death. In the face of imminent death preceded by physical suffering and indignity, a patient who is able to make a responsible and voluntary choice should have the right to take a decision, and the doctor should have the correlative right to provide that person with the necessary assistance.<sup>530</sup>

Justice Souter reiterated his conviction that the applicant's request was motivated by the protection of human dignity in a further part of his argument, where he defined the relationship between the patient and the doctor and the specific role and tasks that the latter had to fulfil. Referring to the judgment of *Roe v. Wade*,<sup>531</sup> he stressed that a good doctor is not just "a mechanic of the human body whose services have no bearing on a person's moral choices" because he is someone who "who does more than treat symptoms, one who ministers to the patient." In the cases under discussion, patients not only sought relief from suffering and a way to end pain, but they sought help to end their lives with dignity. They were motivated by the fear that they would be deprived of dignity by increasing dependence and helplessness, and that they would continue to receive treatment regardless of the side effects, for example, from stronger analgesics. In the face of the inevitability of death, according to Justice Souter, the decision to end life is the same as the generally accepted and respected right to exercise autonomy over one's own body.<sup>532</sup>

The normative nature of human dignity was also evident in the last concurring opinion, by Justice Breyer (it should be stressed that the same opinion was attached to the case of *Vacco v. Quill*), who believed that the case ought to have been debated as being about the right to die with dignity. Justice Breyer acknowl-

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<sup>528</sup> *Ibidem*.

<sup>529</sup> The Justice admitted that at this point in time, in his view, State legislatures had better powers to resolve such cases. *Ibidem*.

<sup>530</sup> *Ibidem*.

<sup>531</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>532</sup> *Washington v. Glucksberg*, 521 U.S. 702 (1997).

edged that the public interest justified the differentiation between doctor-assisted suicide and the right to cease life-supporting treatment. He also agreed with the Court's assertion that the key question was whether the freedoms protected by the due process clause incorporated the rights claimed by the applicants. However, he considered it wrong to use the phrase "right to commit suicide with another's assistance" to describe this right. For this reason, he pointed out that he would not reject the applicants' demands without considering formulating another wording of a legal provision, for which the American legal tradition could provide greater understanding and support.<sup>533</sup>

In Justice Breyer's view, a more appropriate definition of the rights to be asserted would be the phrase the "right to die with dignity." The essence of such a right would be treating: (i) personal control over the manner of death, (ii) professional medical assistance, and (iii) avoidance of unnecessary and severe physical suffering, jointly. Justice Breyer pointed out that a justification of such rights could be found in a dissenting opinion by Justice Harlan in the *Poe v. Ullman* case,<sup>534</sup> where Justice Harlan referred to the liberty protected by the Fourteenth Amendment as "freedom from all substantial arbitrary impositions and purposeless restraints" and also as recognizing that "*certain interests* require particularly careful scrutiny of the state needs asserted to justify their abridgment."<sup>535</sup>

According to Justice Breyer, these "certain interests" could be tantamount or even identical to the rights, freedoms and interests that the Supreme Court described in the case in question as fundamental. As he recalled, Justice Harlan stated that marital privacy is such a "certain interest." When examining the protection that the law afforded to interests previously related but not identical, described by the terms "privacy," "home" and "family," Justice Harlan found in the Constitution the right to "privacy in the home," at the core of which were the "intimate details of the marital relation."<sup>536</sup> According to Justice Breyer, the applicants' request was similar. They argued that the right to die with dignity death could be found when examining the protection afforded by the law and applicable to related but not identical interests concerning personal dignity, medical treatment and freedom from pain (caused by the actions of the State).<sup>537</sup> Taking into account the specific legal circumstances, Justice Breyer expressed the view that the State legislation did not affect the substance of the interest<sup>538</sup> consisting of "the core of the interest in dying with dignity." However, as the Justice concluded, the Supreme Court might have had to revise its conclusions in this type of case.<sup>539</sup>

<sup>533</sup> *Ibidem*.

<sup>534</sup> *Poe v. Ullman*, 367 U.S. 497 (1961).

<sup>535</sup> *Washington v. Glucksberg*, 521 U.S. 702 (1997).

<sup>536</sup> *Ibidem*.

<sup>537</sup> *Ibidem*.

<sup>538</sup> In Justice Harlan's opinion they infringed the essence of the right to privacy.

<sup>539</sup> *Ibidem*.

Concluding, it is worth pointing out that in this judgment, the Supreme Court treated the right to suicide, alone or with the help of others, differently from the right to refuse medical treatment, which was the subject of the decision in the case of *Cruzan v. Missouri Department of Health*. Individuals have the right to accept a natural death instead of having their lives artificially prolonged, but they have no right to seek death actively.

The second ruling of the day was that of the *Vacco v. Quill* of 1997. The case was the result of the constitutional challenge of the New York State's rules penalizing an act of deliberate suicide or assistance in the commission of suicide, by, for example, a doctor who prescribed drugs causing a patient's death.<sup>540</sup>

The provisions were challenged by a group of medical doctors (headed by Timothy E. Quill<sup>541</sup>) and terminally ill patients who alleged a breach of the equal protection clause contained in the Fourteenth Amendment. They argued that the legislation treated two categories of patients unequally because the State legislation allowed a refusal to continue life-sustaining medical treatment by discontinuing medication or disconnecting life-sustaining equipment.<sup>542</sup> They argued that refusing treatment and asking a doctor for help to end one's life was essentially the same thing, since in both situations the outcome was the death of a patient who expressed a wish to hasten his or her death. The district court rejected their application and ruled in favor of the State authorities. However, the Court of Appeal overturned this judgment, recognizing the applicants' argument that the legislation treated patients of the same category, i.e., the terminally ill and those who were conscious and mentally competent, unequally. Patients connected to life-supporting equipment were allowed to demand the removal of the equipment, and that was considered legally admissible. However, the same patients were not allowed to effectively demand that a doctor prescribe them drugs to allow them to hasten death by self-administering the prescribed drugs. The Court of Appeal considered the removal of life-sustaining apparatus to be tantamount to doctor-

<sup>540</sup> New York Consolidated Laws, Penal Law – PEN § 125.15 Manslaughter in the second degree. A person is guilty of manslaughter in the second degree when:

(...)

3. He intentionally causes or aids another person to commit suicide.

Manslaughter in the second degree is a class C felony.

Penal Law – PEN § 125.15 New York Consolidated Laws [online], <https://law.justia.com/codes/new-york/> [22.02.2022].

<sup>541</sup> Timothy E. Quill – one of the proponents of the right to euthanasia, was one of the first to mention this problem in his article entitled: "Death and Dignity — A Case of Individualized Decision Making," *New England Journal of Medicine* 324(10), March 1991, pp. 691–4.

<sup>542</sup> Such State regulations were confirmed in the 1994 judgment in *Quill v. Koppell*, where the District Court ruled that "under New York State law, a competent person may refuse medical treatment even if the withdrawal of such treatment will result in death." *Quill v. Koppell*, 870 F. Supp. 78 (S.D.N.Y. 1994).

assisted suicide.<sup>543</sup> New York State Attorney General Dennis Vacco challenged the judgment in the Supreme Court.

The Supreme Court had to answer the question of whether the New York prohibition of doctor-assisted suicides violated the clause of the equal protection of rights contained in the Fourteenth Amendment, allowing competent terminally ill adults to withdraw from life-supporting treatment, but denying the same right to patients who, in the same condition, in order to achieve the same result (die) had to ask the doctor for a prescription of certain drugs.

The court – as in the case of the *Washington v. Glucksberg* ruling – decided the case unanimously, stating that there was no breach of the equal protection clause. In this way it recognized the right of the State of New York to have passed the contested legislation. However, also in this case, there were as many as five concurring opinions (four of them were drawn up jointly for the *Washington v. Glucksberg* judgment (by Justices O'Connor, Stevens, Breyer and Ginsburg). Justice Rehnquist, who drafted the majority opinion, stressed that the equal protection clause did not create any substantive rights. Instead, it was interpreted as a general rule whereby the authorities must treat similar cases of the regulation of fundamental rights in a similar way. In accordance with previous rulings, the Supreme Court did not consider it a violation when State regulations did not restrict fundamental rights (or did not differentiate between these rights) and were reasonably justified. The Justice pointed out that the contested provisions did not restrict fundamental rights, and the right to die was not of such a nature. He stressed that according to the established line of jurisprudence, whether a right was fundamental in nature and therefore protected by the Constitution, was determined on the basis of the Constitution and not on the basis of the “meaning” of the right as declared by the parties to the dispute. In order to justify this principle further, he pointed out that the overwhelming majority of State regulations distinguished (separated) explicitly between assistance in suicide as such and the discontinuation of treatment, or consent to a patient's refusal of unwanted life-sustaining treatment, by prohibiting the former and allowing the latter. Nearly all States disagreed expressly with suicide and assisted suicide, either in relevant health legislation or in living wills. Such laws also applied in the State of New York.<sup>544</sup> In this way, State legislation pursued

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<sup>543</sup> *Quill v. Vacco*, 80 F.3d 716, 735 (2d Cir. 1996).

<sup>544</sup> New York Consolidated Laws, Public Health Law – PBH § 2989. Effect on other rights.

1. A competent adult's failure to appoint a health care agent or to provide the agent with specific health care instructions pursuant to this article shall create no presumptions regarding the adult's wishes about health care.

2. Nothing in this article creates, expands, diminishes, impairs or supersedes any authority that a principal may have under law to make or express decisions, wishes or instructions regarding health care, including decisions about life sustaining treatment, whether or not expressed in a health care proxy.

the protection and promotion of patients' dignity at the end of their lives, clearly opposing doctor-assisted suicide.<sup>545</sup>

It was also stressed in the majority opinion that the above issues belonged to an area that the State authorities could regulate according to their current policies. In this respect, New York State's rules were extremely firm. The legislation in place dated back to 1965, but aiding and abetting suicide in New York had always been a crime, recognized as such in its statutory law or customary law. Justice Rehnquist also recalled that the protection of a patient's life was always an important public interest. In the case of the first category of patients, it was the protection of individual rights such as the protection of bodily integrity and the preservation of individual autonomy (freedom from unwanted touch), which must be protected by the State. In the other case, there was the demand to hasten death, and patients who expressed such a wish could not benefit from the protection due to them. In this way, the Supreme Court completely rejected the argument put forward by the petitioners that the statutory difference between assisted suicide and the refusal of life-saving treatment was "arbitrary" and "irrational."<sup>546</sup>

Also, the argument about unequal treatment was rejected in the majority opinion. As Justice Rehnquist put it, everyone, regardless of their physical condition, was entitled, if in a sound state of mind, to refuse unwanted life-sustaining treatment; but no one was entitled to help with suicide. This distinction was considered essential by the Justice: it was justified by established case law, by the rules in force, and moreover it was logical and rational.

The Supreme Court recalled that one of the basic legal rules when assessing a given act was the question of the intention of the person who performed the act. Traditionally, the law treats a person who kills someone accidentally differently from a person who acts intentionally and purposefully. The Supreme Court, based on this standard of intent, held that the situations of the terminally ill patients in question were not the same. Consequently, they could not be treated in the same way by law. In the first case, a doctor who stops treatment at the patient's request acts solely to respect the patient's will. The other case is completely different. A doctor, in respecting the patient's decision, must take certain actions which consciously and deliberately aim to deprive the patient of his or her life, for example, by opting for the relevant medication, specifying its dose and the method of use. In the first case, discontinuation of treatment may result in the patient's death, while the patient may not want to die, and it is not certain that the consequence

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3. This article is not intended to permit or promote suicide, assisted suicide, or euthanasia; accordingly, nothing herein shall be construed to permit an agent to consent to any act or omission to which the principal could not consent under law.

Public Health Law – PBH § 2989, New York Consolidated Laws [online], <https://law.justia.com/codes/new-york/> [22.02.2022].

<sup>545</sup> *Vacco v. Quill*, 521 U.S. 793 (1997).

<sup>546</sup> *Ibidem*.

of the disconnection of life-supporting apparatus will result in his or her death<sup>547</sup> (the patient may wish to have the equipment disconnected because of discomfort or pain and only allow the eventuality of possible death). In the other case, however, as a result of a deliberate action by the doctor, there will follow the certain death of the patient.<sup>548</sup> Thus the Supreme Court made a distinction between killing and letting die.<sup>549</sup>

To summarise the considerations in the above rulings, it is important to point out a number of issues, while the development of State legislation in this area cannot be overlooked. In accordance with the content of the judgments under discussion, it was within the competence of individual States to regulate the problem of the broadly defined right to die with dignity. Where it was decided to move away from the traditional penalization of each attempt to assist in suicide, an important role was played by arguments directly referring to the normative nature of human dignity. This approach may even be seen in the titles of the laws passed. It is also worth noting that while the opponents of the right to decide on one's own death call it assisted suicide or medically assisted suicide, its supporters prefer the English terms such as assisted death and doctor-assisted death respectively, or use a more general term: aid in dying.

Up until 2018 eight States have implemented regulations<sup>550</sup> distinguishing between assisted death and medically assisted death, allowing for the latter. In 1994 in Oregon, the Death with Dignity Act was passed by universal suffrage. In 2008, the Death with Dignity Act was passed by universal suffrage in Washington State. In 2009, the Supreme Court of Montana ruled by a 5–2 majority that (the) State law did not prohibit doctor-assisted suicide and introduced protection for those who prescribed measures to cause death at their patients' request. In 2013, the Vermont State Parliament passed the Patient Choice and Control at End of Life Act. In 2015, the California End of Life Option Act was passed in California. There had been four unsuccessful attempts to pass this type of law before. In 2016, in Colorado, in a popular vote, Proposition 106 legalizing the assisted death of terminally ill people was supported. In the District of Columbia, the Death with Dignity Act, passed in 2015, entered into force in 2017. On 1 January 2019, the provisions allowing medical assistance in death, adopted in 2018, entered into force in Hawaii.

In a number of other States, similar initiatives were put forward and debated, including those motivated by the need to respect human dignity in the last moments of life. They included the Death With Dignity Bill in Maryland in 2015, the

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<sup>547</sup> The example of Alphonse Evans, who, after being disconnected from his life-support equipment, breathed on his own for more than 5 days – despite doctors' beliefs that disconnection from the equipment meant immediate death.

<sup>548</sup> This is the problem of the "double effect," widely discussed in ethics and bioethics.

<sup>549</sup> *Vacco v. Quill*, 521 U.S. 793 (1997).

<sup>550</sup> The exception to this is the State of Montana, where the Supreme Court's ruling decided on this issue instead of regulations.

Death With Dignity Initiative Bill in Massachusetts in 2012 which was rejected by a general vote, the Death with Dignity Act tabled unsuccessfully by the New Jersey State Senate in 2014, or the proposal of the Death with Dignity Act which was tabled in New York State in 2015.<sup>551</sup>

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<sup>551</sup> In 2017, the Court of Appeal rejected the claim to recognize the right to death with dignity as compatible with the New York State Constitution in its judgment in *Myers v. Schneiderman*, 2017 NY Slip Op 0641 and decided on 7 September 2017.

## HUMAN DIGNITY AND SAME-SEX MARRIAGES

Equally heated disputes in the United States were and still are being waged around the issue of the legalization of same-sex unions. In this context, too, the idea of human dignity has played an important role in the case law of the Supreme Court, influencing the shape of legal regulations in this area.

One of the first judgments on this subject was the *Bowers v. Hardwick*<sup>552</sup> case of 1986. Michael Hardwick was accused of having committed the crime of sodomy, criminalized by Georgia's state laws, i.e., oral or anal sexual intercourse (without distinction between homosexual and heterosexual intercourse).<sup>553</sup> The intercourse by mutual consent with an adult man took place in his home, which was entered by a police officer who had previously been observing Hardwick. Both men were arrested on suspicion of committing an offence for which they were then facing 2 to 10 years' imprisonment under the then applicable legislation. Eventually, Hardwick was not charged (the district prosecutor declined to file an indictment).<sup>554</sup> However, at the encouragement of representatives of The American Civil Liberties Union (ACLU), Hardwick filed a motion to declare the laws of Georgia unconstitutional to the extent that they criminalized sexual activities to which both parties agreed. The state district court dismissed Hardwick's complaint, but a court of higher instance overturned the judgment and found that the contested legislation violated fundamental rights and was therefore unconstitutional. The judgment was appealed before the Supreme Court by the Attorney General of Georgia, Michael J. Bowers.<sup>555</sup>

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<sup>552</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>553</sup> It is interesting to note that the provision of § 16-6-2 can be found in the Georgia State Code in Title 16 (Offences), Chapter 6 (Sexual Offences).

<sup>554</sup> District Attorney Lewis Slaton chose not to prosecute the sodomy charge, considering that the warrant had expired, and his own belief that the sodomy law should not be used to prosecute consensual sexual activity.

<sup>555</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986).

The Supreme Court took the view that the protection of rights which were not explicitly mentioned in the Constitution was permissible only if those rights were “implicit in the concept of ordered liberty” (as established in the *Palko v. Connecticut* case of 1937) or when they were “deeply rooted in this Nation’s history and tradition.” (as the Court pointed out in the *Griswold v. Connecticut* judgment in 1965). The Constitution did not grant homosexuals any fundamental right (in the constitutional sense) to sexual activities defined as sodomy. Such an assertion, especially in the context of the numerous state laws criminalizing this type of sexual activity was as Justice White put it, at best *facetious*.<sup>556</sup>

The Justice also stressed the majority viewpoint on the interpretation of the due process clause. He pointed out that extending the scope of the clause to cover new fundamental rights should be made with great caution and should arouse resistance each time they came into question. Otherwise, the judicial authority would “without constitutional authority” be taking over the powers of other authorities to govern the country.<sup>557</sup>

The reference to human dignity appeared only in a dissenting opinion delivered by Justice Stevens, who was joined by Justices Brennan and Marshall. Justice Stevens, referring to his previous line of ruling, recalled that the individual decisions of married persons concerning their physical relationships belong to certain freedoms protected by the due process clause of the Fourteenth Amendment, as confirmed in the *Griswold v. Connecticut* case. This protection of private relationships was also extended to unmarried couples, as was done in the judgments of *Carey v. Population Services International* and *Eisenstadt v. Baird*. In dealing with these types of issues, the court stressed “the individual interest in privacy.”<sup>558</sup>

However, Justice Stevens concluded that there were far more greater concerns behind the above decisions. He stressed that the issues with which the Court dealt were about the right of each individual to take extremely important decisions, the consequences of which would affect the future of the individual or his or her family. The court described such decisions as fundamental and connected with basic values. Justice Stevens noted that the language used in these cases reflected the beginnings of the American heritage of liberty: “the abiding interest in individual liberty that makes certain state intrusions on the citizen’s right to decide how he will live his own life intolerable.” Thus, the entire federal judiciary, guided by historical experience and a tradition of respect for the dignity of individual choice in matters of conscience, recognized the existence of those rights and the related obligation to protect them where appropriate. The Justice thus considered that

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<sup>556</sup> *Ibidem*.

<sup>557</sup> *Ibidem*.

<sup>558</sup> *Ibidem*.

an essential “liberty” must include the right to sexual activities (including those not aimed at conceiving a child) which others might find offensive or immoral.<sup>559</sup>

There are several issues that need further consideration when discussing this judgment. First, the reference to the idea of dignity only came up in a dissenting opinion of one Justice. Second, the issue here was not a reference to the dignity of man, but to the dignity of man’s individual choices. And yet Justice Stevens made a few extremely important statements and his view in this matter, although still in a minority in the mid-1980s, prevailed in the first decade of the twenty-first century and was considered relevant in the *Lawrence v. Texas* ruling<sup>560</sup> of 2003. Furthermore, as has been pointed out many times, there are no clearly defined terms in the American tradition that refer to the idea of human dignity, and several phrases are often used in practice to describe the same idea. It is also important to note that the approach adopted by Justice Stevens is extremely characteristic of the American political and legal tradition, where human dignity is inextricably linked to individual freedom, one of the main manifestations of which is freedom of choice. This freedom of decision making is all the more important and valuable when it concerns the private sphere, where the individual decides on personal matters, especially those concerning his or her private life, which primarily concern him or her alone. This area is specially protected, and its protection is justified by the invaluable value of every human being, i.e., the dignity of the individual. In this case, this combination of freedom and human dignity was defined as the *dignity of individual choice*.<sup>561</sup>

The protection of intimate homosexual relations reappeared in the Supreme Court in 2003, following a landmark ruling in *Lawrence v. Texas*, when the idea of human dignity became apparent in the verdict itself and in the opinion of the majority, which in turn had a direct impact on the final court verdict.

The case involved three gay men who spent an evening in Houston, in a flat that belonged to one of them. However, one of the men (Robert Eubanks), driven by envy of his partner (Tyrone Garner) with whom the third one (John Lawrence) was flirting, left the flat and then, in an act of vengeance, reported to the police a disturbance with a gun in the flat he had left. The police officers who entered the flat found Lawrence and Garner having sex. The latter were arrested and then convicted of an offence under the Texas Criminal Code which prohibited deviant sexual relations.<sup>562</sup> In challenging the judgment, Lawrence argued that state legislation violated the due process clause of the Fourteenth Amendment. However,

<sup>559</sup> Justice Stevens quoted one of his rulings: *Fitzgerald v. Porter Memorial Hospital*, 523 F.2d 716, 719–720 (CA7 1975).

<sup>560</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>561</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>562</sup> Sec. 21.06. Homosexual conduct. (a) A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex. Texas Statute, Sec. 21.06 [online], <https://law.justia.com/codes/texas/> [22.02.2022].

the Court of Criminal Appeal of the State of Texas did not uphold Lawrence's arguments and did not rule on the unconstitutional nature of the contested provisions.

The case was referred to the Supreme Court which had to answer the question whether punishing adults for having sex by mutual consent in a private flat violated their vital interests and freedoms protected by the due process clause. The applicants also argued that criminalization of certain aspects of homosexual behaviors, in the absence of the same with regard to heterosexual couples, was contrary to the provisions of the clause of equal protection of rights.<sup>563</sup>

The justices of the Supreme Court, by a majority of 6 to 3, agreed with the applicants' arguments and annulled the judgment in the case of *Bowers v. Hardwick*. The majority opinion was drawn up by Justice Kennedy, and its important argument was a reference to the idea of human dignity and its role in the context of the due process clause. Justice O'Connor, on the other hand, expressed a concurring opinion. As she explained, her conclusions were based on the equal protection clause. The three other Justices submitted two dissenting opinions.<sup>564</sup>

The Supreme Court stressed that in the judgment of *Bowers v. Hardwick*, the individual's liberty interest was defined too narrowly. Justice Kennedy pointed out that sexual relations between two adults, carried on by mutual consent in a private place, were part of the freedom protected by the substantive aspect of the due process clause of the Fourteenth Amendment.

In its judgment, the Court stressed that the objectives of the Act and the penalties provided for by the provisions retained in the *Bowers v. Hardwick* ruling had far more serious consequences than merely a ban on certain sexual activities. In order to assess them properly, in his statement of reasons, Justice Kennedy recalled that, following the *Bowers v. Hardwick* ruling, the Supreme Court decided on two cases which contained key elements for the reasoning of the majority opinion in question. In the *Planned Parenthood of Southeastern Pa v. Casey* case, the Supreme Court confirmed the importance of the substantive aspect of freedom protected by the due process clause, recalling the key passage in this judgment, which referred to the dignity of individuals: "[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to

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<sup>563</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>564</sup> Justice Scalia stressed that the opinion of the majority might have a "ripple effect" and overturn the grounds for a number of other Supreme Court rulings. He pointed out that, as in the case of the rights relating to termination of pregnancy, most justices adapted their arguments to support the rights of those groups with which they sympathized. In that way, the Supreme Court served the gay activists, who should have been able to influence the state legislature themselves. The Supreme Court should not interfere in social processes in progress in that way. At the same time, Justice Scalia observed that the judgment in question would be the beginning of a "slippery slope," to the effect that no form of sexual behavior, no matter how socially undesirable, could be legally banned. Justice Thomas, on the other hand, considered that the law in question was "silly" and should have been repealed, but no constitutional basis could be found to eliminate it as a result of the Supreme Court verdict. *Ibidem*.

personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.” This therefore meant that persons in homosexual relationships might exercise their autonomy in terms of sexual relations, just like heterosexual persons. Meanwhile, the decision of the Court in the *Bowers v. Hardwick* case denied them this right.<sup>565</sup>

As Justice Kennedy noted, the contested regulations referred to the most private human acts and sexual behaviors, carried out in the most private of places, i.e., one’s own home. Their aim was to control personal relationships which fell within the scope of the freedom of choice of each individual without fear of possible punishment. It was irrelevant too whether a human relationship was eligible for formal recognition in law or not. The freedom protected by the Constitution allowed homosexuals to exercise the right to establish relationships within their homes and their private lives, while preserving their dignity as free persons.<sup>566</sup>

The other important judgment to which Justice Kennedy referred was the judgment in *Romer v. Evans* in 1996, where the Supreme Court found the anti-homosexual legislation to be an example of prohibited class-based legislation, thus violating the equal protection clause.<sup>567</sup>

It was stressed in the majority opinion that both the right to equal treatment and the right to a due process (which also manifested itself in the demand for respect for acts protected by the substantive aspects of the liberty of the Fourteenth Amendment) were closely linked. The decision of the state legislature to criminalize homosexuality was a certain legal declaration which, in practice, might have resulted in discrimination against people with a homosexual orientation in both the public and private sphere. Even the informal stigma itself was not the only problem. Justice Kennedy commented on the effects of the contested legislation. He pointed out that even if a prohibited act was only a minor offence, it remained an act prohibited by law. The effects of a conviction therefore included, among other things, the mention of a sexual offence in the files and application forms submitted by convicted persons and their registration as sex offenders under state law. All this was of great weight for the dignity of the persons who had been accused and convicted. They were treated as persons who had committed a crime.<sup>568</sup>

The above case was another manifestation of the impact of the idea of human dignity on the concepts of the substantive aspect of the due process clause. Once again, the Justices linked human dignity to the liberty interests which an individual must have the right to exercise without hindrance in the form of state interference. Second, human dignity emerged as a value in opposition to discrimination, in a similar way to the case of the fight against racial segregation, this time against

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<sup>565</sup> *Ibidem*.

<sup>566</sup> *Ibidem*.

<sup>567</sup> *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>568</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

the unequal treatment of homosexual persons. It was pointed out directly that stigmatizing this type of behavior through the law violated the dignity of individuals.

An important decision for the elimination of discrimination against gays and lesbians and the process of legalizing same-sex unions, was the ruling in the United States v. Windsor case<sup>569</sup> of 2013. It is worthwhile to discuss it briefly here for three reasons. First, it was one of the landmark rulings, and without it, the reasoning carried out in this essay on discrimination against persons with different sexual preferences would have been incomplete. Second, it contained references to the idea of human dignity, although much more important were the references to the idea of dignity linked not to the human being, but to the institution of marriage and the social rank that its conclusion gives to individuals. Third and finally, the judgment in that case was crucial for the later ruling in the Obergefell v. Hodges case.

The matter was the result of the application of the Defense of Marriage Act (DOMA) of 1996, which defined the terms of “marriage” and “spouse” in the context of a relationship between a man and a woman for the purposes of federal legislation. The law was passed as an attempt to prevent the recognition of same-sex unions as marriages in the legal sense of the word. The legislation allowed a State to refuse to recognize a same-sex marriage concluded in another State or country. This was the case with Edith Windsor and Clara Spyer, who married in Canada in 2007. The State of New York where they lived recognized the legality of their marriage. When Spyer died in 2009, her spouse inherited from her. However, the federal authorities, following the DOMA rules, did not recognize their marriage and ordered Windsor to pay an inheritance tax of USD 353,000 in her capacity as heir to a stranger. Windsor brought a lawsuit before the district court to declare the Act on the defense of the institution of marriage unconstitutional. Both the District Court and the Court of Appeal for the Second Circuit ruled the Act unconstitutional. The judgment of the latter was appealed to the Supreme Court.

The Supreme Court ruled by a 5–4 majority that the Act was unconstitutional, and pointed out that the contested provisions deprived same-sex couples who entered into matrimony under State law of the right to equal protection. The majority opinion was drawn up by Justice Kennedy and three other Justices submitted three dissenting opinions.

Justice Kennedy referred to the dignity of persons contracting marriage<sup>570</sup> and the dignity of marriage itself.<sup>571</sup> He also stressed that the main objective of the

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<sup>569</sup> United States v. Windsor, 570 U.S. 744 (2013).

<sup>570</sup> “Here the State’s decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community.” *Ibidem*.

<sup>571</sup> It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage.

DOMA was to distinguish certain unions (recognized as marriages only by State authorities) in a negative way, and consequently to introduce inequality between them and the unions recognized as marriage by federal law. This, in his opinion, had no other objective but to impose inequality.<sup>572</sup>

This statutory inequality between the two types of marriage means that people in a legalized same-sex marriage are deprived not only of certain rights but also of certain responsibilities. Meanwhile, as Justice Kennedy stressed, rights as well as responsibilities strengthen the dignity and integrity of the person. It is worth stressing straight away that, in this sense, human dignity appeared not only as the foundation of rights and freedoms, but also as the basis for specific responsibilities that an individual – by virtue of being human – can or must fulfil in specific situations. In the case of marriage, for example, such responsibilities include the multi-faceted care of the partner, the obligation to be faithful and to cooperate for the benefit of the family they have founded. The question of responsibilities is extremely rare in human rights discourse, but the idea of human dignity is inextricably linked to them. In a broader context, being a human being (holding dignity as a priceless value) gives rise to a series of responsibilities which may be described metaphorically as “walking tall.” Such a perception of human dignity brings the American vision closer to the European one.<sup>573</sup>

Meanwhile, as Justice Kennedy pointed out, the DOMA, having created two conflicting marital regimes, had forced same-sex couples to live as a couple under state law, but as unmarried individuals under federal law. In that way, federal

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(...)

By its recognition of the validity of same-sex marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages, New York sought to give further protection and dignity to that bond. For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status. This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages.

(...)

The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence. The House Report announced its conclusion that “it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage.

(...)

The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence*, 539 U.S. 558, and whose relationship the State has sought to dignify.

(...)

It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. *Ibidem*.

<sup>572</sup> *Ibidem*.

<sup>573</sup> This expression was used e.g., by the German philosopher Ernst Bloch in his work *Naturrecht und menschliche Würde* (Frankfurt am Main, 1977). Another example of such a perception of human dignity are European judgments prohibiting dwarf tossing.

law, which should serve to protect the rights of the individual, reduces the stability and predictability of basic personal relations, which the state authorities considered appropriate to recognize and protect. DOMA undermined both the public and private importance of same-sex marriages sanctioned by states. The provisions of the Act made it clear that such relationships “are unworthy of federal recognition.” This puts same-sex couples in the unstable position of being in a second-class marriage. Such differentiation is demeaning to a couple whose moral and sexual choices are protected by the Constitution, as was confirmed by the Supreme Court in the judgment of *Lawrence v. Texas*.<sup>574</sup>

Concluding, Justice Kennedy stressed that the DOMA distinguished a category of persons who had been considered by state authorities as eligible for having their freedom recognized and protected by law. The Act imposed a disability on this group (of people distinguished by their sexual preferences), and refused to recognize their status granted to them by State authorities. This federal Act was unconstitutional since no legitimate aim might outweigh the effects of discrimination against those who had been recognized by State authorities through the respective legislations of those States, as having their personhood and dignity. By seeking to replace this protection and treating these people as living in marriages less respected than others, the federal Act constituted a violation of the Fifth Amendment.<sup>575</sup>

Lastly, it is just worth noting that Justice Scalia presented an extensive dissent and that in his argumentation, he tried to negate the arguments of the majority of the Justices that were based on the reference to the idea of dignity, claiming that the Justices’ understood this idea incorrectly.

The judgment in the case of *Obergefell v. Hodges*<sup>576</sup> of 2015 is considered a landmark ruling on the rights of homosexual persons for the legalization of their relationships. It is also extremely important, since human dignity played a primary role in it, becoming one of the basic arguments used in the interpretation of the Fourteenth Amendment, which led to the creation of a new fundamental right protected by the Constitution, namely the right to same-sex marriage. It is also the judgment in which human dignity was defined for the first time (by Justice Thomas in his dissenting opinion). It also contained a detailed definition of the place of human dignity in the American tradition, the Constitution and the entire system of American law. It should further be noted that the term *dignity* was used in several different meanings.

The case was the result of lawsuits brought by 14 single-sex couples (and two men whose partners died during the trial) who questioned the constitutionality of State regulations in Michigan, Kentucky, Ohio, and Tennessee which defined

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<sup>574</sup> *United States v. Windsor*, 570 U.S. 744 (2013).

<sup>575</sup> *Ibidem*.

<sup>576</sup> *Obergefell v. Hodges*, 576 U.S. 644 (2015).

marriage as a union between a man and a woman. As a result, the State authorities either refused to recognize same-sex marriages as marriages, or refused to recognize same-sex marriages concluded in other States that allowed such marriages. Both situations produced certain negative legal consequences or had no specific positive consequences. The complainants considered that this situation violated their civil rights protected by the clauses of the Fourteenth Amendment. The lawsuits were brought before the federal circuit courts and in each case the courts agreed with these arguments of the complainants. On appeal, the cases were referred to the United States Court of Appeals for the Sixth Circuit, which, having merged all these cases into one, overturned the judgments of the lower courts and ruled that State regulations were consistent with the Constitution.

The verdict was appealed to the Supreme Court which had to answer two questions. First, whether the Fourteenth Amendment imposed an obligation on the State to allow same-sex marriages. Second, whether the Fourteenth Amendment required State authorities to recognize same-sex marriages concluded legally in other States.

The court decided by a 5–4 majority to grant same-sex couples the right to marry, declaring the contested provisions unconstitutional. The majority opinion was drawn up by Justice Kennedy. Four Justices (the Chief Justice of the Court, Justice Roberts, and Justices Scalia, Thomas and Alito) submitted dissenting opinions. It is worth noting straight away that human dignity played an important role, both in the majority opinion and in the dissenting opinions (especially those by Justice Roberts and Thomas), and the text of the verdict itself is one of the longest (together with the dissents it amounted to over a hundred pages).

Justice Kennedy divided the majority opinion into three parts. In the initial phase, he spoke of the importance of marriage as an institution and the history of its evolution in the United States, especially examining the changes in its perception in the context of the judgments of the Supreme Court. The second and third parts contained a detailed justification of the majority's position with regard to the obligation to marry same-sex couples and the recognition of same-sex marriages concluded in other States. In each of these parts, references to human dignity were made although dignity was given different meanings.

In the first place, Justice Kennedy presented the views of the majority on the importance of marriage as a social institution. He pointed out that a lifelong relationship between a man and a woman had always provided nobility and dignity to all persons, regardless of their position in society. At the same time, however, he stressed that the history of marriage was a history of continuity and change. Such changes as the departure from arranged marriages and the recognition of the principle of equal rights for spouses,<sup>577</sup> were the result of profound changes in

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<sup>577</sup> It is mainly about the *coverture law* according to which the woman was subordinate to her husband on a number of issues. In Anglo-Saxon law, this was particularly evident in the context of

the structure of, the institution of marriage. As women gained political and property rights, society began to understand that women were entitled too, to their own equal dignity. These changes as well as new concepts had strengthened, not weakened, the institution of marriage.<sup>578</sup>

Such activities and developments could be seen especially in the context of the rights and freedoms of homosexual persons. Until the middle of the twentieth century, intimate same-sex relationships had long been condemned in most Western countries for being immoral in themselves, which was often reflected in their penalization under criminal law. For this reason, among others, many people consider homosexuals as individuals incapable of having dignity in their own distinct identity. Even when, in the period after the Second World War, there was a greater awareness of the need to respect the humanity and integrity of homosexuals, their demand for respect for their dignity was not considered justified and was contrary both to the law and to widespread social standards.<sup>579</sup>

Justice Kennedy found that an evolving “understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations.” He also found that opponents of change were wrong to fear that the proposals sought to devalue this institution’s values, since the reason behind the complainants’ actions was precisely respect for the privileges and duties enjoyed by spouses.<sup>580</sup>

In the second part of the majority opinion, Justice Kennedy justified the obligation of the State authorities to marry homosexual couples and recognize same-sex marriages. He stressed that it stemmed from both the due process clause and the equal protection clause. He first recalled the most important statements made by the Supreme Court in its rulings relating to the interpretation of the due process clause in relation to the private life of the individual. He noted that the fundamental liberties protected by the Fourteenth Amendment in this context included “certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”<sup>581</sup>

According to the majority opinion, every court must interpret the law in such a way as to identify those fundamental interests of the individual that must be protected by the State authorities. And while history and tradition were important in that context, Justice Kennedy stressed that they could not play a decisive role in a conflict between constitutional protection and the limitations of the law. This is why the Supreme Court had long been following the rule that the right to marry

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property rights, which discriminated significantly against married women, in practice denying them the ability to manage their property. In the nineteenth century, these laws began to be changed in the USA by means of state laws, called Married Women’s Property Acts.

<sup>578</sup> *Obergefell v. Hodges*, 576 U.S. 644 (2015).

<sup>579</sup> *Ibidem*.

<sup>580</sup> *Ibidem*.

<sup>581</sup> *Ibidem*.

was a right protected by the Constitution; hence its decisions such as declaring unconstitutional prohibitions of interracial marriages enacted in individual States as was in the *Loving v. Virginia* of 1967, or recognition of the right to marry of prisoners serving a sentence (*Turner v. Safley*<sup>582</sup> of 1987).

Justice Kennedy then presented four arguments based on the precedents set by the Supreme Court, which showed that the fundamental right to marry, protected by the Constitution, applied with equal force to same-sex couples. First, the right of a personal choice for marriage is intrinsically linked to the concept of individual autonomy. Decisions regarding marriage are among the most intimate decisions an individual may make. The nature of marriage is that, thanks to its enduring bond, two people together may find other freedoms, such as freedom of self-expression, intimacy and spirituality. Just as these statements apply to people of any race, they must apply to all people regardless of their sexual orientation. The Justice stressed the great value, even dignity, in the bond between two men or two women who are seeking to get married and to make such profound choices in their autonomy.<sup>583</sup>

Second, the right to marry is fundamental because it supports a relationship between two people, and is the most intimate relationship, completely different from any other in which people can be involved. Individuals in same-sex couples have the same right to enjoy such a unique intimate relationship as a woman and a man. This right cannot be limited to freedom from punishment for homosexual intercourse and cannot end with the repeal of laws that penalize homosexual relations.<sup>584</sup>

The third basis for the protection of the right to marry is the recognition that it protects children and families and thus draws on the related rights to raise children, procreation and education. Justice Kennedy referred to the protection of children's rights and position, pointing out that a failure to recognize same-sex marriages harmed children raised by those couples as they were stigmatized of being raised in a lesser family. The contested Acts humiliated the children of same-sex couples. Paradoxically, however, Justice Kennedy found that this did not mean that the right to marry was less important for those who did not or could not have children. Indeed, since precedents showed that the right to contraception in marriage was protected, the right to marry could not be motivated by the desire or ability to procreate or engage in reproduction.<sup>585</sup>

The fourth argument of the majority opinion reached back to the American tradition of treating marriage as a "keystone of our social order." This was demonstrated by numerous State regulations that placed marriage at the core of many

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<sup>582</sup> *Turner v. Safley*, 482 U.S. 78 (1987).

<sup>583</sup> *Obergefell v. Hodges*, 576 U.S. 644 (2015).

<sup>584</sup> *Ibidem*.

<sup>585</sup> *Ibidem*.

specific issues within the legal and social order. According to Justice Kennedy, there could be no difference in regard to this principle between same-sex couples and relationships between a man and a woman. This is humiliating and exclusive for same-sex couples, since such relationships too may pursue “transcendent purposes of marriage.”<sup>586</sup>

Justice Kennedy then presented arguments in favor of the right to marry a person of the same sex, based on the equal protection clause. In his argument, he emphasized that those two ideas were very strongly connected. Although the subjective rights stemming from the rights and freedoms protected by the equal protection clause are based on other precedents and are not always as broad as the due process clause, it was precisely because of this strong link that they were important in the case in question, too. Such a dynamic link between the two clauses had already been cited in the *Loving v. Virginia* judgment.

In this context, the Justice referred to the changing social assessments of certain phenomena. He stressed that certain forms of inequality in such fundamental institutions as marriage that had once passed unnoticed or even been accepted are no longer considered justified by public opinion. As an example, the Justice pointed to the concept of coverture in which the status of a married woman was determined, and which undeniably denied the equal dignity of men and women. However, that concept had prevailed for many years, and it was only recently that its unfairness had become apparent. The court found that the two constitutional clauses were intertwined in the context of the legal treatment of same-sex unions. The contested provisions restricted the freedom of same-sex couples and narrowed the central precepts of equality. The provisions in question were, in essence, unequal. Some couples were denied the benefits granted to other couples and were forbidden to exercise their fundamental right protected by the Constitution. The only reason for this discrimination was gender. This injustice was particularly evident in the long history of the condemnation of same-sex relationships. The denial of the right to marriage operated as a profound and continuous harm, serving to disregard and diminish the value of gays and lesbians.<sup>587</sup>

Summing up this part of deliberations, Justice Kennedy concluded that the right to marry was a fundamental right inherent in the liberty of the person, and under the due process and equal protection of rights clauses contained in the Fourteenth Amendment on same-sex couples, the latter could not be deprived of that right and that freedom.

The Justice rejected the argument that this was a matter to be dealt with primarily by State legislators, rather than by the Supreme Court. Although the Constitution stipulated that democracy and the associated tools for political action, such as elections, were the most appropriate process for changing the law, victims did

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<sup>586</sup> *Ibidem.*

<sup>587</sup> *Ibidem.*

not have to wait for legislative action in their pursuit of the recognition of their fundamental rights. As Justice Kennedy stressed, the histories of the complainants clearly showed the urgency of the case, which the Supreme Court had to decide. In support of this, he cited a statement by one of the complainants who, in his suit, asked the rhetorical question of whether the State of Tennessee could deny his basic dignity by not recognizing his marriage contracted under New York State law.<sup>588</sup>

Finally, in the third part of his deliberations, Justice Kennedy pointed out that the Fourteenth Amendment required States to recognize as legally valid and binding same-sex marriages concluded under the law of another State. Moreover, since same-sex couples were already enjoying the fundamental right to marry in all States, there was no legal basis for States to refuse such recognition.<sup>589</sup>

The idea of human dignity was also referred to in the last paragraph of the majority opinion. Justice Kennedy noted in it that no relationship was deeper than marriage because marriage embodied the highest ideals of love, loyalty, devotion, sacrifice and family. By creating a marriage, two people create far more than just a union of two people. The Justice stressed that it was wrong to assert that the complainants showed a lack of respect for the idea of marriage. He concluded that their requests indicated the opposite – they were an expression of great respect for the institution, and the complainants only demanded that their wishes be allowed to be fulfilled. In this way they expressed the hope that they would not be condemned to live single lives, excluded from one of the oldest institutions of human civilization, and they only asked for equal dignity in the face of the law, which the Constitution should grant them.<sup>590</sup>

As indicated earlier, references to human dignity and other approaches to dignity also appeared in the dissenting opinions of two Justices: Justice Roberts (joined by Justice Scalia and Justice Thomas) and Justice Thomas (joined by Justice Scalia).

Justice Roberts emphasized that the decision taken was, in his opinion, a political decision. Both the previous line of the Supreme Court's rulings and the classic views of the Founding Fathers contained in their political writings indicated that such decisions should be left to State legislators. He continued to argue that the Supreme Court Justices were engaging in a misunderstood judicial activism, and that it was up to the States to decide freely how to define the institution of marriage. The Justice pointed out that the complainants included important social and judicial arguments in their lawsuits, and that their beliefs were becoming increasingly popular and understood in American society. He recalled that between 2009 and 2015, voters and legislators in eleven States and the District of Columbia changed their laws to allow same-sex marriage to be concluded legally. However,

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<sup>588</sup> *Ibidem*.

<sup>589</sup> *Ibidem*.

<sup>590</sup> *Ibidem*.

he also firmly reminded the court that the Supreme Court was not a legislative body, and should have not been worried about whether a same-sex marriage is a good idea. According to the Constitution, judges have the right to say what the law is, not what it should be.<sup>591</sup>

According to Justice Roberts, the fundamental right to marry did not include the right to change the definition of marriage. The society of each State was free to extend the concept of marriage to the marriage of same-sex couples or to preserve the historical definition. However, the Supreme Court did not have the right to order every State to marry same-sex couples obligatorily and to consider such relationships as lawful marriages. The Justice ruled that the majority decision is an act of will and not a legal judgment. The right that had been recognized but had no basis in the Constitution or in any precedent of the Supreme Court. He noted that the complainants had not enumerated any subjective law in the Constitution that had been violated by State laws. He stressed that there was no “Companionship and Understanding” or “Nobility and Dignity” clause in the Constitution. What the complainants did instead, was to point out that the state laws had violated the right contained in a clause of the Fourteenth Amendment, according to which liberty could not be revoked without due process of law. The Justice admitted that the Supreme Court had interpreted it as containing a substantive element that protected certain liberty interests from being violated by State authorities. He then provided a detailed interpretation of the substantive aspect of the right to a due process, asserting that most Justices misinterpreted it.

The Justice was also critical of other arguments supporting the judgment. He admitted that most of them could have been applied with the same efficacy to polyamorous relationships<sup>592</sup> and polygamy. He wrote that if “[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices, (...) why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry?”<sup>593</sup>

Justice Roberts ended his opinion with an ardent statement: “If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today’s decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.”<sup>594</sup>

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<sup>591</sup> *Ibidem*.

<sup>592</sup> Polyamor (Greek: poly – many, Latin: amor – love) – multi-loving, it is the practice of building relationships and entering into emotional and sexual relationships with more than one person at the same time.

<sup>593</sup> *Obergefell v. Hodges*, 576 U.S. 644 (2015).

<sup>594</sup> *Ibidem*.

A much more important reference to human dignity was made in a dissenting opinion issued by Justice Thomas who found that the opinion of the majority was contrary not only to the Constitution, but also to the principles and values on which the American people and State were built. To substantiate this thesis, he put forward arguments indicating that the majority's reasoning was contrary to the classic American legal and political tradition of two ideas: liberty and human dignity.<sup>595</sup>

Justice Thomas pointed out that for centuries (and he remarked that it was much earlier than in 1787), liberty was understood as freedom from the interference of the authorities and not the entitlement to government benefits. The Founding Fathers created the American Constitution in order to protect the individual from unwanted interference by the authorities. The majority opinion, meanwhile, invoked the Constitution in the name of a "liberty" (Justice Thomas put this term in quotation marks) which would not have been accepted by the creators of the Constitution, and what was worse, it was to the detriment of true liberty which should be protected.

To support his thesis, he referred to the views of William Blackstone, John Block and the Founding Fathers as well as previous decisions of the Supreme Court. He argued that even if it were to be assumed that the liberty contained in the clauses of the Fourteenth Amendment included something more than just freedom from physical coercion, it would not have included those powers that were recognized by the majority of Justices and provided in the *ratio decidendi*. Moreover, according to Justice Thomas, regardless of whether liberty had been defined as freedom from interference by the authorities or, more broadly, as freedom of action, the complainants had not in any way been deprived of it. Instead, the State authorities had refused to grant them the powers that had been conferred on them by the government. Indeed, the complainants argued that their liberty included the right to access privileges and benefits that existed exclusively due to the functioning of public authority (e.g., they claimed cash benefits in the form of reduced inheritance taxes in the event of the death of their spouse, or compensation in the event of the death of their spouse as a result of an accident at work). However, as Justice Thomas pointed out, such powers had nothing to do with the classic understanding of liberty. The extent to which the creators of the Constitution would recognize the natural right to marriage, which falls within the broader definition of liberty, had certainly not included a claim to legal recognition and government benefits.<sup>596</sup>

In an equally fundamental and critical way, the Justice referred to the concept of the dignity of persons in same-sex relationships and the dignity of the human being contained in the majority opinion. He pointed out that the intention of the

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<sup>595</sup> Ibidem.

<sup>596</sup> Ibidem.

majority opinion was to promote the dignity of same-sex couples. However, he stressed that the obvious disadvantage of this reasoning was that the Constitution did not contain any “dignity” clause. Moreover, no public authority could grant dignity to anyone. As Justice Thomas noted, in the American political and legal tradition, human dignity had long been understood as an innate value. The authors of the Declaration of Independence proclaimed that “all men are created equal” and are “endowed by their Creator with certain unalienable Rights,” which meant a “vision of humanity in which all men are created in the image of God, and thus are endowed with an innate and inherent worth.” And this vision was “the foundation upon which this Nation was built.”<sup>597</sup>

The consequence of this principle was that human dignity could not have been taken away by any public authority. As Justice Thomas said, slaves had not lost their dignity and humanity because the law allowed their enslavement. Those held by American authorities in internment camps during World War II had not lost their dignity because they were imprisoned. Likewise, those who had been denied government benefits certainly did not lose their dignity because the government denied them these benefits. The government cannot bestow dignity on people and cannot take it away from them.

Justice Thomas was firm in his opinion that the line of reasoning presented in the majority opinion was incorrect. As he noted sarcastically, this reasoning cannot affect the dignity of the persons who are humiliated by the majority opinion. Neither did the incorrect characteristics of the arguments of State authorities contained in the majority opinion affect the dignity of the litigants. This thought was continued by Justice Thomas who stressed that the rejection by the majority of Justices of laws that retained the traditional definition of marriage would not have affected the dignity of the people who by universal suffrage expressed their support for these laws. The annulment of these laws could not have had any impact on the dignity of those who still adhered to the traditional definition of marriage. And the contempt of most Justices for “the understandings of liberty and dignity upon which this Nation was founded” could not affect the dignity of the Americans who still believed in these values.<sup>598</sup>

How heated the dispute around this ruling was may be illustrated by the conclusion of Justice Thomas’ dissenting opinion, which, like the conclusions of the other opinions, was written with great passion and commitment. The Justice pointed out that the key documents for the American political and legal tradition, such as the Declaration of Independence and the Constitution, were based on the idea that the freedom of the human being and its dignity were to be protected from State interference, and it could not be demanded of the State to grant them. He went on to say that “[t]oday’s decision casts that truth aside. In its haste

<sup>597</sup> *Ibidem.*

<sup>598</sup> *Ibidem.*

to reach a desired result, the majority misapplies a clause focused on “due process” to afford substantive rights, disregards the most plausible understanding of the “liberty” protected by that clause, and distorts the principles on which this Nation was founded.” The Justice concluded that the decision in the *Obergefell v. Hodges* case would have had “inestimable consequences for our Constitution and our society.”<sup>599</sup>

Summing up the above ruling, it is worth pointing out a few issues. It is immediately apparent that both dignity and human dignity are invoked in various contexts and meanings, both in the majority opinion and in dissenting opinions. The majority opinion referred to human dignity in the sense of an equal and innate value, belonging to everyone. In that context, the importance of autonomy and individual choices was stressed. Also, its importance for women and homosexuals was highlighted, although dignity was not clearly distinguished from the dignity of certain groups, that is, from the value of the individual based on certain specific characteristics (sexual orientation). At the same time, however, dignity was identified as a characteristic that might have been acquired through marriage, since marriage ennoble the spouses, giving them a higher dignity than those of other couples in other relationships. In that context, dignity was understood either as a feature of a legal institution (marriage), or as a value acquired by certain procedures (marriage), or as a rank or social status (a married person).

It is worth devoting a few moments to the last paragraph of the majority opinion – it made a direct reference to the idea of human dignity as an equal value belonging to everyone, which the law and especially the Constitution had a duty to protect. Equally important is what was missing in the final paragraph. There was no reference either to liberty or to equality (except for an indirect reference as an adjective accompanying dignity). Despite the fact that in the *ratio decidendi* both these values played an extremely important role. Liberty understood as the autonomy of the individual in the most private sphere, which is the intimate relationship, appeared in many places. Similarly, equality, understood as equality before family law, was also highlighted in many places. Yet concluding the majority opinion Justice Kennedy decided to refer exclusively to dignity as the equal value of all people. This indicates the extremely important role that dignity understood in this sense played in the ruling under discussion. On the other hand, however, we read that this right had been granted. It is not, therefore, a question of declaring or treating dignity as a value, but only as one of the rights protected by the Constitution.

The considerations of Justice Thomas, who defined human dignity as the innate, equal, universal and inherent value of every human being, should be considered as being equally fundamental. Justice Thomas identified the place of human

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<sup>599</sup> Ibidem.

dignity in the American political and legal order, referring to it as the foundation on which the whole system had been built, and emphasized that human dignity was not a right that could be demanded of any State.

It is also worth noting that the opinion of Justice Thomas is also characteristic of the American tradition when it comes to describing human dignity. Justice Thomas used such terms as dignity and human dignity interchangeably, without distinguishing between them. Whether he was writing about the priceless value belonging to every human being or about the social rank (or any other meaning) we may only know or learn from the context in which the term was used.

## CONCLUSIONS: AMERICAN CONCEPT OF HUMAN DIGNITY

Human dignity, understood as a natural, inalienable, equal and priceless value that belongs to every individual solely by virtue of being a human being, occupies an extremely important place in the case law of the United States Supreme Court. This has been demonstrated in essays above, where a detailed analysis of the judgments in which the Supreme Court referred to this idea is presented. It should be stressed that human dignity appears in rulings which, in given legal contexts, are usually known as “landmark cases,” or cornerstones. They are precedents that establish new legal standards or rules of conduct to protect rights and liberties. Examples of these precedents include: the case of *Miranda v. Arizona*<sup>600</sup> and its significance for the Fifth Amendment; the *Rochin v. California*<sup>601</sup> case and the *Schmerber v. California*<sup>602</sup> case and their significance for the Fourth Amendment; the *Trop v. Dulles*<sup>603</sup>, and *Hope v. Pelzer*<sup>604</sup> cases and their significance for the Seventh Amendment in the context of cruel and unusual punishments; the *Atkins v. Virginia*<sup>605</sup>, *Roper v. Simmons*<sup>606</sup> and *Kennedy v. Louisiana*<sup>607</sup> cases and their significance for the Eighth Amendment in the context of the restrictions on the imposition of the death penalty; the *McKaskle v. Wiggins*<sup>608</sup> case and its impact on the Sixth Amendment; the impact of the *Cohen v. California*<sup>609</sup> case on the First Amendment; the importance of the *Brown v. Board of Education of Topeka*<sup>610</sup> and *Heart of Atlanta Motel, Inc. v. United States*<sup>611</sup> cases

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<sup>600</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>601</sup> *Rochin v. California*, 342 U.S. 165 (1952).

<sup>602</sup> *Schmerber v. California*, 384 U.S. 757 (1966).

<sup>603</sup> *Trop v. Dulles*, 356 U.S. 86 (1958).

<sup>604</sup> *Hope v. Pelzer*, 536 U.S. 730 (2002).

<sup>605</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>606</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>607</sup> *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

<sup>608</sup> *McKaskle v. Wiggins*, 465 U.S. 168 (1984).

<sup>609</sup> *Cohen v. California*, 403 U.S. 15 (1971).

<sup>610</sup> *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

<sup>611</sup> *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

for the fight against racial segregation; the *Goldberg v. Kelly*<sup>612</sup> case for social assistance; the *Cruzan by Cruzan v. Director, Missouri Department of Health*<sup>613</sup> and *Washington v. Glucksberg*<sup>614</sup> cases for the interpretation of the right to die with dignity; the *Planned Parenthood v. Casey* and *Gonzales v. Carhart*<sup>615</sup> cases for abortion rights; the *Lawrence v. Texas*<sup>616</sup> case for the decriminalization of same-sex relationships; and the *Obergefell v. Hodges*<sup>617</sup> case for the legalization of same-sex relationships.

An analysis of the rulings and political and legal thought has been carried out to formulate answers to the research questions:

- a) Did the idea of human dignity in the twentieth century case law of the U.S. Supreme Court emerge as a result of the creation of an international system of human rights protection?

Human dignity did not appear in the case law of the Supreme Court as a result of its emergence in international law. References to it may be found in judgments handed down before the creation of an international system of human rights protection. The first judgment in which human dignity was an important element of the opinion of the majority was the judgment in the *McNabb v. United States* case of 1943<sup>618</sup>. What is more, in that judgment, human dignity was presented as a value in a democratic society, in which respect for the dignity of all men is central. And this all happened two years before the signing of the United Nations Charter and five years before the adoption of the Universal Declaration of Human Rights. Moreover, what is crucial here is that human dignity had already been mentioned a year earlier in the decisions in *Skinner v. Oklahoma*<sup>619</sup> and *Glasser v. United States*<sup>620</sup>. Finally, we must not forget the oldest judgment discussed in this work, namely that in the case of *Chisholm v. Georgia*,<sup>621</sup> in which reference to native dignity went as far back as 1793.

Equally important is the fact that the very term *human dignity* was already present in Federal case law (the *Zurbrick v. Woodhead* [1937]<sup>622</sup> and the *Esquire*

<sup>612</sup> *Goldberg v. Kelly*, 397 U.S. 254 (1970).

<sup>613</sup> *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990).

<sup>614</sup> *Washington v. Glucksberg*, 521 U.S. 702 (1997).

<sup>615</sup> *Gonzales v. Carhart*, 550 U.S. 124 (2007).

<sup>616</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>617</sup> *Obergefell v. Hodges*, 576 U.S. 644 (2015).

<sup>618</sup> *McNabb v. United States*, 318 U.S. 332 (1943).

<sup>619</sup> *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

<sup>620</sup> *Glasser v. United States*, 315 U.S. 60 (1942).

<sup>621</sup> *Chisholm v. Georgia*, 2 U.S. 419 (1793).

<sup>622</sup> *Zurbrick v. Woodhead*, 90 F.2d 991 (Conn. Cir. Ct 1937).

v. Walker [1945] cases<sup>623</sup>) as well as in State law (the *Laage v. Laage* [1941]<sup>624</sup>) in the 1930s and 1940s.

So, the judgment in the *In re Yamashita* case of 1946 was not the first in which this term appeared in American case law. Hence the claims that the term human dignity was completely alien to American courts before the Second World War must be rejected.

The results of the research are convincing evidence for rejecting the thesis of the “foreign” origin of human dignity in the decisions of the Supreme Court, of its transposition from international law, or that its origins were linked to the end of World War II.

b) What, then, is the origin of the concept of human dignity found in the Supreme Court case law?

Human dignity is an integral part of the broader American political and legal tradition. References to this idea can be found in the philosophy and writings of the Founding Fathers of the United States. It also emerged in views represented by politicians such as Tom Paine, Thomas Jefferson and Justices such as James Wilson, and was present in the political and legal thought of the nineteenth century, although its influence was much smaller at the time – here, representative examples include Franz Lieber’s political and legal doctrine, as well as the writings of Frederick Douglass and the suffragettes.

It is surprising how little space American legal science has devoted to the American roots of human dignity as an idea of a political and legal nature. Discussions on human dignity often point to its ancient (Greek, Roman or Christian), Renaissance or even modern origin (there are strong references to the philosophy of Kant), but there is no broader reference to American traditions. With the exception of, for example, Roger Williams’s writings (which is still outside the scope of this study), it is usually surprising to find extremely cursory references to the above-mentioned representatives of American political and legal thought.

The research that has been carried out has shown that the origins of human dignity as a legal category are wrongly linked to the birth of the international system of human rights in American literature. As this monograph shows, stronger or weaker references to human dignity appeared in the case law of the Supreme Court several years before the United Nations Charter and the Universal

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<sup>623</sup> In this case, however, it should be stressed that it was used in a different sense than that which is relevant to the research problem. The case concerned accusations of obscenity made against photographs published in the “*Esquire*” magazine. The term *human dignity* was used here to distinguish between decency and obscenity: “to the criterion of decency belongs all that is right, fine, and certainly not harmful to human dignity.” Compare: *Esquire v. Walker*, 151 F.2d 49 (D.C. Cir. 1945).

<sup>624</sup> *Laage v. Laage*, 176 Misc. 190 (N.Y. Misc. 1941).

Declaration of Human Rights were signed. What is more, human dignity was mentioned in the case law of lower federal courts. These findings about the American origin of the presence of the idea of human dignity in the case law of the Supreme Court are further strengthened by the analysis of the views of the American judiciary on the emerging international order and the role given to the idea of human dignity within its framework. This analysis has proved beyond any doubt that commentators saw dignity as an idea belonging to the American tradition as strongly as liberty or equality.

- c) What was the evolution of the understanding of human dignity in the American political and legal tradition like?

Both the understanding of human dignity and its meaning in various fields before 1943 were subject to major changes and evolution. Throughout this period, human dignity as a philosophical idea influenced (the spheres of) public life, and was present in the debates on the war against Great Britain or the abolition of slavery. In addition, this was also a political idea that was used in political writings and influenced not only the views of politicians, Justices and lawyers, but also public opinion as a whole. Thus, the idea of human dignity had an impact on the political and legal system. However, this influence was not permanent or continuous but occurred only at certain historical moments.

As for its influence, it took mainly an indirect form (as an explicit reference to this idea) and likewise, the idea of human dignity was rarely (or not at all) referred to directly in legislative acts (such as the Declaration of Independence, the Preamble to the Constitution, the Bill of Rights, or in judicial decisions). The exceptions to this included primarily the case of *Chisholm v. Georgia*. On the other hand, an indirect influence of this idea is evident in the Declaration of Independence and a number of other legislative acts.

The situation is different in political thought – here the idea of human dignity is firmly rooted, although it still competes with the concept of dignity as a social rank or eminence, i.e., a feature belonging to power (monarchs, states, Justices), as exemplified by the views of Paine or Jefferson. However, while indirectly the idea of dignity underpinned the whole political system (regime) and some legal solutions (which can be seen especially in the second half of the twentieth century, where in the same legal contexts the influence of human dignity on law was already directly manifested), it does not have any direct influence in the form of explicit references. The period from 1776 (the date of the Declaration of Independence) to 1942 (the *Glasser v. United States* case) was a period not so much of an evolution in the understanding of the idea of dignity as of an increase or decrease in its influence on constitutional determinations. The peak of the initial period occurred in the *Chisholm v. Georgia* judgment, in which human dignity was cited as a value protected by the

constitutional solutions then adopted. Thereafter, however, there was a decline in the role of dignity until the decision of *Dredd v. Scott*, where man is defined as an object rather than a subject of law (let alone the possessor of an equal and priceless value). The turning point in this trend came with Lincoln's proclamation in which slavery was abolished in order to restore some order of human values. Yet at this time there was no trace of the direct influence of the idea of human dignity on these events.

During the Reconstruction period the importance of the idea of human dignity decreased again and the Black Codes were enacted, although the Fourteenth and Fifteenth Amendments were adopted in an attempt to protect former slaves from discrimination under State law. However, in this case too, there was no clear influence of the idea of human dignity on the adopted legal solutions. A further regression occurred in the second half of the nineteenth century, culminating in *Plessy v. Ferguson*. The influence of the idea of dignity was once again back on the defensive, with some exceptions (the Lieber Code).

Until the early twentieth century, the idea of dignity in the legal sphere was conceived in a rather traditional way. This is evidenced, for example, by its definitions in renowned American legal dictionaries. In the second edition of the *Black's Law Dictionary* of 1910 dignity is defined as: "honor; a title, position, or distinction of honor; dignities are a kind of intangible property whereby a person may possess some characteristic or social position" (this definition, incidentally, referred to William Blackstone's eighteenth century *Commentaries on the Laws of England*). By contrast, in the 1916 edition of *Ballentine's Law Dictionary*, dignity was defined as: "a title; an intangible good subject to inheritance" or "a title of rank or office." By comparison, liberty, freedom of expression and equality had in these dictionaries much more expansive definitions which were closer to modern definitions.<sup>625</sup>

Human dignity appeared again in the rulings of American courts in the first half of the twentieth century, but only incidentally, to finally make its influence felt in a significant way in the *McNabb* case of 1943. This ruling opened the period where the influence of the idea of human dignity on the decisions of the Supreme Court became more apparent.

Thus, when summing up the evolution of the idea of human dignity in the American tradition, it is necessary to point out that the end of the eighteenth century, the entire nineteenth century and the first four decades of the twentieth century were a period in which the fundamental – and unresolved – problem was that of discrimination against African-Americans and women. Where these elements (of discrimination based on race and gender) were not dominant (e.g., the law of war), the idea of dignity had an overt influence, an example here being the Lieber Code. It is important to note that during this period, a stronger emphasis on human dignity could also be observed in political and legal thought than in the case

<sup>625</sup> *Black's & Ballentine's Law Dictionaries* [online], <https://openjurist.org/law-dictionary/dignity> [22.02.2022].

law of the Supreme Court itself. This tendency was reversed only after the Second World War when the Supreme Court began to play a more important role as a law-maker. In this context, it should be remembered that the nineteenth century and the early twentieth was a period when the Supreme Court was not very active in protecting civil rights, on the assumption that the Bill of Rights imposed sufficient limitations on federal power, while the state authorities had much more freedom in this respect. Even the passage of the Reconstruction Amendments made little difference in this regard (their impact was interpreted narrowly). An example of such an understanding of its limited role is freedom of speech, protected by the First Amendment. Until 1926<sup>626</sup> the Supreme Court stood for a literal reading of the text of the First Amendment, believing that it protected the citizen only against interference by the federal authorities. Such a self-imposed limitation on judicial discretion must have been all the more influential and prompted invoking an idea that was not referred to expressly in either the Bill of Rights or the Constitution itself.

d) Can we talk about the American doctrine of human dignity in the Supreme Court case law?

We may assume that we can. If we define a doctrine as a body of statements or beliefs pertaining to a particular field, an ordered set of views on a particular subject, or a historically shaped view that explains the genesis, evolution as well as the functions and aims of – in this case – the idea of human dignity, then we can speak of the American doctrine of human dignity. This is an idea that is an inherent part of the American political and legal tradition, although for more than two centuries of U.S. history, its influence and presence has varied greatly, and its judicial interpretation has been subject to an ongoing evolution. The doctrine of human dignity was being shaped and developed over two centuries of tradition and experience, which may best and most comprehensively be seen in the rulings of the Supreme Court.

Of course, it should be borne in mind that within this doctrine we are also dealing with different points of view on certain issues and a number of competing concepts and clashing opinions; its core is nevertheless satisfactorily well-defined and includes the question of understanding what human dignity is, what the co-existing, complementary or competing concepts of it are, what roles and functions are assigned to it, and in which legal contexts its impact is most significant.

e) How can the American idea of human dignity be defined?

Human dignity is a priceless and innate, equal and universal value belonging to every individual solely by virtue of being human. Its fundamental interpreta-

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<sup>626</sup> In the case of *Gitlow v. New York*, 268 U.S. 652 (1925), compare Michał Urbańczyk, *Liberalna doktryna wolności słowa a swoboda wypowiedzi historycznych*, Poznań, 2009, pp. 101–8.

tive contexts are freedom of choice and personal autonomy and, because of the respect that is given to these values, it must be free to the highest possible degree from any external interference, especially from the State. One of the fundamental aspects of the American concept of human dignity is the rejection of state paternalism towards citizens, even in extreme situations where it might lead to harms to which an individual may be exposed.

Two aspects of the action of public authorities in the context of respect for human dignity are related to this approach. First, the negative one – when the dignity of an individual is protected by the State and its representatives refraining from a certain action. Examples are the decisions of the Supreme Court on procedural and substantive criminal law. Second, the positive aspect – when the dignity of an individual is protected by taking specific actions. Examples are actions undertaken to fight against racial discrimination and discrimination on the grounds of sexual orientation.

The uniqueness of the American concepts is that human dignity is linked to freedom of expression. The focus on the widest possible freedom of expression is justified by the need to respect human dignity, and this aspect outweighs any damage that might be done to an individual's reputation.

What is debatable and still evolving is the progressive nature of human dignity and the question of whether the death penalty is incompatible with it. In Europe, one of the basic features of human dignity is its inalienability as a human attribute, which has brought about the recognition of the death penalty as a punishment incompatible with human dignity. In the United States, this is not so obvious. On the contrary, for many decades, those who, by their conscious action (by committing a crime), violated the basic regulations and norms of society, were thereby divested of this value. The more serious the crime committed, the more abruptly and forcefully this priceless value was forfeited.<sup>627</sup>

f) What roles and functions are performed by the idea of human dignity in the Supreme Court case law?

In the case law of the Supreme Court, the idea of human dignity occupies an important place and has a strong influence on the interpretation and application of the law as:

- the foundation of the whole system,
- the foundation of the system of civil rights,
- the foundation of individual civil rights and, at the same time, the basic criterion for their interpretation.

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<sup>627</sup> William J. Brennan, "Guardians of...", p. 99.

At the same time – depending on the context – it appears as a constitutional value, a constitutional principle, a subjective right (e.g., the right to die with dignity or the right to same-sex marriage) or, related to it, dignity interests. In contexts such as personal freedom and autonomy in the private sphere, criminal law, racial or sexual orientation discrimination, its influence is decisive in terms of the directions in which case law develops. By contrast, in other spheres (e.g., social welfare) its influence is much weaker. It should be noted, however, that references to human dignity were also made, even if not regularly, in the context of other amendments and civil rights, such as the Second and the Fifteenth Amendments.

The present discussion, however, highlights a certain problem, or rather a discrepancy between the treatment of human dignity as a source of rights and freedoms and its uneven impact on these rights. It must be remembered, though, that the American Bill of Rights does not have the structure of contemporary declarations of human rights (which are usually a separate chapter of the Constitution). Moreover, rights and freedoms are also contained in other amendments (especially in the Reconstruction Amendments, i.e., the Thirteenth, the Fourteenth and the Fifteenth Amendments. The amendments themselves are very diverse in structure and concern different issues. Next to such fundamental individual rights as freedom of speech, association, assembly, and religious liberty placed in one single amendment there is the Third Amendment providing for the quartering of soldiers in private homes. The First Amendment, on the other hand, is of fundamental relevance today and is the source of a number of distinct rights and legal theories concerning them. The Third Amendment has little significance today. Finally, it should be added that certain amendments are far more frequently invoked as protections of rights and freedoms than others (here it would be enough to compare the impact of the Fourteenth Amendment, and the outright “oblivion” of the Ninth Amendment).

On the other hand, the fact that invocations of human dignity have appeared in ever newer contexts points to a certain direction in the evolution of the Supreme Court’s rulings, to include the entirety of civil rights.

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An analysis of selected Supreme Court case law, supported by a review of the political-legal thought emerging at the time of the birth of the American State and a search of the sources of American legal science of the 1950s (at the time of the great debate on the emerging international system of human rights) has clearly demonstrated that the American concept of human dignity is an autonomous and original creation firmly rooted in the political-legal tradition of the United States and an idea that has been present in it since the very beginning of its for-

mation. It is not the result of borrowing international standards, but the result of a long evolution. However, two points must be borne in mind. First, it was not until the Supreme Court rulings of the 1940s that the idea of human dignity was revived and American concepts of human dignity flourished, which together may be regarded as constituting the doctrine of human dignity. Second, the broadly understood American political and legal tradition shows that the evolution of the concept of human dignity in America did not proceed without obstacles and difficulties. Slavery, racial segregation and discrimination were phenomena that hindered, or even prevented, the dissemination and recalling of the simple truth underlying the American political system, that all men are created equal in their priceless worth, to refer to the words of Thomas Jefferson.

The American experience shows what it means to care about individual freedom without forgetting about human dignity. This could be seen after the Civil War, when the liberation of slaves was not accompanied by any concern for their dignity as human beings. At the same time, here too we find evidence of what is meant by concern only for equality before the law, especially in its formal aspect, without any guarantee of respect for human dignity. The *Plessy v. Ferguson* case is an example and the doctrine of “separate but equal” is the clearest example of this. Formal equality before the law was not accompanied by any concern for human dignity in the process of applying it. It was not until the judgment in the *Brown v. Board of Education of Topeka* case that racial segregation was held to be unjust *per se* and unacceptable because it intrinsically implied a violation of human dignity.

Concern for human dignity may not, of course, come at the expense of liberty and equality. Tensions between these ideas that are crucial, not only for American Supreme Court rulings but for the United States and liberal democracy in general are among the most important challenges of the twenty-first century.

The American concept of human dignity is based on a particular vision of the relationship between the State, society and the individual. This vision was perhaps articulated most fully in Justice Brandeis’s accompanying sentence in the *Whitney v. California* ruling of 1927, in which he pointed out that those who won American independence believed that “the final end of the State is to make men free to develop their faculties,” and that in the government “the deliberative forces should prevail over the arbitrary.”<sup>628</sup> In the American understanding of human dignity the self-realization element is very strong.

The American concepts of human dignity found in the case law of the Supreme Court is an original and unique contribution to the global history of human dignity. This analysis of the rulings and the conclusions drawn from it may be useful for the experience of other countries and communities, including those in Europe. Today,

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<sup>628</sup> *Whitney v. California*, 274 U.S. 357 (1927).

Europe is undergoing one of its most serious post-war crises; one source of which is a crisis of values. The American view of human dignity, which in many places differs from the European experience, may help to alleviate this crisis by emphasizing the autonomy of the individual and linking human dignity to the natural right of everyone "to be the master of his or her own destiny," while at the same time stressing responsibility for one's own actions, which is also directly linked to the human being and his or her priceless value.

## CASE CITATIONS

Abbate v. United States, 359 U.S. 187 (1959)  
AFL v. American Sash & Door Co., 335 U.S. 538 (1949)  
Application of Masaharu Homma. Homma v. Patterson Secretary of War, et al., 327 U.S. 759 (1946)  
Armstrong v. Manzo, 380 U.S. 545 (1965)  
Atkins v. Virginia, 536 U.S. 304 (2002)  
Belton v. Gebhart, 87 A.2d 862 (1952)  
Bouvia v. Superior Court, 179 Cal.App.3d 1128 (1986)  
Bowers v. Hardwick, 478 U.S. 186 (1986)  
Boyd v. United States, 116 U.S. 616 (1886)  
Brophy v. New England Sinai Hospital, Inc., 398 Mass. 417 (1986)  
Brown v. Board of Education of Topeka, 347 U.S. 483 (1954)  
Brown v. Board of Education of Topeka, 98 F. Supp. 797 (D. Kan. 1951)  
Bush v. Gore, 531 U.S. 98 (2000)  
Carey v. Population Services International, 431 U.S. 678 (1977)  
Chisholm v. Georgia, 2 U.S. 419 (1793)  
Citizens United v. Federal Election Commission, 558 U.S. 310 (2010)  
Civil Rights Cases, 109 U.S. 3 (1883)  
Cohen v. California, 403 U.S. 15 (1971)  
Compassion in Dying v. State of Wash, 79 F.3d 790, 812 (9th Cir. 1995)  
Cruzan by Cruzan v. Harmon, Supreme Court of Missouri, 760 S.W.2d 408 (1988)  
Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990)  
Dandridge v. Williams, 397 U.S. 471 (1970)  
Dobbs v. Jackson Women’s Health Organization, 597 U.S. \_\_\_ (2022)  
Eisenstadt v. Baird, 405 U.S. 438 (1972)  
Esquire v. Walker, 151 F.2d 49 (D.C. Cir. 1945)  
Ex parte Mitsuye Endo, 323 U.S. 283 (1944)  
Fitzgerald v. Porter Memorial Hospital, 523 F.2d 716, 719–720 (CA7 1975)  
Gebhart v. Belton, 91 A.2d 137 (Del. 1952)  
Gibbons v. Ogden, 22 U.S. 1 (1824)  
Gitlow v. New York, 268 U.S. 652 (1925)  
Glasser v. United States, 315 U.S. 60 (1942)  
Goldberg v. Kelly, 397 U.S. 254 (1970)  
Gong Lum v. Rice, 275 U.S. 78 (1927)

Gonzales v. Carhart, 550 U.S. 124 (2007)  
Grannis v. Ordean, 234 U.S. 385, (1914)  
Gray by Gray v. Romeo, 697 F. Supp. 580 (D.R.I.1988)  
Harris v. McRae, 448 U.S. 297 (1980)  
Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964)  
Hirabayashi v. United States, 320 U.S. 81 (1943)  
Hope v. Pelzer, 536 U.S. 730 (2002)  
In re Yamashita, 327 U.S. 1 (1946)  
Kennedy v. Louisiana, 554 U.S. 407 (2008)  
Korematsu v. United States, 323 U.S. 214 (1944)  
Laage v. Laage, 176 Misc. 190 (N.Y. Misc. 1941)  
Lawrence v. Texas, 539 U.S. 558 (2003)  
Lee v. State of Oregon, 891 F. Supp. 1439 (D. Or. 1995)  
Loving v. Virginia, 388 U.S. 1 (1967)  
McKaskle v. Wiggins, 465 U.S. 168 (1984)  
McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950)  
McNabb v. United States, 318 U.S. 332 (1943)  
Minor v. Happersett, 88 U.S. 162 (1875)  
Miranda v. Arizona, 384 U.S. 436 (1966)  
Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938)  
Moore v. City of East Cleveland, 431 U.S. 494 (1977)  
Myers v. Schneiderman, 2017 NY Slip Op 0641 Decided on September 7, 2017  
New State Ice Co. v. Liebmann, 285 U.S. 262 (1932)  
North Carolina v. Mann (State v. Mann), 13 N.C. 263  
Obergefell v. Hodges, 576 U.S. 644 (2015)  
Oyama v. California, 332 U.S. 633 (1948)  
Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992)  
Plessy v. Ferguson, 163 U.S. 537 (1896)  
Poe v. Ullman, 367 U.S. 497 (1961)  
Prince v. Massachusetts, 321 U.S. 158 (1944)  
Quill v. Koppell, 870 F. Supp. 78 (S.D.N.Y. 1994)  
Rasmussen by Mitchell v. Fleming, 154 Ariz. 207, 211, 741 P.2d 674 (1987)  
Reno v. Flores, 507 U.S. 292 (1993)  
Rochin v. California, 342 U.S. 165 (1952)  
Roe v. Wade, 410 U.S. 113 (1973)  
Romer v. Evans, 517 U.S. 620 (1996)  
Roper v. Simmons, 543 U.S. 551 (2005)  
Schmerber v. California, 384 U.S. 757 (1966)  
Scott v. Sandford, 60 U.S. 393 (1856)  
Screws v. United States, 325 U.S. 91 (1945)  
Sipuel v. Board of Regents, 332 U.S. 631 (1948)  
Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942)  
Slaughterhouse Cases, 83 U.S. 36 (1872)  
Stanley v. Georgia, 394 U.S. 557 (1969)  
Steele v. Louisville & N.R. Co., 323 U.S. 192 (1944)

---

Stenberg v. Carhart, 530 U.S. 914 (2000)  
Strauder v. West Virginia, 100 U.S. 303 (1880)  
Sweatt v. Painter, 339 U.S. 629 (1950)  
Thornburgh v. Amer. Coll. of Obstetricians, 476 U.S. 747 (1986)  
Trop v. Dulles, 356 U.S. 86 (1958)  
Turner v. Safley, 482 U.S. 78 (1987)  
United States v. Kras, 409 U.S. 434 (1973)  
United States v. White, 322 U.S. 694 (1944)  
United States v. Windsor, 570 U.S. 744 (2013)  
Vacco v. Quill, 521 U.S. 793 (1997)  
Washington v. Glucksberg, 521 U.S. 702 (1997)  
Weeks v. United States, 232 U.S. 383 (1914)  
Whitney v. California, 274 U.S. 357 (1927)  
Zurbrick v. Woodhead, 90 F.2nd 991 (Conn. Cir. Ct 1937)

## LITERATURE

- Angus Reid Public Opinion, Americans Split on Covering Abortion in Insurance Plans that Use Federal Subsidies* [online], <https://www.priestsforlife.org/statistics/10-01-angus-reid-poll.pdf> [20.04.2022]
- Baranowska, Nina, and Chłopecki, Tomasz. "Kilka słów o kształtowaniu się praw człowieka w okresie XVIII-XX w.," in *Księga dla naszych kolegów: prace prawnicze poświęcone pamięci doktora Andrzeja Ciska, doktora Zygmunta Masternaka i doktora Marka Zagrosika*, Mazurkiewicz, Jacek (ed.), Wrocław, 2013, pp. 49-59
- Barnes, L. Diane. *Frederick Douglass: Reformer and Statesman*, New York - Abingdon, 2013
- Bedau, Hugo Adam. "The Eighth Amendment, Human Dignity, and the Death Penalty," in *The Constitution of Rights: Human Dignity and American Values*, Mayer, Michael J., and Parent, William A. (eds.), Ithaca - London, 1992, pp. 145-77
- Berlin, Ira. *Pokolenia w niewoli*, Warszawa, 2010
- Bloch, Ernst. *Naturrecht und menschliche Würde*, Frankfurt am Main, 1977
- Bosek, Leszek. *Gwarancje godności ludzkiej i ich wpływ na polskie prawo cywilne*, Warszawa, 2012
- Boxill, Bernard R. "Dignity, Slavery and The Thirteenth Amendment," in *The Constitution of Rights: Human Dignity and American Values*, Meyer, Michael J., and Parent, William A. (eds.), Ithaca - London, 1992, pp. 102-17
- Bracey, Christopher. "Dignity in Race Jurisprudence," *University of Pennsylvania Journal of Constitutional Law* 7(3), 2005, pp. 669-720
- Braeman, John. "Preface," in John Braeman, *Before the Civil Rights Revolution: The Old Court and Individual Rights*, New York - Westport - Connecticut - London, 1988
- Brennan, William J. "Bill of Rights and the States," *New York University Law Review* 36(4), 1961, pp. 761-78
- Brennan, William J. "Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights," *New York University Law Review* 61(4), 1986, pp. 535-53
- Brennan, William J. "Centennial Address," *George Washington Law Review* 43(2), 1965-1966, pp. 189-95
- Brennan, William J. "Color-Blind, Creed-Blind, Status-Blind, Sex-Blind," *Human Rights* 14(1), 1987, pp. 30-7
- Brennan, William J. "Constitutional Adjudication," *Notre Dame Lawyer* 40(6), 1965, pp. 559-569

- Brennan, William J. "Constitutional Adjudication and the Death Penalty: A View from the Court," *Harvard Law Review* 100(2), 1986–1987, pp. 313–31
- Brennan, William J. "Equality Principle in American Constitutional Jurisprudence," *Ohio State Law Journal* 48(4), 1987, pp. 921–5
- Brennan, William J. "Guardians of Our Liberties – State Courts No Less than Federal," *Judges' Journal* 15(4), 1976, pp. 82–103
- Brennan, William J. "How Goes the Supreme Court?," *Mercer Law Review* 36(3), 1984–1985, pp. 781–94
- Brennan, William J. "In Defense of Dissents," *Hastings Law Journal* 50(4), 1998–1999, pp. 671–82
- Brennan, William J. "My Encounters with the Constitution," *Judges' Journal* 26(3), 1987, pp. 6–11, 58–60
- Brennan, William J. "My Life on the Court," in *Reason and Passion: Justice Brennan's Enduring Influence*, Rosenkranz, E. Joshua, and Schwartz, Bernard (eds.), New York – London, 1997, pp. 17–21
- Brennan, William J. "Rededication Address: The American Bar Association's Memorial to the Magna Carta," *Loyola of Los Angeles Law Review* 19(1), 1986, pp. 55–9
- Brennan, William J. "Some Aspects of Federalism," *New York University Law Review* 39(6), 1964, pp. 945–61
- Brennan, William J. "Some Judicial Aspects of Federalism," *Revista Juridica de la Universidad de Puerto Rico* 52(2), 1983, pp. 1–12
- Brennan, William J. "State Constitutions and the Protection of Individual Rights," *Harvard Law Review* 90(3), 1977, pp. 489–504
- Brennan, William J. "The Constitution of the United States: Contemporary Ratification," *The Guild Practitioner* 43, 1986, pp. 1–16
- Brennan, William J. "The Criminal Prosecution: Sporting Event or Quest for Truth?," *Washington University Law Quarterly* 3(June), 1963, pp. 279–95
- Brennan, William J. "Tribute to the Honorable Ruggero J. Aldisert," *University of Pittsburgh Law Review* 48(1), 1986–1987, pp. xiii–iv
- Brennan, William J. "Why Have a Bill of Rights?," *Oxford Journal of Legal Studies* 9(4), 1989, pp. 425–40
- Cady Stanton, Elizabeth, and Anthony, Susan B., and Gage, Matilda Joslyn. *History of Women Suffrage*, Volume 1, Rochester – London – Paris 1889
- Chafee, Zechariah, Jr. "Federal and State Powers Under the UN Covenant on Human Rights," *Wisconsin Law Review* 3, 1951, pp. 389–473
- Chernick, Howard, and Reimers, Cordelia. "Welfare Reform and New York City's Low-Income Population," *Federal Reserve Bank of New York Economic Policy Review* 7(2), 2001, pp. 83–97
- Chroust, Anton-Hermann. "The Managerial Function of Law," *Boston University Law Review* 34(3), 1954, pp. 261–90
- Ciechomska, Maria. *Od matriarchatu do feminizmu*, Poznań, 1996
- Ciepluch, Małgorzata. *Mysł liberalno-demokratyczna w amerykańskiej kulturze prawnej w latach 1620–1865*, Gdańsk, 2015
- Ciszewski, Wojciech. "Demokratyczny status sądowej kontroli konstytucyjności prawa," *Filozofia Publiczna i Edukacja Demokratyczna* 5(1), 2016, pp. 170–86

- Claeys, Gregory. *Thomas Paine, Social and political thought*, Washington, 1989
- Clark, Hunter R. *Justice Brennan: The Great Conciliator*, New Jersey, 1995
- Conklin, William E. "The Utilitarian Theory of Equality Before the Law," *Ottawa Law Review* 8(3), 1976, pp. 485–517
- Crimm, Nina J., and Winer, Laurence H. *Politics, Taxes, and the Pulpit: Provocative First Amendment Conflicts*, Oxford – New York, 2011
- Daly, Erin. "Human Dignity in the Roberts Court: A Story of Inchoate Institutions, Autonomous Individuals, and the Reluctant Recognition of a Right," *Ohio Northern University Law Review* 37(2), 2011, pp. 381–427
- Darwall, Stephen. "Pufendorf on Morality, Sociability, and Moral Powers," *Journal of the History of Philosophy* 50(2), 2012, pp. 213–38
- "Death Of Fred Douglass," *New York Times*, 21 February, 1895 [online], <https://archive.nytimes.com/www.nytimes.com/learning/general/onthisday/bday/0207.html> [22.02.2022]
- "Declaration of Sentiments," in: *Declarations of Freedom and Human Dignity*, Anderson, Lieselotte (ed.), Millis, 1997
- Donne, John. *No Man Is An Island* [online], <https://www.poetry.com/poem/22559/noman-is-an-island> [22.02.2022]
- Douglass, Frederick. *My Bondage and My Freedom*, Chicago, 1970
- Douglass, Frederick. *Narrative of the Life of Frederick Douglass. An American Slave*, Boston, 1845 [online], <https://www.gutenberg.org/files/23/23-h/23-h.htm> [22.02.2022]
- Douglass, Frederick. "Prejudice Against Color," in *The Life and Writings of Frederick Douglass*, Foner, Philip (ed.), New York, 1975, vol. 2, pp. 99–101
- Dudziak, Mary L. *Brown as a Cold War Case* [online], <http://www.scotusblog.com/2010/02/the-global-impact-of-brown-v-board-of-education/> [22.02.2022]
- Dunne, Gerald T. "Justice Hugo Black and the Brown Decision: A Speculative Inquiry," *Missouri Law Review* 39(1), 1974, pp. 1–26
- Eilser, Kim Isaac. *A Justice for All: William J. Brennan, Jr., and the Decisions That Transformed America*, New York, 1993
- Fassett, John David, et al. "Supreme Court Law Clerks' Recollections of Brown v. Board of Education," *St. John's Law Review* 78(3), 2004, pp. 515–67
- Foner, Philip S. "Introduction: Thomas Paine – World Citizen and Democrat," in *The Complete Writings of Thomas Paine*, Foner, Philip S. (ed.), New York, 1945, pp. ix–xlvi
- Gaines, Brian J., and Tam Cho, Wendy K. "On California's 1920 Alien Land Law: The Psychology and Economics of Racial Discrimination," *State Politics and Policy Quarterly* 4(3), 2004, pp. 271–93
- Gardner, James A. "A Re-Evaluation of the Attorney-Client Privilege. Part II," *Villanova Law Review* 8(4), 1963, pp. 447–519
- Glensy, Rex D. "The Right to Dignity," *Columbia Human Rights Law Review* 43(1), 2011, pp. 65–142
- Goldman, Roger, and Gallen, David. *Justice William J. Brennan, Jr.: Freedom First*, New York, 1994

- Goodman, Maxine. "Human Dignity in Supreme Court Constitutional Jurisprudence," *Nebraska Law Review* 84(3), 2003, pp. 740–94
- Great American Judges: An Encyclopedia*, vol. 1, Vile, John R. (ed.), Santa Barbara, 2003
- Hall, Mark David. "Bibliographical Essay. History of James Wilson's Law Lectures," in *Collected Works of James Wilson*, Hall, Kermit L., and Hall, Mark David (eds.), Indianapolis, 2007
- Hall, Mark David. *The Political and Legal Philosophy of James Wilson, 1742–1798*, Columbia, 1997
- Hand, Learned. *The Bill of Rights, (Oliver Wendell Holmes Lecture)*, Cambridge, 1958
- Hannam, June. *Feminizm*, Poznań, 2010
- Henkin, Louis. "Human Dignity and Constitutional Rights," in *The Constitution of Rights. Human Dignity and American Values*, Meyer, Michael J., and Parent, William A. (eds.), Ithaca – London 1992
- Hockett, Jeffrey D. *A Storm over This Court: Law, Politics, and Supreme Court Decision Making in Brown v. Board of Education*, Charlottesville, 2013
- Hopkins, W. Wat. *Mr. Justice Brennan and Freedom of Expression*, Westport, 1991
- Howard, A.E. Dick. "Foreword," in *Creating the Bill of Rights: The Documentary Record from the First Federal Congress*, Veit, Helen E., and Bowling, Kenneth R., and Bangs Bickford, Charlene (eds.), Baltimore – London, 1992
- Hymowitz, Carol, and Weissman, Michael. *A History of Women in America*, Toronto – New York – London – Sydney – Auckland, 1978
- Irons, Peter H. *Brennan vs. Rehnquist: The Battle for the Constitution*, New York, 1994
- Jackson, Vicky C. "Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse," *Montana Law Review* 65(1), 2004, pp. 15–40
- Jefferson, Thomas. *A Summary View of the Rights of British America* [online], <https://thefederalistpapers.org/wp-content/uploads/2012/12/Rights-of-British-America-by-Thomas-Jefferson.pdf> [22.02.2022]
- Jefferson, Thomas. "Autobiografia," in *Wizje Stanów Zjednoczonych w pismach Ojców Założycieli*, Osiatyński, Wiktor (ed.), and Jaraczewski, Andrzej (trans.), Warszawa, 1977
- Jefferson, Thomas. *Autobiography* [online], [https://avalon.law.yale.edu/19th\\_century/jeffauto.asp](https://avalon.law.yale.edu/19th_century/jeffauto.asp) [22.02.2022]
- Jefferson, Thomas. *Draft for a Bill for Establishing Religious Freedom* [online], [https://ahp.gatech.edu/rel\\_freedom\\_1779.html](https://ahp.gatech.edu/rel_freedom_1779.html) [22.02.2022]
- Jefferson, Thomas. *First inaugural address* [online], <https://jeffersonpapers.princeton.edu/selected-documents/first-inaugural-address> [22.02.2022]
- Jefferson, Thomas. *Jefferson's draft of the Declaration of Independence, 28 June, 1776* [online], <http://www.let.rug.nl/usa/documents/1776-1785/jeffersons-draft-of-the-declaration-of-independence.php> [22.02.2022]
- Jefferson, Thomas. "Krótki przegląd praw brytyjskiej Ameryki," in: *Wizje Stanów Zjednoczonych w pismach Ojców Założycieli*, Osiatyński, Wiktor (ed.), and Jaraczewski, Andrzej (trans.), Warszawa, 1977
- Jefferson, Thomas. *Letter to Colonel Carrington (16.01.1787)* [online], <https://founders.archives.gov/documents/Jefferson/01-11-02-0047> [22.02.2022]

- Jefferson, Thomas. *Letter to Francis Hopkinson (13.03.1789)* [online], <https://founders.archives.gov/documents/Jefferson/01-14-02-0402> [22.02.2022]
- Jefferson, Thomas. *Letter to "Henry Tompkinson" (Samuel Kercheval) (12.07.1816)* [online], <https://founders.archives.gov/documents/Jefferson/03-10-02-0128-0002> [22.02.2022]
- Jefferson, Thomas. *Letter to James Madison (20.12.1787)* [online], <https://founders.archives.gov/documents/Madison/01-10-02-0210> [22.02.2022]
- Jefferson, Thomas. *Letter to John Adams (28.10.1813)* [online] <https://founders.archives.gov/documents/Jefferson/03-06-02-0446> [22.02.2022]
- Jefferson, Thomas. *Letter to John Holmes (22.04.1820)* [online], <https://founders.archives.gov/documents/Jefferson/03-15-02-0518> [22.02.2022].
- Jefferson, Thomas. *Letter to Pierre Samuel Dupont de Nemours (24.04.1816)* [online], <https://founders.archives.gov/documents/Jefferson/03-09-02-0471> [22.02.2022]
- Jefferson, Thomas. *Letter to Roger C. Weightman (24.06.1826)* [online], <https://founders.archives.gov/documents/Jefferson/98-01-02-6179> [22.02.2022]
- Jefferson, Thomas. *Letter to Thomas Jefferson Smith (21.02.1825)* [online], <https://founders.archives.gov/documents/Jefferson/98-01-02-4987> [22.02.2022]
- Jefferson, Thomas. *Notes on the States of Virginia* [online], <https://www.thefederalistpapers.org/wp-content/uploads/2012/12/Thomas-Jefferson-Notes-On-The-State-Of-Virginia.pdf> [22.02.2022]
- Jefferson, Thomas. "Observations on Démeunier's Manuscript (June 22, 1786)," in *Memoir, Correspondence and Miscellanies. From the Papers of Thomas Jefferson*, vol. 1, Randolph, Thomas J. (ed.), Charlottesville, 1829
- Jefferson, Thomas. "Pierwsze przemówienie inauguracyjne," in *Wizje Stanów Zjednoczonych w pismach Ojców Założycieli*, Osiatyński, Wiktor (ed.), and Jaraczewski, Andrzej (trans.), Warszawa, 1977
- Jefferson, Thomas. *Uwagi o państwie Wirginia*, Wiciech, Tomasz (translation, introduction and elaboration), Kraków, 2014
- Karlan, Pamela S. "What Can Brown® Do for You? Neutral Principles and the Struggle over Equal Protection Clause," *Duke Law Review* 58(6), 2009, pp. 1049–69
- Kaye, Harvey J. *Thomas Paine and the promise of America*, New York, 2005
- Klarman, Michael J. "Windsor and Brown: Marriage Equality and Racial Equality," *Harvard Law Review* 127(1), 2013, pp. 127–60
- Laidler, Paweł. "Proceduralna i materialna właściwość prawa: XIV poprawka i jej rola w rozwoju amerykańskiego konstytucjonalizmu," in *Konstytucjonalizm w państwach anglosaskich*, Zięba, Andrzej (ed.), Kraków, 2013, pp. 411–30
- Laidler, Paweł. "The International Aspect of the Brown Case and the National Aspect of Communism: Foreign Policy and the U.S. Supreme Court during the First Years of the Cold War," in *U.S. Foreign Policy: Theory, Mechanisms, and Practice*, Mania, Andrzej, and Laidler, Paweł, and Wordliczek, Łukasz (eds.), Kraków, 2008, pp. 389–400
- Libiszowska, Zofia. *Tomasz Jefferson*, Wrocław, 1984
- Libiszowska, Zofia. *Tomasz Paine. Obrońca praw człowieka*, Warszawa, 1976

- Lieber, Francis. *A Code for the Government of Armies in the Field, as Authorized by the Laws and Usages Of War on Land* [online], <https://www.gutenberg.org/ebooks/53699> [22.02.2022]
- Lieber, Francis. *On Civil Liberty and Self-Government*, Philadelphia, 1883
- Maciejewski, Marek. "The beginnings of the concept and regulation of human rights and freedoms until the Enlightenment," in *Współczesne koncepcje ochrony wolności i praw podstawowych*, Bator, Andrzej, et al. (eds.) Wrocław, 2013, pp. 9–21
- Macklin, Ruth. "Dignity is a useless concept," *British Medical Journal* 327(7429), 20–27.12.2003, pp. 1419–20
- Maćkowska, Katarzyna. *Normatywny wymiar amerykańskich wczesnych konstytucji stanowych*, Lublin, 2008
- Małek, Ewa. *Wojna pamfletów w Anglii 1790–1793*, Toruń, 1993
- Marion, David E. *The Jurisprudence of Justice William J. Brennan, Jr.: The Law and Politics of 'Libertarian Dignity'*, Lanham, 1997
- McDougal, Myres S., and Leighton, Gertrude C.K. "The Rights of Man in the World Community: Constitutional Illusions versus Rational Action," *The Yale Law Journal* 59(1), 1949–1950, pp. 490–536
- McFeely, William S. *Frederick Douglass*, New York, 1996
- Meyer, Michael J. "Introduction," in *The Constitution of Rights: Human Dignity and American Values*, Meyer, Michael J., and Parent, William A. (eds.), Ithaca – London 1992, pp. 1–9
- Michelman, Frank I. *Brennan and Democracy*, Princetown, 2005
- Modrzejewska, Magdalena. *Libertariańskie koncepcje jednostki i państwa we współczesnej amerykańskiej myśli politycznej*, Kraków, 2010
- Mugge, Robert H. *Aid to Families with Dependent Children: Initial Findings of the 1961 Report on the Characteristics of Recipients* [online], <https://www.ssa.gov/policy/docs/ssb/v26n3/v26n3p3.pdf> [20.02.2022]
- Myrdall, Gunnar. *American Dilemma*, New York – London, 1944
- Myśl amerykańskiego oświecenia*, Furmańczyk, Wiesław, and Sowińska, Iwona (eds.), Warszawa, 1964
- Osiatyński, Wiktor. "Thomas Jefferson (1743–1826)," in *Wizje Stanów Zjednoczonych w pismach Ojców Założycieli*, Osiatyński, Wiktor (ed.), and Jaraczewski, Andrzej (trans.), Warszawa, 1977
- Paine, Thomas. *African Slavery in America* [online], <http://thomaspaine.org/deattributed/african-slavery-in-america.html> [22.02.2022]
- Paine, Thomas. "Agrarian Justice," in *The Complete Writings of Thomas Paine*, Foner, Philip S. (ed.), New York, 1945, pp. 605–23
- Paine, Thomas. "American Crisis," in *The Complete Writings of Thomas Paine*, Foner, Philip S. (ed.), New York, 1945, pp. 47–239
- Paine, Thomas. "Common sense," in *The Complete Writings of Thomas Paine*, Foner, Philip S. (ed.), New York, 1945, pp. 1–46
- Paine, Thomas. *Common Sense*, Philadelphia, 1776
- Paine, Thomas. "Rights of Man," in *The Complete Writings of Thomas Paine*, Foner, Philip S. (ed.), New York, 1945, pp. 243–344
- Paine, Thomas. *Zdrowy rozsądek*, Błaszczuk, Cezary (trans.), Warszawa, 2016

- Parent, W.A. "Constitutional Commands of Human Dignity: A Bicentennial Essay in Honor of Mr. Justice William J. Brennan, Jr.," *Canadian Journal of Law and Jurisprudence* 5(2), 1992, pp. 237–56
- Pastusiak, Longin. *Prezydenci Stanów Zjednoczonych Ameryki Północnej*, Warszawa, 1999
- Paust, Jordan J. "Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content," *Howard Law Journal* 27, 1984, pp. 145–225
- Pawełczak, Marek. "Wstęp," in Ira Berlin, *Pokolenia w niewoli*, Warszawa, 2010
- Piechowiak, Marek. "Klasyczna koncepcja osoby jako podstawa pojmowania praw człowieka. Wokół Tomasza z Akwinu i Immanuela Kanta propozycji ugruntowania godności człowieka," in *Prawo naturalne – natura prawa*, Dardziński, Piotr, and Longchamps de Brier, Franciszek, and Szczucki, Krzysztof (eds.), Warszawa, 2011, pp. 3–20
- Piechowiak, Marek. "Przemowa Demiurga w Platońskim „Timajosie” a współczesne pojęcie godności," in: *Abiit, non obiit. Księga poświęcona pamięci Księdza Profesora Antoniego Kościa SVD*, Dębiński, Antoni, et al. (eds.), Lublin, 2013, pp. 655–65
- Pinker, Steven. "The Stupidity of Dignity," *The New Republic*, 28 May, 2008, pp. 28–31
- Putnam Tong, Rosemarie. *Myśl feministyczna. Wprowadzenie*, Warszawa, 2002
- Quill, Timothy E. "Death and Dignity — A Case of Individualized Decision Making," *New England Journal of Medicine* 324(10), March 1991, pp. 691–4
- Rao, Naomi. "Three Concepts of Human Dignity in Constitutional Law," *Notre Dame Law Review* 86(1), 2011, pp. 183–272
- Reason and Passion: Justice Brennan's Enduring Influence*, Rosenkranz, E. Joshua, and Schwartz, Bernard (eds.), New York – London, 1997
- Resnik, Judith. "Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry," *Yale Law Journal* 115(7), 2006, pp. 1564–670
- Richards, David. A.J. "Liberty, Dignity and Justification," in *The Constitution of Rights: Human Dignity and American Values*, Meyer, Michael J., and Parent, William A. (eds.), Ithaca – London, 1992, pp. 73–101
- Rogge, O. John. "Concept of Ordered Liberty: A New Case," *California Law Review* 47(2), 1959, pp. 238–66
- Rose, Melody. *Abortion: A Documentary and Reference Guide: A Documentary and Reference Guide*, Westport, 2008
- Roy, Deborah A. "Justice William J. Brennan, Jr., James Wilson, and the Pursuit of Equality and Liberty," *Cleveland State Law Review* 61(3), 2013, pp. 665–712
- Różanek, Bartosz. *Trudna droga do Konstytucji Stanów Zjednoczonych Ameryki. Od konstytucji stanowych do „poprawionej” konstytucji federalnej*, Łódź, 2017
- Sajó, András. "From Militant Democracy to the Preventive State?," *Cardozo Law Review* 27(5), 2005–2006, pp. 2255–2294
- Schwartz, Bernard. *A History of Supreme Court*, New York – Oxford, 1993
- Schwartz, Bernard. "How Justice Brennan Changed America," in *Reason and Passion: Justice Justice Brennan's Enduring Influence*, Rosenkranz, E. Joshua, and Schwartz, Bernard (eds.), New York – London, 1997, pp. 31–42
- Schwelb, Egon. "The Influence of the Universal Declaration of Human Rights on International and National Law," *American Society of International Law Proceedings* 53, 1959, pp. 217–29

- Seed, Geoffrey. *James Wilson, Scottish Intellectual and American Statesman*, Millwood, 1978
- Senator John McCain's Farewell Statement [online], <https://www.nytimes.com/2018/08/27/us/politics/john-mccain-farewell-statement.html> [20.02.2022]
- Sensen, Oliver. *Kant on Human Dignity*, Berlin, 2011
- Smith, Charles Page. *James Wilson: Founding Father, 1742–1798*, Chapel Hill, 2011
- Stern, Seth, and Wermiel Stephen. *Justice Brennan: Liberal Champion*, Boston, 2010
- Stone, Geoffrey R. *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism*, New York, 2004
- Student's Guide to the Supreme Court*, Washington, 2010
- Szewczyk, Kazimierz. *Bioetyka*, t. 1: *Medycyna na granicach życia*, Warszawa, 2009
- Szyszkowski, Waław. *Twórcy Stanów Zjednoczonych. Waszyngton, Jefferson, Hamilton*, Warszawa, 1980
- Ślęczka, Kazimierz. *Feminizm*, Katowice, 1999
- Środa, Magdalena. *Idea godności w kulturze i etyce*, Warszawa, 1993
- The Conscience of the Court: Selected Opinions of Justice William J. Brennan JR. on Freedom and Equality*, Sepinuck, Stephen L. (ed.), Carbondale, 1999
- The Constitution of Rights: Human Dignity and American Values*, Mayer, Michael J., and Parent, William A. (eds.), Ithaka – London, 1992
- The Constitution of the United States of America. Analysis and Interpretation. Analysis of Cases Decided by The Supreme Court of the United States to June 28, 2002 Prepared by the Congressional Research Service Library of Congress*, Killian, Johnny H., and Costello, George A., and Thomas, Kenneth R. (eds.), Washington, 2004
- The Federalist 1, General Introduction* [online], <http://www.let.rug.nl/usa/documents/1786-1800/the-federalist-papers/the-federalist-1.php> [22.02.2022]
- The Federalist 15, The Insufficiency of the Present Confederation to Preserve the Union*, [online], <http://www.let.rug.nl/usa/documents/1786-1800/the-federalist-papers/the-federalist-15.php> [22.02.2022]
- The Federalist 17, The Same Subject Continued (The Insufficiency of the Present Confederation to Preserve the Union)* [online], <http://www.let.rug.nl/usa/documents/1786-1800/the-federalist-papers/the-federalist-17.php> [22.02.2022]
- The Federalist 19, The Same Subject Continued (The Insufficiency of the Present Confederation to Preserve the Union)* [online], <http://www.let.rug.nl/usa/documents/1786-1800/the-federalist-papers/the-federalist-19.php> [22.02.2022]
- The Federalist 30, Concerning the General Power of Taxation* [online], <http://www.let.rug.nl/usa/documents/1786-1800/the-federalist-papers/the-federalist-30.php> [22.02.2022]
- The Federalist 45, The Alleged Danger From the Powers of the Union to the State Governments Considered* [online], <http://www.let.rug.nl/usa/documents/1786-1800/the-federalist-papers/the-federalist-45.php> [22.02.2022]
- The Federalist 46, The Influence of the State and Federal Governments Compared* [online], <http://www.let.rug.nl/usa/documents/1786-1800/the-federalist-papers/the-federalist-46.php> [22.02.2022]
- The Federalist 58, Objection was That The Number of Members Will Not Be Augmented as the Progress of Population Demands Considered* [online], <http://Literature>

- 197www.let.rug.nl/usa/documents/1786-1800/the-federalist-papers/the-federalist-58.php [22.02.2022]
- The Federalist 67, The Executive Department* [online], <http://www.let.rug.nl/usa/documents/1786-1800/the-federalist-papers/the-federalist-67.php> [22.02.2022]
- The Federalist 69, The Real Character of the Executive* [online], <http://www.let.rug.nl/usa/documents/1786-1800/the-federalist-papers/the-federalist-69.php> [22.02.2022]
- The Federalist 70a, The Executive Department Further Considered* [online], <http://www.let.rug.nl/usa/documents/1786-1800/the-federalist-papers/the-federalist-70a.php> [22.02.2022]
- The Federalist 71, The Duration in Office of the Executive* [online], <http://www.let.rug.nl/usa/documents/1786-1800/the-federalist-papers/the-federalist-71.php> [22.02.2022]
- The Federalist 78, The Judiciary Department* [online], <http://www.let.rug.nl/usa/documents/1786-1800/the-federalist-papers/the-federalist-78.php> [22.02.2022]
- The Federalist 81, The Judiciary Continued, and the Distribution of the Judicial Authority* [online], <http://www.let.rug.nl/usa/documents/1786-1800/the-federalist-papers/the-federalist-81.php> [22.02.2022]
- The Green Book* [online], <https://digitalcollections.nypl.org/collections/the-greenbook#/?tab=about&scroll=10> [22.02.2022]
- The Works of the Honourable James Wilson, L.L.D.*, Wilson, Bird (ed.), Philadelphia, 1804
- Tokarczyk, Roman. *Prawo amerykańskie*, Kraków, 2003
- Tokarczyk, Roman. *Współczesna amerykańska myśl polityczna*, Warszawa, 1981
- Trotman, C. James. *Frederick Douglass: A Biography*, Greenwood, 2011
- Urbańczyk, Michał. "Idea godności człowieka w amerykańskiej kulturze i doktrynie prawnej," in *Miscellanea Historico-Iuridica* 15(2), 2016, pp. 193–213
- Urbańczyk, Michał. *Liberalna doktryna wolności słowa a swoboda wypowiedzi historycznych*, Poznań, 2009
- Urbańczyk, Michał. "Narodziny wolności czy dziedzictwo zniewolenia. U podstaw amerykańskiej liberalnej doktryny wolności słowa," *Studia nad Autorytaryzmem i Totalitaryzmem* 35(3), 2013, pp. 105–120
- Urbańczyk, Michał. "Od godności dobrze urodzonych po egalitarne szlachectwo dla wszystkich. Szkice ze studiów nad ideą godności człowieka," *Czasopismo Prawno-Historyczne* 66(2), 2014, pp. 153–84
- Urbańczyk, Michał. "O wieloznaczności godności. Rozważania na marginesie filozofii Immanuela Kanta," in *W kręgu doktryn politycznych i prawnych: księga jubileuszowa dedykowana Profesorowi Markowi Maciejewskiemu*, Antonow, Radosław, et al. (eds.), Wrocław, 2020, pp. 705–723
- Urbańczyk, Michał. "Przeciw segregacji rasowej. Idea nonviolence i jej filozoficzne korzenie w myśli społecznej Martina Luthera Kinga," *Filo-Sofija* 15(29), 2015, pp. 177–91
- Urbańczyk, Michał. "Tomasz Jefferson jako „duchowy ojciec” Biblioteki Kongresu," in *Biblioteki i archiwa na jednolitym rynku cyfrowym*, Chałubińska-Jentkiewicz, Katarzyna, and Kakareko, Ksenia, and Sobczak, Jacek (eds.), Poznań, 2018, pp. 27–44

- Vaišvila, Alfonsas. "Human Dignity and the Right to Dignity in Terms of Legal Person-alism. (From Conception of Static Dignity to Conception of Dynamic Dignity)," *Jurisprudencija* 3(117), 2009, pp. 111–27
- Villazor, Rose Cuison. "Rediscovering *Oyama v. California*: At the Intersection of Property, Race and Citizenship," *Washington University Law Review* 87(5), 2010, pp. 979–1042
- Vlastos, Gregory. "Justice and Equality," in *Theories of Rights*, Waldron, Jeremy (ed.), Oxford, 1984, pp. 41–76
- Waldron, Jeremy. "Citizenship and Dignity," in *Understanding Human Dignity*, McCruden, Christopher (ed.), Oxford, 2014, pp. 327–43
- Waldron, Jeremy. "Cruel, Inhuman, and Degrading Treatment: The Words Them-selves," *New York University Public Law and Legal Theory Working Papers* 98, 2008, pp. 1–47
- Waldron, Jeremy. "Dignity and Defamation," *Harvard Law Review* 123(7), 2009–2010, pp. 1597–657
- Waldron, Jeremy. "Dignity and Rank," *European Journal of Sociology* 48(2), 2007, pp. 201–37
- Waldron, Jeremy. "Dignity, Rights, and Responsibilities," *Arizona State Law Journal* 43(4), 2011, pp. 1107–36
- Waldron, Jeremy. *Dignity, Rank and Rights*, Oxford, 2012
- Waldron, Jeremy. "Dignity, Rank, and Rights," in *The Tanner Lectures on Human Values*, Berkeley, 2009, pp. 207–53
- Waldron, Jeremy. "How Law Protects Human Dignity," *New York University Public Law and Legal Theory Working Papers* 317, 2012, pp. 1–25
- Waldron, Jeremy. *One Another's Equals: The Basis of Human Equality*, Cambridge, MA, 2017
- Waldron, Jeremy. *Political Theory*, Cambridge, MA, 2016
- Waldron, Jeremy. "The Dignity of Groups," *Acta Juridica* 66(1), 2008, pp. 66–90
- Waldron, Jeremy. "The Rule of International Law," *Harvard Journal of Law & Public Policy* 30(1), 2006, pp. 15–30
- Waldron, Jeremy. "Torture and Positive Law," *Columbia Law Review* 105(6), 2005, pp. 1681–750
- Waldron, Jeremy. "What are Moral Absolutes Like," *New York University Public Law and Legal Theory Working Papers* 301, 2011, pp. 1–43
- Wermiel, Stephen J. "Gazing into the Future: The 100-Year Legacy of Justice William J. Brennan," *The Journal of Appellate Practice and Process* 13(2), 2012, p. 173–82
- Wermiel, Stephen J. "Law and Human Dignity: The Judicial Soul of Justice Brennan," *William and Mary Bill of Rights Journal* 7(1), 1998, pp. 223–39
- Whitman, James Q. "On Nazi Honor and New European Dignity," in *Darker Legacies of Law in Europe. The Shadow of National Socialism and Fascism over Europe and its Legal Traditions*, Joerges, Christian, and Ghaleigh, Navraj Singh (eds.), Oxford, 2003
- Wieciech, Tomasz. *Unia w myśli politycznej Thomasa Jeffersona*, Kraków, 2012
- Wieciech, Tomasz. "Wstęp," in Thomas Jefferson, *Uwagi o państwie Wirginia*, Kraków, 2014

- Wilson, James. "A Charge Delivered to the Grand Jury in the Circuit Court of the United States, for the District of Virginia, in May, 1791," in *Collected Works of James Wilson*, Hall, Kermit L., and Hall, Mark David (eds.), Indianapolis, 2007, pp. 320–45
- Wilson, James. "Lectures on Law," in *Collected Works of James Wilson*, Hall, Kermit L., and Hall, Mark David (eds.), Indianapolis, 2007, pp. 427–746
- Wilson, James. "Remarks of James Wilson in the Pennsylvania Convention to Ratify the Constitution of the United States, 1787," in *Collected Works of James Wilson*, Hall, Kermit L., and Hall, Mark David (eds.), Indianapolis, 2007, pp. 178–284
- Wizje Stanów Zjednoczonych w pismach Ojców Założycieli*, Osiatyński, Wiktor (ed.), and Jaraczewski, Andrzej (trans.), Warszawa, 1977
- Wright, Quincy. "The United States and Human Rights," *University of Detroit Law Journal* 36(3), 1958–1959, pp. 277–93
- Zajadło, Jerzy. *Ronald Dworkin (1931–2013). Strategia jeża i obrona liberalnej demokracji* [online], <https://kulturaliberalna.pl/2013/02/12/piatek-stany-zjednoczone-zajadlo-ronald-dworkin-1931-2013-strategia-jeza-i-obrona-liberalnej-demokracji/> [20.02.2022]
- Zieliński, Tadeusz J. *Roger Williams. Twórca nowoczesnych stosunków państwo-kościół*, Warszawa, 1997





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