

**UNIVERSITY OF CRAIOVA
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ABSTRACT

TOPIC:

THE DIGNITY OF THE HUMAN PERSON

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Chapter I. Evolution of the notion of dignity

Dignity is an idea dating back to the ancient times. Until its appearance on the legal scene, after the Second World War, dignity was approached from a variety of theological and philosophical perspectives. This plurality of theological and philosophical stands, which have occurred simultaneously or successively throughout human history, while complex and contradictory, have emerged in overlapping layers which have remarkably contributed, as a whole, to defining the dignity of the human person.

In Ancient Greece, dignity was related to a person's abilities. An individual was acknowledged to be respectable judging by their work within their respective community and by the way in which he managed to fulfil the responsibilities resulting from their social status. One characteristic of the Greek polis was the fact that not everyone enjoyed dignity and freedom, and slavery was accepted.

In ancient Rome, an initial meaning of the notion of dignity was that of a hierarchical difference between the ordinary people and the few privileged ones (the Patricians and the Optimates). Dignitas, as status of the dignitaries, was meant to be respected by the ordinary people. Second of all, in Roman society, dignity was seen as a moral quality only acknowledged as based on merits and honour acquired in that society. This was the main argument for earning or losing one's dignity. Dignity was also seen as a virtue, thus, although many people or even all people were potentially entitled to this virtue, a person's worth was given by the way in which they achieved this potential. Granting a person their dignity based on their moral qualities dates back to Cicero's time. Thus, in his work "*On proper actions (On duties)*", it is mentioned that "excellence and dignity can be found in human nature". In Cicero's work dignity is based on a person's ability to reason, to overcome their own sensuality, emotions, impulses, and on the fact that man rules over this world and the rest of the animals.

Thanks to his remarkable contribution, Immanuel Kant is seen as "the father of the modern concept of human dignity"¹ In the eyes of the Königsberg philosopher, human dignity, that which makes man raise above all other beings, consists of the fact that man cannot be used by any man (neither by another man, nor by themselves) as a means, but always as a purpose,

¹ G. Bognetti, *The concept of human dignity in European and U.S. constitutionalism*, in G. Nolte, *European and U.S. constitutionalism. Science and Technique of Democracy*, No. 37/2005, 75, 79.

because "as man cannot sell themselves for any price (because they would thus contradict their own duty of self appreciation), they cannot act to contradict other people's necessary self appreciation, and must therefore admit to the dignity of any other man, with the obligation of showing respect towards any other man"² According to Kant, autonomy is at the base of the dignity of human nature and of any reasonable nature. Dignity does not imply an economically measurable quantity, but an inherent quality of the human being, constitutive for their existence, which makes everyone treat the others with respect.³ Obligation and the right to respect are reciprocal, from Kant's perspective. In the works of the German philosopher there is a distinction between hypothetical and categorical imperatives. The second major statement of the categorical imperative is the following: "Act so that you may use humanity, both for your own person and for any other person, always as a means, and never as a purpose in itself".⁴ In the author's view, man exists as a purpose in itself, not merely as a means that some other will may use to suit their own needs, and that is the reason for which man must always be seen as a purpose in itself, when considering their own actions and those of other rational beings.

A new perspective on dignity was opened with the rise of Christianity. In Christianity terms such as "human dignity" and "sanctity of life" are closely related to the biblical idea of man being created according to God's image. According to the Christian religion, dignity does not come from merit, no one can acquire it from other people and no one can take it away from us.⁵ A first important reference to dignity is seen to have been made before or after the synod in Nice by Lactance or Gregory from Nice, whose works were confirmed by the synod in Chalcedoine. The two synods marked the beginning of the development of the use of human dignity which became a major topic in Christian theology, to which frequent references were made by patristics. As a term, dignity was frequently used at the end of the 19th century and throughout the 20th century by the catholic social doctrine, with relevant works such as *Rerum Novarum*, an encyclical written by Pope Leon XIII, followed by those written by Pope Pius XI and Pope John XXIII, especially "Pacem in terris" and "Gaudium et spes". It is considered that the state is not a purpose in itself, it merely serves man, whose dignity is insistently

² I. Kant, *Metafizica moravurilor*, Ed. Antaios, București, 1999, p. 286.

³ M.-J. Thiel, *La dignité humaine. Perspectives éthiques et théologiques*, in G. Vincent (coord.), *Le corps, le sensible et le sens*, PUS, 2004, p.132.

⁴ I. Kant, *Întemeierea metafizicii moravurilor*, Ed. Humanitas, București, 2007, p.75.

⁵ See W. Pannenberg, *Systematic Theology, Vol.2*, Grand Rapids: William B. Eerdmans, 1991, p.177.

acknowledged, the object of the social teachings of the catholic church being a state based on human dignity. The "Pacem in terris" encyclical introduces a new idea according to which all rights result from the dignity of the human person, and are therefore universal, inviolable and inherent. The personal dignity of man implies that they rejoice freedom and that they are able to make their own decisions, out of their own initiative, belief and sense of responsibility, and not as the result of some external constraint or instigation. In the end, it is worth reminding of communism being deprecated by Pope Pius XI in his well-known Encyclical in 1937, *Divini redemptoris (On atheist communism)*, which became a turning point for making the highest rank use of the term in the political world at that time.⁶

Contemporary references to dignity are placed under the sign of variety. Dignity was intensively approached by the German doctrine, which makes the presentation of the provided solutions be a selective one, and in this part of this work reference shall be made to some undeniably reputable authors. In general, the concepts related to dignity are either conditional or universal. Niklas Luhmann suggested "the dynamic concept of dignity", according to which dignity depends on an individual's possibilities and abilities (*Leistungstheorie*)⁷. In Luhmann's opinion, dignity is an acknowledgement which must be acquired and not a value that someone has based on a natural trait of their personality. Other authors think that dignity has a universal nature, and that it is an intrinsic value or characteristic which belongs to all people in the same way, regardless of their status, abilities and possibilities. Therefore all people have dignity, which means that it is implicit through the mere fact of human existence.

Part of the doctrine insisted upon the fact that dignity cannot be defined once and for all, by referring to the vague, complex, inaccurate, untraceable, unstable, flexible, subjective and intuitive nature of the notion. It was maintained that it was the "vaguest abstract definition", and that "no one knows exactly what it is about, but everyone knows what its absence would mean: vagabonds, barbarians, dirt and privations" therefore "in this entirely negative way we can understand what human dignity means: it appears when it is most ignored, ridiculed or

⁶ For further details, see S.Moyn, *Did the Irish save civilization? The secret history of constitutional dignity*, the 9th of October 2012, Columbia University, on http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2159248, where it is shown that these appeals to dignity, as part of the Catholics' reaction to communism and authoritarian corporatism, were extremely attractive and they influenced the Preamble of the Irish Constitution in 1937, the first Constitution to ever mention the concept of dignity.

⁷ N.Luhmann, *Grundrechte als Institution. Ein Beitrag zur politischen Soziologie*, Duncker and Humblot, Berlin, 1974, pp. 52-83.

despised."⁸. There is also a tendency to think that the meaning of dignity no longer requires any further definition.⁹

The notion of dignity has a plural character¹⁰, which necessarily means that it is susceptible of having more than one point of view (types, approaches, dimensions). A philosophical, legal, political, economical and medical analysis made by Thomas de Koninck and Gilbert Larochelle leads to the conclusion that the "richness of the word seems to have overcome its clarity"¹¹. This basic idea is the starting point for the presentation of the doctrinal efforts made to elucidate this concept, and this chapter includes an overview of the French, Spanish and American doctrines. Paul Kristeller is right to say that: "when trying to understand the idea of human dignity we must not settle for an easy solution"¹², as its amorphous character illustrates the fact that our understanding of its meaning is still a work in progress.

The chapter ends with a presentation of the statements held by the Constitutional Courts regarding the dignity of the human person. Certain constitutional courts (e.g.: the German Federal Constitutional Court) have developed a vast jurisprudence related to the contents and meaning of the dignity of the human person, while other courts, such as the Romanian one, have parsimoniously used this concept. It is only natural that there may be variations between the positions of different Constitutional Courts, considering the influence of the cultural and historical factor on understanding it. In the jurisprudence of the Romanian Constitutional Court it is worth mentioning the Decision no. 1/2012 regarding the admittance of the unconstitutionality objection raised to the provisions of the law amending and completing the Emergency Government Decision no. 155/2001 regarding the approach of the programme managing stray dogs, as approved by the law no. 227/2002, as well as, especially, in the art. 1 point 5 (referring to art. 4 para. (1)), point 6 (referring to art. 5 paras. (1) and (2), point 8, point 9 (referring to art. 8 para. (3) letters a)-d)), point 14 (referring to art. 13(1) and 13(4), point 15 (referring to art. 14

⁸ D. De Béchillon, *Porter atteinte aux catégories anthropologiques fondamentales*, R.T.D.C., 47/2002, p. 60.

⁹ H. C.Nipperdey, quoted in E. Daly, *Dignity rights. Courts, Constitutions and the worth of the human person*, University of Pennsylvania Press, U.S.A., 2012, p. 1.

¹⁰ C.Girard, S.Hennette-Vauchez, *Analyses*, in C. Girard, S. Hennette-Vauchez, *La dignité de la personne humaine. Recherche sur un processus de juridicisation*, P.U.F., Paris, 2005, p.254.

¹¹ T. De Koninck, G. Larochelle, *Avant-propos*, in T. De Koninck and G. Larochelle, *La dignité humaine: philosophie, droit, politique, économie, médecine*, coll. Débats philosophiques, P.U.F., Paris, 2005, p.11.

¹² P.O.Kristeller, *Renaissance concepts of man and other essays*, New York Harper & Row, 1972, p.21.

para. (1) letter b) of the law ¹³, which states that human dignity implies two inherent dimensions, namely: **human relations**, referring to people's right and obligation to have their fundamental rights and liberties respected and to correlatively respect those of their peers and **people's relation to the environment, including the animal world**, which implies, as far as animals are concerned, the moral responsibility that man has to care for these beings so as to prove the level of civilisation they have reached. It can be inferred from the decision of the court that human dignity is an intrinsic value, which must be respected and protected in our social relations; this respect implies negative obligations of the citizens (not to commit actions which may affect their peers' fundamental rights and liberties) and negative and positive obligations of the state (not to affect its citizens' fundamental rights and liberties and to intervene so as to support their fundamental rights and liberties). Man must respect not only other people's dignity, but also their own. Thus, the Court decided that human dignity is violated by obligating them, with no circumstantial evidence, to euthanize stray dogs. Or it is the duty of the public authorities to make sure that those people who act on their behalf do not compromise their own human dignity, even assuming that, on a personal level, the doers do not think that any of their rights have been compromised¹⁴.

Chapter II. Constitutional aspects in the interpretation of the concept of human dignity

Section I. Constitutional aspects in the interpretation of the concept of human dignity after the Second World War. At the end of the Second World War, the whole world discovered the abominable crimes committed during the Nazi regime. Under these circumstances of intense emotional pressure, it was maintained that the laws which helped to achieve the Nazi ideals were not only immoral, but that they could not even be seen as rules, and that the fall of the Nazi regime made them no longer compulsory. In the years after the Second World War, Germany adopted a completely different vision, characterized by the revival of religious feelings, by the psychological need to put a distance between the present and a horrible past, and especially by applying the principles of a constitutional state and the fundamental rights, as provisioned in the Constitution that they adopted. As a result of this radical change, a new fundamental Law was

¹³ Published in Of. Gaz., Part I, nr. 53 of the 23rd of January 2012.

¹⁴ K. Zakariás, K. Benke, *Demnitatea umană în jurisprudența instanțelor constituționale din Germania, Ungaria și România*, p.63.

adopted in Germany in 1949, stating in the first article, para. (1) that: "Human dignity is inviolable. It is the obligation of all state authorities to respect and protect it." When considering the history of the concept until it was included in the constitutional texts after the war, it is worth mentioning its distancing from Kelsen's positivism. This was initially a subtle phenomenon, and then became more and more obvious in a society determined to distance itself from its dreadful past.

In subsection 4 it is presented the distinction between "critical morality" and "legalized morality". Starting from the observation that law and morality are two distinctive normative orders with an essential, unavoidable connection, professor E. Diaz made a distinction between critical and legalized morality starting from accepting a double dimension of morality, namely: in the *personal dimension* it issues behavioural rules that the individual imposes upon themselves, whereas in its *social dimension* it aims at orientating the behaviour of a group of individuals. *Legalized morality* is a set of values acknowledged by a certain legal system, originating in the acts of will of certain individuals and corresponding to a public projection of their personal morality, changed into a set of principles or values which are generally accepted and protected by the legal system. *Critical morality* is a set of moral norms used by individuals to criticize society, thus becoming synonymous to social morality and enabling criticism of the legal order. In the context of the distinction between critical and legalized morality, an immoral behaviour can be assimilated to one which goes against critical morality, against the public projection of a certain morality, but it cannot generate any legal sanctions; it can only be disavowed by the community. If there is an agreement between the disavowal of the community and the legal norm, the morality expressed by the law does not correspond to the status of critical morality, but to that of legalized morality. Such behaviour will be sanctioned because it damages not positive morality, but the legal norm reflecting this morality.

In a separate subsection, the study at hand presents the thesis of public and private ethics¹⁵ of professor Gregorio Peces-Barba Martinez, which is useful because the author pays special attention to the dignity of the human person. The main aspect of the thesis is to emphasize the morality part of the law and to enable the judge reason in a certain way when faced with the need to make a decision in cases which are at the borderline between morality and law.

¹⁵ For details, see G. Peces-Barba, *Etica Pública y Derecho*, Real Academia de Ciencias Morales y Políticas, 19 april. 1993, Madrid 1993 and G. Peces-Barba, *La dignidad de la persona desde la Filosofía del Derecho*, 2nd edition, Dykinson 2003.

The German model of interpreting dignity in the constitutional right influenced the constitutional texts adopted during the second half of the 20th century. At the European level, dignity is included in the constitutions of most states, and this work amply presents these mentions, beginning with the Preamble to the Irish Constitution on the 1st of July 1937. Two periods can be identified, each of them characterised by an increasing use of the concept of human dignity in European constitutional texts: the fall of the dictatorships in Greece, Portugal and Spain in the 7th decade and the transition to democracy of the Central and Eastern European countries in the 9th decade. It is necessary to mention that the members of the Constitutive Assembly were offered 9 translated foreign constitutions, 7 of which included references to the value of dignity. Thus, dignity is mentioned in Chap. 1, "Basic principles", art. 2 para. (1) in the Swedish Constitution on the 1st of January 1975 according to which "Public power must be enforced while respecting everyone's equal value, freedom and dignity"; Title 2, "On the Belgians and their rights", art. 23 in the Belgian Constitution according to which "Every person has the right to lead a life in agreement with human dignity"; art. 7 called "Human dignity" in the Swiss Constitution which provides that "Human dignity must be respected and protected"; the Preamble to the Portuguese Constitution according to which "On the 25th of April 1974, the Movement of the Armed Forces glorified long years of resistance and reflected the Portuguese people's deepest feelings by overthrowing the regime. Delivering Portugal from dictatorship, oppression and colonialism was a revolutionary change and a historical turning point for the Portuguese society. The Revolution restored the fundamental rights and liberties of the Portuguese people. In exerting these rights and liberties, the people's legitimate representatives got together to design a Constitution that would suit the country's aspirations. Portugal is a sovereign state, based on the dignity of the human person and on the will of the people, determined to build a free, just and liable society"; Title 1 - "Fundamental rights and obligations", art. 10 para. (1) "Man's dignity, man's rights" in the Spanish Constitution which provides that "The dignity of the person, their inherent inviolable rights, the free development of their personality, the respect for the law and for other people's rights are the foundation of political order and social peace"; the Preamble to the Hungarian Constitution according to which "We hold that human existence is based on human dignity" and art. 2 of the Italian Constitution which includes the personalistic principle according to which the person "becomes owner of

those fundamental rights constituting the irreducible patrimony of human dignity which the Republic takes it upon itself to protect", and in art. 3 there is a mention of "social dignity"¹⁶

Section II. The concept of dignity in the Romanian Constitution. The beginning of this section consists of an analysis of the general framework, with emphasis on the fact that transition to democracy and to the state subject to the rule of law proved to be a long, difficult process. Within this context it became obvious the need to design a new Constitution.

The members of the Assembly of Deputies and of the Senate declared their common session on the 11th of July 1990 to be a Constitutive Assembly and adopted the Regulation of the Constitutive Assembly and created the Committee for drafting the project of the Constitution¹⁷. On the 29th of October 1990 the Assembly of Deputies and on the 30th of October 1990 the Senate granted it the quality of Permanent Committee. The drafting committee first had to design and present the principles and the chapter structure of the project of the Constitution, and then write each chapter in full in order to have it debated and approved by the Constitutive Assembly. The theses for the project of the Romanian Constitution were published on the 12th of December 1990, and later on debated by the Constitutive Assembly. The debates on the projects and amendments to the Constitution by the Constitutive Assembly began in September 1991, and the approval of the articles in the text ended on the 14th of November 1991. The new Constitution was adopted on the 21st of November 1991 and entered into force on the 8th of December 1991 after having been approved by means of a referendum.

The Constitution was structured in 7 Titles, namely: Title I - "General principles" (art. 1-14), Title II - "Fundamental rights, liberties and obligations" (art. 15-57), Title III - "Public authorities" (art. 58-133), Title IV - "Economy and public finances" (art. 134-139), Title V - "The Constitutional Court" (art. 140-145), Title VI - "Revision of the Constitution" (art. 146-148) and Title VII - "Final and transitory provisions" (149-152). Art. 1 para. (3) of Title I - "General principles" had the following contents: "Romania is a democratic and social state subject to the rule of law, where human dignity, the citizens' right and liberties, the free development of human personality, justice and political pluralism are supreme and guaranteed

¹⁶ For the Italian Constitution, see S. Mangiameli, *Il contributo dell'esperienza costituzionale italiana alla dommatica europea della tutela dei diritti fondamentali*, in A. Pace, *Corte costituzionale e processo costituzionale*, Giuffrè, Milano, 2006, pp. 478-479.

¹⁷ Of. Gaz., nr. 90 of the 12th of July 1990.

values". At point 1(1) in the Revision of the Romanian Constitution Law no. 429/2003¹⁸ it was provisioned that a further phrase would be added to this paragraph "the Romanian people's democratic traditions and the ideals of the Revolution in December 1989". In art. 16 para. (3) of the Constitution, providing that "Public, civil or military functions and dignities may only be held by people of Romanian nationality who reside in this country", the notion is used in its primary sense, that of functions held by dignitaries. Art. 30 para. (6) of the Constitution with the side name "Freedom of expression" mentions dignity among the limitations of the freedom of expression along with honour, a person's private life and the right to self image". This work also focused on the references to dignity in the other versions of the Romanian Constitution (art. 4 in the 1938 Constitution¹⁹ and art. 13 in the Constitution of the Socialist Republic of Romania²⁰ in 1965) with emphasis on the fact that only in art. 1 para. (3) in the 1991 Constitution did the Romanian constitutional system guarantee and raised human dignity to the status of supreme value of the Romanian state.

One of the leading ideas in designing the new Constitution was stating the definitive break with the communist past. Thus, during the debates in the Constitutive Assembly it was expressly mentioned: "The Constitution creates a framework which definitively forbids any return to communism"²¹ Introducing human dignity as supreme value of the Romanian state definitely has a symbolic dimension, marking a break from its communist past and emphasizing the refusal of ever returning to it. It must be said that mentioning a set of values is meant to reflect a shift in the supporting values of the legal system, or, the communist regime approved of a set of collectivist values and intently neglected individual ones (dignity, liberty, ownership). It was underlined the idea that interpreting human dignity as supreme value of the Romanian state favours the individual in their atemporal conflict with the state. The relationships between the state and the individual are based on concepts that are now totally different from those in the communist time. The relationship between the individual and the political power which existed in the totalitarian times was reversed. This work pays special attention to this aspect as it is one

¹⁸ Published in the Of. Gaz., Part I, no. 669 of the 22nd of September 2003.

¹⁹ Published in the Of. Gaz., no. 48 of the 27th of February 1938.

²⁰ Published in the Of. B. of the S.R.R. no. 1 of the 21st of August 1965.

²¹ Gh. Dumitraşcu, Stenography of the session of the 13th of February 1991, published in the Of. Gaz. of Romania, Part II, no. 1 of the 15th of February 1991, *Genesis of the Romanian Constitution*, pp. 66

of the most significant novelty elements. Also, in the last part of this section there is a rather ample presentation of its role as supreme value.

Section III. Understanding the concept of the dignity of the human person. Section III highlights some of the important aspects identified throughout the documentation stage of the thesis, regarding the understanding of the concept of human dignity, namely: a historical presentation of the connection between the dignity of the human person and their fundamental rights, with reference to the discussions that this topic generated in the field of the compared constitutional right; the concept of "invulnerable minimum guaranteed by the dignity of the human person"; the concept of "constitutional image of man"; the beneficiaries of the dignity (the human person, the things, the states, the sovereigns). There is also a resulting answer to the question of whether or not dignity applies to legal persons in the eyes of the Constitutional Court. In this sense it is mentioned the Decision no. 74/2002²², wherein the Court approved the point of view according to which dignity applies to natural persons only; the formulation of the object as designed and developed in the German constitutional right, the way in which it is applied in the jurisprudence of the German Constitutional Court and in that of the European Human Right Court, as well as its main flaws.

A special emphasis was placed on the relevant jurisprudence of the Romanian Constitutional Court, namely the Decision no. 415/2002²³ in which the Court held that the right to the respect and protection of the family private life is a materialisation of the values of human dignity and of the free development of human personality, and the Decision no. 1109/2009²⁴ in which the Romanian constitutional court distinguishes between the citizen's rights and liberties which are constitutional values based on human dignity and on the free development of human personality, rights which only apply to natural persons, and the rights of the legal persons, such as those of an employer, as defined in the constitutive acts, which determine their proper legal capacity enabling them to achieve their goals.

²² Published in the Of. Gaz. no. 283 of the 26th of April 2002.

²³ Published in the Of. Gaz., No. 294 of the 5th of May 2010.

²⁴ Published in the Of. Gaz. No. 1109 of the 9th of October 2009.

At the end of this section, in a separate paragraph, it is presented an opinion expressed by professor Xavier Bioy ²⁵, considering the flaws of the theory of the object and the importance of the author's analysis in providing an answer to the question: When is someone reified? The dignity of the human person, as value granted to the person's unity, can be trampled by treating separately that which should be treated as a whole. Therefore, the unity-dignity of the human person is applied to the relation between the body and the spirit, the body (the physical integrity), the spirit (the psychological integrity), and to the relations between individuality and sociality. Anything that tramples these relations can also trample human dignity. To sum up, it is considered that human dignity is trampled by refusing to value unity, by separating one dimension of the person from the others, seen as equally constitutive for the person.

Chapter III. The dignity of the human person and the right to life

The third chapter called "The dignity of the human person and the right to life" consists of four sections, as shown below: Section 1 - References to the dignity of the human person in international bioethics texts; Section 2 - The legal protection of the human embryo; Section 3 - The civil status of the human body and Section 4 - The protection of a person's dignity after their death.

Section I consists of an analysis of various international instruments in the field of bioethics which refer to the dignity of the human person. Dignity, as proof of man's specificity in relation to any biological beings and things, is a guideline in the lawyers' activities when faced with difficult decisions related to biomedicine ²⁶, taking and transplanting organs and tissues, eugenic practices, using various techniques of medically assisted human procreation, embryo status, examinations of genetic characteristics and other current issues which need regulation.

²⁵ For further details, see X. Bioy, *Le concept de personne humaine en droit public. Recherche sur le sujet des droits fondamentaux*, Dalloz, 2003, wherein it is shown that dignity is that which is owed to man in the three dimensions: biological, spiritual and relational. The dignity of the human person is the value of the unity consisting of the person's components.

²⁶ The status of object or instrument to which a human person is reduced is condemnable on the grounds of this principle. Also, it appears to go against any requirement of respecting dignity all that contributes to treating the person as a recomposable, reshapable thing, all action that aims at subjecting and commercialising the human being. For further details, see Ph. Pedrot, *La dignité de la personne humaine à l'épreuve des technologies biomédicales*, in Ph. Pedrot (coord.), *Ethique, droit et dignité de la personne*, Ed. Economica, 1999, p.63.

The **second section** deals with the issue of the legal protection of the human embryo. At the beginning of the section, it was indicated the fact that there are significant disparities between the European states as for the definition of the human embryo. In most states which are members of the European Union, there is no legal definition of the human embryo (Belgium, Denmark, Finland, Greece, Italy, Luxembourg, Holland, Portugal and Sweden), whereas in the others (Germany, Austria, Spain, the United Kingdom), the law holds rather variable notions. As for the research based on human embryos, there are three distinctive solutions: there are states in which research is only allowed as long as it benefits the respective embryo (Germany, Austria), only on exceptional terms (France, Sweden) or in strict conditions (Denmark, Spain, Finland, the United Kingdom). The issue of defining human embryo was raised in the case of *Oliver Brüstle versus Greenpeace eV*²⁷, wherein the Court of Justice of the European Union gave a wide interpretation of the notion of human embryo: *human embryo is any egg cell which is still being fecundated, any human egg cell which has not been fecundated into which it has been implanted the nucleus of a mature human cell and any unfecundated human egg cell which was stimulated to divide and develop by means of parthenogenesis.*

Numerous aspects related to voluntary abortion were widely dealt with within this section. First, the study of the jurisprudence of the European Court for Human Rights revealed the fact that the European court thinks that the member states should feel free to decide when dealing with the right to life, and that, in general terms, the states should have this freedom even within the framework of an ever-changing Convention, seen as a living instrument which must be adapted to the actual living conditions. The Court decided²⁸ that, at the best, the fact that the embryo/foetus belongs to the human race can be seen as a common element of all states. Regarding this aspect, the Grand Chamber admitted to the following, in its decision in the case of *Vo versus France*: "The potentiality of this being and its capacity of becoming a person - thus benefiting from protection within the civil right in many other states, including France, in the context of heritages and donations, and also in the United Kingdom, it receives protection in the name of human dignity, without being called "person" with the right to live for the purposes of art. 3." In the line of the solution to this case, the practice of the European Court for Human Rights regarding abortion is constant: until now, the Court has been cautious in defining the

²⁷ Decision of the Court, the Great Chamber of the 18th of October 2011, case C-34/10.

²⁸ See case *Vo versus France*, the Grand Chamber, decision of the 8th of July 2004.

embryo/foetus as a person, and let the member states decide. It can still be rightfully considered that human dignity justifies a common minimal protection of the embryo at a European level. Respecting the embryo implies an objective protection of the body, firstly by considering a minimum of physical integrity²⁹. The embryo is seen as a human being, but it has no legal personality. Given the fact that human dignity implies the fact that all human beings belong to mankind, seen as a common nature, and that it is forbidden to treat human beings as objects, in its quality of supreme value human dignity has a normative nature and imposes upon the lawmaker to realize it, which means that the embryo shall benefit from legal protection, even if it has no legal personality. A special place in this section is the presentation of the trends in the evolution of the legal regulations and of the jurisprudence of the Federal German Constitutional Court³⁰, of the Spanish Constitutional Court, and a comment on the solutions provided by the new Penal Code.

One of the purposes of this section was to show that there are close connections between abortion, prenatal diagnose and recent therapies in foetal medicine, as pregnancy may be terminated if the prenatal diagnose determines that the foetus is affected by some incurable disease. The new Civil Code provides that it is allowed to perform medical procedures on those genetic characters which modify the persons' descent, if these procedures aim at preventing and treating genetic diseases³¹ and the use of various techniques³² of medically assisted human procreation for choosing the baby's sex, if the purpose is to avoid serious hereditary disease related to their sex.³² If the new Civil Code forbids collective eugenic practices, the individual ones are allowed. It is worth mentioning art. 12 of the Oviedo Convention, providing that "it is only allowed to perform predictive tests for genetic diseases or tests which aim at identifying the subject carrying a gene that is responsible for a certain disease, or at tracking some

²⁹ For example, regularizing abortion, forbidding the creation of human embryos for research purposes or using them for commercial purposes.

³⁰ The German Constitutional Court mentions the "unborn life", the "incipient life", the "germinal life", without regarding the unborn child as a human person. The court emphasized the fact that the foetus does not benefit from the same rights as a human person, as it is not a "complete person", but it is an "independent legal value" which needs constitutional protection. Referring to human dignity allowed the German court to extend the range of the beneficiaries of the right to life.

³¹ In art. 63 para. (1) of the new Civil Code it is held that "It is forbidden to perform any medical intervention on genetic characters aiming at modifying the person's descent, except for those aiming at preventing and treating genetic diseases"

³² In art. 63 para. (3) of the new Civil Code it is held that "The use of medically assisted procreation techniques is only allowed in choosing the baby's sex if it aims at avoiding serious hereditary diseases related to the baby's sex".

predisposition or genetic susceptibility to a certain disease, for medical purposes or for scientific research related to medical purposes, with the provision of proper genetic advice".

It follows an analysis of recurring to the method of double pre-implantation diagnose for the embryo cells conceived in vitro from the perspective of the lack of doctrinal consensus that this method has generated regarding its compatibility with human dignity, a discussion raised by the fact that several European states legalized the use of this method which provides the possibility of giving birth to a healthy child to heal their brother affected by a serious genetic disease.

In a separate paragraph, the study at hand provides an answer to the question: assuming an unborn child suffers from serious abnormalities which would make abortion permissible, and the doctor fails to discover the disease prior to the birth of that baby, and the baby is born suffering from severe disabilities, would it be appropriate to say that the doctor has the obligation towards the unborn baby to terminate the pregnancy? In order to solve this problem, references were made to the cases of Perruche³³ and McKay versus Essex Area Health Authority³⁴ in order to compare the decisions of the French and British courts, to the reasoning of various prestigious authors and to the use of the argument of the human dignity in the debates generated by the decisions which were made in these cases.

The end of this section consists of several considerations regarding the compatibility between reproductive and therapeutic cloning and the dignity of the human person. The doctrine clearly distinguished between reproductive cloning, which aims at giving birth to a child, and therapeutic cloning, which aims at creating an embryo for therapeutic or research purposes. The Romanian lawmaker, in art. 63 para (2) of the Civil Code forbids any intervention aiming at creating a human being that is genetically identical to another one, as well as the creation of human embryos for research purposes. It is forbidden to clone a human being, be it alive or dead.

The third section is called "The civil status of the human body" and it contains references to: 1) the constitutional framework; 2) The principle of the inviolability of the human body, the principle of the unavailability of the human body and the principle of the priority of the interest and welfare of the human being; 3) the body and the person in the legal doctrine and 4) the prohibition of letting someone die.

The last section of Chapter 3 deals with *The protection of the dignity of the human person after their death*. In this view, it was mentioned that in many legal systems, the dignity of the human

³³ The French Court of Cassation, the 17th of November 2000.

³⁴ 1982, QB 1166, 1982 2All ER 771, CA.

person is attached to the protective status of the dead, both in the civil and in the penal right. Given the dignity of the person, their body does not become a mere object after death.³⁵ After death the body of that person must be treated with respect. The doctrine expressed the opinion that after death the natural person is no longer a rightful subject of the law, but it does not lose its quality of human person, in which case protecting the dead body in the name of the dignity of the human person involves the existence of a residue of social dignity of the person whose memory is worth respecting. According to a different perspective, it is claimed that the respect of the after death image of the person is based on the objective respect of mankind, as the dead body always bears human dignity³⁶.

In the Romanian law, the Civil Code introduces an aspect of novelty to the matter in section 4, called "Respect of the human person including after death", in the second chapter, called "Respect of the human person and of their inherent rights", a section which consists of four articles (art. 78 - "Respect of the dead person", art. 79 "Prohibition of hurting the memory of the dead", art. 80 "Respect of the will of the dead person" and art. 81 "Taking organs from the dead person"), and is presented in detail. According to art. 78 of the Civil Code, the respect of the person after death refers both to the body and to the person's memory. The following aspects are related to the respect of the person's body: a decent behaviour towards the respective person and their funeral; organisation of a funeral service (art. 80); taking organs from the dead (art. 81). The memory of the dead person, meaning the memory that the living have of the dead person is protected by reference to the legal provisions related to the right to an image (art. 73 of the Civil Code) and to the right to reputation (art. 72 para. (2) of the Civil Code) of the living person. Actions to restore the integrity of the memory of the dead person can be taken by the surviving spouse, by any of the first degree relatives of the dead person, as well as by any of their collateral relatives ranging until the fourth degree (art. 256 para. (2)). It was also mentioned that the Romanian lawmaker makes no reference to human dignity, but to the concept of "respect", or, as

³⁵ Some authors say that a dead body is sacred because it is attached to the person. J.-P-Baud, *L'affaire de main volée: une histoire juridique du corps*, Paris, Seuil, 1993, p.55.

³⁶ This solution is accepted in the case of the C.A. in Paris, on the 2nd of July 1997, where it is mentioned that "respect is due to their condition of human being"

admitted in the doctrine, "behind the word "respect" there is always a reference to human dignity" ³⁷.

In this work it is also exposed the jurisprudence of the Federal Constitutional Court of Germany which, ever since 1991, has expressly admitted to the posthumous protection of the dignity of the human person in case the image of the dead person is compromised for posterity by ostracising, defamation, derision or other forms of humiliation ³⁸. Of the utmost importance is the court's analysis in the Mephisto case. ³⁹ The ruling in the Mephisto case was a step forward towards consecrating a right of the post-mortem personality. The constitutional court explained that the posthumous protection of human dignity only extends to violations of a general right to respect, inherent to any human being and to the personal, moral and social value it has acquired throughout their lifetime. The heirs act on behalf of the dead person in order to protect their memory against serious violations of the dignity, reputation and image of the dead. There is a clear distinction between the sufferance of the family members and hurting the inherent dignity of the dead person. It is inferred from the jurisprudence of the federal constitutional court that, although this right is not limited to the protection of famous people, the protection period is different according to the aspects of each case: importance of the problem, fame of that person and intensity of the violation. Post-mortem protection does not last forever; it only becomes more and more limited as time goes by. It does not have an expiry date, and the argument in favour of a limited protection is the fact that in the social space public memory grows week in time.

A special part of this section is the presentation of the decisions of the European Court for Human Rights which significantly contribute to shaping human dignity in the conventional space. Special attention was paid to the case of Akpınar and Altun ⁴⁰ versus Turkey, in which the Strasbourg court reminded that art. 3 of the Convention has never been applied "in the context of the lack of respect for a dead body" and admitted "this approach, after observing the fact that the quality of human being expires upon death and that therefore prohibition of ill treatment no longer applies to dead bodies, such as those of Seyit Külekçi and Doğan Altun, despite the

³⁷ S.H. Henette-Vauchez, C. Girard, *La dignité de la personne humaine: recherche sur un processus de juridicisation*, P.U.F., Paris, 2005, p. 90.

³⁸ Decision of the 5th of April 2001, bVr932/94.

³⁹ Case of Mephisto, 1971, 30 BverfGE 173.

⁴⁰ Decision of the 27th of February 2007.

cruelty of the respective deeds." In a partly dissident opinion, Judge Fura Sandström stated his firm belief that the unmotivated profanation of a dead body, unlike the scientific tests approved by a court to serve the reasonable interest of a third party, is a clear insult to human dignity. In response to what had been presented, it was emphasized the fact that an opportunity was wasted of taking yet another step towards the protection of human dignity, by clearly stating that the obligation of respecting a person's dignity and bodily integrity continues after death.

Chapter IV. The right to dignity in the New Civil Code

Chapter four consists of five sections: 1) the right to the respect of the private and family life in the sense accepted by the European Court for Human Rights; 2) the personality rights; 3) dignity, honour and reputation as mentioned in the compared constitutional right; 4) the right to the respect of the person's dignity in the Civil Code; 5) dignity, honour and reputation.

Chapter four begins with a brief presentation of the concept of "private life" in the sense accepted by the Strasbourg court, which generally consists of⁴¹: the right to a private, intimate life; the right to a private social life and the person's right to a healthy environment.

Section two consists of an ample presentation of the personality rights, defined as "the inherent rights of the human person, innate and non-assignable, which rightfully belong to any natural person to have their primordial interests protected"⁴², or, put in another way, they are "native prerogatives", deriving from the mere fact of being a person⁴³. In the legal doctrine, the personality rights are a relatively new legal category, the earliest attempts to theorize the concept dating back to the end of the 19th century. Also, considering the fact that there is no complete agreement between the members of the doctrine regarding the criteria that can be used in order to categorize the personality rights and the contents of each such category, some of them are mentioned herein. As an aspect of novelty, the Civil Code lists the following as personality rights: *the right to life, health and physical and psychological integrity, the right to dignity, the right to self-image, and the right to the respect of one's private life*. The lawmaker emphasizes the fact that the above is a list of examples, therefore this category also includes other "such rights mentioned by the law".

⁴¹ C. Bârsan, *Convenția europeană a drepturilor omului. Comentariu pe articole*, vol.I, Ed. C.H.Beck., București, 2005, p.600.

⁴² Ph. Malaurie, L. Aynes, *Droit civil. Les personnes. Les incapacités*, 3rd edition, Defrénois, 2007, p. 280.

⁴³ F. Sudre, *Le droit au respect de la vie privée au sens de la Convention européenne des droits de l'homme*, Bruylant, Bruxelles, 2005, p. 311.

An important section (**section four**) was dedicated to the right to the respect of dignity in the provisions of the New Civil Code. Article 72 - The right to dignity in Book I - "On persons", Title II - "The natural person", Chapter II called "The respect for the human being and their inherent rights" provides that: (1) Any person has the right to the respect of their dignity. (2) It is forbidden to harm in any way the honour and reputation of a person, without their prior consent or without observing the limitations in art. 75". Similarly to the personality right, the one mentioned in art. 72 of the Civil Code has the legal characteristics of this category: it is absolute, therefore opposable erga omnes, meaning that everyone has the obligation to restrain from committing acts that may violate it. It is also intangible, not transmissible, not subject to time-barring, it is strictly personal and universal, meaning that it belongs to all persons. The Civil Code introduces certain aspects of novelty to the civil legal means of protecting the non-patrimonial personal rights in Title V - "Protection of the non-patrimonial rights", in Book I - "On persons", art. 252-257. These provisions also apply to the right to dignity, in the sense of consolidating the protection of these rights in relation to the provisions of art. 54-56 in the Decree no. 31/1954 regarding the natural and legal persons.

In the last section (section five) there is a detailed presentation of the concepts of honour, reputation and dignity, with emphasis on the idea that the concept of dignity is more complex than those of honour and reputation. However, as rightfully noticed in the specialized literature, far from a complete, all-comprehensive meaning, anything but an open definition is inconceivable, as it must be understood in its entire complexity. Therefore dignity cannot be defined once and for all; its interpretation must depend on the given circumstances and only apply to the respective case. In this sense it is worth mentioning professor T. Pech's opinion: "It would be unwise to close the list of potential violations of dignity The lack of a positive substantial definition (...) is a safety measure which is indispensable to dealing with the bleak reserves of possibility" ⁴⁴.

Chapter V. The dignity of the human person in the context of discrimination

Chapter V consists of two sections: 1) the concept of dignity of the human person and discrimination - theoretical aspects and 2) the jurisprudence of the National Council for Combating Discrimination.

⁴⁴ B. Maurer, *Le principe de respect de la dignité de la personne humaine et la Convention européenne des droits de l'homme*, Documentation française, Paris, 1999, p. 32.

This scientific endeavour aimed at emphasizing the fact that a person's dignity enables abandoning a formal approach of equality in favour of a substantial one. When analysing the existence of discrimination, special emphasis must be placed on the impact of this regulation upon the target group. Not any different legal approach based on a non-discrimination criterion or on a similar one is forbidden, but discrimination must be identified by its effects. The purpose of non-discrimination is to prevent violation of the dignity of the human person, by imposing or perpetuating the idea that an individual or a group unfavourably affected by a difference in the legal approach is less capable or less worthy of appreciation and recognition as a human being or as a member of society. Therefore, a reference to a person's dignity enables expanding the range of non-discrimination criteria. It is forbidden to use different legal approaches that may violate dignity, whether or not the legal approach is based on a non-discrimination criterion that has been expressly provisioned.

Order no. 137/2000 regarding the prevention and sanctioning of any form of discrimination reflects the provisions of the Council Directive 2000/43/CE regarding the application of the principle of the equal treatment between persons irrespective of racial or ethnic origin ⁴⁵ and the provisions of the Council Directive 2000/78/CE for the creation of a general framework for equal treatment in terms of employment and occupation ⁴⁶. Article 15 in the Order no. 137/2000 holds that: "It is seen as contravention, as long as it does not fall under the incidence of the penal law, any public behaviour of a nationalist - chauvinistic propagandistic nature, instigation to national or racial hatred, or which aims at or the purpose of which is to violate dignity or create an intimidating, hostile, degrading, humiliating or offensive atmosphere, directed against a person, a group of persons or a community and related to their belonging to a specific race, nationality, ethnicity, religion, social class or under favoured category, or to their beliefs, sex or sexual orientation" In the **second section** there is a summarizing presentation of the decisions N.C.C.D. in the problem at hand. In most cases, the analysis is based on the question related to the violation of the dignity of certain persons or groups because of a different treatment based on a stereotype. In order to determine whether or not the petitioner's dignity has truly been violated, the Council ponders if the individual themselves felt humiliated, given their personality and the actual circumstances. However, the Council uses a subjective-objective approach, by

⁴⁵ T. Pech, *La dignité humaine. Du droit à l'éthique de la relation*, Éthique publique, vol. 3, no. 2, 2001., p.106.

⁴⁶ Published in the Official Journal of the European Communities (O.J.E.C.) no. L 180 of the 19th of July 2000.

examining the facts in order to determine if the differentiated treatment resulted in maintaining certain prejudice or stereotypes. The Council has constantly held that discrimination itself is an affront to human dignity; a discriminating treatment results in humiliating, degrading or interfering with the dignity of the discriminated person, especially when this treatment is displayed publicly. Treating someone in a less favourable way based on inherent criteria is basically a proof of disdain and disrespect for their personality.

Chapter VI. Human Dignity in the context of Social and Economic Rights

Chapter VI of this thesis aims at highlighting the connection between human dignity and the social and economic rights, having the following four sections: 1) human dignity and extreme poverty; 2) human dignity and the social and economic rights in comparative constitutional law; 3) human dignity and the social and economic rights in the jurisprudence of the Constitutional Court; 4) human dignity and the social and economic rights in the jurisprudence of the European Court of Human Rights.

It is worth noting that this social conception on dignity is the result of the International Pact on Economic, Social and Cultural Rights which recognizes in its Preamble that these rights derive from the inherent dignity of the human person, and the ideal of a free human being, free from fear and misery cannot be achieved unless there are created the conditions so that everyone could enjoy his economic, social, cultural, civil and political rights. Recognizing our peers as being equal to us in dignity entails treating them with respect and show solidarity with them. Dignity condemns the indifference in favour of a certain „reciprocity obligation“⁴⁷; it is sufficient that the other person does not live as a human being, for the human being in me to find itself denied, devoid of the respect which is due to him⁴⁸.

⁴⁷ X. Bioy, *op. cit.*, p.736.

⁴⁸ J. Hersch, *Les fondements des Droits de l'Homme dans la conscience individuelle*, Commission Nationale Consultative des droits de l'homme, Les droits de l'homme en question, Livre Blanc, Paris, La Documentation française, 1989, p. 81

Numerous constitutions refer to "the fundamentally social opening"⁴⁹ of dignity, and the jurisprudence of constitutional courts had a significant word to say in this matter, as it results from the **second section**.

In the jurisprudence of the Romanian Constitutional Court, presented in detail within **the third section**, Decision no. 1576/2011⁵⁰ is important as the court admitted that dignity may serve at establishing a positive obligation for the State, an obligation to intervene in the sense of ensuring the resources necessary for life, to the extent that without them life would be reduced to a level that cannot be considered as appropriate for any human being. Moreover, the decision is extremely interesting as the Court's argument focuses on the human dignity which is characterized as "*an inalienable attribute of the human being, which requires from all the members of the society a behaviour of respect and protection towards the other individuals and prohibits any humiliating or degrading attitude against the human being*"; in other words, "*each individual is liable to recognize and respect on any other human being the attributes and values that characterize him as human*". The decision brings some novelty elements, namely: first, the inalienable character of dignity which, being inherent to the human person, cannot be lost and cannot be given up as it is inseparable to the person⁵¹, belonging to him precisely from his human quality⁵²; afterwards, the concept has a social connotation, it requires protection and respect in social relations of the individuals; finally, this respect must be effective, entailing both negative and positive obligations, the latter aiming at creating by the State of minimal living conditions.

We should also note the fact that the Romanian Constitutional Court considered that human dignity is not and should not be construed as establishing a preferential treatment for certain categories of people, regardless of their contributions and qualities to the society, as it is an intrinsic value that has the same meanings for any of the individuals. Therefore, the Court stated that the gratitude and the respect due to certain persons, for their significant contribution to

⁴⁹ B. Mathieu, *La dignité de la personne humaine: du bon (et du mauvais?) usage en droit positif français d'un principe universel*, in the paper work A. Sériaux (coord.), *Le droit, la médecine et l'être humain*, P.U.A.M., 1996, p. 220 and the following.

⁵⁰ Published in Official Gazette no. 32 from January 6th 2012.

⁵¹ The human dignity designates the human, respectively the humanity that lies in him: it is the recognition of belonging to this humanity. B. Edelman, *La dignité de la personne humaine, un concept nouveau*, Dalloz, 1997, p.185.

⁵² Being inalienable, the dignity can lead to the adoption by the State of a paternalistic approach. In this case, the State's obligation to protect the dignity of the human being as a species can justify limiting the rights of the person that it tries to protect, whatever the personal options of the person in question.

the development of the society, do not need to be referred to art. 1 par. (3) of the Fundamental Law, but they are connected to the moral obligation of the entire society to show its gratitude toward these persons, and this moral basis to grant benefits does not constitute a regulatory obligation of the State in this respect, according to the Constitution, as it is impossible to talk about the existence of a fundamental right to obtain an indemnity by virtue of the fighting quality distinguished by outstanding deeds in the Romanian Revolution of 1989.

Within **the fourth section**, it is examined the jurisprudence of the European Court of Human Rights. As previously shown, paraphrasing Professor Frederic Sudre, even since the 80s, the Convention appeared as "permeable to social rights"⁵³, in the sense that economic and social rights were protected depending on the manner in which the European judge considered in each case if a certain right or freedom set out in the Convention was violated, but, on the other hand, we have noticed the reservation shown by Strasbourg court to decide that extreme poverty situations fall under art. 3 of the conventional text.

Chapter VII. Crimes against Dignity

The **first section**, entitled Crimes against dignity - aspects of comparative law, through its three sections, addresses the following aspects: the current situation in the European countries regarding decriminalization of insult and defamation; the recommendations of specialized bodies of international and regional organizations regarding the penalties for crimes against dignity and aspects regarding the criminalization of insult and defamation acts within the jurisprudence of the European Court of Human Rights.

The second section - Insult and defamation in Romanian law. The constitutional court, by numerous decisions, rejected the pleas of unconstitutionality of the provisions of art. 205, 206 and 207 of the old Criminal Code. In a general manner, it should be noted within these decisions the refusal of the Constitutional Court to apply the rules of proportionality control (art.53 of the Constitution). To the Court's interpretation, the fact that art. 30 par. (6) of the Constitution provides the possibility to limit the freedom of expression is sufficient in order to decide whether

⁵³ F. Sudre, *La perméabilité de la Convention Européenne des droits de l'homme aux droits sociaux*, Mélanges offerts à J. Mourgeon, Bruylant, Bruxelles, 1998, p. 6.

the provisions of art. 205 and 206 of the Criminal Code are constitutional. In general, there is no reference to the proportionality control, resulting that in the acceptance of the constitutional court, whenever the freedom of expression would affect the person's freedom, honour and reputation, the freedom of expression should be limited. Or, par. (6) of art. 30 of the Constitution of Romania provides limitations to the freedom of expression in order to protect particular interests, but these ones, as exceptions to the rule, are of strict interpretation and application. Any limitation of the freedom of expression simply because it would violate the dignity, honour, private life of a person or the right to their own image is liable to void of content the principle of freedom of expression, to transform it from an exception rule. The Constitutional Court has constantly decided that *"the criminalization of insult and defamation represents exclusively a matter of legislation, not of constitutional control"*⁵⁴, therefore *"the legislator is the only one in a position to decide the criminalization or decriminalization (...) and, in case of criminalization, it cannot be argued that the incriminating text is contrary to the Constitution"*⁵⁵.

Subsequently, the jurisprudence of the Constitutional Court changes, by the Decision no. 62/2007⁵⁶, and for its motivation the Court ruled that the legal provisions that are criticized are contrary to the constitutional provisions of art.1 par. (3) establishing the supreme values of the Romanian State, of art. 21 regarding the free access to justice, of art. 16 regarding the equal rights and art. 30 par. (8) regarding the press offenses, to the extent that: 1) by repealing the provisions of articles 205, 206 and 207 of the Criminal Code it was created "an unacceptable regulatory vacuum" contrary to the provisions of the Fundamental Law on ensuring the human dignity as supreme value; 2) by removing the criminal protection of dignity, the situation of people who are the victims of these crimes is different from that of people whose other rights were violated, as they do not benefit anymore of adequate means to protect the right to honour and reputation; 3) and finally, the constitutional provisions impose upon the legislator the obligation to criminalize the press offenses. In the paragraph meant to comment this decision there are some clarifications on the following aspects: 1) whether or not the insult and defamation acts were automatically criminalized again; 2) the specific of criminal penalties; 3) the constitutional limits of criminalizing of an act within the comparative constitutional law; 4) there is no constitutional obligation to criminalize the insult and defamation; 5) counter-

⁵⁴ Decision no. 51 from April 8th 1999, published in the Official Gazette no. 262 from June 9th 1999.

⁵⁵ Decision no. 200 from November 25th 1999, published in the Official Gazette no. 58 from February 8th 2000.

⁵⁶ Decision no. 62 from January 18th 2007 published in the Official Gazette No. 104 from February 12th 2007

arguments to the thesis of the Constitutional Court according to which the protection by means of civil law of the dignity, honour and reputation is insufficient; 6) the constitutionality control of the legislator's choice to criminalize insult and defamation. This orientation of the institutional court is confirmed by the Decision no. 206/2013⁵⁷, discussed at the end of this section.

The effects of the decision no. 62/2007 which ruled the unconstitutionality of the legal text to repeal the incrimination rules on re-entry into force of the initial provisions have not been clearly delineated either within the jurisprudence, in a distinct paragraph being mentioned the divergent solutions of ordinary courts.

Furthermore, in this paper work was presented the inconsistent resolution by the High Court of Cassation and Justice of the implications to admit the unconstitutionality plea on re-entering into force of the Criminal Code provisions regarding the insult and defamation (Decision no. 1385/2008⁵⁸, Decision no. 367/2009⁵⁹, Decision no. 2203/2010⁶⁰, Decision no. 1342/2010⁶¹, Decision no. 8/2010⁶² and Decision no. 3/2011⁶³).

Chapter VIII. The Emergence of the Concept of Human Dignity in the Criminal Proceeding

The explicit provisions (**first section**) and the implicit provisions (**second section**) of the human dignity are the proof of the steps taken in the direction of improving the protection of the convicted person or the accused person. The human dignity is an expanding concept, through the adoption of the new Criminal Code and Criminal Procedure Code and the Law no. 254/2013 regarding the execution of sentences and the measures involving deprivation of freedom taken by the judicial bodies during the criminal proceedings⁶⁴, the national law making significant changes in the sense of the respect of what is human in the human being, which have been reviewed in this section of the paper. In this chapter, the following aspects have been examined: the

⁵⁷ Published in the Official Gazette no. 350 of June 13th 2013.

⁵⁸ H.C.C.J., Decision no. 1385 from April 14th 2008, criminal section.

⁵⁹ H.C.C.J., Decision no. 367 from February 3rd 2009, criminal section.

⁶⁰ H.C.C.J., Decision no. 2203 from June 3rd 2010, criminal section,

⁶¹ H.C.C.J., Decision no. 1342 from April 8th 2010, criminal section .

⁶² H.C.C.J., United Sections, published in the Official Gazette, no. 416 from June 14th 2011.

⁶³ H.C.C.J., United Sections, published in the Official Gazette, no. 350 from May 19th 2011.

⁶⁴ Published in the Official Gazette no. 514 from August 14th 2013.

respect of the human dignity - fundamental principle of the criminal proceeding; the protection of the image of the human person; the dignity of the human person and the evidence means; the novelty aspects regarding the respect of human dignity with respect to Law no. 254/2013 on the execution of sentences and of measures involving deprivation of freedom ordered by the judicial bodies during the criminal proceeding; establishing by the European Court of the Human Rights of a right to detention conditions in accordance with human dignity; the Standards of the European Committee for preventing torture and inhuman and degrading treatments or sentences. The European Prison Rules; the right to detention conditions in accordance with the human person dignity in the jurisprudence of the European Court of Human Rights - cases brought against Romania; detention of persons dealing with health problems in the jurisprudence of the European Court of the Human Rights - cases brought against Romania; ill treatments of persons deprived of freedom in the jurisprudence of the European Court of Human Rights - cases brought against Romania; the national legal frame; the national mechanism of preventing torture in the detention places; the contesting purpose of the human dignity concept and the compatibility of sentences with the respect of the human person dignity.

Chapter IX. Human dignity in the jurisdiction of European Court of Justice

In chapter IX we carried on a detailed research of main directives of integration of the concept in community law, highlighting the idea that, as a general manner it was used with moderation. This jurisprudential trend modifies starting with the year 2000, when the Charter of Fundamental Rights of European Union, applying to concept, causes the change of this direction⁶⁵, this being due to political value of the document and of an interpretative application more and more systematic from general lawyers⁶⁶. Starting with this moment, the Court of Justice of European Union developed a special interest for the concept of human dignity, one of main causes in its evolution in the jurisprudence of the Court, being the case **C-377/98, Holland vs. Parliament and European Council**⁶⁷, the Court referring in its decision to human dignity, not as a principle or value, but expressly as fundamental right, being part of general principles that it protects in community legal framework and showing that: „It is the role of Court of Justice

⁶⁵ F. Schorkopf, *Würde des Menschen, Persönlichkeits und Kommunikationsgrundrechte*, in the work Dirk Ehlers, *Europäische Grundrechte und Grundfreiheiten*, De Gruyter Recht, Berlin, 2005, pp.410-443.

⁶⁶ C. Maubernard, *Le „droit fondamental à la dignité humaine” en droit communautaire: la brevetabilité du vivant à l’épreuve de la jurisprudence de la Cour de Justice des Communautés Européennes*, *R.T.D.H.*, nr. 54/2003, p.484.

⁶⁷ Case *Holland vs. European Parliament and Council*, case C 377/98, &70, decision from October 9th 2001.

to watch to the compliance of fundamental right of human dignity and person integrity”. Another case where the Court of Justice Luxembourg gives a similar interpreting, qualifying dignity as fundamental right is the **case Omega Spielhallen**⁶⁸, decision where the Court fixed that community law does not have to be contrary to a possible limiting „for reasons of public order” or „when it is detrimental to human dignity”. This means the fact that mainly, the concept of dignity can operate including as a limit of community law. As it was emphasized in recent literature, European Court of Justice seems to have accepted that human dignity has a possible different signification in a significative way from a country to another⁶⁹, referring in the case mentioned previously to the level of protection of human dignity that National Constitution understood to ensure on the territory of German Federal Republic.

⁶⁸ Case Omega Spielhallen- und Automatenaufstellungs-GmbH împotriva Oberbürgermeisterin der Bundesstadt Bonn, case C. 36/02, C.J.C.E., decision from October 14th 2004.

⁶⁹ To see C. McCrudden, *Human dignity in judicial interpretation of human rights*, The European Journal of International Law, vol. 19, 2008.