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# Language and Persuasion: Human Dignity at the European Court of Human Rights

Veronika Fikfak and Lora Izvorova<sup>1</sup>

## Abstract

Although the concept of human dignity is absent from the text of the European Convention on Human Rights, it is mentioned in more than 2100 judgments of the European Court of Human Rights. The judges at the Court have used dignity to develop the scope of Convention rights, but also to signal to respondent states just how serious a violation is and to nudge them towards better compliance. However, these strategies reach dead ends when the Court is faced with government submissions that are based on a conception of dignity that is different from the notion of human dignity relied on by the Court. Through empirical analysis and by focusing on Russia, the country against which the term dignity is used most frequently, the paper maps out situations of conceptual contestation and overlap. We reveal how the Court strategically uses mirroring, substitutes dignity for other Convention values, or altogether avoids confrontation. In such situations, the Court's use (and non-use) of dignity becomes less about persuading states to comply with the Convention and more about preserving its authority and managing its relationship with states.

## Introduction

Dignity is one of the most criticised and contested concepts in academic discussions about human rights.<sup>2</sup> Despite this, dignity is possibly also one of the most studied and theorised ideas owing to its presumptive significance as a foundation of rights protection.<sup>3</sup> Starting with the Charter of the United Nations and the Universal Declaration of Human Rights in the early post-war period, references to dignity can be found in the preambles and the substantive provisions of the vast majority of international human rights treaties.<sup>4</sup> Throughout the second half of the 20<sup>th</sup> Century, this drafting practice also became established for regional human rights conventions and national constitutions.<sup>5</sup> The conception of dignity presumed to underpin these texts is that of dignity as *human* dignity – the inherent and therefore equal worth that all individuals possess simply by virtue of their humanity, and which entitles them to the respect and protection of the state.<sup>6</sup>

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<sup>2</sup> Ruth Macklin, 'Dignity Is a Useless Concept: It Means No More Than Respect for Persons or Their Autonomy' (2003) 327 *British Medical Journal* 1419; Steven Pinker, 'The Stupidity of Dignity' (2008) 238 *New Republic* 28; Michael Rosen, 'Dignity: The Case Against' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2014).

<sup>3</sup> Paolo G Carozza, "'My Friend Is a Stranger': The Death Penalty and the Global Ius Commune of Human Rights' (2003) 81 *Texas Law Review* 61; Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 *EJIL* 655; Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2014); Jeremy Waldron, 'Is Dignity the Foundation of Human Rights?' in Rowan Cruft, Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015); Jeremy Waldron and Meir Dan-Cohen (eds), *Dignity, Rank, and Rights* (Oxford University Press 2015); Pablo Gilabert, *Human Dignity and Human Rights* (OUP 2018).

<sup>4</sup> Convention on the Elimination of All Forms of Discrimination against Women 1979; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984; Convention on the Rights of the Child 1989.

<sup>5</sup> ACHR, arts 5, 6, 11; AfChHPR, art 5; Arab Charter on Human Rights, Article 20(1); EU Charter of Fundamental Rights.

<sup>6</sup> McCrudden *EJIL* (n 3).

Understanding dignity in this way presupposes that when a state is found to have acted incompatibly with human dignity, the human rights violation that has occurred is particularly serious. According to at least one former judge of the European Court of Human Rights (ECtHR, the Court), this is indeed the message that the Court seeks to send to *all* member states of the Council of Europe when it mentions dignity in a judgment.<sup>7</sup> The Court is said to use the reference to dignity to reinforce its judgments when a violation of the Convention is found to have occurred. The choice of terminology is crucial since ‘the concept of human dignity, in virtue of its purchase on universality, serves as a common currency of transnational judicial dialogue and borrowing in matters of human rights.’<sup>8</sup> Given the universal nature and currency of dignity but also its affective power, it is natural that judges on the ECtHR would reach for the term to persuade states to obey its decisions. As studies have shown, when we seek to persuade, we spontaneously make use of emotional language<sup>9</sup> as a means to impact and change the behaviour of others.<sup>10</sup> The concept of dignity, which holds great resonance and promise, is an obvious choice in this respect.<sup>11</sup>

In this paper, we track the Court’s use of the term dignity as a tool of persuasion used by an international court vis-à-vis states. Through an empirical analysis of more than 2122 judgments, we show that although the Court may be seeking to persuade states in the legitimacy and authority of its judgments, the use of dignity does not appear to be a successful strategy if the Court’s ultimate goal is to teach states how to better comply with the Convention (Part I). Our findings reveal that it is not just the Court that finds dignity useful in its reasoning, but also the respondent states. States too rely on dignity, as contained in their constitutions and domestic legal orders. Yet, much less academic work has been done to understand what meanings individual states ascribe to dignity, how their preferred conceptions differ from those of human rights courts, and what the implications of such conceptual differences may be for the authority and legitimacy of these courts and for their relationships with states.<sup>12</sup>

In Parts II and III of this paper, we explore these questions by focusing on the ECtHR judgments in which the respondent state is Russia. We show that Russia has a different understanding of dignity which often contradicts the one articulated by the ECtHR,<sup>13</sup> yet the Court routinely prefers not to acknowledge this clash, let alone address it. Instead, the Court’s usual response when faced with dignity in the Russian government’s submissions, including excerpted judgments of Russian courts and provisions of Russian law relevant to the case at hand, is to either tacitly accept Russia’s conception of dignity or to avoid mentioning dignity altogether. We propose that these are strategies that the Court employs to avoid a direct confrontation with Russia on the meaning of dignity. Such strategic avoidance may allow the Court to preserve the authority of those of its judgments where dignity forms part of the reasoning, it may enable it to protect its legitimacy, or to manage its relationship with states – especially states like Russia which have been taking steps to disembody the Convention from their domestic legal systems.

<sup>7</sup> Jean-Paul Costa, ‘Human Dignity in the Jurisprudence of the European Court of Human Rights’ in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2014).

<sup>8</sup> McCrudden EJIL (n 3).

<sup>9</sup> Rocklage MD, Rucker DD and Nordgren LF, ‘Persuasion, Emotion, and Language: The Intent to Persuade Transforms Language via Emotionality’ (2018) 29 *Psychological Science* 749.

<sup>10</sup> Andrade, E. B., & Ho, T.-H. (2009). Gaming emotions in social interactions. *Journal of Consumer Research*, 36, 539–552, doi:10.1086/599221.

<sup>11</sup> Emily Kidd White, ‘Till Human Voices Wake Us’ (2014) 3 *Journal of Law, Religion and State* 201.

<sup>12</sup> For examples of country specific literature, see David Kretzmer, ‘Human Dignity in Israeli Jurisprudence’ in David Kretzmer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002); Catherine Dupré, *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity* (Hart Publishing 2003).

<sup>13</sup> The primary focus of this paper is on the *functions* of dignity in the Court’s reasoning and respondent states’ submissions, those of Russia in particular. In another paper, one of the authors explores the substantive meanings of dignity in Russia, as compared with the dignity conception underpinning Strasbourg jurisprudence: Lora Izvorova, ‘Acquiring Dignity: The Life of Human Rights’ Foundational Concept in Russia’ (forthcoming).

One of the main consequences of Russia's expulsion from the Council of Europe on 16 March 2022 (pursuant to Article 8 of the Council of Europe statute<sup>14</sup>) is its ceasing to be a Contracting Party to the ECHR. The ECtHR has decided that this will take effect on 16 September 2022, thus maintaining its jurisdiction 'in relation to acts or omissions capable of constituting a violation of the Convention' for a further six months.<sup>15</sup> In light of the complete breakdown of its relationship with Russia, the Court will be even more anxious to preserve its authority and avoid a domino effect. Russia's exit may be happening in the very particular context of its war on Ukraine, but it was arguably not unexpected. Rather, it was the culmination of years of domestic rollback on human rights protections and backlash against the ECtHR – a worrying development that can be observed to various degrees in other states as well.<sup>16</sup>

## Part I. How the Court Uses Dignity: Dignity as a Pedagogical Tool

In the context of the ECtHR, relationships are very important. The Court, which has the responsibility to adjudicate cases coming out of member states of the Council of Europe, forms relationships that are largely pre-defined. Its role is to tell states whether their actions violate the Convention and to bring out precisely those aspects of domestic actions that are problematic, especially if these lead to systemic and repetitive violations. Once the ECtHR has rendered a judgment, the obligation on the state is to put an end to the violation and redress, as far as possible, its negative consequences for the applicant. Yet, if the Court has the power to tell the state *what the law is*, as an international court it has very low enforcement authority and compliance with its decisions is always voluntary. In this regard, as Shany argues, it is the substance of the judgments and the positions endorsed that will motivate and persuade states to implement changes.<sup>17</sup> The use of concepts like 'human dignity' as a type of lingua franca could persuade the responding states to change their approach. As a famous scholar of ethics and law once argued: 'To choose a definition is to plead a cause, so long as the word defined is strongly emotive.'<sup>18</sup> The use of 'human dignity' is perhaps meant to trigger that emotive response, to explain to the state what is at stake.

The only account from inside the Court of what ECtHR judges are aiming to achieve by referring to the term 'dignity' in their judgments is that of former Judge and President Jean-Paul Costa, in his chapter in Christopher McCrudden's edited collection of essays on human dignity.<sup>19</sup> Judge Costa begins by noting the surprising textual absence of dignity from the Convention. He does not attribute this to any deliberate intention on the part of the drafters, but rather sees it as an accident resulting from their preoccupation with the 'more practical, even technical issues' of building a Commission and a Court and providing a way for cases to be brought to Strasbourg.<sup>20</sup> Proceeding on this assumption, Judge Costa considers the absence of 'dignity' from the ECHR to be an unintended 'gap' or 'vacuum'. Yet the Court has – in the course of developing its jurisprudence – filled this apparent gap, using the concept of 'dignity' to build a 'bridge' between the ECHR and other international human rights instruments which do refer to dignity, and which the Court has drawn on as 'external sources of inspiration'.<sup>21</sup>

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<sup>14</sup> Committee of Ministers, 'Resolution on the Cessation of the Membership of the Russian Federation to the Council of Europe' (16 March 2022) CM/Res(2022)2.

<sup>15</sup> Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights (22 March 2022).

<sup>16</sup> For example in Hungary, Poland, and even in 'good compliers' such as the United Kingdom and Denmark.

<sup>17</sup> Yuval Shany, 'Compliance with Decisions of International Courts as Indicative of Their Effectiveness: A Goal-Based Analysis', in J. Crawford and S. Nouwen (eds), *Select Proceedings of the European Society of International Law* (2010), vol. 3, 231, at 232. On other efforts to change state behaviour: Niccolò Ridi and Veronika Fikfak 'Sanctioning to Change State Behaviour' (2022) 23.2 *Journal of International Dispute Settlement*.

<sup>18</sup> Charles Stevenson. *Ethics and Language* (Yale University Press 1944) 210.

<sup>19</sup> Costa (n 7).

<sup>20</sup> *ibid* 394.

<sup>21</sup> *ibid* 401.



On this basis, it is perhaps not surprising that dignity appears in more than 2100 judgments of the Court.<sup>22</sup> While this may seem like a large number in light of dignity's textual absence from the Convention, it represents only about 10% of the Court's total reported case law.<sup>23</sup> This suggests that the Court has found dignity useful in deciding some cases but not others. In other words, the Court's use of dignity has been selective and may therefore have a particular purpose. According to Judge Costa, the Court's goal in invoking human dignity is 'to *reinforce* the reasoning leading to a violation' or 'to reject complaints based on arguments contrary themselves to human dignity'.<sup>24</sup> Other than to build a bridge to other international human rights instruments, the function of such dignity-based reasoning is to assist the Court in what Judge Costa refers to as its 'pedagogical role'. In this regard, he observes that '[w]hen the Court uses human dignity "positively", in order to find a violation, it is clear that it applies it much more to serious violations, with Article 3 being especially privileged'.<sup>25</sup> Dignity is therefore reserved only for those 'especially infamous, outrageous, or disgraceful' breaches of the ECHR, most of which are cases of torture, inhuman or degrading treatment.<sup>26</sup> With such remarks, Judge Costa suggests that the Court has a twofold strategy in mentioning dignity: it indicates to the respondent state the seriousness of its actions and encourages it to address any systemic problems, while at the same time taking the opportunity to elucidate for the benefit of all states where the boundaries of Convention-compliant behaviour lie. As Judge Costa concludes, 'The Court is not merely adjudicating cases: it also has a pedagogical role, and by referring to dignity it thereby sends important signals to all respondent states.'<sup>27</sup>

### (a) The empirical results

In this section we investigate the validity of Judge Costa's propositions. We show how frequently the term 'dignity' is used in the case law of the Court, against which countries it is most frequently invoked, as well as the type of cases in which it appears.

#### Data description and coding tree<sup>28</sup>

In this article, we analyse the use of the term 'human dignity' or 'dignity' in the case law of the European Court of Human Rights. Our starting point is the testing of Judge Costa's model – that dignity is used as a tool which the ECtHR uses to situate itself strategically vis-à-vis the state. For the purpose of the article, we gathered all the cases of the ECtHR that contain a reference to 'dignity' or 'dignité' and words derived from these two roots. 2122 cases were retrieved from the HUDOC ECHR database, the 'official case law database of the ECtHR'.<sup>29</sup> The cases were generated through the lexical search function in HUDOC and cover the period from 1961 to 2019. In relation to each of the cases, we collected the following information: the total number of times dignity is mentioned in the document; the article the case relates to; the respondent state; the judicial panel which decided the case; the part of the decision in which dignity was invoked (facts, law – applicant's position, governmental position, Court's reasoning, separate opinion); whether dignity was used in a positive (to expand rights) or negative manner (to constrain rights); the international instruments which are relied on as a basis for the dignity argument; the year the case was decided; whether the case ended in a violation; whether it was implemented or remains open. These parameters allow us to evaluate

<sup>22</sup> Until December 2019.

<sup>23</sup> How to measure ECtHR case law is notoriously difficult. About 85-90% of all applications coming to the Court end up rejected as inadmissible. The rest is reported in HUDOC. Of this case law, only about 10% refers to dignity.

<sup>24</sup> Costa (n 7) 400–401 (emphasis in original).

<sup>25</sup> *ibid* 400.

<sup>26</sup> *ibid* 402.

<sup>27</sup> *ibid*.

<sup>28</sup> The full coding tree is contained in Fikfak V, 'Against Settlement Before the European Court of Human Rights' (Social Science Research Network 2021) SSRN Scholarly Paper ID 3847608, <http://dx.doi.org/10.2139/ssrn.3847608>.

<sup>29</sup> We have explicit authorisation from the European Court of Human Rights to use the data contained in the HUDOC websites for HRNudge project. ©Council of Europe/European Court of Human Rights - Conseil de l'Europe/Cour européenne des droits de l'homme.

not only the general spread of the term against the different jurisdictions but also to assess more particular ways in which it is being used by the Court. In order to assess the impact of the use of the concept of dignity on the outcome or compliance, we also collected the same information about cases within a specific article in which dignity was not mentioned. This enables us to assess whether the *sole* appearance of dignity correlates with a specific outcome.

### General information about the use of the term ‘dignity’ by the ECtHR

As is visible from *Graph 1* below, the term dignity appears only in about 10% of the Court’s total reported case law. This is contrary to the assertions that ‘dignity’ is infused in the jurisprudence of the Court and that it provides the foundation for human rights protection accorded by the Court. In fact, looking more closely, the majority of references to the concept of ‘dignity’ in the case law of the ECtHR (96%) were made from year 2000 onwards. Before this year, only a handful of cases referred to human dignity. From 2000-2010, as *Graph 2* shows, the use progressively increased each year, with an average of 30 cases per year referring to the notion. The highest usage of ‘human dignity’ can be noted from 2010 onwards, where it appears in at least 100 cases, raising to 200 cases in 2012. The increase of the term dignity is consistent with the increase of cases before the ECtHR (as seen on *Graph 1* - compare orange and blue lines on graph below).<sup>30</sup>

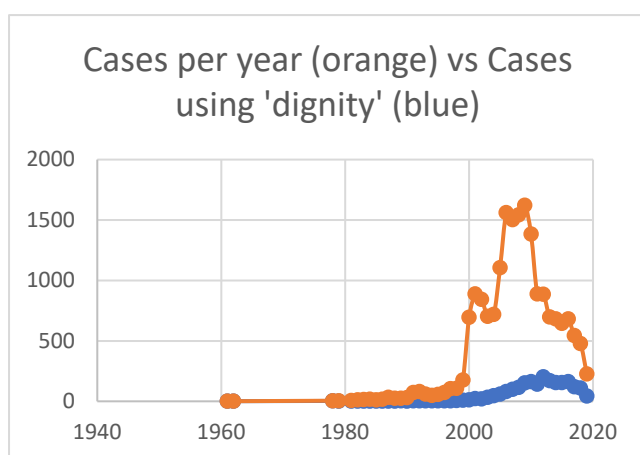


Figure 1 Dignity cases in context of ECtHR case law

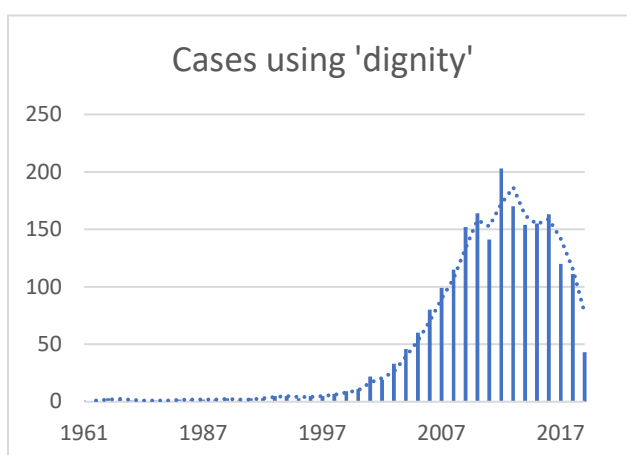


Figure 2 Use of dignity since 1961

In some of the cases in which dignity is mentioned, reference is also made to other international instruments, which refer to dignity explicitly. The Universal Declaration of Human Rights appears in 75 cases, whilst the International Covenant on Civil and Political Rights is mentioned in 171 cases. The Court is perhaps using these references to reflect its ‘deliberate intention of building a bridge between the universal instruments and the silent European text, filling the gap or the vacuum created by the authors of the Convention.’<sup>31</sup> Yet, although these references can be seen as enabling the Court to interpret the Convention ‘not only on the basis of the text of the Convention itself but also drawing on other international instruments [and its dignity language],’<sup>32</sup> they are incredibly rare. Indeed, it is the absence of international instruments in these cases that is surprising, suggesting that the ECtHR is confident to refer to dignity *on its own* and without some other, more specific, textual basis.

<sup>30</sup> This increase is also consistent with the appearance and expansion of dignity in world constitutions. See section later.

<sup>31</sup> Costa (n 7) 400.

<sup>32</sup> *ibid.*



Figure 3 – Map of respondent states against which dignity is invoked

When looking at the geography of *who* the term dignity is used against, the map reveals a striking picture. The main countries against which the term dignity is used are Russia (in 368 out of 2122 cases), followed by Romania with 207 and Turkey with 200, Ukraine with 128, and others. These countries are the most frequent violators of the European Convention of Human Rights and specifically most frequent violators of Article 3 of the Convention (ie the article in the context of which dignity is most frequently referred to).

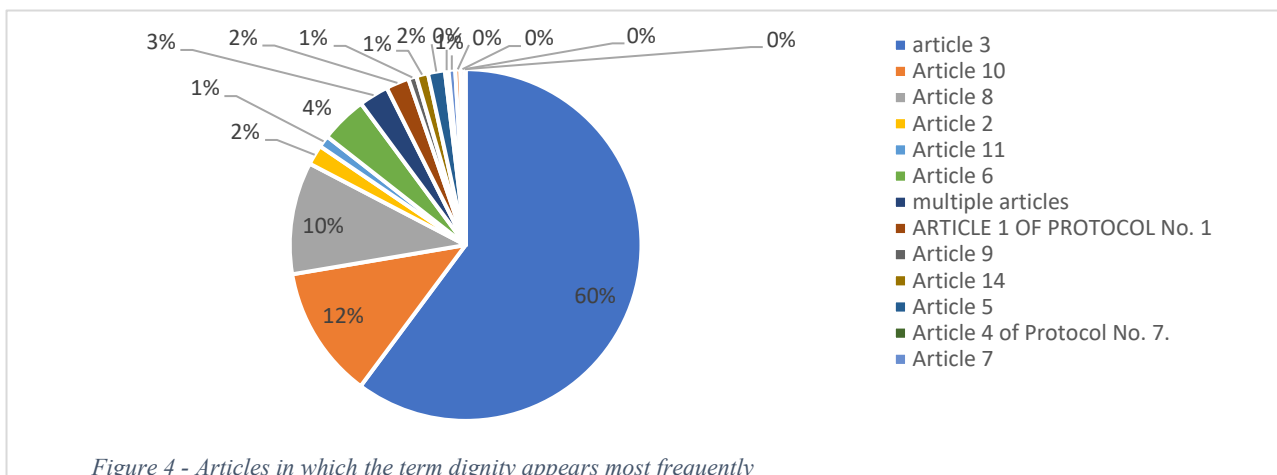


Figure 4 - Articles in which the term dignity appears most frequently

Finally, of the 2122 cases in which ‘dignity’ is referred to, more than half relate to Article 3 (prohibition of torture and inhuman and degrading treatment). The second cluster of cases in which dignity is used relate to Article 10 (freedom of expression), followed by Article 8 (right to privacy).<sup>33</sup>

### (b) Dignity to underline the self-evident obligation

We now turn to the question of how the term ‘dignity’ is used by the Court. We start with the more traditional role of the Court, that of clarifying and elucidating the content of the obligation contained in the Convention in a manner that describes to both the respondent state as well as to other states what Convention-compliant behaviour should look like.

Apart from being the article in which dignity is most often referred to, Article 3 is also the first violation in relation to which dignity was invoked in the ECtHR jurisprudence. The first use of the term dignity happened in 1978 in the case of *Ireland v United Kingdom*. The case concerned interrogation techniques used by the UK during the Troubles in Ireland and hinged on the appropriate interpretation of ‘inhuman and degrading treatment’ under Article 3 of the Convention. Judge Evrigenis, in a *separate opinion*, argued that a broader interpretation of Article 3 was necessary, mirroring that adopted by the UDHR:

*‘By adding to the notion of torture the notions of inhuman and degrading treatment, those who drew up the Convention wished, following Article 5 of the UDHR, to extend the*

<sup>33</sup> 1277 cases (or 60% of all references in cases) are in the context of Article 3 only, 258 cases (or 12% of cases) in relation to Article 10 and 219 cases or (10% of all cases) in relation to Article 8, only 3% of cases refer to multiple violations of the Convention.



*prohibition in Article 3 ... to other categories of acts causing intolerable suffering to individuals or affecting their dignity...*

Judge Evrigenis noted that those additional categories ‘widen[ed] the scope of the prohibition’ of Article 3.<sup>34</sup> In a similar manner, Judge Fitzmaurice invoked dignity as central to the definition of ‘degrading’ treatment and as prohibiting ‘having one’s head shaved, being tarred and feathered, smeared with filth, pelted with much, paraded naked in front of strangers, forced to eat excreta, deface the portrait of one’s sovereign or head of State, or dress up in a way calculated to provoke ridicule or contempt...’<sup>35</sup>

Since its first appearance in *Ireland v UK*, dignity has expanded the application of Article 3 to many other circumstances.<sup>36</sup> These include instances of disproportionate use of physical force against people arrested or in custody,<sup>37</sup> use of restraint on seriously ill individuals,<sup>38</sup> or prisoners living in cramped spaces,<sup>39</sup> with limited sanitation facilities,<sup>40</sup> or lacking natural light, etc.<sup>41</sup> In fact, today dignity is used mostly in cases which relate to poor conditions.<sup>42</sup> The case law in this area is now ‘so abundant’<sup>43</sup> that the Court has developed a new, special paragraph in its reasoning, which underlines the importance of dignity in the context of Article 3. This ‘Article 3 bis’ paragraph,<sup>44</sup> requiring of the state to ensure that the ‘manner and method’ of imprisonment do not subject the applicant ‘to distress or hardship exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured ...’<sup>45</sup>, is currently the foremost source of the term ‘dignity’ in Article 3 cases.

What transpires from this brief overview of how the Court has consistently read dignity into Article 3 and expanded its relevance to the interpretation of the prohibition of torture, inhuman or degrading treatment is that dignity has helped the Court elucidate for the benefit of all member states of the Council of Europe what they must and must not do in order to comply with Article 3. The minimalism associated with dignity owing to its connection to the very basic aspects of humanity, one of which is physical integrity, has enabled the Court to present its gradual dignity-based expansions of the scope of Article 3 as not expansions at all, but merely as *declarations* of the protections that the ECHR had already provided for, and thus as interpretations that, although new in the sense that they had not yet been explicitly articulated by the Court, were really ones that states should have foreseen. This point will be explored and critiqued further in Part III, where the Court’s dignity jurisprudence in relation to other Convention articles will also be analysed. For the moment, what matters is that dignity has been used by ECtHR judges in the same way and for the same reason a teacher might use their red pen to mark their students’ homework – to correct states’ mistakes and to bring their attention to the self-evident aspects of the human rights protections enshrined in the Convention, which they may have overlooked or misunderstood.

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<sup>34</sup> *Ireland v UK* [1978] Application no. 5310/71 (Separate Opinion of Judge Evrigenis).

<sup>35</sup> *ibid* [27] (Separate Opinion of Judge Fitzmaurice).

<sup>36</sup> Natasa Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (Hart Publishing, 2021).

<sup>37</sup> *Ribitsch v Austria* [1995] Application no. 18896/91.

<sup>38</sup> *Mousiel v France* [2002] Application no. 67263/01.

<sup>39</sup> *Kudla v Poland* [2000] Application no. 30210/96.

<sup>40</sup> *Isyar v Bulgaria* [2008] Application no. 391/03.

<sup>41</sup> *Aliiev v Georgia* [2009] Application no. 522/04.

<sup>42</sup> 390 cases out of 1303 relating to Article 3 concern poor conditions. *Ireland v UK*; *Selmouni v France* [1999] (Grand Chamber) Application no. 25803/94; *Kudla v Poland*.

<sup>43</sup> *Costa* (n 7) 396.

<sup>44</sup> F Sudre, ‘L’article 3 bis de la Convention européenne des droits de l’homme: le droit a des conditions de detention conformes au respect de la dignite humaine’, in *Melanges en hommage au Doyen Gerard Chen-Jonathan*, Brussels, Emile Bruylant, 2004, vol. 2, 1499ff.

<sup>45</sup> *Kudla v Poland*.

### (c) Dignity as persuasion

In this section, we test the argument made by Judge Costa that the Court uses dignity as a strategic tool ‘to *reinforce* the reasoning leading to a violation’. To assess this, we establish the correlation between the use of the term dignity and the likelihood of the case ending in a violation. We limit our analysis to Article 3 and 10, which have enough cases to compare the two groups of cases.

#### Article 3 – Dignity as an indication of a serious violation by the respondent state

We first analyse only cases relating to Article 3. We find that out of all Article 3 cases between 1961 and 2018 (2872), the majority (2321) led to a violation. To determine the statistical significance of the term dignity, we compare cases where no mention of dignity is made with cases in which dignity appears. Out of 2872 cases in which Article 3 is involved, dignity appears in 1302 cases. Comparing the group of cases, which refer to dignity with the group where dignity is not mentioned, we find that the use of the term dignity in the context of Article 3 leads to the odds of the outcome resulting in a violation as almost four times higher than if dignity is not mentioned.<sup>46</sup> Significantly, additional analysis shows that for every additional use of the term dignity, the odds of the outcome resulting in a violation are 1.44 times higher.<sup>47</sup> More concretely, when the Court uses the term dignity once, the probability of a violation is 91%. This increases to 94% for two, and to 100% for 8 or more mentions. This means that the more the Court uses dignity (references range between one and 18 times), the more it is likely that a violation of Article 3 will be found.<sup>48</sup>

Costa is therefore correct: the Court uses the term dignity strategically to reinforce the Court’s decision leading to a violation of the Convention. The respondent state is therefore expected to take the Court’s reference to dignity as a sign that *it* has to change its behaviour and to implement the Court’s decision as a matter of urgency, perhaps by addressing structural problems in its domestic laws and practices. The question here is whether in practice the use of ‘dignity’ acts as a persuasive tool.

The impact of ECtHR’s judgments can be measured in various ways. In the context of this paper, we are interested in whether the use of the term dignity (and its frequency) leads to better compliance with judgments of the Court. For each case, we therefore look at the finding of the Court and trace that decision through to execution.<sup>49</sup> The results of logistic regression show that the cases which use the term dignity are more likely to remain open (and therefore not complied with) than cases which do not use the term (odds are 1.28 times higher for noncompliance than compliance).<sup>50</sup> This could indicate that the cases, in which the Court uses dignity are also cases, which are harder to implement or which speak about a systemic problem within the state. The use of the term dignity is therefore related to worse compliance. Furthermore, the number of times the term appears in the judgment – a tool which judges appear to use to nudge states to change their behaviour – has absolutely no impact on compliance. The variable (the number of times dignity is referred to in the judgment) is statistically not significant. In the context of Article 3, therefore, the use of ‘dignity’ appears to have no persuasive function in leading to better execution of judgments.<sup>51</sup>

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<sup>46</sup> Odds Ratio 3.82,  $p=0.000$ .

<sup>47</sup> Of course, the finding of a violation cannot be divorced from the conduct of the state and what actually occurred. In this regard, perhaps dignity is invoked in cases which allege more serious infringements by the State. To control for this as much as possible, the statistical significance of the appearance of dignity is tested again by looking only at the cases which contain dignity (ie comparing like cases with like) and by focusing on the *number of times dignity appears* in a judgment. We analyse 1277 cases and find again that for every additional use of the term dignity, the odds of the outcome resulting in a violation are 1.44 higher. ( $N = 1277$ ; odds ratio = 1.44,  $p.000$ .)

<sup>48</sup> Odds Ratio 1.44,  $p=0.000$ .

<sup>49</sup> Note that we have 500 less datapoints relating to compliance than relating to violations. This is because not all cases get to compliance (ie they may be settled or the Court does not provide information on their execution).

<sup>50</sup>  $P=0.001$ .

<sup>51</sup> Odds ratio 1, but  $p$  value insignificant. These results are not limited to Article 3. In Article 10 cases, which are the second group of most numerous cases, the results are similar. The number of times dignity is used is not a significant predictor of compliance.

Taking stock, in the context of Article 3 where dignity is used most frequently, the results clearly reveal two things. First, they confirm that the function of dignity in ECtHR's jurisprudence is to reinforce a finding of a violation. The more dignity appears in the judgments, the more likely there has been a violation. However, the results also show that the use of the term has little impact on states' behaviour. If judges at the Court believe that the use of *lingua franca* and the familiar, almost universal language of human dignity would encourage states to realise the seriousness of their actions and address these in turn, the facts speak to the contrary. The appearance of the term dignity in a judgment suggests that compliance will be harder to come by and the frequency of the term will have no persuasive impact on states' behaviour.' In Part II, we propose that one explanation of why dignity is not able to help the Court in its pedagogy is that, contrary to what the Court appears to presume, dignity is not part of a common *lingua franca* which the Court shares with states, but is in fact differently understood across national jurisdictions.

### Article 10 – The limits of persuasion

We separately analyse 258 cases relating to Article 10, which represent the second highest group of cases (12%, after Article 3) in which dignity appears. These cases are rarely mentioned in the academic literature on dignity and are also ignored by Judge Costa who argues that Article 10 applications 'very seldom involve human dignity arguments'.<sup>52</sup> Indeed, in his intervention in McCrudden's *Human Dignity*, he reserves only a paragraph to one Article 10 case and even there, the reference is to a separate opinion. While Judge Costa may be right in so far as the proportion of Article 10 cases in which dignity gets mentioned is altogether much smaller than for Article 3 cases, his account fails to appreciate that this group of Article 10 cases is still relatively large and therefore significant to a serious analysis of the role that dignity plays in the Court's jurisprudence.

When we focus on these Article 10 cases, some striking patterns begin to emerge. These relate to the impact that dignity may be having on the outcome of the case, as well as on the ways in which the Court may be adapting its reasoning when faced with arguments of states that are based on conceptions of dignity other than inherent dignity. In this context, we use the same approach as before: to determine the statistical significance of the term dignity to whether a case will end up in a breach, we compare cases where no mention of dignity is made with cases in which dignity appears. In total, 935 cases involving Article 10 are identified, of which 258 make a reference to dignity. The empirical analysis reveals that in Article 10 cases, the Court's use of dignity is *less likely* to lead to a violation. In fact, the appearance of dignity in Article 10 cases makes the odds of a finding that there has been no violation 1.43 times *more likely*.<sup>53</sup> This is in contrast to the results relating to Article 3, where references to dignity meant a violation was more likely.

This result would seem to suggest that compared to Article 10 cases which contain no reference to dignity, freedom of expression cases that *do* engage dignity – usually related to defamation cases and the interference with someone's reputation and honour – are somehow less serious and thus less readily end up in a violation.

Other results confirm that, in Article 10 cases, the number of times the term dignity is used appears to have no bearing on the outcome.<sup>54</sup> If, as Judge Costa suggests, the Court is using dignity to reinforce its conclusion (a finding of a breach), this is not the case under Article 10. In contrast to Article 3, where the quantity of references to dignity was a significant variable, in freedom of expression cases the number of references to dignity are not statistically significant in predicting the conclusion of the case. These results indicate that perhaps the Court is behaving strategically by using the dignity terminology only when physical integrity is at stake. This would suggest that dignity plays a different role in relation to different violations.

But there is another explanation for the different results. In the following sections, we look more closely at Article 10 cases and find that whilst in Article 3 cases, the Court seems to be the main

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<sup>52</sup> Costa (n 7) 400.

<sup>53</sup> P value is 0.034.

<sup>54</sup> This variable is not significant for the calculation of a violation.

driver behind the appearance of dignity, in Article 10 cases, the dignity argument appears to be coming mostly from the respondent state. Although the Court does at times insist that tolerance and respect for the ‘equal dignity of all human beings constitute the foundations of a democratic, pluralistic society’,<sup>55</sup> usually in Article 10 cases it makes no mention of dignity. Instead, states are the primary source of dignity arguments and their use of dignity differs from the Court’s: the protection of dignity is at times used as a defence or an explanation for the interference, rather than to indicate the seriousness of the violation. What we see here therefore is a clash of different conceptions of dignity between different players. We explore this further in the following sections.

## Part II. How States Use Dignity: Dignity as a Contested Concept

### (a) A common lingua franca?

Out of 47 countries of the Council of Europe (over which the ECtHR has jurisdiction), 38 refer to dignity in their constitution either in general form (preamble) or in relation to fundamental rights.<sup>56</sup> The concept is therefore shared across the constitutions of most European states. In fact, looking globally, human dignity appears as a key concept in numerous constitutions around the world. Before the Second World War and the adoption of the UN Charter and the Universal Declaration of Human Rights (in 1945 and 1948), only five countries referred to the concept of human dignity in their constitution. Today, that number stands at 162+, with more than 84% of countries referring to ‘human dignity’ in their constitutive documents.<sup>57</sup> Human dignity as a concept is therefore used more frequently and widely.<sup>58</sup>

Looking more closely at Europe, the majority of states in the Council of Europe refer to dignity multiple times.<sup>59</sup> References to dignity are made on average 3.5 times per constitution. 14 constitutions contain two or three references to dignity, whilst 10 contain between 4 and 9 references. The three that stand out are Azerbaijan and Belgium with 10 references and the Swiss constitution with 12(!) references. The increases in references follow the enactment year of the constitution. Those constitutions mentioning dignity only once were on average enacted in 1968, those mentioning twice were enacted in 1993, 1994 for three mentions, 1998 for four mentions, and 2001 for five mentions. The Swiss Constitution reinforces the point: in 1874, the Constitution did not include any mention of dignity. When a new constitution was adopted in 1999, the term was mentioned five times. Since then, another 7 mentions were added. This is consistent with scholars’ findings about how over time constitutional concepts have been borrowed from one jurisdiction to another and how the idea of human dignity has travelled from old constitutions to the new.<sup>60</sup>

For many of the states whose constitutions refer to dignity, the term serves ‘as a priori bedrock-truth justifications for the entire constitution.’<sup>61</sup> The appearance of dignity in early passages of constitutions, for example, seeks to enshrine values that are meant to reflect the shared history and narrative of the country and represent the common goals towards which they strive. It also has ‘an explicit interpretative function for the constitution as a whole or for specific chapters within it.’<sup>62</sup> It

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<sup>55</sup> *Gündüz v Turkey* (2003) Application no. 35071/97, [40].

<sup>56</sup> The countries that do not mention dignity include Denmark, Norway, Netherlands, France, and Austria. The UK does not have a codified constitution and does not mention the term in its Human Rights Act. It is therefore excluded from the analysis. As regards France, the term plays an important role in the French legal system both in legal interpretation and it appears in instruments such as the Declaration of the Rights of Man and the Citizen of 1789, the preamble of the 1946 Constitution and the Fundamental Principles Recognised by the Laws of the Republic. The current constitution, however, does not mention the term.

<sup>57</sup> Doron Shultziner and Guy E Carmi, ‘Human Dignity in National Constitutions: Functions, Promises and Dangers’ (2014) 62 *The American Journal of Comparative Law* 461, 473.

<sup>58</sup> The graph is copied from [http://comparativeconstitutionsproject.org/files/cm\\_archives/human\\_dignity.pdf?6c8912](http://comparativeconstitutionsproject.org/files/cm_archives/human_dignity.pdf?6c8912).

<sup>59</sup> The texts of the constitutions were accessed at [www.comparativeconstitutionsproject.org/](http://www.comparativeconstitutionsproject.org/).

<sup>60</sup> Shultziner and Carmi (n 57). They map up how European Constitutions – such as the German Basic Law, the Portuguese constitution, and the influence of the colonial powers such as France and the UK – have helped spread the notion of dignity and specific formulations of constitutional provisions to other countries across the world.

<sup>61</sup> Shultziner and Carmi (n 57) 473.

<sup>62</sup> Shultziner and Carmi (n 57) 474.

is used to reassert the limits of power of the state and a general duty on the state to protect the individual. Although provisions mentioning human dignity may be declarative, rather than operational, the remaining articles in the constitution ‘are meant to articulate and specify the belief in human dignity and what it requires.’<sup>63</sup> In this regard, judges and scholars have argued that human dignity is a universal principle that transcends the differences between jurisdictions and confirms the common, shared experience of the single human family: ‘the idea of human dignity as the common thread to be followed across all ... contingencies’ therefore provides the impetus for transnational judicial dialogue in the human rights field.<sup>64</sup> In essence, the argument is that the language of dignity forms part of the common *lingua franca*.

If Council of Europe countries actually share the concept of human dignity, then the ECtHR’s attempts to use dignity language in its judgments to send a ‘message’ to states about what is at stake would be both wise and potentially effective. If – as Paolo Carozza argues – human dignity is said to be ‘universal’, ‘common’ and ‘shared’,<sup>65</sup> the decision to use dignity and to refer to other international instruments in doing so, would be seen as ‘a customary usage’ or ‘the only possible usage’<sup>66</sup> and would be expected to trigger a shift in state behaviour. This is very much the assumption underpinning Judge Costa’s account of dignity as a signal of seriousness and a nudge towards compliance. Yet, in Part I we showed that even though this may be a plausible explanation of what the Court is doing, it is not actually a strategy that appears to be effective with states and is also not a strategy that is seen beyond Article 3. Why is this the case?

McCrudden’s seminal inquiry may hold at least part of the answer. His argument that there is no common conception of human dignity can be juxtaposed with Carozza’s view of dignity as a *lingua franca*. Drawing on the case law of different jurisdictions, McCrudden shows that there is little agreement across constitutional courts about the content of dignity. Beyond what McCrudden calls ‘a minimum core’, which underlines the individual’s intrinsic worth, and the respect and recognition that this worth demands of others, including the state, he finds that dignity ‘does not provide a universalistic, principled basis for judicial decision-making in the human rights context, in the sense that there is little common understanding of what dignity requires substantively within or across jurisdictions.’<sup>67</sup> Instead, dignity is drawn on by judges in a wide range of different substantive areas, it is assigned differing status and weight, it attaches to individuals as well as groups, and it can be used both to support rights and to constrain them. McCrudden implicitly criticizes Carozza for assuming that the fact that jurisdictions *share* the notion of ‘dignity in the human rights context’ leads to a dialogue between judges on the interpretation of human rights norms,<sup>68</sup> and shows that whilst different jurisdictions accept the existence of the *concept* of dignity, there is ‘no common substantive *conception* of dignity.’<sup>69</sup> Instead, McCrudden argues that ‘the concept of “human dignity” plays an important role in the development of human rights adjudication’, specifically ‘in contributing to particular methods of human rights interpretation and adjudication.’<sup>70</sup> In this regard, McCrudden finds that courts use dignity to resolve conflicts of rights, to decide how far domestic rights should

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<sup>63</sup> *ibid* 475, citing Klaus Dicke, ‘The Founding Function of Human Dignity in the Universal Declaration of Human Rights’ in Kretzmer and Klein (n 12).

<sup>64</sup> Carozza (n 3); Cesare Mirabelli, Preliminary Reflections on Fundamental Rights as the Basis of a Common European Law, in *The Clifford Chance Millennium Lectures: The Coming Together of the Common Law and the Civil Law* (Basil Markesinis ed., 2000), 225; Arthur Chaskalson, ‘Human Dignity as a Constitutional Value’ in Kretzmer and Klein (n 12). See also Matthias Mahlmann, ‘Human Dignity and Autonomy in Modern Constitutional Orders’ in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012); Catherine Dupré, ‘Human Dignity in Europe: A Foundational Constitutional Principle’ (2013) 19 *European Public Law*; Costa (n 7); Shulztiner and Carmi (n 57).

<sup>65</sup> Carozza (n 3).

<sup>66</sup> Walter Probert, ‘Law and Persuasion: The Language Behavior of Lawyers’ (1959) 108 *University of Pennsylvania Law Review* 35, 46.

<sup>67</sup> McCrudden *EJIL* (n 3) 655.

<sup>68</sup> *ibid* 695.

<sup>69</sup> *ibid* 712 (emphasis in original).

<sup>70</sup> *ibid* 655.



be interpreted according to international standards, and finally, to decide how expansively to interpret the text, which is the basis for rights protection.

The results of the empirical analysis in Part I support McCrudden's argument about how the European Court uses dignity. Dignity appears to be used strategically to explain the expansion of rights and to interpret the Convention in accordance with other international standards. As empirical evidence showed, it is also used to reinforce the message that a particular violation is serious and that the behaviour of the state should change. Yet, Judge Costa's account of the role of dignity in the jurisprudence of the ECtHR tells only half of the story. In this Part, we look more closely at how states draw on their own conceptions of dignity before the ECtHR. Because states' constitutions and basic documents contain references to dignity, states themselves can find the term 'dignity' useful to reinforce their arguments. More specifically, they can rely on a number of different constitutional provisions – some which mention dignity generally or even aspirationally, others which contain more operational clauses, and finally, provisions which require that dignity be respected by limiting rights of other individuals. This analysis suggests that for some states in the Council of Europe, the term 'dignity' carries a different – more limiting – meaning to the one assigned to the concept by the Court.<sup>71</sup>

In the next section, we specifically focus on one country that has made use of dignity before the ECtHR in each of the three different ways listed above – Russia. In our dataset, Russia is the country, in whose cases the term dignity gets mentioned most often and represents 17% of all of the 'dignity' case law investigated. The 1993 Russian Constitution (as amended in July 2020) refers to dignity in a number of different contexts: in relation to the prohibition of torture and other humiliating treatment or punishment (added in 1993 in anticipation of Russia's joining the Council of Europe),<sup>72</sup> in relation to the dignity and honour of judges (added in July 2020),<sup>73</sup> and once more to emphasise the duty of the state to guarantee the 'protection of citizens' dignity and respect for the working man' (July 2020).<sup>74</sup> Dignity is also mentioned in various provisions of the Civil and Criminal Codes, among other federal legislation. In the next section, we investigate which of these uses of dignity in Russian law have played a role in the state's justifications for interfering with Convention rights, and how.

## (b) The case of Russia: functions of dignity in the state's submissions before the Court

### Human dignity as an aspirational value and a minimum standard of humane treatment

In the original unamended version of the Russian Constitution from 1993, human dignity was mentioned only once – in Article 21, which contains the prohibition of 'torture, violence or other severe or humiliating treatment or punishment' and the involuntary subjection to medical, scientific or other experimentation. In this provision, the duty of the state to protect human dignity is formulated in absolute terms ('[n]othing may serve as a basis for its derogation'). In relation to torture, dignity in the Russian Constitution thus sets a minimum standard of humane treatment or a benchmark against which state's treatment of individuals should be evaluated.

Before the ECtHR, Article 21 of the Russian Constitution is usually relevant to applications alleging breaches of Article 3 of the Convention, and as such it is invariably quoted in the section of the Court's judgment detailing the relevant domestic law and practice.<sup>75</sup> Despite this, the submissions of the Russian Government in Article 3 cases rarely include reasoning phrased in terms of human

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<sup>71</sup> Shulztiner and Carmi show that the limiting nature of dignity is mostly 'characteristic of countries whose political regime is non-democratic or of developing countries.' In Europe, they highlight its use in post-Soviet countries. At the same time, they argue that post 1990s, the more provisions arguing for dignity as enhancing rights protection have been borrowed and transplanted into new countries. In this context, the new Eastern European countries and the new Russian Constitution contain for the first time references to the inviolability of human dignity and the duty on the State (rather than citizens) to protect it. Shulztiner and Carmi (n 57) 461ff.

<sup>72</sup> 1993 Constitution of the Russian Federation, art 21; Russia joined the Council of Europe on 28 February 1996.

<sup>73</sup> *ibid*, arts 83(f), 102(k).

<sup>74</sup> *ibid*, art 75.1.

<sup>75</sup> See any ECtHR judgment on an Article 3 complaint against Russia, e.g., *Kalashnikov v Russia* [2002] Application no. 47095/99.

dignity.<sup>76</sup> This is interesting considering that Article 3 is the Convention article in relation to which the ECtHR has most often had recourse to the concept, and in doing so has used dignity in the very same ways that Article 21 of the Russian Constitution does – i.e., aspirationally, to emphasise that ‘[r]espect for human dignity forms part of the very essence of the Convention’,<sup>77</sup> and as an aid to interpretation, in particular to determine whether the ill-treatment of the individual by the state meets the threshold of ‘minimum severity’.<sup>78</sup>

Still, in terms of the meaning of dignity in the context of the prohibition of torture, inhuman or degrading treatment, there seems to be a basic conceptual overlap between the Court and Russia. This is suggested, on the one hand, by the fact that like other Council of Europe states, Russia has incorporated the Court’s general principles of interpretation of Article 3 ECHR into its federal laws.<sup>79</sup> In addition to that, in its submissions to the ECtHR the Russian Government has never suggested that it understands dignity in this context to mean anything other than inherent human dignity by virtue of which an individual’s physical integrity must be respected by the state.<sup>80</sup> In some of the earlier ECtHR judgments in which the Court found the overcrowded conditions in Russian prisons incompatible with human dignity, the Russian Government explicitly acknowledged overcrowding as a structural problem that it was working to address so as to ensure compliance with Article 3 of the Convention.<sup>81</sup> More crucially, following *Svinarenko and Slyadnev v Russia*, the case in which the ECtHR held that the controversial practice in Russian courtrooms of placing defendants in criminal trials in a metal cage ‘constitutes *in itself* ... an affront to human dignity in breach of Article 3’,<sup>82</sup> Russia has since not sought to justify the use of metal cages.<sup>83</sup> Instead, the Government has pointed out that the cages are gradually being replaced with glass cabins, which ‘did not have an appearance that could by itself raise issues under Article 3 of the Convention’ – an argument which the ECtHR has accepted.<sup>84</sup>

### Protection of the reputation and rights of others: the dignity of public officials

The concept of dignity is most frequently invoked by Russia to justify interfering with the right to freedom of expression.<sup>85</sup> The factual background to most of the Article 10 cases in which Russia has been the respondent state consists of the applicant’s publication (or the dissemination by them by other means) of material critical of another individual, who responded by bringing defamation proceedings before domestic courts, claiming that the applicant’s statements were false and caused damage to their honour, dignity, or reputation contrary to Article 152 of the Civil Code.<sup>86</sup> Before the ECtHR, the applicant then alleges that the domestic courts’ decisions finding them liable constituted a breach of Article 10 by the state, whilst in response, the Russian Government argues that the interference with the applicant’s freedom of expression pursued the legitimate aim of protecting the

<sup>76</sup> Among the few Article 3 judgments in which dignity is mentioned in the summary of the Russian Government’s submissions are *Antipenkov v Russia* [2009] Application no. 33470/03; *Khodorkovskiy and Lebedev v Russia* [2013] Application nos. 11082/06 and 13772/05.

<sup>77</sup> *Svinarenko and Slyadnev v Russia* [2014] (Grand Chamber) Applications nos. 32541/08 and 43441/08 [118] in the Court’s reasoning. See also *Tyrer v UK* [1978] Application no. 5856/72 [33].

<sup>78</sup> *Ireland v UK*. See also *Kudla v Poland* [92]; *Nachova v Bulgaria* [2005] Application no. 43577/98 [145]; *ibid*.

<sup>79</sup> Civil Code, arts 150 and 151; Federal Law ‘On the Detention of Suspects’ of 15 July 1995, No. 103-FZ, art 4; Criminal Code, art 7; Code of Administrative Offences, arts 1.6 and 3.1.

<sup>80</sup> *Geld v Russia* [2012] Application no. 1900/04; *Velichko v Russia* [2013] Application no. 19664/07; *Gorovoy v Russia* [2013] Application no. 54655/07 for examples of prison overcrowding cases.

<sup>81</sup> *Velichko v Russia* [2013]; *Gorovoy v Russia* [2013]; *Gorbulya v Russia* [2014] Application no. 31535/09.

<sup>82</sup> *Svinarenko and Slyadnev* [138] (emphasis added).

<sup>83</sup> In *Shulmin and Others v Russia* [2018] Applications nos. 15918/13 and others, no submissions at all were filed.

<sup>84</sup> *Yaroslav Belousov v Russia* [2016] Applications nos. 2653/13 and 60980/14 [119], [124].

<sup>85</sup> In our sample, there are 108 judgments in which dignity is mentioned either in Russia’s submissions or the separate opinions of Judges Kovler or Dedov. Of these, 52 concern Article 10 complaints (48%).

<sup>86</sup> The Plenary Supreme Court has clarified that statements that tarnish a person’s honour, dignity or business reputation are ‘[s]tatements alleging that a person has broken the law, committed a dishonest act, behaved unethically or broken the rules of business etiquette’: Resolution no. 3 of the Plenary Supreme Court of the Russian Federation of 24 February 2005; *Fedchenko v Russia* (No. 4) [2018] Application no. 17221/13 [22].

reputation and rights of others.<sup>87</sup> Therefore, from the point of view of the respondent state, in the context of the right to freedom of expression dignity plays a rights-constraining function – it is used to limit the scope of the applicant’s Convention right and balance it against the dignity, honour, and reputation of the individual against whom the defamatory remarks were made.

Notably, in the cases that reach Strasbourg this individual is almost invariably a public official.<sup>88</sup> Thus, the protection of dignity has been deployed in the justification arguments of the Russian Government in relation to the protection of the honour and reputation of governors,<sup>89</sup> civil servants,<sup>90</sup> judges,<sup>91</sup> and police officers.<sup>92</sup> For example, at stake has been the dignity of a regional governor, whom an applicant’s newspaper article had sarcastically praised for their ‘remarkable achievements ... in fostering corruption’;<sup>93</sup> a military commander, who had been accused of discriminating between residents on the basis of their social status;<sup>94</sup> and a judge, about whom a journalist had published an article calling them a ‘lawless person in a judge’s robe’.<sup>95</sup> These three cases are representative of the vast majority of Article 10 cases against Russia, which reveal a pattern of extra vigilant application of Article 152 of the Civil Code to protect the dignity, honour and reputation of public officials. Significantly, recent sociological research on defamation suits in Russia confirms that public officials are also a disproportionately large proportion of claimants in domestic proceedings.<sup>96</sup> This is despite the fact that the Civil Code is neutral as to whose dignity, honour, and reputation are protected. It appears, therefore, that by assuming public office individuals in Russia acquire a special kind of dignity which leads to their right to reputation weighing more heavily than the right of others to express themselves freely, in situations where the two come into conflict.

There is arguably no case that better illustrates this than *Savva Terentyev v Russia*, which concerned the dignity of police officers. The case did not actually begin as a defamation suit, but as a case under Article 282 of the Criminal Code – the offence of incitement to hatred, enmity, and humiliation of dignity of an individual or group on the basis of gender, race, nationality, language, origin, attitude to religion or belonging to a social group. The domestic court dealing with the case classified police officers as a protected ‘social group’ for the purpose of Article 282: ‘the police officers of Russia [were] a large social group – people united by their common activity in protecting the life, health, rights and liberties of people, property, public and State interests from crimes and offences’. The court found that the applicant had humiliated the dignity of police officers by comparing them to pigs and referring to them as ‘inferior on account of their professional grouping’, ‘cop-hoodlum filth’, ‘lowbrows and hoodlums – the dumbest and most uneducated representatives of the animal world’, among other similar epithets.<sup>97</sup>

According to the Russian Government in *Savva Terentyev*, the protection of the dignity of police officers was important for maintaining the authority of law-enforcement agencies. If abusive remarks of the kind made by the applicant were left unpunished, this would undermine the authority

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<sup>87</sup> *OOO Ipress and Others v Russia* [2013] Application nos. 33501/04 and others; *OOO Izdatelskiy Tsentr Kvartirnyy Ryad v Russia* [2017] Application no. 39748/05, among other cases.

<sup>88</sup> It is striking that only in relation to two Article 8 complaints the domestic courts had considered the dignity, honour, and reputation of private citizens under Article 152 of the Civil Code and had found them *not* to have been violated by the publication of pernicious information about them: *Khuzhin and Others v Russia* [2008] Application no. 13470/02; *Bogomolova v Russia* [2017] Application no. 13812/09.

<sup>89</sup> *Novaya Gazeta and Borodyanskiy v Russia* [2013] Application no. 14087/08; *Fedchenko v Russia* (No. 4) [2018].

<sup>90</sup> *Zakharov v Russia* [2006] Application no. 14881/03; *Cheltsova v Russia* [2017] Application no. 44294/06.

<sup>91</sup> *Aleksey Ovchinnikov v Russia* [2010] Application no. 24061/04; *Bezmyannyy v Russia* [2010] Application no. 10941/03.

<sup>92</sup> *Dyundin v Russia* [2008] Application no. 37406/03; *Khmel v Russia* [2013] Application no. 20383/04.

<sup>93</sup> *Timakov and OOO ID Rubezh v Russia* [2020] Applications nos. 46232/10 and 74770/10 [5].

<sup>94</sup> *Kazakov v Russia* [2008] Application no. 1758/02.

<sup>95</sup> *Tolmachev v Russia* [2020] Application no. 42182/11 [6].

<sup>96</sup> Maria Popova, ‘Journalists, Judges and State Officials: How Russian Courts Adjudicate Defamation Lawsuits against the Media’ in Agnieszka Kubal and Marina Kurkchyan (eds), *A Sociology of Justice in Russia* (Cambridge University Press 2018).

<sup>97</sup> *Savva Terentyev v Russia* [2018] Application no. 10692/09 [22-23] in the Russian Government’s submissions.

of police officers and ‘encourage the public to disregard them and disobey their orders.’<sup>98</sup> This is an argument that Russia has made in relation to the dignity of public officials more generally. In *Timakov and OOO ID Rubezh v Russia*, the case of the regional governor mentioned above, the domestic courts had found that protecting the ‘moral authority’ of the governor was crucial for the proper functioning of the Tula region and ‘its interactions with other constituent entities of the Russian Federation’.<sup>99</sup> In relation to judges, the Russian Government has in fact sought to justify interfering with applicants’ freedom of expression by arguing that the interference was necessary both to protect the reputation and rights of the judge who has been the target of verbal abuse, and for ‘maintaining the authority and impartiality of the judiciary’ as a whole – a permissible ground for restricting freedom of speech in its own right pursuant to the second paragraph of Article 10.<sup>100</sup> In that regard, it bears noting that the honour and dignity of the judicial office has been protected in Russian law for some time. It has served as a ground for termination of Russian judges since 1992.<sup>101</sup> More recently, the amendments to the Russian Constitution of July 2020 provide for a new procedure whereby the President is granted the power to propose, and the Federation Council the power to dismiss, judges of certain courts if they are found to be ‘tarnishing the honour and dignity of the judge’.<sup>102</sup>

### Protection of morals and the rights of others: the dignity of children and Orthodox believers

In addition to public officials, the two other main social groups in relation to whom the concept of dignity has been invoked by the Russian Government to trump the Convention rights of individuals have been Orthodox believers and children. While protecting the dignity, honour, and reputation of public officials has been explained by the need to maintain the integrity and authority of the office they represent, the dignity of children and the dignity of believers are essential aspects of the traditional morality allegedly shared by the majority of people in Russia, and which the state, the Constitutional Court, and the Russian Orthodox Church all consider to be currently under threat, particularly from ‘homosexual lifestyles’ and their ‘promotion’.

In the case of *Bayev and Others v Russia*, three gay rights activists challenged the consistency of Russia’s ‘gay propaganda law’, prohibiting the promotion of homosexuality amongst minors, with Articles 10 and 14 of the ECHR.<sup>103</sup> Pursuant to this law, domestic courts had found the applicants guilty of administrative offences for holding demonstrations against the law near a children’s library and a secondary school, holding banners with statements such as ‘Homosexuality is normal’ and ‘Homosexuality is good’.<sup>104</sup> Before the Court, Russia sought to justify the restrictions the impugned law imposes on speech, by arguing that they were necessary and proportionate measures aimed at protecting public health and morals, and the right of others. While dignity is not explicitly mentioned in the part of the Court’s judgment where the Government’s submissions are summarised, it did play a role in the decision of the Russian Constitutional Court on which the Government’s arguments were based, as well as in the dissenting opinion of Judge Dedov.

Notably, the Constitutional Court used dignity to emphasise the importance of protecting the rights of both groups of individuals whom the law directly impacts – the group which it is allegedly intended to protect (children) *and* the group whose rights it restricts (homosexuals). On the one hand, the Constitutional Court asserted that ‘[t]he prohibition on the promotion of non-traditional sexual relationships ... does not signify a negative appraisal by the State of *non-traditional sexual*

<sup>98</sup> *ibid* [49].

<sup>99</sup> *Timakov* [9], [24] in excerpts of domestic courts’ decisions.

<sup>100</sup> *Kudeshkina v Russia* [2009] Application no. 29492/05 [69]; *Tolmachev* [33].

<sup>101</sup> Federal Law ‘On the Status of Judges in the Russian Federation’ of 26 June 1992, No. 3132-1, art 14 (in 1992 version); Federal Constitutional Law ‘On the Constitutional Court of the Russian Federation’ of 21 July 1994, No. 1-FZK, art 18 (6).

<sup>102</sup> The procedure applies to presidents, vice-presidents, and judges of the Constitutional Court, Supreme Court, cassation, and appeal courts (Article 83 on the powers of the Russian President; Article 102 on the jurisdiction of the Federation Council). It has now been replicated also in the Law ‘On the Constitutional Court’ (art 18) and the Law ‘On the Status of Judges’ (art 14.1).

<sup>103</sup> *Bayev and Others v Russia* [2017] Applications nos. 67667/09, 44092/12, 56717/12.

<sup>104</sup> *ibid* [10], [14].

*relationships* as such, and is not intended to belittle the honour and *dignity of citizens who are involved in such relationships...*<sup>105</sup> In other words, each individual's sexual orientation falls within their sphere of personal autonomy, which is itself an aspect of their human dignity – a non-derogable interest under the Russian Constitution.<sup>106</sup> On the other hand, the Constitutional Judges explained, 'the dissemination by a person of his beliefs and preferences regarding sexual orientation... *should not infringe on the dignity of others and cast doubt on public morality in its understanding prevailing in Russian society*, since otherwise it would contradict the foundations of law and order.'<sup>107</sup> Freedom of speech is not absolute and can be subject to limitations that are considered necessary for the protection of others and for maintaining balance between constitutional values. Other than the principle of equality, among these constitutional values were the traditional understandings of marriage as the union between a man and a woman, and of the family as having the primary role of ensuring 'the birth and upbringing of children'.<sup>108</sup>

The function of dignity in justifying the law was to tilt the scales in such a way that these traditional understandings would weigh more heavily in the balance, and be ultimately prioritised over the rights of LGBT individuals not to be discriminated against.<sup>109</sup> This was achieved by invoking the dignity in relation to children,<sup>110</sup> who are perceived as a vulnerable group that must be protected from 'distorted representations of the socially accepted models of family relations' – that is to say, information which may 'adversely affect' a child's 'psychological state and development', as well as their 'social adaptation'.<sup>111</sup> Dissenting from the majority judgment of the ECtHR which found Russia in violation of Articles 10 and 14, Judge Dedov echoed the reasoning of the Constitutional Court and mirrored its use of dignity. In his view, 'the impugned Law sought to protect the privacy (including the *dignity and integrity*) of the children' – a consideration to which the majority on the Strasbourg bench had failed to give due regard.<sup>112</sup>

The 'dignity of believers' has played a similar rights-constraining function in Russia's justifications for interfering with freedom of speech and freedom of protest. As with the dignity of children, which in *Bayev* was seemingly categorised under both the legitimate aim of protecting the rights of others and the aim of protecting morals, the dignity of believers has also been referred to in relation to these two aims. In the case of *Alekseyev v Russia*, the Russian Government sought to justify the refusal by the Moscow authorities to grant permission for the gay parades co-organised by the applicant on the ground that, as the demonstrations in *Bayev*, they constituted 'promotion of homosexuality' which 'was incompatible with the "religious doctrines for the majority of the population"'. If the parades had been allowed to go ahead, they 'would be perceived by believers as an intentional insult to their religious feelings and a "terrible debasement of their human dignity"'.<sup>113</sup> The authorities' wish to avoid this eventuality justified the limitation of the applicants' right to protest. In a similar vein, in *Mariya Alekhina and Others v Russia*, where members of the punk rock band Pussy Riot were convicted of hooliganism for reasons of religious hatred and enmity for their 'punk prayers' at the altar of Moscow's Christ the Saviour Cathedral and at the Epiphany

<sup>105</sup> Judgment of the Russian Constitutional Court of 23 September 2014, No. 24-Π as excerpted in *ibid* [25] (emphasis added).

<sup>106</sup> Dmitri Bartenev, 'LGBT Rights in Russia and European Human Rights Standards' in Lauri Mälksoo and Wolfgang Benedek (eds), *Russia and the European Court of Human Rights: The Strasbourg Effect* (CUP 2017) 340-41.

<sup>107</sup> *Bayev* [25] (emphasis added).

<sup>108</sup> *ibid*.

<sup>109</sup> We refer to the rights of LGBT, as opposed to LGBTQI+ individuals, because in the cases discussed the arguments of the Russian Government were phrased in terms of the former.

<sup>110</sup> The dignity of children is also protected in various provisions of the Family Code: e.g., art 54 (rights of the child to education, security and all-round development, and to be raised by their parents), art 65 (right of the child to be free from abuse, exploitation, and other forms of ill-treatment). Family Code provisions mentioning the dignity of the child have been cited in a number of ECtHR judgments on Article 8 complaints, where the applicants had been deprived of parental authority: *Zelikha Magomadova* [2019] Application no. 58724/14; *Y.I. v Russia* [2020] Application no. 68868/14.

<sup>111</sup> *Bayev* [25] (emphasis added).

<sup>112</sup> *Bayev*, Dissenting Opinion of Judge Dedov (emphasis added).

<sup>113</sup> *Alekseyev v Russia* [2010] Application nos. 4916/07 and others [59] in the submissions of the Russian Government.



Cathedral,<sup>114</sup> dignity was used to support Russia's argument that the need to protect the right to religious freedom of Orthodox believers under Article 9 of the Convention required that the applicants were punished for their 'provocative' actions. In addition to their choice of venue, their clothing and their use of 'obscene language' – all of which contributed to the insult caused to the religious feelings of Orthodox believers and the disrespect shown to 'the canons of the Orthodox Church' –, the domestic courts considered the applicants' feminist ideas as further evidence of their motivation of religious hatred, as feminism was 'incompatible' with the 'dogmatic basis' of Orthodox Christianity.<sup>115</sup>

Taking stock, what the cases of *Bayev, Alekseyev, and Mariya Alekhina* suggest about the meaning of dignity from Russia's perspective is that dignity is an interest defined through the prism of certain 'traditional' understandings of morality, decency, family and sexual relations, which have a basis in Orthodox Christian ideas and are part of Russia's constitutional foundations.<sup>116</sup> Thus, the role of dignity in defining the scope of Convention rights or mediating conflicts between them is to underline the importance of protecting the integrity of these traditional understandings and the rights of those groups of individuals considered essential for their safeguarding.

### Part III. Searching for Dignity between the Court and the State: Dignity as a Situating Concept

To recap, while some judges and scholars suggest that there is a common conception of dignity, a type of lingua franca, our analysis has revealed a great variety of understandings of the concept throughout the Council of Europe. Focusing on Russia, we have specifically queried the idea that the conception of dignity as expressed by the Court in its jurisprudence is shared by all member states. In fact, the discussion of the provisions of Russian law, domestic courts' decisions, submissions of the Government before the ECtHR, and developments in social and religious thinking in Russia, have shown that while dignity may be perceived as inherent in the context of violations of physical integrity contrary to Article 3, in other contexts it can be attached to groups of individuals based on their position in society, and serve to justify the protection of their moral beliefs, reputation, or other rights, over the Convention rights of individuals. These latter conceptions of dignity, which have been central to Russia's justifications for interfering with freedom of speech in particular, are difficult to reconcile with much of the ECtHR jurisprudence.<sup>117</sup> To the extent that dignity can be seen as a core pillar of the philosophical foundations of human rights, some of the meanings attached to dignity in Russian law make these foundations seem very unstable because they depend on the status, conduct, or beliefs of individuals. Russia's approach to dignity is thus in opposition to the liberal understanding of the concept, which underpins the majority of Strasbourg's dignity jurisprudence, and according to which dignity is an inherent human quality foregrounding the claim of the inalienability of human rights.

In this Part, we will examine how the Court has responded to the implicit but very real conceptual challenge from Russia in relation to the meaning and function of dignity in the context of the ECHR. The response of the Court to the arguments made by states is key because Judge Costa speaks of human dignity as a situating concept, that is as a tool which the ECtHR uses to position itself vis-à-vis the international community and vis-à-vis different member states. He thinks of human dignity as a way of 'establish[ing] relationships, build[ing] maps'.<sup>118</sup> In this third and final part of the paper, we show how the Court strategically positions itself vis-à-vis the different dignity conceptions used by Russia and how this strategic positioning can be seen as part of a broader effort by the Court to maintain its authority as the final instance interpreter of the ECHR, while at the same time managing its relationship with the states over which it exercises that authority. We also reflect on the reasons

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<sup>114</sup> *Mariya Alekhina and Others v Russia* [2018] Application no. 38004/12; Criminal Code, art 213.

<sup>115</sup> Judgment of Khamovnicheskiy District Court of 17 August 2012, excerpted in *ibid* [50-52].

<sup>116</sup> For a more detailed analysis of the substantive meanings of dignity in Russia, see Lora Izvorova (n 13) (forthcoming).

<sup>117</sup> *ibid*.

<sup>118</sup> Probert (n 66) 44.

that may be motivating the Court's reactions, and on problems they raise in terms of the authority and legitimacy of the ECtHR as an international court.

### (a) the Court's reactions in cases of overlap

In many contexts and most frequently in relation to Article 3, there appears to be no difference in how 'dignity' is conceived by the Court and how it is conceived by other member states, including Russia. As mentioned before, Russia has recognised that, for example, metal cages in courtrooms were unacceptable and had to be replaced to avoid arousing in defendants the 'feelings of humiliation, helplessness, fear, anguish and inferiority'<sup>119</sup> and exposing them in a manner that 'would convey to their judges... a negative image of them as being dangerous to the point of requiring such an extreme physical restraint, thus undermining the presumption of innocence.'<sup>120</sup> When metal cages were later replaced by glass cabins, in *Yaroslav Belousov* the ECtHR distinguished glass cabins based on their less 'harsh appearance'. This meant that placement of a defendant in a glass cabin 'does not in itself involve an element of humiliation sufficient to reach the minimum level of severity, as is the case with metal cages.'<sup>121</sup> Instead, in relation to glass installations the Court had to consider all the circumstances of the confinement, and whether taken as a whole they caused the applicant 'distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention'.<sup>122</sup> This was a nod to the Russian Government, which had made this very same argument justifying the practice.<sup>123</sup>

In cases of overlap more broadly, the Court will defer to the member state and its domestic courts' use of dignity. This happens most frequently against Germany, where dignity is singled out as the highest value of its constitutional order and is protected explicitly by Article 1 of the Basic Law. As a consequence, German courts refer to the term regularly and resolve important constitutional cases by relying on the constitutional importance of dignity.<sup>124</sup> This in effect reduces the requirement for the ECtHR to engage with the argument further. In fact, the Court hardly ever refers to dignity in cases involving Germany. Indeed, most references come from citations of German domestic courts judgments rather than the ECtHR. The Court – of its own initiative – almost never invokes the term against Germany.<sup>125</sup>

### (b) the Court's reactions in cases of conflict

#### Avoiding the term 'dignity'

In cases where the meaning and function of dignity in the submissions of a respondent state conflict with the ECtHR's dignity jurisprudence, one of the Court's responses has been to refrain from mentioning dignity in its judgments altogether, although this may go against established case law. While the Court has avoided dignity in most of the Article 10 cases discussed in Part II, its use of this strategy is not limited to reputation cases.<sup>126</sup>

In several jurisdictions, the granting of rights to gay, lesbian, and transgender individuals is heavily reliant on dignity. From the decriminalization of 'sodomy' to the permission of marriage between same-sex partners, courts have stressed the extent to which limitations of these rights represent an infringement of human dignity: 'There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader

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<sup>119</sup> *Svinarenko and Slyadnev v Russia* [129].

<sup>120</sup> *ibid* [133].

<sup>121</sup> *Yaroslav Belousov v Russia* [125].

<sup>122</sup> *ibid*.

<sup>123</sup> *ibid* [119].

<sup>124</sup> Ernest Benda, *The Protection of Human Dignity* (Article 1 of the Basic Law), 53 SMU L. Rev. 443 (2000).

<sup>125</sup> Out of 2122 cases, in only 47 cases dignity is mentioned in applications against Germany. In all of these cases, dignity is invoked by the German authorities either in reference to the Basic law or the case law of the domestic courts.

<sup>126</sup> For example, *OOO Izdatelskiy Tsentr Kvartirnyy Ryad v Russia*; *Cheltsova v Russia*.

society.<sup>127</sup> In this context, the ECtHR has also used dignity to reaffirm that the ‘very essence of the Convention is respect for human dignity and human freedom’.<sup>128</sup> In *Goodwin v UK*, a case concerning a transgender individual, the Court referred to dignity several times and ruled that a refusal by state authorities to grant the applicants the right to be registered on the registry of births with their new gender violated Article 8. Yet, despite the Court’s reaffirmation in *Goodwin* of the equal dignity of members of minority sexual orientations or gender identities, dignity *was not* the driving force behind the Court’s reasoning in the case of the Russian gay protesters in *Bayev*.<sup>129</sup> As mentioned in Part II, it was not the Court but Russia who relied on dignity in *Bayev* to argue that the dignity of others took precedence over the rights of members of the LGBT community.<sup>130</sup> The only references to dignity in the judgment of the Court are those of Russian courts and the Russian Judge Dedov in Strasbourg, who dissented from the majority judgment.

In deciding *Bayev*, the ECtHR majority followed its firmly established approach not ‘to endorse policies and decisions which embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority’, and underlined that ‘references to traditions or general assumptions in a particular country cannot of themselves be considered by the Court to amount to sufficient justification for the differential treatment, any more than similar negative attitudes towards those of a different race, origin or colour’.<sup>131</sup> Hence, even if the majority of Russians disapproved of the public display of homosexuality, that was irrelevant to the Court’s assessment as popular support could only facilitate the expansion of the protective scope of the Convention, not its narrowing.<sup>132</sup>

Despite its strong rejection of the Russian Government’s position in *Bayev*, the Court does not juxtapose its own view of dignity with the one adopted by the Russian Constitutional Court. In *Goodwin*, the Court underlined that society ‘may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost’.<sup>133</sup> In *Bayev*, by contrast, the Court does not challenge the respondent state’s understanding of dignity and instead focuses on highlighting how the prohibition adopted by Russia led to stigma and prejudice: ‘by adopting such laws the authorities reinforce *stigma and prejudice* and encourage homophobia, which is incompatible with the notions of *equality, pluralism and tolerance* inherent in a democratic society’.<sup>134</sup>

The recognition of stigma is of course an important step in assessing how a certain measure affects the victims. It shows how the victim is singled out and treated differently from other groups. For the Court, the use of the word stigma is also associated with a greater likelihood of a finding of a violation.<sup>135</sup> But whilst the definition of stigma includes ‘unworthiness’, and according to the Oxford English Dictionary it represents a sign of censure or condemnation, dignity is defined as being of ‘elevated character and worthy of respect’. The *positive* language of dignity should therefore be used to (re)address the *negative* stigma individuals have suffered. Or in other words, the language of dignity should be used to underline the ‘dignity and worth of individual’ (as happens in *Goodwin*) and to elevate the discriminated person to equality. As McCrudden writes, dignity is one of the values that *further* anti-discrimination norms.<sup>136</sup> The notion of ‘equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual.’<sup>137</sup> In *Bayev*, the Court refers to the trifecta of equality, pluralism and tolerance, but dignity makes no appearance.

<sup>127</sup> National Coalition for Gay and Lesbian Equality v Minister of Justice, 6 BHRC 127 (CC 1998), 1998 (12) BCLR 1517 (South Africa CC).

<sup>128</sup> *Christine Goodwin v UK* [2002] (Grand Chamber) Application no. 28957/95 [90].

<sup>129</sup> See also *Alekseyev*.

<sup>130</sup> *Bayev* [2017] Applications nos. 67667/09, 44092/12, 56717/12 [25].

<sup>131</sup> *ibid* [68].

<sup>132</sup> *ibid* [69].

<sup>133</sup> *Christine Goodwin* [91].

<sup>134</sup> *Bayev* [83] (emphasis added).

<sup>135</sup> Empirically stigma is used almost exclusively in torture cases and is associated with a higher degree of violations and of compensation.

<sup>136</sup> McCrudden EJIL (n 3) 689.

<sup>137</sup> *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, IAmCtHR Advisory Opinion OC-4/84 of 19 Jan 1984, [55]-[6].

Perhaps the Court understands dignity and stigma as two sides of the same coin and therefore reference to dignity is unnecessary. Nevertheless, the Court's decision not to phrase the discussion in terms of dignity and to stop at the 'mere' recognition of stigma would appear to be 'the easy way out'. The silence allows the respondent state and its organs (in this case, the Russian Constitutional Court) to maintain its own view and interpretation of dignity, a view that significantly differs from the Court's.

### Avoiding conceptual confrontation

The fact that the Court tends to avoid mentioning dignity in its Article 10 judgments against Russia does not mean that it always fails to express its concern about the implications of Russia's dignity conception on freedom of speech. A strategy the Court seems to have followed in some Article 10 cases where the applicant was found by domestic courts either liable for damaging the dignity, honour and reputation of a public official,<sup>138</sup> or guilty of slander,<sup>139</sup> insulting a public official,<sup>140</sup> or inciting hatred or enmity against a 'social group',<sup>141</sup> is to criticise the judgments of domestic courts for failing to grasp the correct role of dignity in the balancing of rights.

For instance, in the case of *Timakov and OOO ID Rubezh v Russia*, the Court noted that the domestic courts which dealt with the regional governor's defamation claim failed to 'assess whether the impugned statements could be regarded as constituting an actual attack capable of causing prejudice to the claimant's honour or business reputation, let alone his dignity'.<sup>142</sup> According to the Court, the domestic courts did not undertake a proper balancing between the governor's interest in protecting his reputation and the interest of the public in the transparency and accountability of his office, and more generally in receiving information on matters of public concern. The domestic courts had focused almost exclusively on the governor's social status and position as 'the head of the permanently functioning highest executive authority of the Tula Region', and on the more technical matters of whether the applicant had proved the truthfulness of his statements. They had therefore failed to give consideration to the principles laid down in the Court's jurisprudence, and had not demonstrated the necessity and proportionality of the measure, thus overstepping their margin of appreciation.<sup>143</sup> In *Timakov* and in *Tolmachev*, the Court also reproached Russian courts for basing their reasoning 'on the tacit assumption that interests relating to the protection of the honour and dignity of others (*in particular of those vested with public powers*) prevail over freedom of expression in all circumstances'.<sup>144</sup> In this way, the Court has effectively re-characterised the problem as one of application and balancing, avoiding a direct conceptual confrontation.

Even in cases where the *human* nature of dignity is at stake, the Court has avoided a direct and open confrontation with Russia. *Romanenko and Others v Russia* concerned the reputation of the courts' management department of Primorskiy Region.<sup>145</sup> The applicants – who had spoken against the department – were fined 15,000 roubles plus legal costs and expenses and were ordered to publish a refutation because they had hurt the dignity and reputation of a public body. Whilst the ECtHR did pay heed to the arguments of the applicants and third parties which questioned the idea that 'public bodies and authorities, such as the courts' management department in the instant case' could have standing to sue in defamation,<sup>146</sup> and cited a report of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe stating that public authorities '*per se cannot possess any dignity, honour, or reputation*',<sup>147</sup> the Court did not challenge Russia's view that a public body can have

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<sup>138</sup> Civil Code of the Russian Federation 1994, art 152.

<sup>139</sup> Criminal Code of the Russian Federation 1996 art 128(1).

<sup>140</sup> Criminal Code, art 319.

<sup>141</sup> Criminal Code, art 282.

<sup>142</sup> *Timakov* [2020] Applications nos. 46232/10 and 74770/10 [66] in the Court's reasoning.

<sup>143</sup> *ibid* [65], [71].

<sup>144</sup> *ibid* [66]; *Tolmachev* [51] (emphasis added).

<sup>145</sup> *Romanenko and Others v Russia* [2009] Application no. 11751/03.

<sup>146</sup> *ibid* [39].

<sup>147</sup> *ibid* [25] (emphasis added).

dignity. Instead, it ‘acknowledge[d] that there may be sound policy reasons to decide that public bodies should not have standing to sue in defamation in their own capacity’, but ultimately exercised self-restraint, ruling that ‘it is not its task to examine the domestic legislation in the abstract but rather consider the manner in which that legislation was applied to, or affected, the applicant in a particular case’.<sup>148</sup>

The Court’s self-restraint is clearly motivated by an appreciation of the limits of its subsidiary jurisdiction, which is a vital aspect of its relationship with states. In relation to Russia, such self-restraint may have seemed prudent at the time. In the years leading up to Russia’s expulsion from the Council of Europe, the ECtHR had been facing intense backlash from the state, manifested most palpably in the introduction of a review procedure for Strasbourg judgments, empowering the Russian Constitutional Court to declare a judgment impossible to execute if it was found to contradict the ‘basic principles of the constitutional order of the Russian Federation’.<sup>149</sup> In this context, perhaps we can understand the Court’s avoidance strategies as attempts, which we now know to have failed, to placate Russia and avoid its departure from the Convention system altogether. Now, as we anticipate Russia’s ceasing to be a Contracting Party to the ECHR in September 2022, we can debate whether the Court’s prudence did not go far enough or if it was a misguided approach from the very beginning that ultimately backfired.

The ECtHR’s reluctance to engage in a conceptual conflict with Russia on the meaning of dignity may also be indicative of the Court’s acceptance that it has not been, and perhaps it is not able to, persuade Russia that dignity is to be understood as an inalienable *human* characteristic, which is possessed by all individuals equally and by virtue of their humanity, and which is therefore not dependent on any position the individual may hold in society. Indeed, when in 2019 a case arose regarding the dignity of the Moscow City Council, the Court again accepted Russia’s view on the dignity of public bodies. Underlining that ‘a mere institutional interest of the Moscow City Council in protecting its “reputation” does not necessarily attract the same level of guarantees as that accorded to “the protection of the reputation ... of others” within the meaning of Article 10 § 2 of the Convention’, the ECtHR nevertheless accepted that the Moscow City Council, as a legal entity, could in principle possess dignity, honour and reputation worth protecting.<sup>150</sup> Thus, what transpires from our case analysis taken altogether is that the Court is carefully calibrating the nature and extent of its challenge to Russia’s domestic laws and practices on which dignity is taken to have a bearing. On the one hand, the Court’s authority and legitimacy, as well as the perception of the European Convention as an instrument for the protection of the fundamental rights and freedoms of individuals, would be jeopardised if the Court were to accept, most strikingly, the proposition that public bodies have the same kind of dignity, honour and reputation as individuals, and that these are to be accorded equal protection. But on the other hand, the authority and legitimacy of the Court’s judgments also inherently depend on how persuasive they are to the member states against which they are delivered. Following the total collapse of its relationship with one (former) member state, it remains to be seen whether the ECtHR will change anything in its approach to deciding cases in which respondent states invoke the concept of dignity in ways that contradict the Court’s established jurisprudence, or whether the Court will stick to its current strategies of avoidance.

## Conclusion

Considering its textual absence from the European Convention on Human Rights, understanding the role of dignity in the jurisprudence of the European Court of Human Rights is very important. This paper has tested the hypothesis of former Judge and President of the Court, Jean-Paul Costa that dignity serves as a pedagogical tool for the Court, enabling it to signal to the respondent state the

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<sup>148</sup> *ibid* [39].

<sup>149</sup> Judgment of the Russian Constitutional Court of 14 July 2015, No. 21-P; Federal Constitutional Law ‘On the Constitutional Court of the Russian Federation’ of 21 July 1994, No. 1-FZK, art 85; 1993 Constitution of the Russian Federation (as amended in July 2020), art 79.

<sup>150</sup> *Margulev v Russia* [2019] Application no. 15449/09 [45].



seriousness of its violation and to elucidate for the benefit of all states the scope of Convention compliant behaviour. The results of our statistical analysis have shown that, indeed, dignity is most often used by the Court in Article 3 cases, and that the cases in which dignity is mentioned are more likely to end with a finding of a violation. However, these cases are also more likely to remain open, suggesting that the Court's references to dignity fail to persuade states, as they lead to worse rather than better compliance. A closer look at the uses of dignity in the national constitutions of member states, and in the Russian Government's justifications before the ECtHR for interfering with freedom of expression, arguably reveals one possible explanation for this. Contrary to some arguments, human dignity is not a *lingua franca* but in fact a deeply contested concept. Although there may be universal agreement that respect for human dignity requires that individuals not be subjected to torture, inhuman or degrading treatment, beyond this 'minimum core' understanding of dignity, member states of the Council of Europe have ascribed a variety of different meanings to the concept. By mapping out the Court's strategies of avoiding conceptual confrontation in cases where the Russian Government has invoked the dignity of public officials, children, or Orthodox believers as justification for restricting the rights of individuals to free speech and non-discrimination, the paper has shown that the Court is aware of the limited persuasiveness of its dignity reasoning to Russia and has responded by adapting its own usage of the concept. The paper stipulated that in doing so, the Court may have been hoping to preserve the authority of its own dignity jurisprudence, and to keep Russia – one of the states with the worst compliance with the Convention – in its fold. Russia's imminent departure from the Convention system indicates that in relation to this particular state, none of the Court's strategic uses and non-uses of dignity have achieved their intended results. Given its war on Ukraine and the domestic crackdown on human rights that has accompanied it, Russia has clearly not been nudged towards better compliance with the ECHR, and neither has the Court's avoidance of conceptual confrontation on the meaning of dignity ensured the Court's continued jurisdiction in relation to the state. It remains to be seen whether Russia's exit will precipitate a change in the Court's approach to the concept of dignity, or whether the same strategies will be maintained with the hope of more success vis-à-vis other states.