

# The Concept of Human Dignity in Obergefell v. Hodges – A Comparison of U.S. and German Constitutional Law

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## I. Introduction

On June 26<sup>th</sup> 2015 the United States Supreme Court delivered its highly anticipated landmark ruling in Obergefell v. Hodges<sup>1</sup> on the permissibility of same-sex marriage in the United States of America. The court ruled in a 5:4 vote in favor of same-sex marriage. Justice *Anthony Kennedy* delivered the opinion of the court. The decision held that under the Due Process and Equal Protection Clauses of the 14<sup>th</sup> Amendment to the U.S. constitution, same-sex couples have the same right and liberty to marry as opposite-sex couples do.<sup>2</sup> This also includes the right to have a marriage recognized by the authorities, if it was carried out lawfully in another state. Apart from the Due Process and Equal Protection Clauses invoked by the decision, it also makes ample reference to 'dignity'. The conclusion to the majority opinion reads as follows:

*“No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than*

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1 Obergefell v. Hodges, 576 U.S. \_\_\_\_ (2015)

2 Obergefell v. Hodges, 576 U.S. \_\_\_\_ (2015), Opinion p. 22

*once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for **equal dignity** in the eyes of the law. The Constitution grants them that right.”<sup>3</sup>*

It is this last point of invoking a concept of dignity to justify the majority opinion, which has sparked a lot of debate, not only in the dissenting opinion of Justice *Thomas*,<sup>4</sup> but also in the decision's aftermath, in press as well as voices of legal scholars.<sup>5</sup> It is also particularly and solely this point that this article will focus on and restrain its discussion to. There will be no deeper evaluation or commentary on the issue of same-sex marriage in general. I am clearly in favor of same-sex marriage and generally believe that the decision of the Supreme Court was a long needed and important step in the right direction. The legal implications of the establishment of a right to dignity for the future of U.S. constitutional law are a different matter nonetheless and deserve a further analysis on its own, moving away from biases the issue at hand

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3 Obergefell v. Hodges, 576 U.S. \_\_\_\_ (2015), Opinion p. 28, highlight not in the original

4 Obergefell v. Hodges, 576 U.S. \_\_\_\_ (2015), Dissent Thomas, p. 16ff. (for a discussion see below ...)

5 For example: *Rosen* 2015, available online at <http://www.theatlantic.com/politics/archive/2015/04/the-dangerous-doctrine-of-dignity/391796/>, updated on 4/29/2015, checked on 7/8/2015; *Hunter* 2015, available online at <http://www.thenation.com/article/the-undetermined-legacy-of-obergefell-v-hodges/>, updated on 6/29/2015, checked on 7/8/2015

might raise. If the critics are right, then the decision creates a new right to dignity, which was not present in U.S. constitutional law prior to it. According to them, this right to dignity is not only a vague, but also a very dangerous concept for future decisions of the Supreme Court.

This article wants to address the following questions: What is meant by (human) dignity in general and what does it mean for constitutional law? Can the state infringe upon somebodies dignity? Was it needed to justify the majority decision in the case at stake? Where lies the danger of this vague concept for judicial decision making? In answering these questions it will outline a brief summary of the underlying philosophical definition of human dignity and draw a comparison to German constitutional law, which has a longstanding tradition of the interpretation and application of a constitutional concept of human dignity. This will hopefully highlight some of the possible hurdles and dangers that are intertwined with the concept and its vagueness, but which are not inevitably unsolvable.

## II. What is Human Dignity?

Most strikingly, Justice *Thomas* declared in his dissenting opinion (in which Justice *Scalia* joined), that human dignity is not something either granted or taken away by the government, but innate to human beings.<sup>6</sup> This statement has some truth at its core. Nonetheless, the idea that the government cannot violate somebodies dignity is obviously false. In order to show why, it is important to first explain what is meant by the

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6 Obergefell v. Hodges, 576 U.S. \_\_\_\_ (2015), Diss. Thomas, p. 17

concept of human dignity. This section will try to give an outline of the possible content of a right to dignity (though this task is a rather difficult one and many readers will likely disagree with the arguments proposed). It will be shown that the concept itself does come with a lot of baggage and the fear of misuse or overuse is not to be taken too lightly. A few cases from German constitutional history shall be described in order to address this claim.<sup>7</sup> In the end I shall address Justice *Thomas*'s claim that the state itself can neither grant nor deny this dignity to anybody, which will be shown to be false. Quite the opposite is true, especially the government can violate somebody's dignity. If dignity is seen as a basic right and one assumes a concept of basic rights as protection from governmental force, i.e. as rights against the state (which is exactly what Justice *Thomas* is invoking earlier in his dissent when talking about liberty), then one can even go so far as to claim that only governmental action really can infringe on this right.

Human dignity<sup>8</sup> is a vague concept. It is mentioned in various contexts, such as legal, political and philosophical disputes as well as legal documents or international treaties. For example:

- Article 1 of the United Nations Universal Declaration of Human Rights of 1948 states: "All human beings are born free and equal in

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<sup>7</sup> One may ask whether it is worthwhile to compare the U.S. and German model in this case, since both countries have a very different history of constitutional law. While trying to define human dignity we nonetheless will see that it is a philosophical and universal concept (like concepts of human rights in general), rather than one of the constitutional law of any single nation.

<sup>8</sup> Or dignity of man, dignity of the person, just dignity or any other similar expression

dignity and rights.”<sup>9</sup>

- Article 1 of the Charter of Fundamental Rights of the European Union (proclaimed in 2000, in force since December 2009)<sup>10</sup> states: “Human dignity is inviolable. It must be respected and protected.”<sup>11</sup>

These provisions come with a natural problem of legal texts. The treaties or various constitutions around the world (such as the constitutions of Germany<sup>12</sup>, Italy<sup>13</sup>, Switzerland<sup>14</sup> or South Africa<sup>15</sup>) do not provide a definition as to what they mean when they ascribe dignity to human beings. The interpretation therefore is up to debate. For the purposes of this article the question is, what is meant by human dignity as a legal or constitutional concept? Human dignity as a legal concept does not stand on its own, but is linked to human dignity as a philosophical concept. Its proper definition, if it is even possible to give one, as well as its value or extend to which it is ascribed to people is linked also to the cultural and historical background of a given legal

9 <http://www.un.org/en/documents/udhr/>, checked on 7/10/2015

10 EU Charter of Fundamental Rights, available online at [http://ec.europa.eu/justice/fundamental-rights/charter/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm), checked on 7/10/2015

11 [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_2010.083.01.0389.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_2010.083.01.0389.01.ENG), checked on 7/10/2015

12 see below

13 Art. 41: „Private economic enterprise is free. It may not be carried out against the common good or in such a manner that could damage safety, liberty and human dignity.”, [https://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf), checked on 7/10/2015

14 Art. 7: “Human dignity is to be respected and protected.”, [http://www.servat.unibe.ch/icl/sz00000\\_html](http://www.servat.unibe.ch/icl/sz00000_html), checked on 7/10/2015

15 Section 10: “Everyone has inherent dignity and the right to have their dignity respected and protected.”, <http://www.gov.za/documents/constitution/chapter-2-bill-rights#10>, checked on 7/10/2015

system.<sup>16</sup> The attempt to compare the German and U.S. legal concept of human dignity is based on the premise that Germany by now has a very long-lasting and strong tradition of legalizing a philosophical concept which goes back to *Immanuel Kant* whereas the U.S., while having mentioned dignity in various legal contexts, still does not have a full out developed legal concept. What I want to point out, is not so much a recommendation to learn from the German model and adapt it to the U.S., but rather to learn from the German mistakes and difficulties, which exactly highlight some of the fears and criticisms that have been raised in the wake of the *Obergefell v. Hodges* decision.<sup>17</sup>

## 1. Human Dignity as a Philosophical Concept

The first deliberations on human dignity can be traced back to antiquity. *Cicero* in his 'De Officiis' (44 B.C.) mentioned dignity several

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16 The differences between the German- and English-speaking worlds can already vividly be demonstrated by looking at the German and English language *Wikipedia* entries on human dignity. The German one, after introducing the historical background, focuses heavily on the legal concept developed by the constitutional court, whereas the English version focuses more on giving a definition in different areas of usage (philosophy, medicine and yes – also law). See <https://en.wikipedia.org/wiki/Dignity>, checked on 7/10/2015 and <https://de.wikipedia.org/wiki/Menschenw%C3%BCrde>, checked on 7/10/2015

17 For example *Hunter* 2015, available online at <http://www.thenation.com/article/the-undetermined-legacy-of-obergefell-v-hodges/>, updated on 6/29/2015, checked on 7/8/2015; *Rosen* 2015, available online at <http://www.theatlantic.com/politics/archive/2015/04/the-dangerous-doctrine-of-dignity/391796/>, updated on 4/29/2015, checked on 7/8/2015 (for a discussion of the arguments see below)

times,<sup>18</sup> though his concept was arguably quite different from our more modern conception of dignity. Religious implications of a concept of human dignity are easily found as well. Its meaning in Christianity for example is well described by the Catechism of the Catholic Church, which states:

*“The dignity of the human person is rooted in his creation in the image and likeness of God [...]”*<sup>19</sup>

A more secular and also more recent conception of Human Dignity can be found in 18<sup>th</sup> century philosophy. The philosophical concept which arguably is most influential, sophisticated and useful is the one which goes back to one of the most important German philosophers of the 18<sup>th</sup> century, *Immanuel Kant*. *Kant*’s greatest contribution to moral philosophy lies in his development of a universal moral law, a law which any rational agent can derive at *a priori* by pure reasoning. In his view, humans are rational autonomous beings, in the sense that they can give laws to themselves. He lays out the line of reasoning to arrive at a particular universal law in his ‘Groundwork of the Metaphysics of Morals’, first published in 1785. *Kant* himself calls this universal law the ‘categorical imperative’. In his own words this law states as follows:

*“Act only on that maxim through which you can at the same time will that it should become a universal law.”*<sup>20</sup>

18 *Cicero/Miller* 44 B.C., available online at <https://www.gutenberg.org/files/47001/47001-h/47001-h.htm>, updated on 9/29/2014, checked on 7/10/2015

19 Part Three, Section One, Chapter One of the Catechism of the Catholic Church, available online at [http://www.vatican.va/archive/ENG0015/\\_\\_\\_P5F.HTM](http://www.vatican.va/archive/ENG0015/___P5F.HTM), checked on 7/10/2015

20 *Kant/Paton, H. J. (transl.)* 1785 (transl. originally published 1948 (2005

This formula can be described as the summary of a “decision procedure for moral reasoning”,<sup>21</sup> a test any rational agent can and should apply to evaluate the permissibility of an action. Violating this moral law would at the same time mean violating rationality.<sup>22</sup> According to *Kant* there is only one categorical imperative, but it can be formulated in different ways. This is to say that all formulations are not exactly the same, but they are equivalent in such a way, as they will always lead to the same results when applied and therefore are consistent with each other.<sup>23</sup>

Important to the discussion at hand, that is the philosophical concept of human dignity, is *Kant's* formulation of the categorical imperative which is typically labelled ‘The Humanity Formula’<sup>24</sup> or ‘formula of humanity as an end’<sup>25</sup>. Again, in *Kant's* own words this version states as follows:

*“Act in such a way that you always treat humanity, whether in your own person or in the person of any other; never simply as a means, but always at the same time as an end.”*<sup>26</sup>

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Edition), p. 97; in the German original: “... handle nur nach derjenigen Maxime, durch die du zugleich wollen kannst, daß sie ein allgemeines Gesetz werde.”, *Kant* 1785, p. 50

21 *Johnson*, available online at <http://plato.stanford.edu/entries/kant-moral/>, checked on 7/10/2015, section 5

22 *Johnson*, available online at <http://plato.stanford.edu/entries/kant-moral/>, checked on 7/10/2015, section 3

23 *Johnson*, available online at <http://plato.stanford.edu/entries/kant-moral/>, checked on 7/10/2015, section 9

24 *Johnson*, available online at <http://plato.stanford.edu/entries/kant-moral/>, checked on 7/10/2015, section 6

25 *Sandel* 2010, p. 122

26 *Kant/Paton, H. J. (transl.)* 1785 (transl. originally published 1948 (2005



This formulation of the categorical imperative introduces the notion of respect for persons, a respect that is attributed to humans due to their distinctively human features. In *Kant* these features are our capacity for rationality, autonomy and the ability to pursue our own ends. Humans are free and rational agents, giving laws to themselves or being the authors of their own moral laws. Without rational agents, there could be no morality at all. Due to this capacity, humans deserve equal respect.<sup>27</sup> “... it is the presence of this self-governing reason in each person that Kant thought offered decisive grounds for viewing each as possessed of equal worth and deserving of equal respect.”<sup>28</sup>

This account of respect for human beings, due to their distinctive human features as rational, autonomous law givers, is what can be called the attribution of human dignity.<sup>29</sup> The most important notion contained in this definition is that this dignity is not something earned due to a person's achievements or value to society. Quite the opposite, it is a feature inherent in people, only because they are human beings. “We are to respect human beings simply because they are persons and this requires a certain sort of regard. We are not called on to respect them

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Edition), p. 106f.; in the German original: “Handle so, daß du die Menschheit, sowohl in deiner Person, als in der Person eines jeden andern, jederzeit zugleich als Zweck, niemals bloß als Mittel brauchest.”, *Kant* 1785, p. 60

27 *Johnson*, available online at <http://plato.stanford.edu/entries/kant-moral/>, checked on 7/10/2015; *Rachels* 1986, available online at [http://public.callutheran.edu/~chenxi/phil345\\_022.pdf](http://public.callutheran.edu/~chenxi/phil345_022.pdf), checked on 7/17/2015

28 *Johnson*, available online at <http://plato.stanford.edu/entries/kant-moral/>, checked on 7/10/2015, Introduction

29 *Johnson*, available online at <http://plato.stanford.edu/entries/kant-moral/>, checked on 7/10/2015, section 7; *Rachels* 1986, available online at [http://public.callutheran.edu/~chenxi/phil345\\_022.pdf](http://public.callutheran.edu/~chenxi/phil345_022.pdf), checked on 7/17/2015

insofar as they have met some standard of evaluation appropriate to persons.”<sup>30</sup>

The simplest practical example for its application on an individual level is that of the promise. Assuming you need money and would like a friend to lend it to you. But you know at the same time, that you cannot pay back your loan. You could lie to your friend to get the money, making a false promise, therefore manipulating him into giving you the money. In this case you use him as a mere means to the end of getting the money, you therefore infringe upon his dignity.<sup>31</sup> If you would honestly tell him that you don't have a way of repaying him, but still would like him to give you the money for whatever purpose, you empower him to use his reason and autonomy in the matter. “If he did decide to give the money for this purpose, he would be choosing to make

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30 *Johnson*, available online at <http://plato.stanford.edu/entries/kant-moral/>, checked on 7/10/2015, section 6. Note that this idea is not shared throughout the philosophical realm. A completely opposite account can be found in *Hobbes*: “The publique worth of a man, which is the Value set on him by the Common-wealth, is that which men commonly call DIGNITY. And this Value of him by the Common-wealth, is understood, by offices of Command, Judicature, publike Employment; or by Names and Titles, introduced for distinction of such Value.”, *Hobbes* 1651, chapter 10, section ‘Dignity’, original emphasis

31 Of course the very same example can be (and is frequently) used to illustrate the first version of the categorical imperative: You cannot logically conceive of a world in which ‘Making lying promises to get what I need’ is a universal law, since in this world there would be no institution of a promise in the first place. Easily said, if everybody is lying and cheating all the time, then nobody would believe anybody’s promises anymore and thus the original concept of promises loses its meaning. For a more detailed discussion see *Johnson*, available online at <http://plato.stanford.edu/entries/kant-moral/>, checked on 7/10/2015, Section 5

that purpose *his own*. Thus you would not merely be using him as a means to achieving *your* goal.” In the latter case you would respect his dignity.<sup>32</sup>

In the *Kantian* sense therefore, the concept of human dignity is shortly described as the respect that we owe to each other due to our distinctive human features. Violating somebody's dignity violates the universal law and at the same time means acting irrational.

## 2. Infringement of Human Dignity by Governmental Action

By now it is easy to see how this respect can be withheld or how someone's dignity can be infringed upon by government action. Treating people always as ends in themselves and never as a means only is the standard of evaluation in this respect. Treating people as mere means to an end is to objectify them, to use them like an object.<sup>33</sup> The Nazi regime, which interned specific groups of people (most notably people of the

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32 *Rachels* 1986, available online at [http://public.callutheran.edu/~chenxi/phil345\\_022.pdf](http://public.callutheran.edu/~chenxi/phil345_022.pdf), checked on 7/17/2015, original emphasis

33 Or animal for that matter, although this would only indicate that in most societies animals still have a status comparable to objects. It is not supposed to indicate that this status is correct and that animals don't have rights. It is to the contrary easily justifiable to attribute dignity and other rights to animals as well, although I would point out, not to the same extent as to humans and not to the same extent to all animals alike. For an introduction and discussion of the question whether a non-human animal can be a person, see *Singer* 2011, p. 94ff.. *Kant* however did not attribute dignity to animals. He concluded that they are merely there to be used by man. See *Rachels* 1986, available online at [http://public.callutheran.edu/~chenxi/phil345\\_022.pdf](http://public.callutheran.edu/~chenxi/phil345_022.pdf), checked on 7/17/2015

Jewish faith) in concentration camps, used them as forced laborers and killed them systematically without due process and any possibility of recourse to the authorities, clearly disregarded their status as persons.<sup>34</sup> Justice *Thomas* says: “Slaves did not lose their dignity (any more than they lost their humanity) because the government allowed them to be enslaved. Those held in internment camps did not lose their dignity because the government confined them.”<sup>35</sup> This statement is turning the whole idea of dignity on its head. Can there really be a more profound example of a violation of ones dignity by governmental action than slavery or the internment of Japanese-Americans without due process of law during World War 2? These examples illustrate the objectification of human beings and disregard for their status as persons par excellence.

The German Constitutional Court over time has developed a standard of human dignity which is exactly based on *Kant's* conception and has at its core the question of the objectification of a person. To this I want to turn next.

### 3. Human Dignity in the German Constitution

Article 1 Section 1 of the German constitution states:

*“Human dignity shall be inviolable. To respect and protect it shall  
 be the duty of all state authority.”*<sup>36</sup>

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34 See *Schultziner* 2003, p. 12f. for an account of the treatment and humiliation of Jews in concentration camps (quoting from Victor Frankl's ‘Man's search for Meaning’)

35 *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015), Diss. Thomas, p. 17

36 Basic Law for the Federal Republic of Germany 2012, available online at [http://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html#p0015](http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0015),

Already this simple statement is opposed to Justice *Thomas's* remarks. The framers of the German constitution obviously saw it as self-evident that human dignity can be violated and that the government has an obligation to protect it.

The German constitution was designed as an answer to the cruelty and atrocities of Nazi Germany. That is the reason why the basic rights have been put first and human dignity introduces these basic rights in Art. 1 of the constitution.<sup>37</sup> In fact, human dignity is such an important constitutional principle that, unlike most other articles, Art. 1 is unchangeable, as Art. 79 Sec. 3 stipulates.<sup>38</sup> If a violation of one's dignity is proven in court, there can be no justification for it. Unlike other basic rights in the following articles of the constitution, it is not possible to weigh dignity against any other right.<sup>39</sup> Apart from being relevant on its

updated on 7/11/2012, checked on 8/24/2015. In the German original: "Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt."; Grundgesetz für die Bundesrepublik Deutschland 2014, available online at <http://www.gesetze-im-internet.de/gg/BJNR000010949.html>, updated on 12/23/2014, checked on 8/24/2015

37 *Jarass/Pieroth* 2007, Art. 1 Rn. 1. There is a minor academic dispute about the character of human dignity as a subjective right. This dispute is most likely to be solved in the affirmative and does not have much practical implications. *Hillgruber* 2015, Art. 1 Rn. 1f.; *Jarass/Pieroth* 2007 Art. 1 Rn. 3

38 *Jarass/Pieroth* 2007, Art. 1 Rn. 2. Art 79 Sec. 3 reads as follows: "Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.", Basic Law for the Federal Republic of Germany 2012, available online at [http://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html#p0015](http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0015), updated on 7/11/2012, checked on 8/24/2015

39 *Hillgruber* 2015, Art. 1 Rn. 9ff.; *Jarass/Pieroth* 2007, Art. 1 Rn. 16

own account, human dignity is most important in conjunction with other basic rights, such as the right to life and personal integrity (Art. 2 Sec. 2) or the right to free development of personality (Art. 2 Sec. 1), among others.<sup>40</sup> Human dignity is attributed to everybody, regardless of his social status or his individual capabilities. Children as well as adults, mentally ill as well as healthy, already alive or pre-birth, everybody is a carrier of dignity. Even after a persons' death, a certain amount of dignity prevails. It does not matter whether a person is aware of his rights or ignorant.<sup>41</sup> Just as the above mentioned international treaties, so also the German constitution does lack a definition of human dignity in its text. The German constitutional court over time has helped to fill up the stipulation with content.

The principles which have been developed over time by the German constitutional court are very close, if not in part identical, to the above mentioned philosophical ideas of *Immanuel Kant*. Every human being deserves a certain amount of respect, which is attributed to him solely on the basis of his being human. The government has to grant this respect to everybody, without exception. The strongest definition frequently used by the court is the so called 'Object-Formula', which states that a human being may not be used solely as an object in the process of governmental action. This does not imply that any kind of submission to the rules of a country or to criminal punishment is intolerable. It does mean however that exceptionally cruel punishments for example are outlawed, as well as slavery or torture during police investigations, which would treat a person only as an object in the

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40 Hillgruber 2015, Art. 1 Rn. 1ff.; Jarass/Pieroth 2007, Art. 1 Rn. 5, 17

41 Hillgruber 2015, Art. 1 Rn. 3ff.; Jarass/Pieroth 2007, Art. 1 Rn. 8

process of criminal procedure by bending his autonomy, self-determination and will.<sup>42</sup>

Cases in which a court held that Art. 1 Sect. 1 was violated are not hard to find. A few examples:

- In 1977 the Constitutional Court held that a criminal sentence of life imprisonment is only in accordance with Art. 1 Sect. 1, if the convicted criminal has a chance to be released from prison again at some point in his life. A mere possibility of pardon, for example by the head of state, is not enough to fulfill this requirement. There have to be specifically defined legal measures a prisoner may take.<sup>43</sup>
- In 1981 the Federal Administrative Court of Germany, in a by now infamous and highly disputed decision, ruled that 'peep-shows' violate the human dignity of the exposed women. In the same decision it was held that on the other hand an ordinary striptease-show does not violate the dignity of the stripper.<sup>44</sup>
- In 2000 the Higher Administrative Court of North Rhine-Westphalia ruled that 'laser-tag' games violate human dignity and could therefore be forbidden by local authorities. In a similar decision of the same year they ruled that 'paintball' games violate human dignity as well.<sup>45</sup>
- In 2006 the Constitutional Court ruled that § 14.3 of the Aviation

42 *Hillgruber* 2015, Art. 1 Rn. 12ff.; *Jarass/Pieroth* 2007, Art. 1 Rn. 11f.

43 BVerfGE 45, 187; *Jarass/Pieroth* 2007, Art. 1 Rn. 18; an English translation of parts of the decision can be found at: Germany, 45 BVerfGE 187 2003, available online at <http://www.hrcr.org/safrica/dignity/45bverfge187.html>, updated on 12/17/2003, checked on 8/24/2015

44 BVerwG 64, 274

45 Laser tag: OVG NRW, 5 A 4916/98; Paintball: OVG NRW, 5 B 588/00

Security Act is “not compatible with the right to life (Article 2.2 sentence 1 of the Basic Law) in conjunction with the guarantee of human dignity (Article 1.1 of the Basic Law)” and therefore void. The statute, crafted in the aftermath of the September 11<sup>th</sup> 2001 attacks on the World Trade Center in New York, would have allowed armed forces to shoot down an aircraft in a similar terrorist scenario, if it were to occur in Germany.<sup>46</sup>

This small collection already illustrates vividly, that human dignity as a constitutional concept can be a very powerful device. It may be used to justify a variety of outcomes, some of which deal with serious matters (like the Aviation Security Act), others which are just plain silly (like the peep-show or laser-tag examples). The 2006 decision also illustrates vividly how the object-formula can be applied. Civilians onboard the aircraft would be degraded to mere objects in the authorities’ efforts to stop the terrorists. Therefore, as long as there are civilians onboard, it is not permissible to shoot down the aircraft. If there were only terrorists onboard, the aircraft may be shoot down.<sup>47</sup>

Even though in German constitutional law, the concept of human dignity has a comparatively narrow and specific content, even this is still too vague and open to achieve a certain predictability of legal decisions.

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46 Press Release: Authorisation to shoot down aircraft in the Aviation Security Act void, available online at <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2006/bvg06-011.html>, checked on 8/24/2015

47 Press Release: Authorisation to shoot down aircraft in the Aviation Security Act void, available online at <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2006/bvg06-011.html>, checked on 8/24/2015



The peep-show and laser-tag cases illustrate how the government, backed up the courts, may use the concept to impose certain ideologies or moral standards.<sup>48</sup> The notion that human dignity also applies up to a certain degree to conduct between individuals, regardless of their consent,<sup>49</sup> leads to a situation in which a basic right, which supposedly is there to protect the individual from governmental force, is turned on its head and used against these same individuals participating in voluntary conduct.<sup>50</sup>

This exact same fear is to be found in the criticism to the *Obergefell* decision. Here it might be even more relevant to stay cautious, since the concept of human dignity in U.S. constitutional law is still not as narrowly defined as the German one.

#### 4. Human Dignity in the U.S. Constitution

Unlike Germany and some other countries, the U.S. constitution does not mention the terms 'dignity' or 'human dignity' anywhere in its text, as Justice *Thomas* rightfully points out.<sup>51</sup> Not surprisingly, already

48 Although to be fair, these cases did not end up in the constitutional court, which would have been the highest authority on the matter and may or may not have ruled differently.

49 *Hillgruber* 2015, Art. 1 Rn. 7f.; *Jarass/Pieroth* 2007, Art. 1 Rn. 14

50 A more detailed criticism of the concept of human dignity as used by the German judiciary can be found in a speech given by *Norbert Hoerster* at the University Hospital of the University of Würzburg in Germany, who labels the whole concept as nothing more than an 'empty formula'; video available online at <http://www.philosophicum.ukw.de/symposium-menschenwuerde/video-vortrag-6.html>, checked on 8/27/2015

51 *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015), Dissent *Thomas*, p. 16. One

before the ruling there were voices warning to use dignity as a basis for legalizing same sex marriage, since it might create a precedent for future decisions in which dignity could be used to justify any kind of outcome.<sup>52</sup>

That dignity is not specifically mentioned in the text, does not imply however that the U.S. constitution does not recognize a right to dignity. On the contrary, the idea and rationale of human dignity is prevalent throughout several Supreme Court rulings over time. In fact, the idea has so far been invoked by more than 900 Supreme Court decisions over the past decades.<sup>53</sup> The first time the phrase ‘human dignity’ itself was specifically stated was in 1946 in a dissenting opinion by Justice *Murphy* to the decision in ‘*In re Yamashita*, 327 U.S. 1, 29 (1946)’. Equivalent expressions can be traced back even further and although the concept might not have been alien to Supreme Court decisions before, the increasing usage of the term from 1946 onwards may be linked to the Preamble of the United Nations Charter, which was signed in San Francisco prior to the decision on June 26<sup>th</sup> 1945 and which, similar to the above mentioned Universal Declaration of Human Rights, mentions

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may however find a reference to dignity in the constitutions of Montana, Illinois and Louisiana, *Rosenfeld/Sajó* 2012, p. 381 fn 74

52 *Rosen* titled “The Dangers of a Constitutional ‘Right to Dignity’ – It may provide support for same-sex marriage, but it also empowers judges to decide whose ‘dignity’ they wish to prioritize.”, *Rosen* 2015, available online at <http://www.theatlantic.com/politics/archive/2015/04/the-dangerous-doctrine-of-dignity/391796/>, updated on 4/29/2015, checked on 7/8/2015

53 *Rosen* 2015, available online at <http://www.theatlantic.com/politics/archive/2015/04/the-dangerous-doctrine-of-dignity/391796/>, updated on 4/29/2015, checked on 7/8/2015

“the dignity and worth of the human person” in its preamble.<sup>54</sup> “... from the 1940s onwards, references to human dignity have played a significant, if not doctrinally, systematically clarified role. The concept has been important for matters such as cruel and unusual punishment, the constitutionality of the death penalty, prisoners’ rights and conditions of confinement, (body cavity) searches, taking of bodily fluid and other intrusions on bodily integrity, and procedural rights such as the privilege against self-incrimination or personal reputation.”<sup>55</sup>

In the context of same-sex relationships and in each case under the influence of Justice *Kennedy*, who also in *Obergefell v. Hodges* delivered the opinion of the court, dignity has been invoked by prior decisions as well. In 2003 the Supreme Court ruled in *Lawrence v. Texas*<sup>56</sup> that laws, which criminalize sexual conduct among same-sex couples are unconstitutional, a decision overruling the court’s 1986 decision in *Bowers v. Hardwick*,<sup>57</sup> which upheld such laws. In 2013 the court in *United States v. Windsor*<sup>58</sup> struck down the provision in the Defense of Marriage Act (DOMA), which excluded a same-sex partner from the definition of ‘spouse’ as used in federal statutes. In both instances Justice *Kennedy* delivered the opinion of the court and made ample reference to dignity.<sup>59</sup>

The majority opinion in *Obergefell v. Hodges* therefore does not

54 *Paust* 1984, p. 151ff.; for the text of the charter see: Charter of the United Nations: Preamble, available online at <http://www.un.org/en/documents/charter/preamble.shtml>, checked on 8/20/2015

55 *Rosenfeld/Sajó* 2012, p. 381

56 *Lawrence v. Texas*, 539 US 558

57 *Bowers v. Hardwick* 478 US 186

58 *United States v. Windsor* 570 US \_\_\_\_ (2013)

59 *Ho* 2015, available online at <http://jurist.org/forum/2015/07/Jeremiah-Ho-Obergefell-Hodges.php>, updated on 7/22/2015, checked on 8/25/2015

make up a new right when it talks about dignity, it rather draws on past decisions. Furthermore, even if there is no such right specifically mentioned in the text of the constitution, it should be noted that even a constitution is a legal document, which is not immune to change over time. Not only amendments through the political process, but also changes in interpretation mirror changing notions of legal debate and society as a whole. How else may one explain the many instances in which the Supreme Court itself overruled one of its older decisions (assuming that the constitution wasn't amended in between)?<sup>60</sup>

What is more worrying than the 'invention' of new rights, is the lack of specific content of the concept of human dignity, just as or even more than described in the German case above. So far human dignity has been mentioned in many decisions, without the court ever finding an agreed upon standard of evaluation, which would enable a predictable outcome of future decisions. *Paust*, already in 1984, shows in which alternate and seemingly unrelated circumstances dignity has been invoked by the U.S. Supreme Court: "... the reader will note that the concept of human dignity is extremely broad. It has been used, perhaps as it always should, as an open-ended and dynamic constitutional precept that is often interdependent with most of our constitutional rights and a fundamental belief in the inherent dignity and worth of every human

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60 In opposition to Justice *Roberts's* dissenting opinion, the majority opinion implies that the interpretation of the constitution is up for change over time: "The single most important theme in the opinion is that the Constitution provides not merely space but also support for expanding the perimeters of human rights.", *Hunter* 2015, available online at <http://www.thenation.com/article/the-undetermined-legacy-of-obergefell-v-hodges/>, updated on 6/29/2015, checked on 7/8/2015

person.”<sup>61</sup> In a similar direction, though not limited to the U.S., points *Schultziner* in his 2003 article ‘Human Dignity: Functions and Meanings’. Here he lays out not only the rise of the idea of human dignity in various areas of discourse, but also points out that its meaning has become ever more ambiguous over time.<sup>62</sup> He finds several possible contents of human dignity, but concludes that it cannot be precisely defined.<sup>63</sup> *Rosen* holds that “... dignity is such an abstract concept that its boundaries are difficult to discern.” and concludes that liberals may come to regret the establishment of the principle if it ever is used against their interests.<sup>64</sup> *Hunter* even goes so far as implying that ‘equal dignity’ as a new concept of right is invoked by Justice *Kennedy* specifically because it does not have “... an established standard for its assessment.” The majority, in other words, therefore was free to make up whatever justification they pleased and didn’t have to bother holding their evaluation up to scrutiny in light of established standards of, for example, the constitution’s Equal Protection Clause.<sup>65</sup>

The fear of misuse or overuse of this ‘newly’ established concept should not be taken too lightly, but not too seriously either. A further discussion follows in the conclusion below.

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61 *Paust* 1984, p. 150

62 *Schultziner* 2003

63 *Schultziner* 2003, p. 1

64 *Rosen* 2015, available online at <http://www.theatlantic.com/politics/archive/2015/04/the-dangerous-doctrine-of-dignity/391796/>, updated on 4/29/2015, checked on 7/8/2015

65 *Hunter* 2015, available online at <http://www.thenation.com/article/the-undetermined-legacy-of-obergefell-v-hodges/>, updated on 6/29/2015, checked on 7/8/2015

### III. Human Dignity and Same Sex Marriage

One further question, which needs to be answered, is what the decision would have been in Obergefell v. Hodges without reference to dignity. Would it have changed the outcome? Most likely not! Even without reference to equal dignity under the law, established principles of the U.S. constitution like liberty and equality would most likely have supported a similar outcome. And in that sense might have supported an outcome, which holds up to scrutiny much more than the one which actually was derived at. *Hunter* puts it perfectly:

*“The essential holding in Obergefell is easy to state: The right to marry has long been considered a fundamental right under the Due Process Clause, meaning that a state may not deny it to an individual unless necessary to achieve a compelling public interest. There is no such interest in denying that right to same-sex couples, a conclusion fortified by the also long-recognized principle that states must apply laws equally, all the more so when they entail fundamental rights.”*<sup>66</sup>

Noteworthy again, is a comparison to the German model. First, German law does not recognize the institution of same-sex marriage. In Germany same-sex relationships are ruled by the Act on Registered Life Partnerships of 2001,<sup>67</sup> which allows for same-sex couples to register a

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<sup>66</sup> *Hunter* 2015, available online at <http://www.thenation.com/article/the-undetermined-legacy-of-obergefell-v-hodges/>, updated on 6/29/2015, checked on 7/8/2015

<sup>67</sup> German: Gesetz über die Eingetragene Lebenspartnerschaft (Lebenspartnerschaftsgesetz – LPartG), available at: <http://www.gesetz-im-internet.de/lpartg/index.html>, checked on 8/26/2015

lifetime partnership, which is in most instances similar to the institution of marriage regulated in Book 4 of the German Civil Code. The law was challenged in the constitutional court after its enactment and upheld in 2002.<sup>68</sup> In later decisions the court brought the two institutions ever more closely together and strengthened rights of same-sex couples. The latest decisions from 2013 strengthened adoption rights for same-sex couples<sup>69</sup> and held different treatment in tax regulation between marriages and lifetime-partnerships to be unconstitutional.<sup>70</sup> In all these decisions however, the main focus of the argument was on equality (laid down in Art. 3 of the German Constitution), never on human dignity (Art. 1).

#### IV. Conclusion

One doesn't need to invoke dignity to rule in favor of same sex marriage. Dignity is a concept which forbids to withhold a person's respect, a respect he deserves from anybody and most of all from the government, simply because he is a human being. But, at the same time, it is also not entirely wrong to use a concept of dignity and specifically 'equal dignity in the eyes of the law' in legal debate and decision making, as the majority in *Obergefell v. Hodges* does. The problems of this decision are its implications for the future of constitutional law. Can dignity be a powerful and useful concept, which will aid decision making? No doubt about it. Can it also be a powerful ally in reducing, rather than

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68 BVerfGE 105, 313

69 2 BvR 1981/06

70 1 BvR 3247/09

protecting peoples' rights? No doubt about that either.

The concept of human dignity is not new in U.S. constitutional law. It is neither novel to *Obergefell v. Hodges*, nor has it been finally established with the decision due to a lack of a proper definition, respectively an agreed upon standard of evaluation. But even where there is a possible standard of evaluation, as the example of the German situation illustrates, the fear of misuse is not to be underestimated. What is needed to avoid this trap, is to develop this standard further in future decisions and not let rulings of the highest court of a country be clouded in obscurity or to put it in Justice *Scalia's* words: "... the mystical aphorisms of the fortune cookie."<sup>71</sup> A look at the philosophical discussion about dignity as well as at constitutional law of other countries and international law may bring the debate closer to an actual definition. Even if there never will be a solid definition and a certain amount of vagueness is unavoidable, it is important to lay out certain standards in order to prevent the establishment of a handy, but borderless concept, which could justify any possible outcome.

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71 *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015), Dissent *Scalia*, p. 8 fn 22



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