CONFERENCE PROGRAMME

Human Dignity and the Constitutional Crisis in Europe: *Humanity, Democracy, Social Europe*

A Two-Day Conference

Thursday 15th – Friday 16th June 2017

European University Institute, Florence

Teatro, Badia Fiesolana

Via dei Roccettini 9,

I-50014 San Domenico di Fiesole (FI) - Italy

Conference Organisers

Gábor Halmai

Catherine Dupré

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THURSDAY 15th JUNE 2017

9.00 REGISTRATION

9.30 WELCOME AND OPENING REMARKS

Chair: Gábor Halmai (EUI, Italy)

Catherine Dupré (University of Exeter, UK)
Manfred Nowak (EIUC, Italy)

10.30 KEYNOTE I

András Sajó (Vice-President and Judge at the European Court of Human Rights; Professor of Law at the Central European University and Global Visiting Professor of Law at New York University Law School)

12.00 LUNCH

13.00 PLENARY I - A COMPASS FOR DEMOCRACY: LEGITIMACY AND POLICY-MAKING

Chair: Daniel Bedford (University of Portsmouth, UK)

Human Dignity and Public Policy
Jörg Fedtke (Tulane University Law School, USA, and University of Passau, Germany)
Judicial Activism / Democratic Activism: the Democratizing Effects of Dignity Jurisprudence
Erin Daly (Widener University, USA)
Dignity, Democracy, Legitimacy: The European Citizen as Subject and Agent
Alexandra Kemmerer (Max Planck Institute for Comparative Public and International Law, Germany)

14.30 REFRESHMENTS

14:45 PLENARY II - SHAPING COLLECTIVE IDENTITY: CULTURE AND CIVILISATION

Chair: Deidre Curtin (EUI, Italy)

'Dignity' and 'Identity' in the European Legal Culture: An Ambiguous Relationship
Cesare Pinelli, Sapienza (Sapienza University of Rome, Italy)
Destruction of Constitutional Order and Principles of Liberal Democracy – The Case of Poland
Aleksandra Gliszczyńska-Grabias (Poznań Human Rights Centre, Institute of Law Studies of the Polish Academy of Sciences, Poland)
Discourses of Collective Dignity, the State of Exception and the Twilight of the Rule of Law: The Case of Poland
Przemyslaw Tacik (Jagiellonian University, Poland)

16:15 REFRESHMENTS

16:30 PLENARY III - SHAPING INDIVIDUAL IDENTITIES: (DIS)RESPECTING DIFFERENCE

Chair: Bruno de Witte (EUI, Italy)

Human Dignity as New Frontier: The Conquest of the West?
Stéphanie Hennette-Vauchez (Paris West University Nanterre La Défense, France)
Human dignity, Paternalism and Religious Symbols
Anabela Costa Leão (University of Porto, Portugal) and Benedita Mac Crorie (University of Minho, Portugal)
Bringing Dignity into the European Constitutional Adjudication of Roma Rights
Bujar Taho (CEU, Hungary)
The Istanbul Convention - Ensuring the Dignity of the Victim Within the Context of a Challenging European Landscape
Shazia Choudhry (Queen Mary University of London, UK)

FRIDAY 16th JUNE 2017

9.00 PLENARY IV - A LIFE IN DIGNITY: CHALLENGING AUSTERITY

Chair: Claire Kilpatrick (EUI, Italy)

Diverse Approaches, Unified Protection? European Human Rights Institutions Facing Austerity
Rory O'Connell (Ulster, UK)
Dignity and Solidarity – Lost in Transition. The Case of Hungary
Nóra Chronowski (ELTE, Budapest)
What 'Human Dignity' tells us about Human Rights Law and the World Today
Margot Salomon (LSE, UK)

10.30 KEYNOTE II

Dieter Grimm (Professor of Public Law at Humboldt University; Visiting Professor of Law and Gruber Global Constitutionalism Fellow at Yale Law School)

12.00 LUNCH

13:00 PLENARY V - NON-CITIZENS AS HUMAN BEINGS: INCLUSION AND EXCLUSION

Chair: Panos Kapotas (University of Portsmouth, UK)

Human Dignity and the Balance between Integrative and Selective Functions of Citizenship
Maria Dicosola (University of Bari, Italy)
Anti-Migration Policy and Human Dignity: The Misuse of Constitutional Identity in Hungary
Gábor Halmai (EUI, Italy)
Access to Healthcare, the European Legal Space, and the Prohibition of Inhuman and Degrading Treatment under the ECHR: Towards a Human Dignity Test for Assessing the Legality of Deporting Rejected Asylum-Seekers?
Charlotte Steinorth (CEU, Budapest)

14:30 REFRESHMENTS

14:45 PLENARY VI - FRAMING CONSTITUTIONAL REVISION: SOVEREIGNTY AND SELF-DETERMINATION

Chair: Gábor Halmai (EUI, Italy)

Human Dignity and Constituent Power
Jacob Weinrib (Queen's University, Canada)
Repeal of the Human Rights Act 1998: The Common Law to the Rescue?
Daniel Bedford (University of Portsmouth, UK)
Should Issues Related to Human Dignity be Subject to Popular Referendums? A Contextualized Analysis of the Debate on Same Sex Marriage and the Review of the Romanian Constitution
Elena Brodeala (EUI, Italy)

16:15 REFRESHMENTS

16:30 CLOSING REMARKS

Chair: Catherine Dupré

Martin Scheinin (EUI, Italy)
Panos Kapotas (University of Portsmouth, UK)

ABSTRACTS

PLENARY I - A COMPASS FOR DEMOCRACY: LEGITIMACY AND POLICY-MAKING

Human Dignity and Public Policy
Jörg Fedtke (Tulane University Law School, USA, and University of Passau, Germany)

Human dignity is considered a core value in many societies. Human dignity is most often thought to shield the individual against a wide range of state activities such as data collection and processing or intense forms of surveillance, inhuman and degrading punishment, torture, lifelong imprisonment without the possibility of parole, the downing of hijacked commercial airliners that terrorist threaten to crash and cause tremendous damage on the ground, or execution. The state must in these cases *refrain from acting* in a particular way.

A second, less common, dimension points in the opposite direction. Human dignity can require the creation of socio-economic conditions that enable individuals to lead a dignified existence. Access to food and water, shelter, medical care, a basic education or even the political and cultural life of a community come to mind. The state must *provide* these fundamentals of life.
This dimension is further extended if the state is placed under an obligation to actively protect individuals beyond the existential core. The focus here is on the duty of the state to safeguard human dignity from threats that usually (but not always) result from the actions of other private parties. Minors lacking the assets or experience to secure loans of their entrepreneurial parents may have to be protected against banks that exploit the close family relationship and seek to enforce financially suffocating surety contracts long after the business activities of their parents have gone south. Peep shows that put prostitutes on display through small viewing slots, a low-tech form of pay-per-view, may have to banned even if the women consent to the situation. The discovery and medical or commercial exploitation of the human genome may face constitutional limits. The state is under an obligation to *intervene*.

Finally, it may be possible to conceptualize human dignity as a fundamental state principle or *Grundnorm* that informs (and even prescribes) public policy in much wider terms. Courts may have to take human dignity into account when interpreting statutes. The legislator may be under an obligation to create a legal infrastructure that protects and promotes human dignity in a large number of societal contexts. And the executive may have to act in light of considerations flowing from human dignity. The state may, in short, have to *shape society* in a way that promotes human dignity and adapt its approach in key policy areas such as the refugee crisis, political relations with foreign nations, the use of military force abroad or environmental protection. Concerns over human dignity may thus have compelled Angela Merkel, Chancellor of Germany, to admit 1,000,000 refugees in need across southern and eastern Europe in 2015 even though they were neither German citizens nor physically present within the territory at the time. She described the decision of her administration to help the refugees as a 'humanitarian imperative' (*humanitärer Imperativ*). Membership rights in the European Union can be suspended if countries violate their commitment to human dignity. Laser tag, played with much enthusiasm at corporate parties or private birthdays in so many countries, may be unconstitutional.

It is this fourth dimension of the concept – the potential of human dignity to provide a compass for public policy – that is of interest here.

Questions arise. What are the exact contours of this wider concept of human dignity – both in terms of its constitutional moorings and substantive reach? Can we draw on our experience with human dignity as a right that is inherent in and attaches to every individual human being in an attempt to define its substance as a compass for shaping various areas of public policy? Can human dignity – defined and promoted as the key paradigm of all collective (state) endeavor – provide an answer to what many observes describe as a fundamental crisis of western democracy at the outset of the 21st Century? This paper seeks to explore some of these questions from a comparative and interdisciplinary perspective by utilizing the experience of societies that have identified human dignity as a value that transcends the traditional dimension of human rights protection.

Judicial Activism / Democratic Activism: the Democratizing Effects of Dignity Jurisprudence
Erin Daly (Widener University, USA)
In most of the world's constitutions, human dignity is protected as a fundamental or foundational value, an independent right, or a right associated with a particular interest (e.g. labor, bodily integrity, equality, privacy) or a discreet segment of the population (e.g. women, the elderly or children, prisoners). But dignity often resists energetic judicial implementation and application in part because of its amorphous nature which can open courts and tribunals to charges of over-reaching, legislating from the bench, or violating principles of separation or balance of powers.

Yet, somewhat paradoxically, judicial enforcement of dignity rights enhance not judicial authority but rather the political domain of active and engaged citizenship. Judicial vindication of dignity rights helps to build a strong democracy by reinforcing the dignity of every human being within the body politic. This can happen in several ways. First, when courts and tribunals vindicate dignity rights to political participation, such as the dignity-based rights to vote, to participate in the political process (including the necessary ancillary rights to information and access to justice). Second, it can happen when courts vindicate sub-

stantive rights that ensure the existensminimum -- the quality of life necessary for individuals to participate in political activity, including adequate access to food, water, healthcare, and shelter, as well as education. Finally, courts and tribunals can enhance the political domain simply by recognizing the equal value of every member of the polity: a decision that does no more than acknowledge the dignity of a claimant (win or lose on the merits) nonetheless sends a message that the claimant (and others similarly situated) are valued members of the political community; this, in turn, can encourage political engagement and active participation in the decisions of the political community. Judicial enforcement of dignity rights, therefore, should be recognized as enhancing not judicial authority, but the political realm of public engagement and decisionmaking.

Dignity, Democracy, Legitimacy: The European Citizen as Subject and Agent
Alexandra Kemmerer (Max Planck Institute for Comparative Public and International Law, Germany)

PLENARY II - SHAPING COLLECTIVE IDENTITY: CULTURE AND CIVILISATION

'Dignity' and 'Identity' in the European Legal Culture: An Ambiguous Relationship
Cesare Pinelli, Sapienza (Sapienza University of Rome, Italy)

In the European legal culture, theoretical accounts of fundamental rights reflected for a longwhile an atomistic view of the individual as disconnected from others. It came from the Enlightenment's legacy, and corresponded to the fact that liberty and equality, rather than dignity, were the main principles inspiring the 19th century's constitutionalism. It was only in the aftermath of World War 2 that the latter joined the former in driving the construction of fundamental rights, as a tool for 'striving to embrace the complexity of human identities' (C.Dupré, *The Age of Dignity*, at 194). Dignity, particularly in the 1948 Universal Declaration of human rights, was thus felt as an appeal to humanity, and, as such, a value that would at least complement those of liberty and equality. It requires the mutual recognition of a minimum moral identity of human beings which, in turn, implies a relational notion of identity that cannot be reconciled with the Rawlsian 'unencumbered self', or with an atomistic view of the individual.

At this respect, dignity is likely to challenge the notion of identity lying at the core of fundamental rights' theories, that corresponds to the following account: 'Notre esprit semble rivé au mode d'appréhension cartésien de la réalité psychique. Nous avons peine à imaginer autre chose qu'une substance entrant secondairement en relation avec des etres analogues, chacun se tenant en soi et par soi. Ce faisant nous manquons la constitution relationnelle de la personne, relative à la primauté absolue de la relation elle-meme" (D.Bourg, 'Sujet, personne, individu', *Droits*, 1991, n. 13, 88).

This habit may be a reason why, in spite of post-World War 2 constitutional declarations, dignity did not drive scholarly attention in continental Europe, with the exception of Germany, until the last decade of the past century, when an increasing reliance on dignity affected both the European and national case-law, together with its recognition in the EU Charter of fundamental rights.

And yet, 'Dignity-based universal human rights mean an inclusion into the (hypothetical and universal) moral community; it is an ultimate act of moral inclusion into an otherwise immoral body politic. Dignity is a-psychological, it does not reflect emotional or other psychological needs, and it does not provide identity, except the fundamental one of equality of the self, irrespective of status, that is, irrespective of everything social'; accordingly, 'The intuitions that support human rights easily fall prey to identity concerns and locally determined cultural framing' (A.Sajo, *Constitutional sentiments*, 66-67).

Rather than to an abstract and legally enforced notion, 'identity' is here referred to what each person, or each community, thinks of itself. And here comes the difficulty of reconciling dignity with identity, which the rise of populism and xenophobia vis-à-vis the refugee crisis throughout Europe suffices to demonstrate.

Hence the ambiguity of the dignity/identity relationship which I would like to explore in my paper. Especially because it might shed some light on the ostensible contradiction between the increasing judicial protection of dignity-based fundamental rights and neglect of the minimum standard of dignity emerging inter alia from the building of walls against alleged invasions of foreigners and, inevitably, among European peoples as well.

Destruction of Constitutional Order and Principles of Liberal Democracy – The Case of Poland

Aleksandra Gliszczyńska-Grabias (Poznań Human Rights Centre, Institute of Law Studies of the Polish Academy of Sciences, Poland)

The end of the "pedagogy of shame" and "apologizing policy" was announced by the "Law and Justice" Party on the night of its electoral victory in October 2015. It was a clear reference to the behavior of a large part of Polish society, including top politicians, who expressed pity, shame and the feeling of co-responsibility for the truth (disclosed several years ago) about the Jedwabne Pogrom in 1941, when Poles burnt their Jewish neighbors in a barn. From now on, said the new government, Poles are to be presented only as victims, never perpetrators of past atrocities. Very soon this new, so-called „national collective loyalty" will be legally enforceable, under jail penalty. Polish Minister of Justice is currently preparing a criminal code provision - The bill on the prevention of insult to the national honor and good name of the Polish nation. The new law will target not only scholars dealing with the past but also such artist as Olga Tokarczuk, an eminent Polish writer, who was bold enough to state publicly: "*We contrived a narrative of Polish history depicting Poland as a tolerant, open country, one which has never disgraced itself with any wrongdoing towards its minority groups. (…) Meanwhile, as colonizers and ethnic majority we did appalling things, suppressing the minorities; we were slaveholders and murderers of Jews*."

On the electoral night nobody suspected, however, that imposing new historical narrative would be only one element of a broader plan, namely eradication of the existing constitutional order and the rule of order in Poland. This plan includes: hamstring of the Constitutional Tribunal; introducing the primacy of a group's dignity over the dignity of an individual; departure from the adjective 'liberal', which has accompanied Polish democracy, resulting in the reduction of the democratic system to the element of free elections; violation of international standards in the area of human rights protection; grotesque understanding of the notion of "Polish nation", whose honor must be defended with methods of criminal repression.

The paper will try to demonstrate the consequences of going away from the principles of liberal democracy and international legal standards in the area of human rights protection, including protection of human dignity and freedom of speech. In particular I would like to demonstrate, in the legal comparative and historical context, how destructive could the consequences of the transfer of the rights and freedoms from an individual to the collective defined as "nation" be and consider how mechanism of "militant democracy" can be applied in a situation when, under the pretext of protection of the "dignity of the state and nation", the constitutional norms and values are breached. I will also consider the fragility of legal protections, which, as the case of Poland proves, are not able to defend the constitutional order against the rule of the parliamentary majority which destroys it.

Discourses of Collective Dignity, the State of Exception and the Twilight of the Rule of Law: The Case of Poland

Przemyslaw Tacik (Jagiellonian University, Poland)

The aim of the proposed paper is to provide an in-depth study of the link between the usage of dignity-related terms in Polish public discourse and the conspicuous upsurge of nationalist and authoritarian rhetoric and practice of executing power. This case study will be taken for a starting point to outline some generalisations on the ambiguity of the post-Enlightenment logic of sovereignty, still inherent in the concept of fundamental rights and dignity of human beings.

Since 2015, when the new, self-proclaimed conservative (and, in fact, authoritarian-revolutionary) government came to power in Poland, the country's budding democratic system was exposed to unprecedented strain. The new majority, lacking constitutional majority, did not work to reach the necessary threshold of support, but decided to simply disregard valid legal norms. Most notoriously, the Constitutional Tribunal was staffed by newly sworn-in "judges" who were elected even though there were no actual vacancies. In this sense, the applied procedures followed Giorgio Agamben's logic of the state of exception, in which rules are officially still valid, but rendered effectively inoperative. Concurrently, such moves were justified with rhetoric of dignity, adamant defiance towards previous foreign partners (almost all of them began to be presented in bad light) and shameless disregard for the rule of law as conceived of in the liberal vision of democracy. One of the most often repeated metaphors referred to these practices as "raising from the nation's knees". They were presented not only as admissible, but even necessary in the light of the nation's "interest". One of the most often cited justifications was coined by a member of the Parliament, a former hero of the Solidarity movement now supporting the authoritarian turn, who infamously stated that the law which does not serve the nation's interest should not be deemed law. As if to give an inadvertent parody of the Radbruch formula, the MP made the validity of law dependent on the vaguely understood "interest of the nation", transcendent to law.

This discourse of dignity was not only clearly opposed to the liberal discourse of individuals' dignity, but, more importantly, it was impermeable to the latter's influence. The new discourse of dignity referred either to the dignity of the whole nation (construed as an idealised community of similarly thinking individuals who support the turn) or to the dignity of the underprivileged layers of Polish society. In the classically authoritarian shortcut, the disfavoured "silent majority" was identified with the nation itself. Dignity of individuals as individuals has been practically overshadowed by the vision of dignity drawn from the nation's pride.

In order to explain the upsurge of dignity-founded authoritarianism in Poland, unprecedented on the European plane, I will seek a historical explanation in the exceptional position of Polish struggle for freedom and democracy. In no liberal European country after 1989 has been the dignity so visibly and shamelessly opposed to the rule law. As I will attempt to demonstrate, the concept of dignity is inherently ambiguous and may be easily intercepted by authoritarianism.

PLENARY III - SHAPING INDIVIDUAL IDENTITIES: (DIS)RESPECTING DIFFERENCE

Human Dignity as New Frontier: The Conquest of the West?
Stéphanie Hennette-Vauchez (Université Paris Nanterre France)

Was human dignity ever an inclusive model of constitutionalism? Rhetorically, it certainly has been. Emblematic in that respect is, among other examples, the 2000 EU Charter of fundamental rights whose explanatory report claims that human dignity is not only a fundamental right in itself but also the very foundation of fundamental rights. Historical works however have established that contemporary norms of human dignity derive from aristocratic norms of honor more than they express ontological / axiological norms (the right to have rights, based on the sole quality of human being). While leading authors have claimed that these ancient norms of honor had evolved in an egalitarian fashion and are now awarded to all persons (Whitman, Waldron), I wish to develop a more critical reading of the contemporary usages of human dignity as a legal principle –and to do so in both a technical and a theoretical perspective. Technically, I will seek to insist on the multiplication of instances in which human dignity serves not as a right (fundamental or other) but rather, as a ground for the limitation thereof. In order to do so, I will refer to various examples gathered in a variety of European constitutional legal orders but also, more specifically, to French law and the ways in which modes of reasoning that blossomed in the 1990s and 2000s on the concept of human dignity are now migrating to other landscapes (eg laïcité) and delivering similarly exclusionary solutions. Theoretically, pursuing analytical hypotheses that I formulated in a previous paper, I wish to insist on the illusion of axiological / inclusive understandings of human dignity, and insist, rather, on the identitarian and behavioral norms it conveys. Particular attention will be paid to the work "human dignity" and its variants are doing in fields such as religious freedom, nationality law or aliens' status.

Human dignity, Paternalism and Religious Symbols
Anabela Costa Leão (University of Porto, Portugal) and Benedita Mac Crorie (University of Minho, Portugal)

If it is true that most western countries are today characterized by cultural diversity, arising not only but also from immigration, religious diversity is one of the most, if not the most, visible face of that cultural diversity (in a broad sense). Therefore, there is no surprise that conflicts between dimensions of freedom of religion and other fundamental rights and/ or constitutional principles, from equality and human dignity to neutrality and separation between Church and State (whose scope remains, somehow, uncertain), arise frequently.

The case law of both national courts and the European Court of Human Rights (ECHR) provides several examples of cases concerning issues arising from the use of religious symbols in public places, among which those worn by women partially or totally covering the face. That is the case of the well-known Leila Şahin v. Turquey (2005) and, more recently, of S.A.S. v. France (2014), both of the ECHR, but also of the decision of the french Conseil Constitutionnel (2010) and the decision of the belgian Cour Constitutionelle (2012) on laws interdicting the use of clothing fully or substantially hiding the face in public places.
The prohibition of use of religious attire - namely headscarves, hijabs, niqabs or burqas – is generally grounded on a wide range of reasons. These reasons encompass, among others, the protection of public order and collective security, the State's duty to protect a certain conception of "living together" ("vivre ensemble") and the need to safeguard religious neutrality and "laicité" in specific places such as public schools, the need to safeguard the principle of equality between sexes and the protection of women´s autonomy and dignity.

In this paper we will explore this last type of reasons (even assuming they cannot be completely separated from the other). Although aiming to safeguard the autonomy of individuals, many of the bans imposed on the use of religious symbols in public spaces are based on paternalistic grounds, since the use of these symbols may reflect, many times, a deliberate choice. These bans seem, therefore, hardly compatible with autonomy itself, since autonomy should include the possibility of adopting a behavior that appears in the eyes of others as an option (a free exercise of choice) for inequality or exclusion.
The question to be posed is, therefore, if it is legitimate, in a plural society, based on the human dignity principle, for the State to limit the freedom of its citizens, protecting their fundamental rights against their own will, when they do not harm others or the community as a whole. Is the legal system entitled to protect the individual against the risk of the misuse of his freedom? Are the bans on the use of religious attire legitimate, when they aim to protect women who use them because they chose to do so?

Bringing Dignity into the European Constitutional Adjudication of Roma Rights
Bujar Taho (CEU, Hungary)

Over the last two decades, the ECtHR has been elaborating an extensive body of case law on the rights of Roma individuals often, though not always, instinctively relying on an anti-discrimination argument. Among the cases handled by the ECtHR, there are a few with significant implications for the definition of the Roma's collective identity as well as their quest for integra-

tion. More specifically, the Court has recognized "the right to a gypsy way of life," and has granted legal effect to "a marriage [presumably] entered into as per the Roma rites." Whereas these rulings have seemingly provided redress for the concerned Roma individuals, an inside look could reveal how exclusively relying on the anti-discrimination argument may give way to a stereotypical judgement which results in a 'segregative' approach that hampers their integration into the mainstream society. Moreover, the Court's legal reasoning reflects a submissive reliance on the arguments put forward by the applicants' legal counsels who are institutionally neither qualified nor required to observe the unintended policy implications of their legal arguments. Unless the Court takes a more active and sensitive role towards the incidental insinuations of its future decisions, it runs the risk of authorizing or legitimizing a stereotypical and divisive approach in the public policy cycles, which would inevitably challenge the credibility of the Court's constitutional adjudication. This does not mean that the Court shall abandon the anti-discrimination argument. Instead, it suggests that the Court must carefully evaluate the limitations of the anti-discrimination argument in reconciling individual and collective rights of the protected groups.

Indeed, as this article will argue, human dignity in its capacity as a neutral, dialogical and equalizing tool for interpretation of individual and collective rights could better inform adjudication of Roma rights by avoiding the antidiscrimination's inherited divisive effects while still ensuring redress for the applicants' short-term as well as long-term legitimate interests. In making this argument, this article will illustrate how from an institutional perspective, resort to human dignity carries transformative potentials for safeguarding the supremacy of the ECtHR in the current multi-layered and fragile constitutional adjudication in Europe.

The Istanbul Convention - Ensuring the Dignity of the Victim Within the Context of a Challenging European Landscape
Shazia Choudhry (Queen Mary University of London, UK)

In recent times there have been a number of policy reform initiatives and capacity building strategies in relation to violence against women within Europe. At the Council of Europe one major initiative has been the Convention on Convention on preventing and combating Violence against Women and Domestic Violence which attempts to ensure that European wide standards and support are made available to victims of domestic violence. The Convention is informed by a number of decisions of the European Court of Human Rights which assessed a number of claims made by victims of domestic violence in relation to Article 2, Article 3 and Article 8.

This paper will focus on how these claims are intrinsically linked to the concept of dignity and how the Istanbul Convention attempts to ensure that the dignity of all victims is maintained against a context of the 'othering' of non Europeans. It will employ a methodology of critical frame analysis as theorised by the literature on social movements, and anti-essentialist critiques within feminist literature to ask: how VAW is problematised; what solutions are offered; where they are located; to what extent they are gendered; and who has a voice in these policy and legal texts.

PLENARY IV - A LIFE IN DIGNITY: CHALLENGING AUSTERITY

Diverse Approaches, Unified Protection? European Human Rights Institutions Facing Austerity
Rory O'Connell (Ulster, UK)

The European Court of Human Rights and the European Committee on Social Rights have been faced with cases arising from the rise of austerity politics in Europe and consequent restrictions on economic and social rights. This paper will examine how those institutions have risen to the challenge of these cases highlighting their different contexts and approaches. The European Court of Human Rights enforces the European Convention on Human Rights, a text which does not explicitly protect most social and economic rights. Yet it has the most developed mechanism for individual judicial complaints in the human rights system. With a degree of hesitancy the European Court has started to address restrictions on economic and social rights in the context of austerity, at least where there is an excessive and individual burden on applicants. The European Committee on Social Rights on the other hand monitors compliance with the different versions of the European Social Charter, and its context is the inverse. The Charter's (or Charters') texts(s) explicitly deal with economic and social rights in some detail. Yet its enforcement mechanisms do not offer individual redress but focus on collective enforcement through monitoring and a collective complaints procedure which has not been ratified by all Council of Europe states. Focusing particularly on issues of social security and social welfare, the paper will consider whether the two institutions provide effective complementary protection for rights in the age of austerity. Do they provide a coherent unified response despite their diverse contexts or does diversity here lead to incoherence?

Dignity and Solidarity – Lost in Transition. The Case of Hungary
Nóra Chronowski (ELTE, Budapest)

The constitutional backsliding in Hungary since 2010 is well-known. The 'rule by law' governance and the frequently amended new constitution of 2011/12 also reformulated the frameworks of the protection of human dignity and social solidarity. The decline of the standards in this field is spectacular and visible.

The paper intends to call the attention to the dangers of this path which may even challenge the European solidarity as well.

(i) For this purpose a short section will be devoted to the notion of social solidarity and its realisation in Hungary in the pre-2010 constitutional practise. The Constitutional Court in the late 1990's was even willing to strike down austerity measures for the protection of social rights closely tying them to the protection of equal human dignity. Although social solidarity was underdeveloped societal practice for several reasons, the Constitutional Court strongly committed itself to the protection of human dignity and this way guaranteed a higher profile for social (solidarity) rights, especially in case of social care based on neediness.

(ii) Then, as a contrast, the 'non-solidary' system of the Fundamental Law and the new directions of the constitutional case law will be discussed. Ironically, during the elaboration of the new Hungarian constitution, the EU Charter of Fundamental Rights was taken as a starting point – at least, in the government's communication.

Solidarity rights were codified by the EU Fundamental Rights Convention in 2000 with regard to their close connection to the value of dignity. The principle of social solidarity also appeared in the case law of the CJEU as the foundation of social welfare system. Solidarity in the European Union is a common value recognised also by the preamble of the Charter and Articles 2-3 of the TEU, which can be considered as an identity-forming feature and socially it may serve the supranational community-building.

In the meantime, social security does not appear as a fundamental right in the Fundamental Law, but merely as something the State "shall strive" for, thus it only a state goal, which is a step backward in comparison with the former Constitution. Social insurance does not appear as a constitutional institution. Paragraph (3) of Article XIX raised serious concerns as it refers to uncertain measures: 'The nature and extent of social measures may be determined by law in accordance with the usefulness to the community of the beneficiary's activity.' What is useful to the community and who decides on the usefulness in certain cases? Might the social support be withhold in the absence of "useful activity" on this constitutional bases, even if the person concerned is needy and the cause of the situation falls outside his or her own fault? The member states has a wide margin of appreciation regarding their social security system, thus the rules of the Fundamental Law itself does not breach the EU law directly, but the new Hungarian constitutional regulation on social security does not guarantee the equal dignity and the property protection. The recent case law of the Constitutional Court reaffirms the initial concerns, the dignity supported solidarity lost in the post-democratic transitions in the past seven years.

What 'Human Dignity' tells us about Human Rights Law and the World Today
Margot Salomon (LSE, UK)

One way to consider what the principle of human dignity offers international human rights law is to see whether it can help address some of the grave concerns that challenge the emancipatory efforts of human rights law today. Drawing on several critiques that can be levelled against the operation of human rights in the current economic climate, this paper will reflect on whether human dignity is a tool that can further the cause of social rights in Europe.

PLENARY V - NON-CITIZENS AS HUMAN BEINGS: INCLUSION AND EXCLUSION

Human Dignity and the Balance between Integrative and Selective Functions of Citizenship
Maria Dicosola (University of Bari, Italy)

With reference to the relationship between foreigners and nationals, citizenship can perform either an integrative or a selective function. This is particularly evident when examining the rules concerning the acquisition of citizenship at birth and after birth. Indeed, with reference to the rules on the acquisition of citizenship at birth, it is common opinion that while the ius soli criterion is strongly integrative, the ius sanguinis criterion is more selective. Moreover, the integrative function of the mechanisms for the acquisition of citizenship after birth, including in particular naturalization, is clear.

However, the contrast between integrative and selective functions of citizenship is far from being sharp. Indeed, since the origins of modern States, citizenship laws have always been the object of several reforms with the aim of finding a balance between their functions, in particular in times of special social transformation.

For example, in most of the continental European countries that experienced massive fluxes of immigration since the end of the Second World War to the beginning of the second millennium, citizenship legislation was reformed with the aim of reinforcing its integrative function. In this context, in those countries traditionally based on the ius sanguinis principle, it was added also the possibility of acquiring citizenship on the basis of the ius soli rule, if a set of conditions were met.

In the balance between selective and integrative functions of citizenship, the former can also prevail. The 1981 reform of the citizenship law of the United Kingdom, followed by the 2004 reform in Ireland, both introducing limitations to birthright citizenship, are clear examples of this trend.

In addition, the selective function can also prevail in the rules for the acquisition of citizenship after birth. In this regard, the

comparative analysis of the citizenship tests introduced in most of the European countries in the last decades, usually, but not only, as counter-terrorism measures, shows how even the most integrative mechanisms for the acquisition of citizenship can indeed perform a selective function.

All this considering, my paper, on the basis of a comparative constitutional law analysis of the evolution of the rules on the acquisition of citizenship in some European countries (including United Kingdom, Ireland, France, Germany, the Netherlands, Belgium, Spain and Italy), argues that the selective function is prevailing over the integrative function. As a result, conferring citizenship to individuals born on the territory of a country to foreign parents or seeking to become members of the political community of the State where they moved as immigrants is becoming an hard process.

Is the predominance of the selective function of citizenship in line with the principle of human dignity? Reasoning on the basis of the philosophic contribution of Hannah Arendt – thus considering that the right to citizenship, by conferring the status of membership to a political community, is the precondition of the fundamental rights of the individuals – the answer should be negative.

Anti-Migration Policy and Human Dignity: The Misuse of Constitutional Identity in Hungary
Gábor Halmai, (EUI, Italy)

This presentation discusses the abuse of constitutional identity by the Constitutional Court as a pretext to justify the Hungarian government's refusal to apply the EU's refugee relocation scheme. As a reaction to the 2015 refugee crisis, the government of Hungary after psychological preparations adopted a series of anti-rule-of-law immigration laws followed by an invalid anti-migrant referendum. After a failed constitutional amendment, which aimed at legitimizing the no-refugee policy of the government, the packed Constitutional Court came to the rescue, and rubberstamped the constitutional identity defence. The misuse of constitutional identity, the presentation argues cannot be derived from the previous jurisprudence of the Court, which in the early 1990s established its concept of human dignity as 'mother right', a subsidiary of all rights in defence of individual autonomy, such as self-identity, self-determination as part of the 'general right of the individual'. Right before and after the EU accession of the country the Court followed a mild approach of limited EU law primacy approach, which did not change immediately after Viktor Orbán's government introduced an illiberal constitutional system and packed the Constitutional Court after 2010. The reason for change has been the government's anti-migration policy, and the Court was instrumental to justify the government's desire to exclude refugees from Hungary and to evade its obligations under European law. The presentation concludes that this misuse of constitutional identity, which cynically refers to human dignity and other fundamental rights for merely nationalistic political purposes discredits every genuine and legitimate reference to national constitutional identity claims, and strengthens the calls for an end of constitutional pluralism in the EU altogether.

Access to Healthcare, the European Legal Space, and the Prohibition of Inhuman and Degrading Treatment under the ECHR: Towards a Human Dignity Test for Assessing the Legality of Deporting Rejected Asylum-Seekers?
Charlotte Steinorth (CEU, Budapest)

Ever since the path-breaking Soering judgement, the European Court of Human Rights has firmly established in its case-law that the expulsion of a non-citizen to a country where the individual runs a real risk of being subject to inhuman or degrading treatment engages a State Party's Convention responsibility. The prohibition of expelling individuals to foreign jurisdictions in such circumstances was further strengthened through the Court's jurisprudence in the context of terrorism. Such was the importance given to the absolute nature of Article 3 that "the activities of the individual in question, however undesirable or dangerous" did not have any impact on the duty of the State party not to expose an individual to the risk of being subject to torture, inhuman or degrading treatment in a foreign jurisdiction.

The Court's case law in expulsion cases concerning seriously ill aliens who are unlikely to receive adequate medical care in their home country, however, suggests a more limited scope of protection. Contrary to its previous case-law under Article 3, the Court made reference in the landmark case of N v UK to the idea of a "fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights" alluding to the impossible burden that would be placed on Contracting States if required to provide "free and unlimited health care to all aliens without a right to stay." While the Court has shown a greater willingness in its recent Grand Chamber judgment (Paposhvili v Belgium) to consider the availability of treatment in the destination country and the impact of a removal measure on the alien's health condition when assessing a violation of Article 3, it did not entirely depart from its previous requirement of "very exceptional humanitarian circumstances".

The paper aims to critically engage with the Court's concerns relating to the resource-burden on the host country arising from health care costs of migrants without a right to stay within the jurisdiction of a European state. In doing so, the paper contrasts the reasoning of the Court in the health care cases of aliens without a right to stay with its earlier Article 3 jurisprudence on expulsion measures against foreigners suspected of involvement in terrorist activity. Whereas the Court's strong stance in favour of upholding Convention standards vis-à-vis undesirable foreigners in the context of anti-terrorism measures has been widely celebrated as a triumph of upholding the value of human dignity even for the least desirable, the Court's attitude to-

wards the protection of seriously ill asylum-seekers expresses a more hesitant approach.

The paper proposes a general human dignity threshold test to identify those foreigner who run a real risk of being subjected to conditions in which their human dignity will be violated - irrespective of the source of the violation.

PLENARY VI - FRAMING CONSTITUTIONAL REVISION: SOVEREIGNTY AND SELF-DETERMINATION

Human Dignity and Constituent Power
Jacob Weinrib (Queen's University, Canada)

This Chapter considers constituent power from the standpoint of a theory of human dignity. My aim is twofold. First, I will expose a problem in the standard strategy for justifying constraints on constituent power. Second, I will offer an alternative justification that stems from a dignitarian theory of public law that I have developed elsewhere.

In jurisdictions around the world, eternity clauses impose ongoing constraints on the exercise of a constitution's amending power. The standard strategy for justifying eternity clauses, known as the basic structure doctrine, distinguishes between two kinds of constitutional moments. The first involves the original establishment of a constitutional order, while the second concerns the subsequent enactment of constitutional amendments. According to the doctrine, these moments stand in a hierarchical relationship: amendments must conform to the identity of the established constitutional order. I argue that this doctrine is objectionable because it focuses on the wrong consideration. Instead of focusing on the demands that human dignity imposes on constituent power, the doctrine focuses on the order in which successive exercises of constituent power occur. The result is that the original exercise of constituent power establishes the parameters for all future constitutional reform. This doctrine is problematic because it is only as adequate as the constitutional context in which it happens to be applied. When applied to constitutional states that respect and protect human dignity, the doctrine could be deployed to invalidate amendments that would undermine the constitution's protection of human dignity and fundamental rights. But the same doctrine could just as easily be applied in the context of a wicked regime to deny the legality of amendments that would establish a legal and institutional framework responsive to dignity's demands.

Accordingly, I formulate an alternative account of constituent power. My guiding idea is that human dignity imposes a duty on legal systems to adopt, maintain and refine a modern constitutional form of governance. A modern constitutional state consists in the norms and institutional arrangements that elevate human dignity from a mere object of moral concern into a justiciable constraint on all public authority. The adoption of this form of governance has significant ramifications for subsequent exercises of amending powers. Since an amendment to the constitutional order is a paradigmatic exercise of public authority, it follows that amendments that seek to degrade or dismantle the norms and institutional arrangements that constitute a modern constitutional form of governance cannot be valid.

The implications of this approach are twofold. On the one hand, every modern constitutional state has an implied eternity clause that protects its normative and institutional structure. On the other, alternative forms of governance must engage in constitutional reform to bring themselves into accordance with the modern constitutional paradigm.

Repeal of the Human Rights Act 1998: The Common Law to the Rescue?
Daniel Bedford (University of Portsmouth, UK)

The UK Conservative Party has previously expressed its desire to repeal and replace the Human Rights Act 1998. During the final stages of the recent election campaign, Prime Minister Theresa May indicated that she was willing to "rip up" human rights legislation in order to tackle the threat of terrorism. And the Democratic Unionist Party (DUP), who now prop up the minority Conservative government, have criticised the Human Rights Act 1998 and called for reform. This paper considers the extent to which the Government would indeed be able to fundamentally alter the scope and foundations of human rights protection in the UK through repealing and replacing the Human Rights Act 1998. In particular, it examines the role of the common law as an alternative source of protection of human dignity and human rights in the UK.

Should Issues Related to Human Dignity be Subject to Popular Referendums? A Contextualized Analysis of the Debate on Same Sex Marriage and the Review of the Romanian Constitution
Elena Brodeala (EUI, Italy)

At the moment, the young Romanian constitutional democracy is facing probably the most serious challenges since the fall of State Socialism in 1989. Not only that the biggest protests since 1989 are currently ongoing due to an attempt of the freshly appointed social democratic Government to weaken country's anti-corruption legal framework, but at the same time the first citizens' initiative to review the 1991 Constitution is under debate in the Romanian Parliament, where the social democrats have majority. The initiative, backed by the know-how and financing of US conservative organizations specialized in constitutional litigation, aims to replace the term 'spouses' from the text of Article 48 on family with the expression 'a man and a woman'. The purpose of this revision is to ban same sex marriages in Romania, excluding in this way LGBT members of society from

enjoying full citizenship rights and disrespecting, as I will argue, their human dignity. The promoters of this initiative succeeded to gather with the support of the Romanian Orthodox Church 3 million signatures in favor of the constitutional review, in the conditions in which Romania has a population of 19 million and just 500 000 signatures would have been enough for the initiative to fulfill the validity legal requirement. The Romanian Constitutional Court already delivered a favorable judgment with regard to this initiative and held, among others, that such a proposal "does not suppress citizen's fundamental rights". The social democrats are also using this initiative to re-legitimize their contested power and regain social support. In the conditions in which the Romanian President called for a "anti-corruption referendum", the social democrats also speak about giving a voice to the 3 million people who supported the initiative and organizing a referendum on the topic. By focusing on the particular Romanian case, this paper aims to discuss whether, how and when sensitive issues like same sex marriage, that as I will argue, has at its core the respect for human dignity, should be subject to popular referendums. Especially when talking about vulnerable groups like sexual minorities, would such referendums strengthen or weaken (young) democracies? Would they solve or deepen constitutional crises in Europe and beyond? And would referendums ensure that the dignity of groups that are generally marginalized is brought into debate and eventually respected?