

## AHARON BARAK'S CONCEPT OF HUMAN DIGNITY AND THE NOTION OF DIGNITY IN JURISPRUDENCE OF POLISH CONSTITUTIONAL COURT

### Introduction

Aharon Barak, a respected scholar, longtime justice (from 1978) and then the chairman of the Israeli Supreme Court,<sup>1</sup> writes much about comparative constitutional law and human rights. Both as justice and scholar, Barak is a supporter of judicial activism.<sup>2</sup> In recent years his books on the principle of proportionality and human dignity were published in English and his views are becoming more and more popular among lawyers in Central Europe. The aim of the paper is to examine whether the concept of dignity presented by Barak is useful to understand the approach to human dignity as a legal concept in Central European legal systems. Before referring to Barak's view, I will briefly present the most important features of understanding of human dignity in Polish law and legal thought.

### I. Human Dignity as the Foundation of the Legal Order in Poland

Polish Constitution of April 2, 1997 points to dignity in Article 30 as the source of all constitutional human and civil rights and freedoms. In this provision, dignity is characterized as inherent and inalienable. Although dignity occupies a very important place in the Polish constitution, as it appears at the beginning of Chapter II on the freedoms, rights and duties of a human being and citizen, Constitutional Court does not deal often with the content of this notion. Moreover, the Court very rarely finds that a specific provision violates the Constitution solely because it violates human dignity. According to the Tribunal, the argumentation based on the violation of dignity itself would be admissible only if a specific legal regulation meant that a person would become an object of actions by the authorities, ceasing to be their subject. This would apply to situations in which the

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<sup>1</sup> He was born as Erik Brick in Kaunas on September 16, 1936.

<sup>2</sup> Cf. Aharon Barak, *The Judge in a Democracy* (Princeton: Princeton University Press, 2008), 263–81.

legislator would cause a human being to be treated purely instrumentally. Therefore, the Polish Constitutional Court clearly uses the approach to dignity developed in German jurisprudence, based on the considerations of Günter Dürig (1920–1996), who transposed Kantian concept of dignity as something opposed to “price” into the interpretation of Article 1 clause 1 of the German Basic Law of 1949. On the background of this article, Dürig presented the famous “object formula” (*Objektformel*), according to which, in a democratic state, an individual cannot be seen solely as an object of state power.<sup>3</sup> One of the most prominent Polish constitutional lawyers, Leszek Garlicki<sup>4</sup> strongly emphasized that Dürig’s formula is also suitable in the context of the Polish constitution.<sup>5</sup>

One of the judgments in which the Constitutional Court dealt with the issue of dignity most extensively was the judgment of September 30, 2008,<sup>6</sup> in which it made extensive use of the “object formula” in its considerations. The Court examined the compliance of Article 122a of the Act of July 3, 2002, Aviation Law.<sup>7</sup> This provision allowed for the shooting down, because of state security, of an aircraft used “for illegal activities, in particular as a means of a terrorist attack from the air”. This provision was deemed unconstitutional as it led to the instrumental treatment of aircraft passengers. The Court also noted that passengers were in danger not only because of terrorists’ actions, but also because the state had failed to fulfill its obligation to ensure security.<sup>8</sup> It should be emphasized that the Polish Constitutional Court repeated the argumentation of the *Bundesverfassungsgericht* expressed in the judgment of February 15, 2006.<sup>9</sup>

<sup>3</sup> Cf. Günter Dürig, “Der Grundrechtssatz von der Menschenwürde: Entwurf eines praktikablen Wertsystems der Grundrechte aus Art. 1 Abs. I in Verbindung mit Art. 19 Abs. II des Grundgesetzes,” *Archiv des öffentlichen Rechts* 81, no. 2 (1956), 117–57; Matthias Mahlmann, “Human Dignity and Autonomy in Constitutional Orders,” in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford: Oxford University Press, 2012), 379–80; Horst Dreier, “Art. 1 I,” in *Grundgesetz. Kommentar*, ed. Horst Dreier (Tübingen: Mohr Siebeck, 2004), 166–68. I agree with Olga Rosenkranzová who writes (referring to Dietmar Pfordten) that Dürig’s interpretation is based on a misapprehension. Kant applied his concept of dignity, expressed in the third formula of the categorical imperative, only to morality and the sphere of *homo noumenon*. Thus this concept was not intended to be employed in the realm of law and physical relations between human beings (i.e. the domain of *homo phenomenon*). In Kant’s philosophy, the concept of dignity justifies those obligations of an individual in the social sphere, which he or she imposes on himself or herself. Olga Rosenkranzová, *Lidská důstojnost: Právně teoretická a filozofická perspektiva. Giovanni Pico della Mirandola & Immanuel Kant* (Praha: Leges, 2019), 86–89, 128–33. Cf. Immanuel Kant, *Groundwork for the Metaphysics of Morals*, translated by Allen W. Wood (New Haven and London: Yale University Press, 2002), 52–54.

<sup>4</sup> Professor Garlicki was a justice of the Constitutional Court between 1993 and 2001, and he was appointed the justice of the European Court of Human Rights, the function he performed until 2012.

<sup>5</sup> Leszek Garlicki, “Artykuł 30,” in *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. Leszek Garlicki and Marek Zubik (Warszawa: Wydawnictwo Sejmowe, 2016), vol. II, 34.

<sup>6</sup> Judgment of September 30, 2008, file no. K 44/07.

<sup>7</sup> Journal of Laws of 2005, No. 226, item 1944.

<sup>8</sup> Judgment of September 30, 2008, file no. K 44/07, point 174.

<sup>9</sup> Judgment, file no. 1 BvR 357/05 (Urteil des Ersten Senats vom 15. Februar 2006), accessed November 23, 2020, [https://www.bundes-verfassungsgericht.de/SharedDocs/Entscheidungen/DE/2006/02/rs20060215\\_1bvr035705.html](https://www.bundes-verfassungsgericht.de/SharedDocs/Entscheidungen/DE/2006/02/rs20060215_1bvr035705.html).

Polish Constitutional Court, exactly as the its German equivalent, sees dignity both as a constitutional value and as a constitutional right. According to the Court, the right to respect and protect the dignity is a separate subjective right with a normative content different than other constitutional rights of individuals.<sup>10</sup> As the Court emphasizes, “The subject of the right to dignity is, in the most general terms, to create (guarantee) such a situation for every human being that he or she has the possibility of autonomous realization of his or her personality, but above all that he or she does not become the subject of actions by others (especially public authority) and is not only an instrument during the realization of their goals”. In fact, however, the court makes little use of the right to dignity in its jurisprudence. Therefore, I agree with Ewa Łętowska, who writes that the concept of dignity appears in jurisprudence primarily as an argument of “an axiological assessment of the provisions and institutions of the legal system”.<sup>11</sup>

Polish Constitutional Court not only very rarely refers to the right to dignity, but also avoids any reference to dignity in cases which are controversial in terms of worldview. Constitutional Court’s judgment of May 27, 1997 tightly limited the admissibility of abortion in Poland. The judgment caused the return to conditions defined by the Act of January 7, 1993 on family planning, protection of the human fetus and conditions for permitting termination of pregnancy.<sup>12</sup> Therefore, performing an abortion was allowed only if there is a reasonable suspicion that the pregnancy is a result of rape, if the pregnancy endangers the life or health of the mother, or there is a “high probability of severe and irreversible impairment of the fetus or an incurable life-threatening disease” (Article 4a). In the Court’s opinion, dignity is mentioned only once and no attempt was made to define this notion. The main part of the argument is based on the necessity of protection of human life in democratic state. Human life was seen as the most precious value which must be protected at every stage of its development.<sup>13</sup> Some more important remarks on dignity were presented in the dissenting opinion of Justice Leszek Garlicki who argued that the conflict between dignity of the fetus and dignity of the mother arises in this case. In the much publicized judgment of October 22, 2020 Constitutional Court decided that the provision allowing the abortion in case of severe and irreversible impairment of the fetus or its incurable life-threatening disease is unconstitutional. The

<sup>10</sup> Judgment of October 15, 2002, file no. SK 6/02, point 6.2; Judgment of July 9, 2009, file no. SK 48/05, point 2.2 (48). Cf. Krzysztof Wojtyczek, “Ochrona godności człowieka, wolności i równości przy pomocy skargi konstytucyjnej w polskim systemie prawnym,” in *Godność człowieka jako kategoria prawna (opracowania i materiały)*, ed. Krystian Complak (Wrocław: Drukarnia Centrum Handlu i Poligrafii, 2001), 205–06.

<sup>11</sup> Ewa Łętowska, “O godności, jej funkcji w obrocie prawnym i promocyjnej roli Rzecznika Praw Obywatelskich,” in *Godność człowieka a prawa ekonomiczne i socjalne. Księga jubileuszowa wydana w piętnastą rocznicę ustanowienia Rzecznika Praw Obywatelskich* (Warsaw: Biuro Rzecznika Praw Obywatelskich, 2003), 248. Professor Ewa Łętowska was the first Polish ombudsman (1988–1992) and then she served as a justice of the Constitutional Court (2002–2011).

<sup>12</sup> Journal of Laws of 1993, no. 17, item 78.

<sup>13</sup> Judgment of May 28, 1997, file no. K. 26/96.

judgment led to much criticism over the functioning of the Court and to demonstrations and riots that took place on the streets of large Polish cities. The majority opinion of this highly controversial judgment was published as late as at the end of January 2021. In its opinion, the Court stressed the linkage between dignity and protection of life, stressing already in the judgement of September 30, 2008, concerning destruction of an aircraft. Putting emphasis on dignity of an unborn child is a novelty of the Court's legal reasoning in comparison with its previous judgments.<sup>14</sup> According to the sentence the mentioned provision "inconsistent with Article 38 [right to life] in connection with Article 30 [human dignity] and in connection with Article 31 section 3 [principle of proportionality] of the Constitution of the Republic of Poland". Therefore, the main emphasis was put on the right to life, while human dignity was mentioned only in the background.<sup>15</sup>

The Polish Constitutional Court is not only attached to the understanding of dignity developed by the German Federal Constitutional Court, but also it utilizes the division into personal dignity (*godność osobowa*) and dignity connected with personality (*godność osobowościowa*).<sup>16</sup> The first type of dignity, named also the "transcendent dignity" by the Court, is characterized as an inalienable value, so it cannot be violated by the legislator. A human being is always equipped with this kind of dignity, regardless of his or her actions or attitudes in life. Dignity in the second sense includes, in turn, all the values of one's psychic life and values that make a person respected in society. The term "personality right", being a clear reference to German *Persönlichkeitsrecht*, is sometimes used in connection with this type of dignity. Thus, in the eyes of Constitutional Court, state bodies, including legislative authorities, act in compliance with Article 30 of the Polish Constitution when they does not violate dignity in the second sense.<sup>17</sup>

## II. Aharon Barak's Concept of Dignity

Aharon Barak advocates a purposive interpretation of constitutional provisions, i.e. the interpretation that takes into account "the role, the function and the purpose that

<sup>14</sup> Judgment of October 22, 2020, file no. K 1/20, the sentence available on: <https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/11300-planowanie-rodziny-ochrona-plodu-ludzkiego-i-warunki-dopuszczalnosci-przerywania-ciazy>, accessed November 23, 2020.

<sup>15</sup> Dignity is mentioned only once in the short press note summarizing the Court's line of argument: "Moreover, the Court stated that the unborn child, as a human being who is entitled to inherent and inalienable dignity, is a subject having the right to life", "Komunikat. Planowanie rodziny, ochrona płodu ludzkiego i warunki dopuszczalności przerywania ciąży," *Trybunał Konstytucyjny*, accessed November 23, 2020, <https://trybunal.gov.pl/postepowanie-i-orzeczenia/komunikaty-prasowe/komunikaty-po/art/11299-planowanie-rodziny-ochrona-plodu-ludzkiego-i-warunki-dopuszczalnosci-przerywania-ciazy>.

<sup>16</sup> This division was developed mainly by the authors adhering to personalism. Cf. Józef Krukowski, "Godność człowieka podstawą konstytucyjnego katalogu praw i wolności jednostki," in *Podstawowe prawa jednostki i ich sądowa ochrona*, ed. Leszek Wiśniewski (Warszawa: Wydawnictwo Sejmowe, 1997), 39–42; Franciszek J. Mazurek, *Godność osoby ludzkiej podstawą praw człowieka* (Lublin: Katolicki Uniwersytet Lubelski, 2001).

<sup>17</sup> Judgment of March 5, 2003, file no. K 7/01; Judgment of February 22, 2005, file no. K 10/04; Judgment of July 9, 2009, file no. SK 48/05, point 2.2 (nos. 49–50).

the constitution fills at the time of interpretation”.<sup>18</sup> The teleological method stands in opposition to both intentionalism and originalism, i.e. two methods that refer to the views from the time of the adoption of the constitution (the first of which takes into account the will of the “fathers of the constitution,” while the second appeals to the understanding of the constitution at the time of its adoption by society). In line with Barak’s assumptions, dignity of an individual is a constitutional value if this is the result of the functions and purpose of the constitution ascribed to it at the time of its interpretation. It should be noted that Barak is in fact a positivist and normativist, and his approach is characterized by a peculiar relativism. He points out that the norms of a given legal system form a Kelsenian pyramid, and each constitution is interpreted according to the rules of interpretation appropriate for a given legal system. Therefore, in his opinion, there is no such thing as one universal method of interpretation, although he also points out that different methods of interpretation, created on the basis of different constitutional systems, often lead to the same results.

Aharon Barak is of the view that great philosophical or theological concepts, such as those of Thomas Aquinas or Kant, may be a signpost for solving constitutional problems, but do not provide a final recipe. The reason for this is simple: great thinkers usually did not deal with the interpretation of rights enshrined in constitutional charters of rights, and therefore the perspective of their considerations is completely different from that of a lawyer who has to issue a specific decision or judgment. Therefore, in Barak’s opinion, answers to the questions about the rights guaranteed in the constitution can only be found at the constitutional level.<sup>19</sup> While the scholar is willing to agree that the element of Kantian approach to dignity, i.e. the view that the treatment of a human individual as a mere object will lead to violation of dignity, is almost universally recognized in the contemporary legal and ethical discourse, the majority of currently formulated philosophical and legal concepts of dignity are not convincing for Barak. He criticizes particularly Ronald Dworkin’s theory of dignity as an idea that embraces two ethical principles, namely self-respect and authenticity. The former means that each person is to take his or her own life and the lives of others seriously. The latter implies that each individual should express himself in relations with others, in his or her life, and this duty also includes finding one’s own life path that a person considers good in the circumstances in which he or she finds himself or herself.<sup>20</sup>

In Barak’s view, Dworkin’s theory is not able to function as a standard according to which dignity as a constitutional concept could be understood. The Israeli judge claims that accepting Dworkin’s standpoint would lead to building the legal system upon a single

<sup>18</sup> Aharon Barak, *Human Dignity. The Constitutional Value and the Constitutional Right* (Cambridge: Cambridge University Press, 2015), 70. The first Hebrew edition of this book was in 2012.

<sup>19</sup> Barak, *Human Dignity*, 4.

<sup>20</sup> Cf. Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, Massachusetts: Harvard University Press, 2011), 203–13.

principle, while “the law is based upon a number of principles, which are in state of constant conflict and must be balanced”.<sup>21</sup> Moreover, as Barak repeatedly emphasizes, this conflict is nothing bad. Regardless of the criticism of Dworkin presented by Barak, it should be noted that Dworkin’s theory is not convincing due to the fact that it is based on a specific understanding of the individual and relationship to society. This understanding can be described as quite radically individualistic, i.e. emphasizing the rights and claims of an individual towards society, and marginalizing his or her potential obligations and duties. The principles specified by Dworkin are essentially arbitrary and are based on a system of values that does not have to obtain the general consent of citizens (these are values that make up a specific variant of liberalism). Meanwhile, in a democratic state, dignity as a legal concept cannot be defined in a way that can be easily challenged as being arbitrary.

In his book on dignity as the constitutional value and the constitutional right, Barak rejects the position that dignity is an axiomatic, universal concept. As he writes: “It may be that the concept of human dignity in a given society was initially based upon the religious view that sees God’s image in man. Eventually a change may have taken place in that society’s view, and it now bases human dignity upon Kantian rationality”.<sup>22</sup> Hence Barak concludes that the understanding of dignity changes over time, and that dignity itself is a relative concept, “dependent upon historical, cultural, religious, social and political contexts”.<sup>23</sup> According to Barak, this feature does not diminish, however, the importance of dignity. On the contrary, it actually highlights it. Due to the fact that each society develops its own concept of dignity, this category becomes especially important to this society. Moreover, although these concepts differ, they are after all the expression of one idea. They overlap, so that despite the differences or even contradictions between them, there are common elements. Above all, all concepts of dignity concern human dignity in society, not the dignity of the solitary Robinson Crusoe. A robinsonade of dignity is therefore impossible, so dignity should be considered a “relational” concept, i.e. referring to the relationship of an individual with other people.<sup>24</sup> Barak states that when analyzing various traditions of thinking about dignity, one should recognize that “human dignity preserves the physical and psychical integrity of a person, their personal identity and their basic subsistence, and ensures equality between people”.<sup>25</sup> When addressing these arguments, I would like to make few remarks. First, it is obvious that human societies are transforming and certain concepts are changing in the course of historical development. However, this does not mean a complete break with the past. If so, the thought of Aristotle, Thomas Aquinas or

<sup>21</sup> Barak, *Human dignity*, 119.

<sup>22</sup> *Ibid*, 6.

<sup>23</sup> *Ibid*.

<sup>24</sup> Cf. *Ibid*, 7–8.

<sup>25</sup> *Ibid*, 7. Cf. *Ibid*, 129 (here the author combines the concept of dignity with the autonomy of the individual’s will and its guarantees, and then very broadly defines the spheres of the individual’s autonomy, which, in Barak’s opinion, are fundamental to his or her dignity).

Kant would have only historical significance for us, as a document of how people used to think in other social conditions. However, this is not the case, although certainly slightly different aspects of, let's say, Kant's theory appeal especially to us living in the early twenty-first century, and others were emphasized by commentators two hundred years ago. Secondly, all concepts of dignity refer to the position and place of man in the state and society, but this does not mean that according to many of them (e.g. Christian personalism) even a single person, living like Robinson Crusoe in a one-person society, is not deprived of dignity, though, certainly, this dignity can be fully recognized when a person lives in a society. Thirdly, the understanding of dignity adopted by Barak seems to be so broad that it dilutes the concept of dignity: it begins to include elements of other rights, belonging to the catalogue of constitutional rights of an individual (in fact, Barak does not deny this). The specificity of dignity as a right is that usually the deprivation of something or the lack of something (the possibility of action, choice, respect for a human being, fundamental equality, basic livelihoods) leads to the conclusion that, on the real or normative level, human dignity has been violated. The specificity of the right to dignity lies, therefore, not so much in the fact that it concerns many spheres of human existence, but in the fact that it is actualized in a situation that can be described as negative from the point of view of an individual.

Barak is clearly in favor of "spacious" understanding of the right to dignity. This understanding must lead to cases where this right overlaps with other constitutional rights and freedoms.<sup>26</sup> Barak sees such situations as desirable. Possible conflict between the right to dignity and some other constitutional right (rights) is dismissed by Barak<sup>27</sup> with the statement that it just happens and the conflict will be resolved on a sub-constitutional level. This should not, however, lead to limitation of the scope of the right to dignity or to any other constitutional right which conflicts with it. Such problems should be resolved *ad casu*, in the context of a specific case.

In the interpretation of Barak, the right to dignity becomes not an absolute right, but the right being a legal principle in the sense of Alexy.<sup>28</sup> Therefore, it will be applied according to the scheme "more or less" and subjected to balancing with other constitutional rights. Moreover, Barak is a supporter of using the proportionality clause in relation to the right

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<sup>26</sup> Such an extensive understanding of human dignity has been developed by the US Supreme Court. Polish scholar, Michał Urbańczyk mentions the many categories of matters with regard to which Supreme Court refers to dignity. Therefore, this notion appears not only in *ratio decidendi* of decisions concerning the "Bill of Rights" (first ten amendments to the US Constitution), but also in the judgments concerning such issues as racial discrimination, social benefits, standard of fair trial in administrative proceedings, „right to die with dignity”, and protection of private life (including abortion and same-sex marriages). Cf. Michał Urbańczyk, *Idea godności człowieka w orzecznictwie Sądu Najwyższego Stanów Zjednoczonych Ameryki* (Poznań: Wydawnictwo Naukowe Uniwersytetu Adama Mickiewicza, 2019), 111–275.

<sup>27</sup> Barak, *Human Dignity*, XIX.

<sup>28</sup> Cf. Robert Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2002), 44–109.

to dignity: this right should not be excluded from the use of this clause.<sup>29</sup> Obviously, such an understanding of dignity is in clear contradiction with how dignity is perceived under the Polish constitution.

### Concluding Remarks

Aharon Barak is wrong when he points out that the understanding of the right to dignity as an absolute right that is not subject to limitation is specific to the German constitutional system. This understanding of dignity is in fact adopted, as a result of the reception of the German constitutional theory, in a number of Central European states, especially the Czech Republic,<sup>30</sup> Slovakia,<sup>31</sup> Hungary (at least until the adoption of the 2011 constitution),<sup>32</sup> and Poland. At the same time, Barak convincingly shows that if the right to dignity is considered absolute, as it is in the German constitutional order, it must also be recognized as a right with a narrow scope of application, which plays an independent role only in cases when human beings are treated as mere tools (as was the case with both Polish and German provisions concerning an aircraft with passengers hijacked by terrorists). However, wherever it is possible to base a decision on other constitutional right, one which is not absolute, this is what the constitutional court would do. If the right seen as absolute and, therefore, not subjected to limitation in accordance with the proportionality principle, was given a broader scope, a kind of paralysis of certain spheres of social life would occur. In such a case any limitation of these spheres in accordance the principle of proportionality would be precluded. As the analysis of the practice of the Polish Constitutional Court confirms, the status of an absolute right granted to the right to dignity means also that its scope is defined in a restrictive way. Aharon Barak is, therefore, right when he suggests that the authors of the constitution face an alternative: either right to dignity broadly understood, but at the same time subjected to limitations, or right to dignity recognized as absolute, but in fact defined very narrowly. In the first case this right will be subjected to limitations as any other fundamental right, while in the second case the right will only exceptionally be an independent criterion of constitutional review.

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<sup>29</sup> For Barak, the principle of proportionality is one of the most fundamental constitutional issues. The scholar devoted a separate monograph to this issue. Cf. Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press, 2012).

<sup>30</sup> Cf. Rosenkranzová, *Lidská důstojnost*, 138–46.

<sup>31</sup> Cf. Helena Barancová, “Ludská dôstojnosť – základ právneho štátu,” in *Hodnotový systém práva a jeho reflexia v právnej teórii a praxi*, ed. Peter Blaho and Adriana Švecová (Trnava: Trnavská univerzita v Trnave, Právnická fakulta, 2013), vol. 1, 48–64.

<sup>32</sup> Cf. Catherine Dupré, *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity* (Oxford and Portland, Oregon: Hart Publishing, 2003), 65–155. On the notion of dignity under present Hungarian constitution, cf. Catherine Dupré, “La dignité humaine dans la Loi fondamentale hongroise de 2012,” *Revue Est Europa*, special issue no. 1 (2012): 89–110.



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### **Пётр Шиманец. Концепція людської гідності Аарона Барака та поняття гідності у практиці Конституційного суду Польщі**

**Анотація.** Ізраїльський учений і суддя Аарон Барак заперечує позицію, згідно з якою гідність є аксіоматичним, універсальним поняттям. Більше того, він виступає за «розлоге» розуміння права на гідність, що робить його широкою та відкритою категорією. Метою статті є вивчити, чи є концепція гідності, представлена Бараком, корисною для розуміння підходу до людської гідності як правового поняття в тих центральноевропейських правових системах, які зазнали впливу німецької конституційної теорії. У зв'язку із цим досліджується практика Конституційного суду Польщі.

Автор не повністю поділяє підхід Барака до гідності (зокрема, не погоджуючись із тим, що розуміння права на гідність як абсолютного права є специфічним для німецької конституційної системи). Однак зроблено висновок про те, що Барак має рацію, стверджуючи, що автори конституції стикаються з альтернативою: або право на гідність у широкому розумінні, яке водночас піддається обмеженням, або абсолютне право на гідність, яке, однак, визначене дуже вузько. У першому випадку це право буде піддано обмеженням, як і будь-яке інше фундаментальне право, тоді як у другому випадку право лише у виняткових випадках буде незалежним критерієм конституційного контролю (як це було з польським та німецьким положеннями, що

стосуються захопленого терористами літака з пасажирями). Тому статус абсолютного права, наданий праву на гідність, також означає, що це право має обмежену сферу застосування та відіграє незалежну роль лише у випадках, коли до людей ставляться як до простих інструментів. Цей висновок підтверджується аналізом практики Конституційного суду Польщі.

**Ключові слова:** Аарон Барак; людська гідність; право на гідність; Конституційний суд Польщі.

**Петр Шиманец. Концепция человеческого достоинства Аарона Барака и понятие достоинства в практике Конституционного суда Польши**

**Аннотация.** Израильский ученый и судья Аарон Барак отвергает позицию, согласно которой достоинство является аксиоматическим универсальным понятием. Более того, он выступает за «пространное» понимание права на достоинство, делая его широкой и открытой категорией. Целью статьи является исследование того, насколько концепция достоинства, представленная Барак, полезна для понимания подхода к человеческому достоинству как правовой концепции в тех центральноевропейских правовых системах, на которые оказала влияние немецкая конституционная теория. В связи с этим изучается судебная практика Конституционного суда Польши. Автор не полностью разделяет подход Барака к достоинству. Однако делается вывод, что Барак прав, утверждая, что статус абсолютного права, предоставленный праву на достоинство, означает также, что его объем определяется ограничительным образом.

**Ключевые слова:** Аарон Барак; человеческое достоинство; право на достоинство; Конституционный суд Польши.

**Piotr Szymaniec. Aharon Barak's Concept of Human Dignity and the Notion of Dignity in Jurisprudence of Polish Constitutional Court**

**Abstract.** Israeli scholar and judge, Aharon Barak rejects the position that dignity is an axiomatic, universal concept. Moreover, he is in favor of “spacious” understanding of the right to dignity, making it a vast and broad category. The aim of the paper is to examine whether the concept of dignity presented by Barak is useful to understand the approach to human dignity as a legal concept in those Central European legal systems which have been influenced by German constitutional theory. In that regard the jurisprudence of Polish Constitutional Court is examined. The author is not fully convinced by Barak's approach to dignity. The conclusion is drawn, however, that Barak is right when claiming that the status of an absolute right granted to the right to dignity means also that its scope is defined in a restrictive way.

**Keywords:** Aharon Barak; human dignity; right to dignity; Polish Constitutional Court.

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