

**HUMAN DIGNITY AND PROPORTIONATE PUNISHMENT: THE
JURISPRUDENCE OF GERMANY AND SOUTH AFRICA, AND ITS
IMPLICATIONS FOR PUERTO RICO**

ARTICLE

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INTRODUCTION

THE UNSPEAKABLE VIOLATIONS OF HUMAN RIGHTS THAT OCCURRED DURING the Second World War shaped the future development of the legal systems. One of the legal concepts that emerged in the aftermath of that catastrophe and has since become increasingly important is human dignity.¹ In

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¹ See ERIN DALY, DIGNITY RIGHTS: COURTS, CONSTITUTIONS AND THE WORTH OF THE HUMAN PERSON 1 (2013). Dignity is also an important concept in the religious and philosophical domain, about which theologians and philosophers have written for centuries. The focus of this paper, however, is exclusively on the secular, legal concept of human dignity, of much more recent development and with its own independent meaning, purpose, and function. In relation to the religious and philosophical concept, see, e.g., Ruedi Imbach, *Human Dignity in the Middle Ages (twelfth to fourteenth century)*, in THE CAMBRIDGE HANDBOOK OF HUMAN DIGNITY: INTERDISCIPLINARY PERSPECTIVES 64 (Marcus Düwell et al. eds., 2014); Piet Steenbakkens, *Human dignity in Renaissance humanism*, in THE CAMBRIDGE HANDBOOK OF HUMAN DIGNITY: INTERDISCIPLINARY PERSPECTIVES 85 (Marcus Düwell et al. eds., 2014); Thomas E. Hill, Jr., *Kantian perspectives on the rational basis of human dignity*, in THE CAMBRIDGE HANDBOOK OF HUMAN DIGNITY: INTERDISCIPLINARY PERSPECTIVES 215 (Marcus Düwell et al. eds., 2014).

the international context, it has served as the normative basis for declarations of human rights and the protection of physical integrity and individual liberties.² At the national level, it has been incorporated in a number of constitutions as a value with foundational transcendence that informs the substance of most, if not all, of the rights and serves as a guideline for constitutional interpretation.³

The Constitution of the Commonwealth of Puerto Rico was among those that embraced the concept, declaring at the beginning of its Bill of Rights that “the dignity of the human being is inviolable.”⁴ Although the drafters of the Constitution viewed human dignity as a constitutional value with an essential role in the protection of human rights, the Puerto Rico Supreme Court has yet to interpret and apply the clause. This paper will consider the human dignity clause of the Constitution of Puerto Rico as a constitutional value to guide the interpretation of constitutional rights and shape their scope.⁵ Specifically, I will examine the requirement of proportional punishment included in the right against cruel and unusual punishments of the Constitution of Puerto Rico.⁶ The inquiry, then, will be how the analysis of proportionality is influenced when human dignity is taken into account and what may be some of its implications for the law of sentencing in Puerto Rico.

For guidance, I will look to the jurisprudence of the German Federal Constitutional Court and the South African Constitutional Court. The German Constitution of 1949 (the Basic Law) was among the first to enshrine human dignity as a value of the highest constitutional hierarchy and throughout the years the German courts have developed a prolific case law, applying the concept in diverse

² See International Covenant on Civil and Political Rights art. 10(1), Dec. 19, 1966, S. TREATY DOC. No. 95-20, 999 U.N.T.S. 171; see also World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, para. 2, U.N. Doc. A/CONF.157/23 (July 12, 1993).

³ See AHARON BARAK, *HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT* 103-04 (Daniel Kayros trans., 2015).

⁴ CONST. PR art. II, § 1.

⁵ It has been argued that the human dignity provision of the Constitution of Puerto Rico should be interpreted and applied as a free-standing constitutional right in itself, instead of as a constitutional value or principle. See Hiram A. Meléndez-Juarbe, *Privacy in Puerto Rico and the Madman's Plight: Decisions*, 9 GEO. J. GENDER & L. 1, 47 (2008). Although that is a legitimate and plausible interpretation of the clause, I believe, for the reasons that I will examine in Part I, that it is more consistent with the text, structure, and history of the provision and the Constitution itself to understand it as a value or principle that forms the basis for each of the constitutional rights and that has a fundamental role in their interpretation. That does not mean that human dignity is destined to occupy a secondary role in our legal system. On the contrary, we shall see that in jurisdictions where human dignity is considered both a constitutional value and a constitutional right –like in South Africa–, its more effective and meaningful role in the legal system has been through its function as a constitutional value that informs the scope of the constitutional rights to ensure their vigor and relevance for the protection of human rights through changing times and circumstances.

⁶ CONST. PR art. II, § 12.

circumstances.⁷ As a result, the jurisprudence of the German Federal Constitutional Court on human dignity is considered the primary source for comparative analysis.⁸ Furthermore, the language and structure of the human dignity provision of the Puerto Rican Constitution parallels that in the Basic Law, making the interpretations of the German Constitutional Court of singular relevance for the Commonwealth.⁹

For its part, the Constitution of South Africa of 1996 recognizes the inviolability of human dignity as a constitutional value of the highest hierarchy and requires its protection in several provisions.¹⁰ Because of the importance of the concept for the constitutional order, the South African Constitutional Court has engendered a prominent jurisprudence on the protection of human dignity in various contexts, among them sentencing and punishment. Today, South African case law and legal literature on human dignity is regarded as the second most developed one and a fertile basis for comparative law analysis.¹¹

Despite its increasing importance, however, the legal concept of human dignity has also been the object of criticism. Among the main objections raised is that the concept is squishy,¹² vague,¹³ and that it unduly expands the discretion of judges to impose their moral views through adjudication.¹⁴ Yet, that a concept may

⁷ GRUNDGESETZ FÜR DIE BUNDERSREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 1(1) (Ger.), reprinted in BARAK, *supra* note 3, at 225-26, 240, translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0026.

⁸ *Id.*

⁹ See Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15, 25-26 (2004) (noting also the influence of the Puerto Rican human dignity provision on the equivalent provision in the Constitution of Montana).

¹⁰ S. AFR. CONST., 1996.

¹¹ Stuart Woolman, *Dignity*, in 3 CONSTITUTIONAL LAW OF SOUTH AFRICA ch. 36, at 36-1 (Stuart Woolman & Michael Bishop eds., 2d ed. 2013).

¹² Steven Pinker, *The Stupidity of Dignity*, THE NEW REPUBLIC (May 28, 2008), <https://newrepublic.com/article/64674/the-stupidity-dignity>.

¹³ Horst Dreier, *Human Dignity in German Law*, in THE CAMBRIDGE HANDBOOK OF HUMAN DIGNITY: INTERDISCIPLINARY PERSPECTIVES 375, 378 (Marcus Düwell et al. eds., 2014).

¹⁴ See generally, Sebastian Unger, *'Human Dignity Shall Be Inviolable': Dealing with a Constitutional Taboo*, in CURRENT PROBLEMS IN THE PROTECTION OF HUMAN RIGHTS: PERSPECTIVES FROM GERMANY AND THE UK 189 (Katja S. Ziegler & Peter M. Huber eds., 2013). Another frequent objection is that the concept is too contextual and relative, having different meanings at different times and places. But variations in the scope of a constitutional provision through time is not something new and probably the innate result of interpreting a document conceived to last and rule the destiny of a polity for many generations. For its part, regional and local variations in content and scope—variations that are also not unique to the concept of human dignity—are beneficial since they allow for the adjustment of the concept to the socio-political and legal traditions of a society. See DALY, *supra* note 1, at 4. Nevertheless:

be broad and complex does not mean that it is useless or helplessly undefinable; those characteristics are shared by several other concepts whose acceptance and primacy in many legal systems is undisputable—such as liberty, equality, or due process of law—and which have been interpreted and delimited by the courts.

Therefore, the Puerto Rico Supreme Court should strive to expound the meaning of the human dignity provision, elucidate its purpose, and delineate the standards to guide the discretion of judges in its application. That is what Germany and South Africa have done and through the examination of some of their cases I will show that human dignity can be a workable legal concept of great importance for the protection of a person's autonomy and his or her worth as a human being.

This paper is structured in four parts. First, I will examine the background of the human dignity clause of the Constitution of Puerto Rico, how the drafters perceived its role in the constitutional system, and how the Puerto Rico Supreme Court has approached the clause. In the second part, I will begin with a brief review on how the U.S. Supreme Court has sketched the analysis of proportionality under the cruel and unusual punishments clause of the U.S. Bill of Rights, after which I will proceed with a similar examination of how the Puerto Rico Supreme Court has interpreted the equivalent provision in the Commonwealth's Constitution. In the third part, I will analyze how human dignity has influenced the analysis of sentencing proportionality in Germany and South Africa through the constitutionalization of the culpability principle and the offender's interest in resocialization. Lastly, I will consider some of the implications for the Puerto Rican sentencing law of analyzing the requirement of proportionate punishment in light of human dignity.

Criminal sentencing in Puerto Rico is characterized for its deeply punitive character. Despite evidence of the lack of correlation between longer sentences and the deterrence of criminal activity, politicians keep augmenting the prison terms and enacting harsher measures like the elimination of alternative penalties to imprisonment. Considerations of a political-electoral nature seem to be having a significant influence on the development of the Commonwealth's criminal law, where just in the last thirteen years two penal codes have been adopted and numerous amendments have been made, continuing the trend towards longer prison sentences.¹⁵

[w]hile there is no single understanding of what dignity means in all circumstances, the cases reveal that courts interpreting the concept of dignity and applying it to concrete factual situations have developed a sense of the word that is coherent and substantive, and not merely a product of each judge's idiosyncratic moral standards.

Id. at 5; see also Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655, 723 (2008).

¹⁵ In 2004, a Penal Code was enacted to supersede the 1974 Penal Code. Just eight years later, the 2004 Penal Code was replaced by the 2012 Penal Code under the justification, among others, that the 2004 Penal Code was too lenient. On the historical tendency towards lengthier prison sentences in Puerto Rico, see generally DORA NEVARES-MUÑIZ, *DERECHO PENAL PUERTORRIQUEÑO: PARTE GENERAL* 45-68 (2015).

In the center of all this, however, there is a person—the convict—whose dignity must be respected. The aim of this paper is, thus, to call the attention of the state, and particularly of the courts as last interpreters of the Constitution, about the necessity of developing the human dignity clause to examine the proportionality of the criminal laws and vindicate the fundamental value of our constitutional *ethos*.

I. THE HUMAN DIGNITY CLAUSE OF THE CONSTITUTION OF PUERTO RICO

The Constitution of Puerto Rico was adopted in 1952, following the demands on the U.S. Congress by the local political class who claimed more autonomy for self-governance.¹⁶ Before that, the Jones-Shafroth Act,¹⁷ enacted by the federal government in 1917 and which provided—among other things—for a governor appointed by the U.S. President, was the organic law that ruled Puerto Rico.¹⁸ In response to those demands, in 1950 the federal Congress passed Public Law 600 which authorized the people of Puerto Rico to draft a constitution to govern their internal affairs.¹⁹ A Constitutional Convention was called to draft the charter, whose content would be later ratified by the people of Puerto Rico in a referendum and finally approved by the U.S. Government with certain modifications.²⁰ Thus, the Commonwealth of Puerto Rico was born.

Article II of the Constitution of Puerto Rico contains the Bill of Rights.²¹ The purpose of the delegates to the Constitutional Convention was to draft a list of individual rights with a broader scope than those contained in the Bill of Rights of the U.S. Constitution, an aim that responded to the limited reach of the individual liberties historically enjoyed by the people of Puerto Rico.²² For that reason,

¹⁶ See generally, II JOSÉ TRIAS MONGE, *HISTORIA CONSTITUCIONAL DE PUERTO RICO* 314-26 (1981).

¹⁷ Jones-Shafroth Act, ch. 145, §§ 1-12, 39 Stat. 951, 951-55 (1917).

¹⁸ The constitutional relationship between the United States and Puerto Rico is long and intricate, and it is not the purpose of this paper to expand upon it. As general background information, I believe it suffices to say that the United States acquired the island of Puerto Rico from Spain after the end of the Spanish-American War in 1898. Until the adoption of the Constitution of Puerto Rico, local affairs were governed by organic laws enacted by the U.S. Congress, like the Jones Act. Even though Public Law 600 and the adoption of the Constitution in 1952 modified important aspects of that relationship, the status of Puerto Rico in the constitutional scheme of the United States is that of a territory. See *Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1863 (2016). For a detailed account of the history and nature of this relationship, see generally EFRÉN RIVERA RAMOS, *AMERICAN COLONIALISM IN PUERTO RICO: THE JUDICIAL AND SOCIAL LEGACY* (2007).

¹⁹ Puerto Rican Federal Relations Act, Pub. L. No. 600, ch. 446, 64 Stat. 319 (1950).

²⁰ Section 20 of the Bill of Rights, which included socio-economic rights like the right to work and the right to public assistance in unemployment, sickness or disability, was unauthorized by the U.S. Congress. See III JOSÉ TRIAS MONGE, *HISTORIA CONSTITUCIONAL DE PUERTO RICO* 209-12 (1982).

²¹ CONST. PR art. II.

²² See Meléndez-Juarbe, *supra* note 5, at 37-38.

the Bill of Rights of the Constitution of Puerto Rico, besides adopting the fundamental protections of the federal Constitution, had to reflect the new categories of human rights that were being developed at the time.²³ In particular, the drafters sought inspiration from the American Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of American States in 1948, and from the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations also in 1948.²⁴

Among those new categories of human rights and principles was human dignity. After the events of the Second World War, the protection of human dignity was at the forefront of the human rights discussion.²⁵ As such, the concept figured prominently in the preamble of the American Declaration of the Rights and Duties of Man—“[a]ll men are born free and equal, in dignity and in rights . . .”—²⁶ and in several provisions of the Universal Declaration of Human Rights, which in its Section 1 declared that “[a]ll human beings are born free and equal in dignity and rights.”²⁷ Likewise, the new Constitution of the Federal Republic of Germany of 1949 began by stating in Article 1(1) that “[h]uman dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.”²⁸ These provisions influenced the drafters of the Commonwealth’s Constitution who, reflecting on an

²³ See TRÍAS MONGE, *supra* note 20, at 170.

²⁴ *Id.* The relevance of this background for constitutional interpretation has been acknowledged by the Puerto Rico Supreme Court:

The origin and background of the Constitution of the Commonwealth of Puerto Rico –which is inspired by the Universal Declaration of Human Rights– are different from those of the Constitution of the United States of America. The reformist spirit of the “forties’ generation” and the liberal bent of the members of the Constitutional Convention, bore upon the standards used to select our demandable rights. . . . With the help of the extensive constitutional experience of the United States, we have set up the minimum safeguards of fundamental rights. However, our Bill of Rights allows us to venture further in the defense of human rights. Our Constitution recognizes and grants some fundamental rights with a more global and protective vision than does the United States Constitution. When construing it, we should guarantee its vigor and relevance for the socioeconomic and political problems of our times.

López Vives v. Policía de P.R., 18 P.R. Offic. Trans. 264, 273 (1987) (citation omitted).

²⁵ Klaus Dicke, *The Founding Function of Human Dignity in the Universal Declaration of Human Rights*, in THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE 111; see also Jackson, *supra* note 9, at 16-17.

²⁶ *American Declaration of the Rights and Duties of Man*, O.A.S. Res. XXX, 9th Int’l Conference of American States, pmb., O.A.S. Official Record, OEA/Ser.L.V./II.23, doc. 21 rev. 6 (1948), reprinted in RICHARD B. LILICH, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS: A COMPILATION OF TREATIES, AGREEMENTS, AND DECLARATIONS OF ESPECIAL INTEREST TO THE UNITED STATES 430.1 (1990).

²⁷ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

²⁸ GRUNDGESETZ FÜR DIE BUNDERSREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 1(1) (Ger.).

entrenched value of the Puerto Rican community,²⁹ wrote into Section 1 of the Bill of Rights that “[t]he dignity of the human being is inviolable.”³⁰

For the drafters, the inviolability of human dignity was the essence of the polity and the cornerstone of the constitutional order.³¹ Although they did not define it, their view was that, as a value of the highest constitutional hierarchy, human dignity was the foundation for the individual rights protected in the Constitution.³² As such, it served two functions: on one hand, it was the normative basis for the content of those rights; on the other, it was a standard to guide their interpretation and shape their scope:

The purpose of this section [1 of the Bill of Rights] is to affix in a clear manner as the consubstantial basis of everything that follows the principle of the dignity of the human being and, as a consequence, the essential equality of all persons within our constitutional system. . . . For what is deemed to be necessary, our legal organization is strengthened by this constitutional provision and obliged to widen its other provisions to give full execution to what is here ordered.³³

Despite its important role, the human dignity clause has not been construed by the Puerto Rico Supreme Court. When the court has mentioned it, it has been merely in a rhetorical fashion, without inquiry into its content and its relation to

²⁹ See Carlos E. Ramos González, *La inviolabilidad de la dignidad humana: Lo indigno de la búsqueda de expectativas razonables de intimidad en el derecho constitucional puertorriqueño*, 45 REV. JUR. UIPR 185, 189–91 (2010–2011). It should be noted, however, that as Professor Ramos Gonzalez explains, there is no express mention in the records of the Puerto Rican constitutional convention regarding the direct influence of Article 1(i) of the German Constitution on the drafting of the Puerto Rican human dignity clause. In this sense, the influence of the German human dignity provision on the equivalent clause in the Puerto Rican Constitution can be inferred from their very similar language, structure and, specially, their characterization of human dignity as *inviolable*, which was a particular trait of the recently adopted German Constitution. The German Constitution of 1949 was also mentioned at least twice — although in somewhat general terms— in the debates at the Puerto Rican constitutional convention of 1951–52. See *id.* at 189; see also Jackson, *supra* note 9.

³⁰ CONST. PR art. II, § 1.

³¹ Jaime Benítez, the president of the Bill of Rights Commission at the Constitutional Convention, explained to the delegates that:

[T]he “ideological architecture” of the Bill of Rights “is summarized by this first sentence: the dignity of the human being is inviolable. This is the basic bedrock principle of democracy. Within it lies democracy’s strength and moral vitality. Because, before anything else, democracy is a moral force and its morality resides precisely in the recognition of the dignity of the human being; on the high respect that this dignity deserves; and the consequent responsibility that every constitutional order has to rely on this dignity, protect it and defend it.”

Meléndez-Juarbe, *supra* note 5, at 44 (quoting 2 DIARIO DE SESIONES DE LA CONVENCION CONSTITUYENTE 1103 (1952)) (statement by Mr. Jaime Benítez) (translation by Meléndez-Juarbe)).

³² 2 DIARIO DE SESIONES DE LA CONVENCION CONSTITUYENTE 1103, 1371–72 (1952).

³³ 4 DIARIO DE SESIONES DE LA CONVENCION CONSTITUYENTE 2561 (1951) [hereinafter 4 DIARIO DE SESIONES] (translation by author).

the legal issue under consideration. This has been the case, for example, in controversies about the right to privacy or in the context of the antidiscrimination clause of the Constitution.³⁴ In these instances, the court has said that the human dignity clause applies *ex proprio vigore* and protects against both state and private actions.³⁵ However, no further analysis follows. Instead, the court focuses on the privacy or antidiscrimination provisions in controversy and proceeds to interpret them in a wholly independent manner, without any further reference to the human dignity clause and how it might interact with the right under consideration.³⁶

Only in the concurring opinions of a few justices has the meaning, content, and role of the human dignity clause been examined with more attention.³⁷ In particular, the concurrent opinions of Justice Rodríguez Rodríguez in the case of *Lozada Tirado v. Testigos Jehová*,³⁸ and of Chief Justice Fiol Matta in *Pueblo v. Sánchez Valle*,³⁹ analyzed the dignity clause with more depth and in tune with comparative law. In *Lozada Tirado*, the constitutionality of a law that limited the effects of a living will to reject medical treatment exclusively to circumstances in which there was a diagnosis of terminal illness or persistent vegetative state was challenged.⁴⁰ A majority of the Court analyzed the controversy under its precedents on the right to privacy.⁴¹ The majority concluded that a person's prerogative to reject medical treatment, even when necessary to save his or her life, was protected by that right.⁴² Since the law in question improperly limited the exercise of the right, it was deemed unconstitutional. As in other privacy cases, the Court mentioned that the inviolability of human dignity was a value of the highest hierarchy, but refrained from any discussion about its content and how it relates to the right to privacy and its derivative right to reject medical treatment.

In her concurrent opinion, Justice Rodríguez Rodríguez agreed with the majority that the right to privacy protects the decision to reject medical treatment. However, to reach that conclusion she considered first the human dignity clause, whose basis was individual autonomy. Because of that autonomy, a person is free to develop his or her personality and make important, personal decisions about

³⁴ See *Arroyo v. Rattan Specialties, Inc.*, 17 P.R. Offic. Trans. 43 (1986); *Figueroa Ferrer v. E.L.A.*, 7 P.R. Offic. Trans. 278 (1978).

³⁵ See *Arroyo*, 17 P.R. Offic. Trans. at 74.

³⁶ See José Julián Álvarez González, *La dignidad como derecho independiente*, 45 REV. JUR. UPR 205, 208 (2010).

³⁷ See, e.g., *Ex Parte Andino Torres*, 151 P.R. Dec. 794, 807 (2000) (Negrón García, J., concurring).

³⁸ *Lozada Tirado v. Testigos Jehová*, 177 P.R. Dec. 893, 934 (2010) (Rodríguez Rodríguez, J., concurring).

³⁹ *Pueblo v. Sánchez Valle*, 192 P.R. Dec. 594, 648 (2015) (Fiol Matta, C.J., concurring).

⁴⁰ *Lozada Tirado*, 177 P.R. Dec. at 899-900.

⁴¹ The Court also considered the concept of liberty in the due process clause of the Constitution of Puerto Rico and the Constitution of the United States. *Id.* at 911-12.

⁴² *Id.* at 933. Following precedents of the U.S. Supreme Court, the Court added that in certain circumstances that right can be limited by overriding state interests, such as the protection of minors or the integrity of the medical profession. *Id.* at 916.

how to conduct his or her life. Human dignity is, thus, “a continuous undertaking of self-realization that becomes manifest in a conscious and responsible exercise of self-determination regarding one’s own life and that carries with it an expectation of respect from others.”⁴³ Applying this notion to the interpretation of the scope of the right to privacy, she concluded that it protected a person’s fundamental and intimate decision to reject medical treatment.

In the second case, *Pueblo v. Sánchez Valle*, the issue was whether the Commonwealth of Puerto Rico could prosecute a person for the same offense for which that person had been prosecuted in the federal jurisdiction, without violating the right against double jeopardy enshrined in the Constitution of Puerto Rico and of the United States.⁴⁴ A majority of the court concluded that the doctrine of dual-sovereignty, an exception to the protection against double jeopardy recognized by the U.S. Supreme Court in *United States v. Lanza*,⁴⁵ does not apply in Puerto Rico because, as a territory of the United States, the ultimate source of the Commonwealth’s authority to prosecute crime was the U.S. Congress.⁴⁶ Since Mr. Sánchez Valle had been previously prosecuted in the federal jurisdiction, the right against double jeopardy protected him from prosecution by the Commonwealth because its ultimate source of authority was the federal government; that is, the same sovereign that had already tried him.⁴⁷

Chief Justice Fiol Matta rejected this approach and argued that as a result of the legal process that led to the adoption of the Constitution in 1952, Puerto Rico acquired the sovereignty necessary for the application of the dual-sovereignty doctrine.⁴⁸ However, she reasoned that the dual-sovereign doctrine had to be discarded because it violated the double jeopardy clause of the Constitution of Puerto Rico when interpreted in light of the human dignity clause.⁴⁹ In this sense, she emphasized that the inviolability of human dignity was the fundamental principle of the Constitution and that it permeated the entire legal system, having a central role in the interpretation of individual rights.⁵⁰

She argued that because of the inherent worth of each human being, the inviolability of human dignity requires that a person be always seen as an end in himself or herself and never treated as a mere means for the consecution of the state’s purposes. Based on this, Chief Justice Fiol Matta asserted that punishing a person

43 *Id.* at 945 (Rodríguez Rodríguez, J., concurring).

44 *Sánchez Valle*, 192 P.R. Dec. at 598.

45 *United States v. Lanza*, 260 U.S. 377, 382 (1922).

46 *Sánchez Valle*, 192 P.R. Dec. at 645.

47 The conclusion also operates backwards. That is, the federal government cannot prosecute an individual for the same offense for which he or she has been prosecuted by the Commonwealth. This decision was upheld by the U.S. Supreme Court in *Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1863 (2016).

48 *Sánchez Valle*, 192 P.R. Dec. at 648–49 (Fiol Matta, C.J., concurring).

49 *Id.* at 725–26.

50 *Id.* at 724.

twice for the same offense is equivalent to treating him or her as a mere instrument of the state in the interest of deterring crime. Thus, the dual-sovereign doctrine is incompatible with human dignity and a violation of the right against double jeopardy.⁵¹

The opinions of Chief Justice Fiol Matta and Justice Rodríguez Rodríguez reflected the way in which courts from other jurisdictions have conceived the inviolability of human dignity; that is, as the duty to respect the humanity of a person, which includes the person's autonomy to develop his or her personality in order to fulfill his or her life. As a corollary, the state cannot treat the person as a mere means to advance its objectives.⁵² As will be discussed, that is also how the Federal Constitutional Court of Germany and the Constitutional Court of South Africa have interpreted the content of human dignity.

These two opinions were also significant in exposing, by way of contrast, the scant attention that the Puerto Rico Supreme Court has paid to the interpretation of the human dignity clause. This neglect has adverse consequences not only for the soundness of the court's jurisprudence; as I will show with respect to criminal sentencing, it also unjustifiably restricts individual liberty and disregards a person's capacity for self-realization.

II. THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE AND THE REQUIREMENT OF PROPORTIONALITY

Section 12 of the Bill of Rights of the Constitution of Puerto Rico declares that "cruel and unusual punishment shall not be inflicted."⁵³ This provision was based on the Eighth Amendment to the U.S. Constitution, which states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."⁵⁴ Inasmuch as the interpretations of the U.S. Supreme Court regarding the fundamental rights guaranteed by the federal Bill of Rights establish the minimum scope of protection for the equivalent provisions in the constitutions of the states and Puerto Rico,⁵⁵ I will begin this part with a brief review on how the U.S. Supreme Court has interpreted the Eighth Amendment with respect to punishment proportionality.⁵⁶

⁵¹ *Id.* at 726.

⁵² *Id.* Lozada Tirado v. Testigos Jehová, 177 P.R. Dec. 893, 945 (2010) (Rodríguez Rodríguez, J., concurring).

⁵³ CONST. PR art. II, § 12.

⁵⁴ U.S. CONST. amend. VIII.

⁵⁵ In *Robinson v. California*, the U.S. Supreme Court held that the prohibitions of the Eighth Amendment apply to the states through the due process clause of the Fourteenth Amendment. See *Robinson v. California*, 370 U.S. 660, 667 (1962).

⁵⁶ Because the death penalty is constitutionally banned in Puerto Rico, my focus will be on the U.S. Supreme Court's proportionality analysis in the context of non-capital sentences. See CONST. PR art. II, § 7.

A. The Eighth Amendment to the U.S. Constitution

The U.S. Supreme Court interpreted for the first time in *Weems v. United States* that the Eighth Amendment includes an element of proportionality between crime and punishment.⁵⁷ That case began in the courts of the Philippines—then under the jurisdiction of the U.S. Government—where the petitioner was found guilty for the falsification of a public document and sentenced to *cadena temporal*, a punishment that consisted of fifteen years of imprisonment at hard labor in chains, as well as other accessory penalties.⁵⁸ The U.S. Supreme Court reviewed the sentence and compared it to other sentences imposed in the Philippines and in the United States for similar and more serious crimes, which led the Court to conclude that the punishment was excessive. The Court thereby stated that “it is a precept of justice that punishment for [a] crime should be graduated and proportionated to [the] offense”,⁵⁹ and declared that the sentence violated the Eighth Amendment.⁶⁰

Decades later, in *Trop v. Dulles*, the Court considered whether the forfeiture of citizenship as punishment for the crime of wartime desertion was constitutional.⁶¹ As to the interpretation of the cruel and unusual punishment clause, the plurality opinion asserted that “[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man” and that the scope of protection afforded by the Amendment is not static, but that it must draw meaning from the “evolving standards of decency that mark the progress of a maturing society.”⁶² The plurality then reviewed the penal laws of other countries and determined that “[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for [a] crime.”⁶³ Accordingly, it held that the punishment was contrary to the Eighth Amendment.⁶⁴

It was notable for the plurality to have referred to dignity as the underlying basis of the Eighth Amendment, since the U.S. Constitution does not expressly mention that term. Moreover, some parts of the opinion seemed to allude to the ways in which denationalization implicates human dignity, as when it expressed that “[t]here may be involved no physical mistreatment, no primitive torture.

⁵⁷ *Weems v. United States*, 217 U.S. 349 (1910).

⁵⁸ *Id.* at 364-65 (the accessory penalties included the loss of parental rights and perpetual subjection to surveillance).

⁵⁹ *Id.* at 367.

⁶⁰ *Id.* at 382.

⁶¹ *Trop v. Dulles*, 356 U.S. 86 (1958) (plurality opinion).

⁶² *Id.* at 100-01.

⁶³ *Id.* at 102.

⁶⁴ *Id.* at 103.

There is instead the total destruction of the individual's status in organized society.⁶⁵ However, although the phrase has been reiterated in later Eighth Amendment cases—generally in those dealing with capital sentences—the concept has not been developed by the Court, which has in turn failed to explain the role of dignity in the assessment of a punishment's constitutionality.⁶⁶

It was in *Solem v. Helm*, years later, that the U.S. Supreme Court outlined a three-part test for the proportionality analysis of non-capital sentences.⁶⁷ The respondent had been convicted in the state courts for passing a fraudulent check for \$100.00 and, because of six prior convictions for non-violent crimes, sentenced to life imprisonment without the possibility of parole. To analyze whether the penalty was excessive under the Eighth Amendment, the Court held that three factors had to be assessed in conjunction: (1) a comparison between the harshness of the penalty and the gravity of the offense, considering the harm caused or threatened and the culpability of the offender; (2) a comparison with sentences imposed within the same jurisdiction for other crimes, and (3) a comparison with sentences imposed in other jurisdictions for the same crime.⁶⁸

After examining the sentence in light of these three factors, the Supreme Court concluded: (1) that respondent had received the most severe punishment available in the state even though he committed a relatively minor crime; (2) that he was penalized more severely than other persons who committed more serious crimes, and (3) that he was treated "more harshly than he would have been in any other jurisdiction."⁶⁹ Therefore, the sentence was held disproportionate and invalid.⁷⁰

⁶⁵ *Id.* at 101.

⁶⁶ See Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 772–73 (2006) ("The role of human dignity is most troubling in the Eighth Amendment jurisprudence because, while the Court expresses an unwavering commitment to advancing human dignity in these cases, the Court's analysis of human dignity in most death penalty cases is weak and meaningless") (footnote omitted). *But see* Justice Brennan's concurring opinion in *Furman v. Georgia* in which he proposed four principles to assess whether a punishment is contrary to human dignity: (1) "a punishment must not be so severe as to be degrading to the dignity of human beings;" (2) the government "must not arbitrarily inflict a severe punishment;" (3) "a severe punishment must not be unacceptable to contemporary society," and (4) "a severe punishment must not be excessive." *Furman v. Georgia*, 408 U.S. 238, 271–79 (1972) (Brennan, J., concurring). The concept of human dignity has had a more relevant function in other areas of the Court's jurisprudence, such as in privacy cases, where it has been used to inform the interpretation of the right to liberty in the due process clause of the Fourteenth Amendment. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁶⁷ *Solem v. Helm*, 463 U.S. 277 (1983).

⁶⁸ *Id.*, at 292.

⁶⁹ *Id.*, at 303. Further, the Court held that in evaluating the gravity of the offense the focus must rely on the felony that triggered the sentence.

⁷⁰ *Id.* *Solem* remains the only case in which the U.S. Supreme Court has found the terms of a prison sentence to be excessive. In *Weems*, although the Court considered the term of imprisonment, the final decision was influenced by the characteristics of the type of punishment —*cadena temporal*— under consideration.

This test, however, was modified in *Harmelin v. Michigan*, where the Court upheld a mandatory sentence of life imprisonment without the possibility of parole for possession of 672 grams (over 1.5 pounds) of cocaine.⁷¹ Justice Kennedy's plurality opinion posited that because of principles such as deference towards the legislature in establishing the prison terms and determining the penological schemes to address the problem of criminality, as well as by reason of the system of federalism, "[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime."⁷²

In consequence, the plurality altered *Solem's* test to narrow the scope for proportionality review: instead of considering the three factors in combination, courts must first compare, as a threshold matter, the harshness of the penalty and the gravity of the offense. Justice Kennedy further stated that "only in the rare case[s] in which a threshold comparison . . . leads to an inference of gross disproportionality," should the intra and inter-jurisdictional comparison be made.⁷³ Thus, "[t]he proper role for comparative analysis of sentences . . . is to validate an initial judgment that a sentence is grossly disproportionate to a crime."⁷⁴ The plurality conducted the threshold comparison and concluded that, in view of the seriousness of the offense, the sentence did not give rise to an inference of gross disproportionality and a comparison with other sentences imposed in the same and in other jurisdictions was unnecessary.⁷⁵

Lastly, in *Ewing v. California* a plurality of the U.S. Supreme Court inserted a new component into *Harmelin's* threshold test with the effect of further limiting the scope for proportionality review.⁷⁶ The petitioner had stolen three golf clubs from a store and, because of previous convictions, was sentenced to life imprisonment with no possibility of parole for twenty-five years. Justice O'Connor's plurality opinion applied *Harmelin's* test to evaluate the proportionality of the penalty and added that a sentence will pass the threshold test—and therefore will not be grossly disproportionate—whenever the state has a reasonable basis to believe

⁷¹ *Harmelin v. Michigan*, 501 U.S. 957 (1991) (plurality opinion).

⁷² *Id.* at 1001. (citations omitted) (Justice Kennedy's opinion was joined by Justice O'Connor and Justice Souter).

⁷³ *Id.* at 1005.

⁷⁴ *Id.*

⁷⁵ *Id.* at 1008-09. For his part, Justice Scalia agreed with the result, but argued, in a separate opinion joined by Chief Justice Rehnquist, that the Eighth Amendment does not require proportionality in non-capital sentences. Justice White dissented, joined by Justices Blackmun and Stevens, and asserted that "Justice Kennedy's abandonment of the second and third factors set forth in *Solem* makes any attempt at an objective proportionality analysis futile. . . . Application of *Solem's* proportionality analysis leaves no doubt that the Michigan statute at issue fails constitutional muster . . ." *Id.* at 1020-21 (White, J., dissenting). Justice Marshall also dissented in a separate opinion.

⁷⁶ *Ewing v. California*, 538 U.S. 11 (2003) (plurality opinion).

that the sentence substantially advances any of the goals of punishment; that is, deterrence, incapacitation, retribution, or rehabilitation.⁷⁷

The plurality concluded that, since the Court had held in previous cases that the deterrence and incapacitation of repeat offenders were valid goals of recidivist statutes like California's "Three Strikes and You're Out" law, the sentence was justified by the state's public safety interest.⁷⁸ In consequence, the sentence was not excessive under the Eighth Amendment and an intra and inter-jurisdictional comparison was not necessary: "[t]o be sure, Ewing's sentence is a long one. But it reflects a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated."⁷⁹

The decision in *Ewing* has been strongly criticized, with one commentator saying that with it the Court has "greatly weakened, if not almost eliminated, proportionality review, as applied to prison sentences."⁸⁰ Others have argued that *Harmelin's* (and in consequence *Ewing's*) threshold test is too subjective, withholding the benefit of the inter and intra-jurisdictional comparison,⁸¹ and still oth-

⁷⁷ *Id.* at 25. Justice O'Connor's opinion was joined by Chief Justice Rehnquist and Justice Kennedy. Four main theories of punishment have been generally proposed in criminal law as the aims of punishment: retribution, deterrence, incapacitation, and rehabilitation. Retribution, often times called "retaliation" or "revenge," is based on the idea that the offender deserves a punishment in proportion to the harm caused or threatened, thus helping to restore society's peace of mind and vindicating respect for the law. Deterrence, on the other hand, which is at times alluded to as "general prevention," views punishment as a tool to inflict in others the fear of suffering in themselves the predicaments that those who have broken the law have been subjected to (e.g., imprisonment, death penalty, etc.), thus deterring them from incurring in the forbidden conduct. Incapacitation, also expressed as "restraint" or "isolation," views punishment as the means to exclude from society those who have disrupted its norms and caused or threatened harm; whereas the main purpose of rehabilitation, sometimes referred to as "reformation," is to treat and reform the offender so that he or she can return to society as a law-abiding citizen. Today, some of the most relevant conceptualizations of punishment include different aspects from each of these theories, which are viewed as compatible instead of in exclusion of each other. For a more detailed account of the four classic theories of punishments and some of the criticism that each has given rise to, see WAYNE R. LAFAVE, 1 SUBSTANTIVE CRIMINAL LAW 36-47 (2d ed. 2003).

⁷⁸ *Ewing*, 538 U.S. at 29-30.

⁷⁹ *Id.* at 30. Justice Scalia concurred with the result and wrote a separate opinion reiterating his view that the Eighth Amendment does not include a principle of proportionality in non-capital sentences. Nevertheless, he criticized the rationale of the plurality for being dissociated from the concept of proportionality:

Proportionality—the notion that the punishment should fit the crime—is inherently a concept tied to the penological goal of retribution. "[I]t becomes difficult to speak intelligently of 'proportionality,' once deterrence and rehabilitation are given significant weight", not to mention giving weight to the purpose of California's three strikes law: incapacitation.

Id. at 31 (Scalia, J., concurring) (quoting *Harmelin*, 501 U.S. at 989). Justice Breyer dissented and wrote an opinion, which Justices Stevens, Souter, and Ginsburg joined.

⁸⁰ Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1059 (2004).

⁸¹ See Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 148-49 (2007).

ers, like Professor Youngjae Lee, have asserted that the rationale of *Ewing's* plurality is inconsistent with the purpose of the Eighth Amendment as a limit on the state's punitive power. Professor Lee stated that:

The institution of punishment is desirable for various and well-rehearsed reasons, including retribution, deterrence, incapacitation, and rehabilitation. The purpose of the Eighth Amendment ban on “cruel and unusual punishments,” however, is to place constraints on the ways in which we pursue these ends. Therefore, a reading of the proportionality limitation in the Eighth Amendment that boils down to the position that any punishment is constitutionally permissible as long as it satisfies an accepted purpose is at odds with the general logic of the Eighth Amendment.⁸²

Indeed, if the constitutionality of a sentence will depend on whether it is justified under any of the rationales for punishment, it will be highly unlikely for a prison sentence not to pass muster since it could always be justified as advancing the rationale of incapacitation. Therefore, we have seen how despite the remarks in *Weems* and *Trop* about proportionality and human dignity, the Court's latest decisions have seriously restricted the scope for proportionality review under the Eighth Amendment.⁸³ This has let the robust enforcement of the principle of proportionate punishment in the hands of state courts. With this in mind, let us see how the Puerto Rico Supreme Court has interpreted the prohibition against cruel and unusual punishments included in the Commonwealth's Constitution.

B. The Cruel and Unusual Punishments Clause of the Constitution of Puerto Rico

As stated before, Section 12 of the Bill of Rights of the Constitution of Puerto Rico protects against cruel and unusual punishments.⁸⁴ Although there were few

⁸² Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 683 (2005).

⁸³ For the analysis of proportionality in capital sentences the Court has developed a stricter test in which it conducts both intra and inter-jurisdictional evaluation to assess the “evolving standards of decency” with regard to the sentence under consideration. As part of that test, and independently of the intra and inter-jurisdictional comparison, the Court exerts its own judgment (based on the text, history, meaning, and purpose of the Eighth Amendment) to decide whether the death sentence is disproportionate in relation to the circumstances of the crime and the offender. This test has led the Court to find the death penalty disproportionate for the crime of rape (*Kennedy v. Louisiana*) and for felony murder when the offender did not kill, attempted to kill, nor intended the death of the victim (*Enmund v. Florida*). The U.S. Supreme Court has also found the death penalty disproportionate in the cases of juvenile (*Atkins v. Virginia*) and mentally retarded offenders (*Roper v. Simmons*). See generally, *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Enmund v. Florida*, 458 U.S. 782 (1982). For a criticism of this two-track approach to sentencing—for not finding support in the Constitution nor in the advancement of any public policy, as well as for discriminating against non-capital offenders—see Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145 (2009).

⁸⁴ CONST. PR art. II, § 12.

discussions at the Constitutional Convention regarding the content of this right, the report prepared by the Bill of Rights Committee at the Convention makes plain that the provision was influenced by the drafters' belief that convicts, no matter how heinous their crime, retain their dignity as human beings.⁸⁵ Therefore, the state has to respect the dignity of the offender and cannot inflict dehumanizing punishments, such as disproportionate penalties:

The evolution of criminal law and penitentiary institutions has consisted in the incessant struggle to humanize punishment, which responds to the moral principle that every delinquent is still a person notwithstanding his or her criminal acts and the penalty, as sanction for the crime and in due proportion to it, should never result in the degradation of the person. Cruel and unusual punishments are degrading punishments; they humiliate or annihilate the personality of the offender at its core. Apart from this, punishments of this nature violate the principle of justice that requires proportionality with respect to the crime committed.⁸⁶

The Puerto Rico Supreme Court has reaffirmed that the provision includes a requirement of proportionality, but its application has been inconsistent and a thorough articulation of the right has been absent from the court's jurisprudence. For instance, in *Pueblo v. Pérez Méndez* the court upheld a sentence of eight months of imprisonment for participation in a clandestine lottery, expressing that "the punishment determined by the Legislature must be in proportion to the social problem that it intends to prevent" and simply made reference to two cases from Louisiana and Kentucky that upheld similar sentences.⁸⁷ Likewise, in *Pueblo v. Burgos Hernández* the court upheld a prison sentence of 112 years and concluded, without further analysis, that "[t]aking into account the nature of the offenses committed and the fact that the punishments imposed fall within the limits fixed by a valid statute, the [claim of disproportionality] lacks merit."⁸⁸

However, in *Pueblo v. Pérez Zayas* the approach began to change in favor of a more careful analysis.⁸⁹ The petitioner had been convicted of robbery and two violations of the Puerto Rico Weapons Act,⁹⁰ and sentenced to thirty years of imprisonment. In the appeal, he argued that the trial judge erred by not considering the mitigating evidence, such as his criminal record, age, family dependents, or the fact that he did not shoot the firearm and that no one was injured. The court declared that the cruel and unusual punishment clause requires penalties "to be

85 4 DIARIO DE SESIONES, *supra* note 33, at 2571-72.

86 *Id.* at 2572 (translation by author).

87 *Pueblo v. Pérez Méndez*, 83 P.R. Dec. 228, 233-34 (1961) (translation by author).

88 *Pueblo v. Burgos Hernández*, 13 P.R. Offic. Trans. 1075, 1086 (1983) (The petitioner was convicted of rape, robbery, attempt to commit sodomy, and violations to the Puerto Rico Weapons Act, 25 LPRA §§ 455-460k).

89 *Pueblo v. Pérez Zayas*, 16 P.R. Offic. Trans. 243 (1985).

90 25 LPRA §§ 455-460k.

proportionate to the severity of the criminal conduct, not to be arbitrarily imposed, in short, the imposition of less restrictive penalties to achieve the purposes for which they are imposed.”⁹¹ Although the court expressed that normally it would not intervene with the trial court’s sentencing discretion, the circumstances of the crime and the characteristics of the offender warranted a modification of the sentence to safeguard the right against cruel and unusual punishments. Accordingly, it reduced the prison sentence to fifteen years.⁹²

Despite this assessment, it was not until a few years later, in *Pueblo v. Echevarría Rodríguez*, that the court formally sketched a test to examine proportionality.⁹³ That test was formulated in the following terms:

[T]he court must weigh, on one hand, the severity of the punishment and, on the other, the gravity of the criminal conduct in light of the following factors: (a) the harm caused to the victim and to society, and (b) the culpability of the offender. This last factor means the mental state with which the offender committed the crime, that is, his or her *mens rea*. In addition, the courts must consider whether the convict will have the benefit of parole [under the terms of the sentence].⁹⁴

It is worth noting that when the court referred to the culpability of the offender, it limited the reach of the inquiry to the narrower aspect of *mens rea*. That is, what it considered relevant with regard to culpability was the mental state with which the offender committed the crime.⁹⁵ To appraise that mental state, the court referred to some of the classic common law terms to describe *mens rea* and concluded that the culpability of the offender in that case was significant because he planned the crime and committed it with deliberation and in a *cold-hearted manner*. The court also considered the gravity of the offense—aggravated kidnapping, aggravated damages, and conspiracy—as well as the future availability of parole and rejected petitioner’s claim of disproportionality.⁹⁶

This test has not been modified by or used in later cases. Some important aspects differentiate the *Echevarría* test from the proportionality analysis followed by the U.S. Supreme Court. For example, the Puerto Rico Supreme Court has not adopted the standard of gross disproportionality between punishment and offense; in *Echevarría* the court referred to this standard as one of *reasonable proportionality*.⁹⁷ In addition, the Puerto Rican test does not include *Solem’s* intra and inter-jurisdictional comparison with other sentences, nor a consideration, as in

⁹¹ *Pérez Zayas*, 16 P.R. Offic. Trans. at 249 (citations omitted).

⁹² *Id.*

⁹³ *Pueblo v. Echevarría Rodríguez*, 128 P.R. Dec. 299 (1991).

⁹⁴ *Id.* at 372 (citation omitted) (translation by author).

⁹⁵ By thus narrowing the element of culpability, the court excluded factors that could be important to properly assess the blameworthiness of the offender, such as his or her motives and aims, personal circumstances, or prior behavior.

⁹⁶ *Echevarría*, 128 P.R. Dec. at 372-73 (1991).

⁹⁷ *Id.* at 372.

Ewing, of whether the sentence advances any of the goals of punishment in order to validate its constitutionality. On the contrary, the *Echevarría* test stressed that punishment should correspond to the circumstances of the crime and the offender, taking into account the harm caused (assessed through factors such as the use of violence, the magnitude of the crime, or the risk created by the conduct), as well as the degree of culpability.

In *Brunet Justiniano v. Hernández Colón*, the court affirmed the broader scope of the proportionality requirement under the Commonwealth's Constitution and implicitly rejected the view embraced by the U.S. Supreme Court in *Harmelin*.⁹⁸ Thereby, the court expressed that the Puerto Rican proportionality provision protects not only against barbaric and inhuman forms of punishment, but also that:

[O]ur jurisprudence has recognized its application in other situations, such as indefinite imprisonment for civil contempt . . . ; when the penalty becomes a perpetual punishment; when penalties are disproportionate and arbitrary; when penalties are applied unevenly to persons who are in similar situations, and when a prison sentence is imposed merely for being a drug addict.⁹⁹

Despite such statements, however, the Puerto Rico Supreme Court has paid insufficient attention to the exegesis of the cruel and unusual punishments clause, with only a few opinions beginning to explore the content of the right and its requirement of proportionality. Moreover, in its interpretations the court has not taken into account the constitutional value of human dignity despite the close relationship between both concepts, as the drafters of the Puerto Rican Constitution rightly pointed out. Because of the limited scope for proportionality review under the most recent federal cases interpreting the Eighth Amendment, the Puerto Rico Supreme Court must develop its own interpretation of the proportionality requirement in light of the values espoused by the Puerto Rican Constitution. This is, precisely, the purpose of its Bill of Rights: to expand the scope of individual guarantees when necessary in order to protect human rights and promote the free development of the human being.

Since the Puerto Rico Supreme Court's jurisprudence on human dignity is still in its embryonic stage, in the next part I will examine how Germany and South Africa have construed the human dignity provision in their constitutions and applied it in the context of criminal sentencing. My aim is that this will serve to illustrate how human dignity can be interpreted to work as a functional legal value with a meaningful role in the constitutional order. However, I do not intend to suggest that Puerto Rico should adopt the same understandings and applications of dignity as Germany or South Africa. Clearly there are historical, socioeconomic,

⁹⁸ *Brunet Justiniano v. Hernández Colón*, 130 P.R. Dec. 248 (1992).

⁹⁹ *Id.* at 271-72 (citations omitted) (translation by author). It should be noted that in *Robinson v. California*, 370 U.S. 660, 667 (1962), the U.S. Supreme Court held that the Eighth Amendment protects against the criminalization of status conduct, such as the condition of being a drug addict, and said that "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."

political, legal, and cultural differences that must be considered, among other reasons because they allow the concept to adapt and respond to the specific circumstances of each society. Nevertheless, it is also true that they share important characteristics; fundamentally, they are democracies that place the protection of human rights as the cornerstone of the constitutional scheme. These common traits can be especially appraised in a context like criminal sentencing, where the duty to respect the intrinsic worth of each human being becomes decidedly pertinent.

III. COMPARATIVE LAW: GERMANY AND SOUTH AFRICA

A. Human Dignity and Proportionate Punishment in the Case Law of the German Federal Constitutional Court

In 1949, four years after the end of the Second World War, the Federal Republic of Germany adopted its Constitution, known as the Basic Law. With the horrific violations of human rights perpetrated by the Nazi regime fresh in the conscience of the German people, the Basic Law began its formulation of fundamental rights with the declaration in Article 1(1) that “[h]uman dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.”¹⁰⁰ The preeminent position of this clause at the head of the Basic Law represented the understanding that the inviolability of human dignity was the founding value of the German state and the source that legitimated its authority. The purpose of the state’s existence was thus to respect and protect human dignity.¹⁰¹

Article 1(1) has not been viewed by the courts as a mere rhetorical provision declaring ideals and aspirations. From the start, the Federal Constitutional Court conceived human dignity as a workable legal concept, applying it to diverse controversies as a constitutional value with an essential role in the interpretation of the Basic Law.¹⁰² Human dignity is considered an absolute value or principle that informs the substance and scope of all constitutional rights.¹⁰³ Every human being is entitled to respect and the state has the duty to restrict itself from violating human dignity and to intervene when necessary to protect it from assault by a third party.

With regard to its meaning, the Federal Constitutional Court has refrained from *a priori* definitions and instead has interpreted the clause through its application to concrete situations.¹⁰⁴ In this sense, the court has developed the object

¹⁰⁰ GRUNDGESETZ FÜR DIE BUNDERSREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 1(1) (Ger.).

¹⁰¹ See Eckart Klein, *Human Dignity in German Law*, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE* 145, 146 (David Kretzmer & Eckart Klein eds., 2002).

¹⁰² See Dreier, *supra* note 13, at 376.

¹⁰³ DONALD P. KOMMERS & RUSSELL A. MILLER, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 423 (3rd ed. 2012).

¹⁰⁴ EDWARD J. EBERLE, *DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES* 43 (2002).

formula (*objektformel*) to identify when human dignity is violated.¹⁰⁵ Examined through the object formula, the inviolability of human dignity implies the prohibition of treating a person merely as a means for the consecution of the state's goals and the corresponding duty of conceiving the person as an end in himself or herself:

Article 1(1) of the German Basic Law protects the individual human being not only against humiliation, branding, persecution, outlawing and similar actions by third parties or by the state itself. . . . [T]he obligation to respect and protect human dignity generally precludes making a human being a mere object of the state. What is thus absolutely prohibited is any treatment of a human being by public authority which fundamentally calls into question his or her quality as a subject . . .¹⁰⁶

The Federal Constitutional Court, thereby, has applied the human dignity provision in conjunction with the right to the development of one's personality—Article 2(1)—and the right to equality—Article 3(1)—to recognize a right to privacy,¹⁰⁷ honor,¹⁰⁸ and image;¹⁰⁹ to protect the intimacy of a person's life;¹¹⁰ to recognize a person's right to leave the country;¹¹¹ and to establish restraints on the procedures that the state can follow in criminal prosecutions, such as the ban on the polygraph test¹¹² and on any procedure that causes unusual physical pain or that could affect the person's health.¹¹³

¹⁰⁵ BARAK, *supra* note 3, at 235.

¹⁰⁶ Aviation Security Act Case, Bundesverfassungsgericht [BverfGE], 1 BvR 357/05 (Ger.), Feb. 15, 2006, available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2006/02/rs20060215_1bvro35705.html.

¹⁰⁷ See Microcensus Case, 27 BVERFGE 1 (1969), reprinted in KOMMERS & MILLER, *supra* note 103, at 356-358.

¹⁰⁸ *Id.*, at 368.

¹⁰⁹ See Tape Recording I Case, 31 BVERFGE 255 (1971).

¹¹⁰ See KOMMERS & MILLER, *supra* note 103 at 413 (for a discussion of the Transsexual I Case, 49 BVERFGE 286 (1978), recognizing the right of a transgender person to have his or her gender modified in the registry after a sex-change operation). See also Transsexual II Case, 88 BVERFGE 87 (1993), which declared unconstitutional the statutory requisite that the person be at least twenty-five years old before applying for the modification of his or her gender in the official registries and held that: "Article 2(1) in combination with Article 1(1) of the Basic Law protects the narrow personal sphere of life, especially one's intimate and sexual sphere, and guarantees to every person the fundamental right to determine the circumstances under which he or she behaves or acts in the public realm." KOMMERS & MILLER, *supra* note 103, at 423.

¹¹¹ See Elfes Case, 6 BVERFGE 32 (1957), reprinted in KOMMERS & MILLER, *supra* note 103, at 401-04.

¹¹² See Polygraph Case, (Chamber Decision) 35 Neue Juristische Wochenschrift 375 (1982); 17 BVERFGE 347 (1963). "To elicit the truth by attaching persons to a machine... is to regard them as objects and not as human beings capable of telling the truth through ordinary questioning." KOMMERS & MILLER, *supra* note 103, at 363.

¹¹³ See Spinal Tap Case, 16 BVERFGE 194 (1963); see also Pneumoencephalography Case, 17 BVERFGE 108 (1963).

Thus, through its application in various cases, it is possible to distinguish some of the basic content of Article 1(1). As Professor Aharon Barak indicates, at a minimum it means:

[P]rotect[ng] and ensuring bodily integrity. Included in this are the prohibition of torture, severe punishments, brainwashing, systematic rape and degradation. The second is ensuring basic equality between people. The third is protection of the personal identity of the individual, and protection of a person's psychological integrity and intellectual fulfillment. The fourth is ensuring the minimal subsistence of the individual in society.¹¹⁴

Regarding criminal sentencing, the jurisprudence of the German Federal Constitutional Court interpreting Article 1(1) of the Basic Law is particularly relevant since one of its landmark decisions was a case considering the influence of human dignity precisely in this context. Because of its importance for understanding the implications of human dignity on proportionate punishment, much of the discussion that follows will revolve around this case—the *Life Imprisonment case*—¹¹⁵ in which the court examined whether life imprisonment was constitutional. The defendant in that case had been accused of murder with aggravating circumstances, one of the few instances in which the German Penal Code required a sentence of life imprisonment.¹¹⁶ The trial court found him guilty but, before imposing the sentence, referred to the Federal Constitutional Court the question about the constitutionality of life imprisonment in light of several provisions, particularly the human dignity clause.

The Federal Constitutional Court heard the testimonies of officials from several of the German states about the implementation of life imprisonment sentences, as well as the testimonies of psychiatrists and criminologists with respect to its physical and psychological effects. The court concluded that, although life imprisonment was not unconstitutional *per se*, the way in which it was being implemented was inadequate to pass constitutional muster. For the penalty to be compatible with human dignity the government had to give the convict “a concrete and realistically attainable chance to regain his freedom at some later point in time.”¹¹⁷ Thus, the court instructed the Parliament to enact a law regulating the procedure for the conditional release of prisoners serving life sentences. In reaching this conclusion, the court made far-reaching statements about human dignity and its implications for the proportionality of punishment.

The court expressed that the duty to respect human dignity is based on the notion of the human being “as a spiritual-moral beings endowed with the freedom

¹¹⁴ BARAK, *supra* note 3, at 237 (footnote omitted).

¹¹⁵ Life Imprisonment Case, 45 BVERFG 187 (1977), reprinted in KOMMERS & MILLER, *supra* note 103, at 363-68.

¹¹⁶ DIRK VAN ZYL SMIT, TAKING LIFE IMPRISONMENT SERIOUSLY IN NATIONAL AND INTERNATIONAL LAW 135 (2002).

¹¹⁷ Life Imprisonment Case, 45 BVERFG 187 (1977), reprinted in KOMMERS & MILLER, *supra* note 103, at 366.

to determine and develop themselves.”¹¹⁸ That freedom, however, cannot be unlimited because a person is connected to the community in an interdependent relationship.¹¹⁹ Because of this connection, the liberty of the individual can be limited in circumstances where it is necessary for the security of society. But even in such circumstances, the state must act with respect for the dignity of the human being and the equal worth of every person. Because of each person’s inherent worth, which includes the autonomy to develop his or her personality, the state is prohibited from treating a person as a mere instrument and must always act consonant with the view that his or her self-realization as a human being is an ultimate end.¹²⁰

Therefore, the inviolability of human dignity prohibits cruel, inhuman, and degrading punishments, and requires that the inflicted punishment be proportionate to the severity of the offense and the culpability of the offender. Without regard for the offender’s blameworthiness and his or her capacity to develop his or her personality in accordance with the law, the state would not be viewing the offender as an individual human being. Instead, it would be treating him or her as a mere instrument in the battle against crime as is explained in the court’s rationale:

It is contrary to human dignity to make persons the mere tools of the state. The principle that “each person must shape his own life” applies unreservedly to all areas of law; the intrinsic dignity of each person depends on his status as an independent personality. In the area of criminal sanctions, which demands the highest degree of justice, Article 1(1) [the human dignity clause] determines the nature of punishment and the relationship between guilt and atonement. The basic principle of “*nulla pena sine culpa*” has the rank of a constitutional norm. Every punishment must justly relate to the severity of the offense and the guilt of the offender. Respect for human dignity especially requires the prohibition of cruel, inhuman, and degrading punishments. The state cannot turn the offender into an object of crime prevention to the detriment of his or her constitutionally protected right to social worth and respect.¹²¹

The court explained that because human dignity is intrinsic to every person, prisoners retain the guarantee to have their dignity respected and the government is obliged to safeguard the basic necessities for a life worthy of a human being and procure the conditions necessary for the development of their personality.¹²² That is, the state has “the [constitutional] duty to strive towards their resocialization, to preserve their ability to cope with life and to counteract the negative effects of

118 *Id.* at 365.

119 *Id.*

120 *Id.*

121 *Id.*

122 *Id.* at 366.

incarceration and the destructive changes in personality that accompany imprisonment.¹²³ As such, as a corollary of the respect for human dignity together with the right to develop one's personality,¹²⁴ convicts have a constitutionally protected interest in their resocialization and, in the case of those condemned to life imprisonment, to have the opportunity to regain their freedom.¹²⁵

As a result, the court held that life imprisonment can only be compatible with the human dignity clause if the state provides the offender "with the concrete and realistically attainable chance" of reentering society.¹²⁶ That is, life prisoners have a right grounded in the Basic Law to claim from the state the opportunity to reenter society after a reasonable period. The Federal Constitutional Court expressed this by referring to the object formula:

[T]he state strikes at the very heart of human dignity if it treats the prisoner without regard to the development of his personality and strips him of all hope of ever earning his freedom. . . . In these cases, where the social prognosis is positive, life imprisonment can hardly be justified. Moreover, the long, continuous lack of freedom is an extraordinarily physical and psychological burden that could result in substantial detriment to the prisoner's personality, one good reason for introducing the possibility of release. A sentence of life imprisonment cannot be enforced humanely if the prisoner is denied *a priori* any and every possibility of returning to freedom.¹²⁷

The *Life Imprisonment* case had at least two important effects for the German legal system regarding proportional punishment. One was the constitutionalization of the culpability principle, which requires that punishment "be proportionate to the offense, and to the offender, in the sense that the punishment reflect the offender's culpability, or desert."¹²⁸ Accordingly, the blameworthiness of the offender marks the ceiling for the punishment that can be validly imposed. This does not mean that utilitarian goals, such as deterrence or incapacitation, cannot be considered in the determination of the penalty. Their influence on the penalty imposed, however, cannot exceed the offender's desert.¹²⁹

123 *Id.*

124 "Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law", GRUNDGESETZ FÜR DIE BUNDERSREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 2(i), translated in EBERLE, *supra* note 104, at 51.

125 The court referred to the Lebach Case, in which it held that as a consequence of the inviolable character of human dignity, together with the right to the development of personality and the principle of the social state, the state is obliged to provide the offender with opportunities and mechanisms to promote his or her resocialization. See Lebach Case, 35 BVERFGE 202 (1973), reprinted in KOMMERS & MILLER, *supra* note 103, at 483.

126 45 BVERFGE 187 (1977), reprinted in KOMMERS & MILLER, *supra* note 103, at 366.

127 *Id.* at 366-367.

128 MARKUS D. DUBBER & TATJANA HÖRNLE, CRIMINAL LAW: A COMPARATIVE APPROACH 23 (2014).

129 *Id.*

In the *Life Imprisonment case*, the German Federal Constitutional Court linked this principle to human dignity.¹³⁰ Because respect for human dignity implies respect for a person's individuality and the prohibition of treating him or her merely as a means, the state must account for the blameworthiness of the offender—which includes both, the harm caused and the culpability of the offender—and impose the punishment that fits the convict and the particulars of his or her crime as closely as possible. Recurring to the Latin formulation of the culpability principle, the court sanctioned its constitutional roots by stating that “[t]he basic principle *nulla poena sine culpa* has the rank of a constitutional norm. Every punishment must justly relate to the severity of the offense and the guilt of the offender.”¹³¹

This principle has been codified in Section 46(1) of the German Penal Code, which states that “[t]he guilt of the offender is the basis for sentencing.”¹³² Section 46(2) follows with a list of mitigating and aggravating circumstances that the sentencing court must weigh before imposing punishment. As required by the culpability principle, the list is made up of factors relevant to the assessment of the blameworthiness of the offender and includes, among others:

[T]he motives and aims of the offender; the attitude reflected in the offence and the degree of force of will involved in its commission; . . . the consequences caused by the offence to the extent that the offender is to blame for them; the offender's prior history, his personal and financial circumstances.¹³³

Those factors allow for the individualization of the sentence so that it reflects what the offender deserves. This is not attained by requiring the imposition of the sentence that perfectly fits the blameworthiness of the offender—a demand which would be almost impossible to satisfy—, but by selecting from the sentencing frame established for each offense¹³⁴ an adequate and just sentence proportional to the harm caused and the degree of culpability. As Professor Michael Bohlander explained:

The sentencing frame of each offence . . . is the starting point for the sentence in an individual case: the court must first find the appropriate frame, which can be a difficult exercise to begin with. Once the court has identified the appropriate

¹³⁰ *Id.* at 24.

¹³¹ 45 BVERFGE 187 (1977), reprinted in KOMMERS & MILLER, *supra* note 103, at 365.

¹³² STRAFGESETZBUCH [STGB] [PENAL CODE], Nov. 13, 1998, as amended, § 46, para. 1, translation at https://www.gesetze-im-internet.de/englisch_stgb/.

¹³³ *Id.* § 46, para. 2.

¹³⁴ Except for the crimes of aggravated murder and genocide, both of which entail a mandatory penalty of life imprisonment, each crime in the German Penal Code has its own sentencing frame. The maximum term of imprisonment in fixed-term sentences is fifteen years. See STRAFGESETZBUCH [STGB] [PENAL CODE] § 38.

range, it must attribute the proper term to the offender based on her guilt or degree of blameworthiness.¹³⁵

The other major effect of the *Life Imprisonment* decision was the recognition that prisoners have a constitutionally protected interest in their resocialization. This means that unjustifiably long prison sentences cannot be imposed because they disregard the offender's capacity to develop his or her personality and self-realize in due observance of the law. The *Life Imprisonment case* established that inmates condemned to life imprisonment have the right to receive from the state not only the basic necessities of life (such as proper accommodations, nutrition, and medical treatment) and be offered the resources necessary for their resocialization (such as educational and work programs), but also to demand a "concrete and realistically attainable" opportunity to reenter society.¹³⁶

In this sense, the court posited that indeterminate sentences are contrary to human dignity when the prisoner has already served for a reasonable period to atone for his or her crime and conditional release does not represent a threat to the security of the community. Thus, conditional release must be available for convicts serving life sentences and the point of its availability, although a matter that the Court left to the discretion of Parliament, had to be based on reasonable parameters to guarantee the *concrete* and *realistically* attainable opportunity of regaining freedom. The court emphasized that for the crime of aggravated murder that did not mean that an indefinite prison sentence was *per se* unconstitutional. If after a proper assessment the conclusion was that the convict still represented a threat to public safety, the courts could deny the petition for conditional release. However, what the state cannot do is to deny *a priori* every opportunity to regain freedom.¹³⁷

After the *Life Imprisonment case* the German Parliament amended the Penal Code to enact Section 57a, which regulates the procedure for the conditional release of convicts sentenced to life imprisonment. As a result, conditional release is available after the prisoner has served fifteen years of his or her prison sentence. Other elements that the courts must evaluate before granting conditional release include the "personality of the offender, his or her behavior in prison", capacity to lead a law-abiding life, and the circumstances of the crime.¹³⁸

The commitment of the German legal system to the resocialization of the offender is reflected as well in other provisions of the Penal Code, like Section 57 which regulates conditional early release in sentences of fixed-term imprisonment.¹³⁹ In those instances, early release on parole is available after the prisoner

¹³⁵ MICHAEL BOHLANDER, *PRINCIPLES OF GERMAN CRIMINAL PROCEDURE* 177 (2012).

¹³⁶ 45 BVERFG 187 (1977), *reprinted in* KOMMERS & MILLER, *supra* note 103, at 366.

¹³⁷ *Id.* at 365.

¹³⁸ STRAFGESETZBUCH [STGB] [PENAL CODE] § 57a. The constitutionality of these criteria was upheld by the Federal Constitutional Court in 86 BVERFG 288; *See* KOMMERS & MILLER, *supra* note 103, at 368-69.

¹³⁹ STRAFGESETZBUCH [STGB] [PENAL CODE] § 57.

has served two thirds of the sentence and his or her release is appropriate considering public safety concerns. Generally, there is a presumption in favor of release.¹⁴⁰ Additionally, Section 38 establishes that the maximum term of imprisonment in fixed-term sentences is fifteen years.¹⁴¹ On the other hand, Section 46, with regard to the principles of sentencing, states that “[t]he effects which the sentence can be expected to have on the offender’s future life in society shall be taken into account.”¹⁴²

The Federal Constitutional Court has further reaffirmed the importance of resocialization and its relation to human dignity in later cases. For example, in the *War Criminal case* the Court considered the “circumstances of the crime” factor in Section 57(1) of the Penal Code and held that in the evaluation of whether to grant conditional release, courts cannot ascribe excessive emphasis to that factor to the exclusion of a fair consideration of the personality, state of mind, and age of the offender.¹⁴³ Likewise, in the *Youth Imprisonment case* the court held that with respect to juveniles the state has to provide forms of assistance and resources tailored to their biological, psychological, and social needs, stressing in particular the importance of counseling, leisure, physical activity, continuing education, and familial contacts.¹⁴⁴

All in all, in the *Life Imprisonment case* the Federal Constitutional Court embraced the notion that respect for human dignity means respect for a person’s humanity. Consequently, the autonomy of the person to develop his or her personality to fulfill his or her life must be respected. What this means for proportionate punishment is that the individuality of the offender is central. A person’s deeds, no matter how reprehensible, cannot obliterate the consideration of his or her humanity. Thus, when determining the sentence courts must account for the blameworthiness of the offender as the basis for proportionate punishment. Additionally, the interest in resocialization must be included in the analysis because imprisonment cannot be for such a long term as to deprive the offender of a realistically attainable chance of regaining freedom. As we shall see, this notion of the relationship between human dignity and proportionate punishment is shared by the South African legal system as well.

¹⁴⁰ BOHLANDER, *supra* note 135, at 209.

¹⁴¹ STRAFGESETZBUCH [StGB] [Penal Code] § 38.

¹⁴² *Id.* § 46. Some of the characteristics that German courts have considered in relation to this provision include whether the convict is a first-time prisoner, his or her advanced age, and reduced life expectancy because of a serious disease. See BOHLANDER, *supra* note 135, at 188-89.

¹⁴³ War Criminal Case, 72 BVERFGE 105 (1986). KOMMERS & MILLER, *supra* note 103, at 369; STRAFGESETZBUCH [StGB] [PENAL CODE] § 57, para. 1.

¹⁴⁴ See KOMMERS & MILLER, *supra* note 103, at 369-70; see also BOHLANDER, *supra* note 135, at 212 (“Juvenile proceedings . . . operate on the basis that the primary aim of the sanction is the education of the defendant, not her punishment”).

B. Human Dignity and Proportionate Punishment in the Case Law of the South African Constitutional Court

The system of apartheid in South Africa from 1948 to 1994 was notorious for the gross violations of rights and liberties of the non-white population. That past explains the importance of human dignity in the new South African constitutional order and the paramount position it occupies in the jurisprudence of its Constitutional Court. Human dignity is enshrined in several provisions of the Final Constitution of 1996, particularly in Section 10, which states: “[e]veryone has inherent dignity and the right to have their dignity respected and protected.”¹⁴⁵

The South African Constitution conceives human dignity as both a freestanding and enforceable constitutional right, and as a constitutional value that informs the content and shapes the scope of other rights. As a freestanding right, human dignity has rarely been applied as the exclusive dispositive rule; more often it is employed as a complementary right that reinforces the application of other constitutional rights whose scope is more tailored to the issue under consideration.¹⁴⁶ Still, when a fundamental liberty interest not protected by a more specific constitutional provision has been claimed, the courts have resorted to the right to human dignity as the legal vehicle to confer protection. That has been the case, for example, with issues related to family life and intimate associations, which are not expressly provided for in the Bill of Rights.¹⁴⁷

However, human dignity is most frequently invoked as a constitutional value.¹⁴⁸ In this role, it is used as an interpretative standard to shape the contours of constitutional rights. This function is prescribed in Section 39(1) of the Constitution, which reads: “[w]hen interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.”¹⁴⁹ With this in mind, for example, the court concluded in *Khosa v. Minister of Social Development* that the “exclusion of permanent residents in need [from] social-security programmes . . . [has] a serious impact on [their] dignity” which in turn supported the finding that the Social Assistance Act under consideration violated both the plaintiff’s right to equality and their right to social security.¹⁵⁰

¹⁴⁵ S. AFR. CONST., 1996, § 10, reprinted in Woolman, *supra* note 11, at 36-1.

¹⁴⁶ *Id.* at 36-19 to -20.

¹⁴⁷ *Id.* at 36-20.

¹⁴⁸ *Id.* at 36-22.

¹⁴⁹ S. AFR. CONST., 1996, § 39(1), reprinted in Woolman, *supra* note 11, at 36-1. Human dignity also performs an important role as a factor to be considered in the balance that courts must conduct when a constitutional right is limited by a statute. See S. AFR. CONST., 1996, § 36(i) (“The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”).

¹⁵⁰ *Khosa v. Minister of Social Development* 2004 (6) BCLR 569 (CC) at para. 76; Social Assistance Act 59 of 1992.

Likewise, Justice O'Regan, in her opinion in *Dawood v. Minister of Home Affairs*, gave an illustrative explanation of how human dignity is conceived and applied in the country's legal system:

The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. . . . [D]ignity is not only a *value* fundamental to our Constitution, it is a justiciable and enforceable *right* that must be respected and protected.¹⁵¹

The Constitutional Court of South Africa, like its German counterpart, has not defined human dignity *a priori*, evaluating instead its meaning and content in concrete legal issues.¹⁵² The court has interpreted human dignity as forbidding the objectification of persons and has nullified prejudicial classifications based on race, gender, and sexual orientation. For instance, in *National Coalition for Gay and Lesbian Equality v. Minister of Justice* the court found that the crime of sodomy in the context of consenting adults represented an affront to the identity of gay men and violated their privacy.¹⁵³

Likewise, in *Minister of Home Affairs v. Fourie* the Court held that the law that banned same-sex couples from getting married was not only inconsistent with the right to equality, but also violated the dignity of gays and lesbians by preventing their exercise of self-determination.¹⁵⁴ For its part, in *Moseneke v. The Master and Bhe v. Magistrate* the court declared invalid several statutory provisions and customary practices from the apartheid era that unfairly discriminated based on race and gender by establishing separate succession norms for black decedents and allowing for male primogeniture rules.¹⁵⁵ The court held such manifestly racist and sexist rules an affront to the dignity of black people and women, respectively.

Thus, the inviolability of human dignity means the recognition of each person's intrinsic worth. That worth is shared with every other human being because

¹⁵¹ *Dawood v. Minister of Home Affairs* 2000 (8) BCLR 837 (CC) at para. 35 (footnote omitted).

¹⁵² BARAK, *supra* note 3, at 268.

¹⁵³ *National Coalition for Gay and Lesbian Equality v. Minister of Justice* 1998 (12) BCLR 1517 (CC).

¹⁵⁴ *Minister of Home Affairs v. Fourie; Lesbian and Gay Equality Project v. Minister of Home Affairs* 2006 (3) BCLR 355 (CC) at para. 114; *see also National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs* 2000 (1) BCLR 39 (CC) (where an immigration provision excluding the same-sex life partner of a permanent South African resident from the benefit of receiving an immigration permit was declared unconstitutional); *Du Toit v. Minister of Welfare and Population Development* 2002 (10) BCLR 1006 (CC) (declaring unconstitutional legislation that prohibited adoption by same-sex couples).

¹⁵⁵ *Moseneke v. The Master* 2001 (2) SA18 (CC); *Bhe v. Magistrate Khayelitsha* 2005 (1) BCLR 1 (CC).

all persons are equal in dignity. Consequently, each human being is entitled to equal concern and respect. It is the humanity of a person, the set of characteristics that make him or her unique, what underlies dignity and commands the respect for the individual's autonomy to develop his or her personality and give meaning to his or her life.¹⁵⁶

This concept of human dignity has also emerged in the Constitutional Court's case law on criminal punishment. In that domain, human dignity has served mainly as a value guiding the interpretation and scope of the right against cruel, inhuman, or degrading treatment or punishment, which is guaranteed in Section 12(1)(e) of South African Constitution's Bill of Rights.¹⁵⁷ In this context, the court has expressly applied the object formula developed in the German jurisprudence to identify a violation of human dignity. An example of this is *S. v. Makwanyane*, where the court considered the constitutionality of the death penalty.¹⁵⁸ The court began its analysis explaining that the provisions of the Constitution cannot be interpreted in isolation, but in relation to each other and its underlying values. In the case of a capital sentence, the right against cruel, inhuman, or degrading punishment had to be interpreted together with the protection of human dignity, life, and equality. Those guarantees were fundamentally affected by the death penalty and therefore were relevant to the assessment of its constitutionality.

Regarding dignity, the court in *S. v. Makwanyane* emphasized that it is an inherent attribute of each person and, although inevitably limited to some degree by the very nature of punishment, it cannot be annulled by a conviction. Accordingly, when punishing a person, the state must respect the humanity of the offender and his or her capacity to develop his or her personality. Thus, a penalty that objectifies the offender is anathema to human dignity and the requirement of treating the person as a goal in himself or herself. By destroying life, capital punishment destroys the core of human dignity and treats the offender merely as an instrument to deter crime or to satisfy demands for retaliation. The annihilation of life and dignity, together with the elements of arbitrariness, inequality and the possibility of error in its enforcement made the imposition of a capital sentence a cruel, inhuman, and degrading punishment. To this end, the court surmised that:

The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter Three [of the Bill of Rights]. By committing ourselves to a society founded on the recognition of human rights we

¹⁵⁶ Anton Fagan, *Human Dignity in South African Law*, in *THE CAMBRIDGE HANDBOOK OF HUMAN DIGNITY: INTERDISCIPLINARY PERSPECTIVES* 401, 404 (Marcus Düwell et al. eds., 2014).

¹⁵⁷ See S. AFR. CONST., 1996, § 12(1)(e), reprinted in Stu Woolman & Michael Bishop, *Freedom and Security of the Person*, in 3 *CONSTITUTIONAL LAW OF SOUTH AFRICA* ch. 40, at 40-1 (Stuart Woolman & Michael Bishop eds., 2d ed. 2013).

¹⁵⁸ *S. v. Makwanyane* 1995 (6) BCLR 665 (CC) (the death penalty was prescribed in Section 277(1)(a) of the Criminal Procedure Act as punishment for the crime of murder, see Criminal Procedure Act 51 of 1977 § 277 (1)(a)).

are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does, including the way it punishes criminals. This is not achieved by objectifying murderers and putting them to death to serve as an example to others in the expectation that they might possibly be deterred thereby.¹⁵⁹

Likewise, in *S v. Williams* the question was whether the penalty of juvenile whipping was consistent with human dignity and the protection against cruel, inhuman, or degrading treatment or punishment.¹⁶⁰ The court focused on the features and characteristics of whipping and emphasized its dehumanizing nature: the helplessness of the offender, his or her submission to the beatings, the increasing fear and agony between strokes, the severe physical and mental pain, and the absolute state of vulnerability. The court further concluded that the degrading and humiliating nature of the punishment made it irreconcilable with the inherent worth of the juvenile.¹⁶¹ Moreover, the court determined that not only was the dignity of the offender violated; the dignity of the person charged with the administration of the strokes, who had to participate in the brutality of the spectacle, was also infringed.¹⁶² As such, corporal punishments, because of their cruelty and detrimental physical, psychological, and moral effects, are an affront to the dignity of all who partake in it and constitute cruel, inhuman, and degrading punishment. With regard to this, the court concluded that:

Corporal punishment involves the intentional infliction of physical pain on a human being by another human being at the instigation of the State. This is the key feature distinguishing it from other punishments. The degree of pain inflicted is quite arbitrary, depending as it does on the person who is delegated to do the whipping. The court merely directs the number of strokes to be imposed. The objective must be to penetrate the levels of tolerance to pain; the result must be cringing fear, a terror of expectation before the whipping and acute distress which often draws involuntary screams during the infliction. There is no dignity in the act itself; the recipient might struggle against himself to maintain a semblance of

159 *Id.* at para. 144.

160 *S v. Williams* 1995 (3) SA 632 (CC) (whipping was authorized by Section 294 of the Criminal Procedure Act. The consolidated cases before the court involved six juveniles who were sentenced to a “moderate correction of a number of strokes with a light cane.” *Id.* at para. 1; see Criminal Procedure Act 51 of 1977 § 294).

161 To accentuate the humiliating character of the punishment, the court mentioned that in the case of adult whipping the offender was stripped naked before submitting to the whippings. Although the punishment before the court’s consideration was juvenile whipping, it is clear from the court’s reasoning and statements that adult whipping is also unconstitutional. *Id.* at para. 44-45.

162 For a discussion on some of the implications of degrading and humiliating punishment for the collective dignity of the community in whose name punishment is imposed, see generally Carol S. Steiker, *To See a World in a Grain of Sand: Dignity and Indignity in the American Criminal Justice*, in *THE PUNITIVE IMAGINATION: LAW, JUSTICE, AND RESPONSIBILITY* 19 (Austin Sarat ed., 2014).

dignified suffering or even unconcern; there is no dignity even in the person delivering the punishment. It is a practice that debases everyone involved in it.¹⁶³

Distinct from *Makwanyane* and *Williams*, in which the Constitutional Court considered the constitutionality of the punishments *per se*, the issue in *S. v. Dodo* was one of proportionality.¹⁶⁴ In particular, the question before the court was whether the mandatory sentence of life imprisonment for the crime of aggravated murder, established in Section 51(1) of the Criminal Law Amendment Act of 1997, constituted cruel, inhuman, or degrading punishment. Section 51(3) of the same Act was also pertinent to the analysis because it qualified Section 51(1) by allowing the imposition of a lesser sentence when the trial court was convinced that “substantial and compelling circumstances” existed.¹⁶⁵

The court stated that disproportionate punishments violate the protection against cruel, inhuman, or degrading punishments. It emphasized that to analyze whether a punishment is proportional, human dignity must be taken into account because “[w]hile it is not easy to distinguish between the three concepts ‘cruel’, ‘inhuman’ and ‘degrading’, the impairment of human dignity, in some form and to some degree, must be involved in all three.”¹⁶⁶ The court then went on to establish the criterion for the analysis of proportionality, recognizing the need to account for the offender’s dignity through the consideration of his or her blameworthiness.

In this sense, the court held that when evaluating the proportionality between crime and punishment all factors relevant to the gravity of the criminal act, as well as all relevant personal circumstances relating to the offender that could have a bearing on his or her culpability, must be assessed.¹⁶⁷ Otherwise, if the length of the sentence has no relation to the offender’s blameworthiness, he or she would be being treated merely as a means for the achievement of the goals of the state. The court stated the following:

To attempt to justify any period of penal incarceration . . . without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end.¹⁶⁸

¹⁶³ *S. v. Williams* 1995 (3) SA 632 (CC) at para. 89.

¹⁶⁴ *S. v. Dodo* 2001 (5) BCLR 423 (CC).

¹⁶⁵ Criminal Law Amendment Act 105 of 1997 §§ 51(1), 51(3).

¹⁶⁶ *S. v. Dodo* 2001 (5) BCLR 423 (CC) at para. 35.

¹⁶⁷ *Id.* para. 37.

¹⁶⁸ *Id.* at para. 38. The court interpreted the term *offence* as referring to the blameworthiness of the offender in the following manner:

However, after this appraisal of the proportionality requirement, the court determined that in the present case it was not necessary to decide whether a mandatory sentence of life imprisonment was disproportionate to the crime. Because of the exception in Section 51(3) of the Criminal Law Amendment Act for “substantial and compelling circumstances”—which the court read as including circumstances of disproportionality—life imprisonment was not fully mandatory under the statute and the trial courts were not required to impose it when it would be inconsistent with the right against cruel, degrading, or inhuman punishment.¹⁶⁹

Notwithstanding that, it should be emphasized how, by requiring the consideration of all relevant factors regarding the seriousness of the offense and the personal circumstances of the offender, the South African Constitutional Court affirmed the culpability principle as the basis for proportional punishment. For the court, disproportionate sentences are cruel, inhuman, and degrading because they violate human dignity by not accounting for that which resides “at the very heart of human dignity,”¹⁷⁰ that is, the offender’s individuality, his or her humanity. Consequently, the penalty cannot exceed the offender’s blameworthiness, which encompasses both the harm caused and the degree of culpability, because otherwise the offender would be treated as a mere means to the state’s goals and not as an end in and of himself or herself.

The assessment of the harm caused includes “the degree and extent of violence used, the nature of any weapon, the brutality and cruelty of the attack, the nature and character of the victim, whether the victim was unarmed or helpless, and so on.”¹⁷¹ For its part, the assessment of the culpability of the offender takes into account, among others, the age of the offender, his or her motives, physical and mental health, economic and familial circumstances—such as the presence of dependents—, and any other factor that diminishes the offender’s criminal capacity.¹⁷² Because respect for human dignity means the prohibition of treating a person merely as a means, the state cannot punish based solely on the seriousness of the crime or with the predominant objective of advancing utilitarian goals. Like for the German Constitutional Court, here the blameworthiness of the offender marks the ceiling of what he or she deserves and, thus, the maximum sanction that can be inflicted:

Offence, as used throughout in the present context, consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender.

Id. para. 37.

169 *Id.* para. 40.

170 *Id.* para. 38.

171 SS TERNBLANCHE, A GUIDE TO SENTENCING IN SOUTH AFRICA 186 (2nd ed. 2007).

172 *Id.* at 150.

Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence¹⁷³ . . . the offender is being used essentially as a means to another end and the offender's dignity assailed. So too where the reformative effect of the punishment is predominant and the offender sentenced to lengthy imprisonment, principally because he cannot be reformed in a shorter period, but the length of imprisonment bears no relationship to what the committed offence merits.¹⁷⁴

Another theme that runs throughout the decision in *Dodo* is the defense of individualized sentencing. Although the court did not hold that mandatory sentences were unconstitutional *per se*, it emphasized that courts must exercise discretion when mandatory sentences seem grossly disproportional to the offender's blameworthiness.¹⁷⁵ The exercise of that discretion is a precondition for the court's ability to account for the individuality of the offender and constitutes one of the hallmarks of South African sentencing law.¹⁷⁶ Therefore, although the court acknowledged that "[i]t is pre-eminently the function of the Legislature to determine what conduct should be criminalized and punished," it affirmed that:

The legislature's powers are decidedly not unlimited. Legislation is by its nature general. It cannot provide for each individually determined case. Accordingly such power ought not, on general constitutional principles, wholly to exclude the important function and power of a court to apply and adapt a general principle to the individual case.¹⁷⁷

Lastly, with regard to the resocialization of the offender, its foundation in the inviolability of human dignity is recognized in the South African Constitution itself, whose Section 35(2)(e) provides that prisoners have the right "to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at State expense, of adequate accommodation, nutrition, reading material and medical treatment."¹⁷⁸ The interest in resocialization is also reflected in the way South Africa's legal system approaches imprisonment, where,

¹⁷³ That is, as encompassing both the seriousness of the criminal conduct and the culpability of the offender.

¹⁷⁴ *S v. Dodo* 2001 2001 (5) BCLR 423 (CC) at para. 38.

¹⁷⁵ Mandatory sentences are the exception in South Africa and when they apply, like Section 51(1) of the Criminal Law Amendment Act of 1997, they are not strictly mandatory because the imposition of a lesser sentence is permitted in view of substantial and compelling circumstances. See Criminal Law Amendment Act 105 of 1997 §§ 51(1) (S. Afr.).

¹⁷⁶ Many of the provisions of South Africa's sentencing law recognize this discretion. Its importance for the legal system was echoed by judge Smalberger JA of the Supreme Court of Appeals when he expressed that "[a] mandatory sentence . . . reduces the Court's normal sentencing function to the level of a rubber stamp. It negates the ideal of individualisation. The morally just and the morally reprehensible are treated alike. Extenuating and aggravating factors both count for nothing. No consideration, no matter how valid or compelling, can affect the question of sentencing." See TERNBLANCHE, *supra* note 171, at 119, 126 (internal citation omitted).

¹⁷⁷ *S v. Dodo* 2001 2001 (5) BCLR 423 (CC) at para. 26.

¹⁷⁸ S. AFR. CONST., 1996, § 35(2)(e), reprinted in Woolman, *supra* note 11, at 36-39 n.1.

before sentencing, the courts must take into account the effects that the sentence will have on the offender considering, among other factors, his or her age and criminal record.¹⁷⁹ The result is that imprisonment is not the most common sentence in South Africa and should not be imposed whenever possible.¹⁸⁰ In addition, the availability of parole is an element of all prison sentences. For example, in the case of life imprisonment, parole can be granted after serving twenty-five years of the sentence or, if the prisoner is sixty-five years old or older, after he or she has served for fifteen years.¹⁸¹ For all sentences of more than twelve months, conditional release can be available after serving half of the prison term.¹⁸²

Thus, in South Africa, as in Germany, respect for human dignity has influenced the analysis of sentence proportionality through the recognition that, since each person is a goal in himself or herself and due regard must be given to his or her autonomy, the interest in the resocialization of the offender must be considered when determining the sentence. Likewise, the sentence imposed cannot exceed the blameworthiness of the offender because otherwise he or she would be treated without consideration for his or her individuality; that is, merely as an instrument for the advancement of the state's interests.

With this notion of what human dignity has meant for the German and South African law of criminal sentencing, let us consider now what might be some of the implications for the Puerto Rican criminal justice system of including human dignity in the analysis of proportionality.

IV. IMPLICATIONS FOR THE ANALYSIS OF PROPORTIONALITY IN PUERTO RICO

As a legal concept, human dignity protects the humanity of a person.¹⁸³ Because of that humanity, each person has an inherent worth that must be respected. Respect for the dignity of each person means respect for his or her worth and for his or her autonomy to develop his or her personality in accordance, of course, with the respect due to the dignity of every other human being. As a standard for adjudication, the courts of Germany and South Africa have translated this into the object formula and determined that the dignity of a person is violated when he or she is treated merely as an instrument for the achievement of the state's purposes. Because of his or her intrinsic dignity, a person must be always viewed as an end in himself or herself.

This conceptualization of human dignity conforms with the way the drafters of the Commonwealth's Constitution viewed the human dignity clause as a vehicle

¹⁷⁹ TERNBLANCHE, *supra* note 171, at 209, 219-20.

¹⁸⁰ *Id.* at 211, 219.

¹⁸¹ *Id.* at 234.

¹⁸² *Id.* at 228.

¹⁸³ BARAK, *supra* note 3, at 124.

to expand the protections of the Bill of Rights to protect human rights and reinforce the free development of the personality.¹⁸⁴ Also, this conceptualization has been embraced by some of the Justices of the Puerto Rico Supreme Court, such as Chief Justice Fiol Matta and Justice Rodríguez Rodríguez.¹⁸⁵ Then, if the constitutional value of human dignity is conceived in this manner and applied to the interpretation of the right against cruel and unusual punishments, what might be the conceptual and practical implications for the requirement of proportionality? Does the current law of sentencing and punishment conform to the respect for human dignity? How does the constitutionalization of the culpability principle and the recognition of the constitutionally protected interest in resocialization affect the sentencing scheme currently in place?

In *Pueblo v. Echevarría*, the Puerto Rico Supreme Court announced the test for the analysis of proportionality and held that the severity of the punishment had to be examined in light of the harm caused to the victim and society, and the *mens rea* or the mental state with which the offender committed the crime.¹⁸⁶ However, when due regard is given to the individuality of the offender this test fails to meet the demands of human dignity. As we saw, the culpability principle—as a corollary of the prohibition of treating the offender merely as a means—requires that punishment does not exceed the offender’s blameworthiness, understood in the twofold sense as the harm caused by the criminal conduct and the degree of culpability of the offender. For the purpose of sentencing, that notion of culpability is wider than how the term is understood for purposes of determining criminal liability (*mens rea*). That is so because if the sentence cannot exceed the blameworthiness of the offender, then culpability must include not only the mental state with which the offender committed the crime—purposely, knowingly, recklessly, negligently—, but other considerations as well that are relevant to the assessment of the offender’s circumstances, such as his or her age, physical and mental health, aims and motives, or the behavior before and after the crime.

Echevarría’s test considered the harm caused and the culpability of the offender, but did so in a manner at odds with what dignity requires. On one hand, the court employed a far-reaching notion of harm that includes not only the harm suffered by the victim, but also by society. That broad notion of societal harm could serve to justify the imposition of severe punishment for the most dilated consequences, losing sight of the blameworthiness of the offender for the particular crime committed and encouraging the view of the offender as an instrument for retaliation. On the other hand, the concept of culpability that the court espoused—as being equivalent to *mens rea*—is inadequate as it fails to account for the factors that can influence the blameworthiness of the offender. Therefore, to be consistent with human dignity—and its prohibition of treating the offender as

184 4 DIARIO DE SESIONES, *supra* note 33, at 3174-75.

185 See *Pueblo v. Sánchez Valle*, 192 P.R. Dec. 594, 648 (2015) (Fiol Matta, C.J., concurring); *Lozada Tirado v. Testigos Jehová*, 177 P.R. Dec. 893, 934 (2010) (Rodríguez Rodríguez, J., concurring); see also *Ex Parte Andino Torres*, 151 P.R. Dec. 794, 797 (2000) (Negrón García, J., concurring).

186 *Pueblo v. Echevarría Rodríguez*, 128 P.R. Dec. 299, 372-73 (1991).

a mere means for the advancement of the state's goals—the analysis of proportionality must be modified to properly assess the blameworthiness of the offender in light of the harm caused to the victim and the degree of culpability.

The constitutionalization of the culpability principle means that the blameworthiness of the offender sets the ceiling for the maximum sentence that can be imposed without violating his or her dignity. That does not imply that the Commonwealth cannot consider the consequentialist goals of punishment—deterrence, incapacitation, or rehabilitation—when determining the sentencing scheme or imposing a lesser punishment than what the offender deserves as when, for example, the offender cooperates with the authorities or for any other valid reason. What would be contrary to human dignity—and therefore banned by the requirement of proportionality included in the right against cruel and unusual punishments—is to punish the offender in excess of what he or she deserves in order to account for such consequentialist aims. In this sense, human dignity—through the culpability principle and its requirement that punishment be proportionate to the blameworthiness of the offender—imposes a retributive limit on the Commonwealth's punitive power, while recognizing the state's prerogative to pursue different policies and sentencing goals.¹⁸⁷

Human dignity is also closely related to sentencing discretion because only in that way can the courts adapt the general rules enacted by the legislature to meet the circumstances of the offense and the offender. In Puerto Rico, the penalties of imprisonment are established not in terms ranging from a minimum to a maximum, but in fixed number of years.¹⁸⁸ For this reason, the way in which courts exercise some degree of discretion is through Articles 65 and 66 of the Penal Code, which, respectively, list a number of mitigating and aggravating factors with regard to the characteristics of the offender and the circumstances of the crime.¹⁸⁹ In this sense, the existence of mitigating factors allow the courts to reduce the term of imprisonment down to twenty-five percent from the fixed term and the

¹⁸⁷ Similarly, Professor Youngjae Lee has argued that the proportionality requirement in the Eighth Amendment to the U.S. Constitution is based on the retributivist principle that “one should not be punished more harshly than one deserves.” See Lee, *supra* note 82, at 683. Thereby, he has elaborated a framework for the analysis of proportionality claims where such retributive principle defines the maximum punishment that can be imposed without violating the Eighth Amendment. Professor Lee, however, does not expound on the legal basis for his premise that the proportionality requirement in the Eighth Amendment is based on retributivist principles. Since the U.S. Supreme Court has held that the foundation of the Eighth Amendment is “nothing less than the dignity of man,” that legal basis, as in Puerto Rico, may well be the constitutional value of human dignity. See *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion).

¹⁸⁸ For example, a fixed penalty of twenty-five years of imprisonment for the crime of aggravated robbery. See *CÓD. PEN. PR art. 190*, 33 LPRR §5260 (2010 & Supl. 2017).

¹⁸⁹ Among the mitigating factors, Article 65 includes the age of the offender, whether he or she is a first-time offender, his or her reputation in the community, or the offender's physical and mental condition. Among the aggravating factors, Article 66 includes whether a firearm or other dangerous weapon was used to commit the crime, whether the victim suffered serious physical harm, or whether the victim was particularly vulnerable for being a minor, an older person, or a pregnant woman. *CÓD. PEN. PR art. 65, 66*, 33 LPRR §§ 5098-5099 (2010 & Supl. 2017).

presence of aggravating factors to enhance it up to twenty-five percent from the fixed term. However, Article 67 of the Penal Code makes optional the weighing of mitigating and aggravating factors included in Articles 65 and 66.¹⁹⁰ By allowing for the imposition of punishment without considering the circumstances of the offense and the characteristics of the offender, Article 67 fails to meet the demands of human dignity with regard to proportionate punishment. Therefore, it must be amended to state that, when sentencing, courts must consider whether mitigating or aggravating factors are present.¹⁹¹

Likewise, Article 67 of the Penal Code forbids the consideration of any mitigating or aggravating circumstance when the crime entails a penalty of ninety-nine years of imprisonment.¹⁹² Two provisions in the Penal Code currently carry such a penalty: Article 94, for first-degree murder, and Article 73, for habitual recidivism.¹⁹³ Nonetheless, by inflicting such a severe punishment while preventing the courts from exercising discretion to consider the blameworthiness of the offender, Article 67 treats the offender as a mere instrument for the advancement of the state's goals and not as an individual human being with rights and interests that ought to be considered.

The other major implication of human dignity for punishment proportionality is the recognition of a constitutionally protected interest in the resocialization of the convict. We saw in the *Life Imprisonment case* that for the sentence of life imprisonment this meant that, after a reasonable period of incarceration, the state had to give the offender the opportunity to regain his or her freedom through the mechanism of conditional release. Accordingly, for the penalty of imprisonment for a fixed term it would mean that the imposed sentence cannot be so long as to be equivalent to life imprisonment, either because the prisoner will not outlive it or because the possibility of reentering society would be impaired since the prisoner would have spent most of his or her life serving the sentence.¹⁹⁴ Additionally,

190 *Id.* § 5100.

191 The equivalent section in the German Penal Code concerning mitigating and aggravating circumstances states that “[w]hen sentencing the court *shall* weight the circumstances in fav[or] and against the offender. Consideration *shall* in particular be given to . . .” STRAFGESETZBUCH [STGB] [PENAL CODE], Nov. 13, 1998, as amended, §46 (emphasis added), *translation at* https://www.gesetze-im-internet.de/englisch_stgb/.

192 *Id.* § 5100.

193 Cód. Pen. PR art. 73, 94, 33 LPRA §§ 5107, 5143 (2010 & Supl. 2017). Habitual recidivism is imposed when an offender, previously convicted for two felonies, commits a third that entails a penalty of more than twenty years of imprisonment. *Id.* § 5107(b). Additionally, habitual recidivism applies when the third felony consists of a violation of some of the provisions of the Puerto Rico Controlled Substances Act or the Puerto Rico Weapons Act. *Id.* § 5107(c); *see also* Puerto Rico Controlled Substances Act, Act No. 4 of June 23, 1971, 24 LPRA §§ 2101-2311 (2011 & Supl. 2017); Puerto Rico Weapons Act, Act No. 404 of September 11, 2000, 25 L.P.R.A. §§ 455-460k (2016 & Supl. 2017).

194 In Puerto Rico, this is reinforced by Article VI, Section 19 of the Commonwealth's Constitution, which declares that “[i]t shall be the public policy of the Commonwealth . . . to regulate its penal institutions in a manner that effectively achieves their purposes and to provide, within the limits of available resources, for the adequate treatment of delinquents in order to make possible their moral and social rehabilitation.” CONST. PR art. VI, § 19.

as a corollary of the interest in resocialization the state has to guarantee throughout the execution of the sentence the basic conditions necessary for the development of the offender's personality, including appropriate accommodations, nutrition, medical treatment, and the availability of educational programs and work opportunities.¹⁹⁵

A consequence of the constitutionalization of the offender's interest in resocialization would be that the sentence of ninety-nine years of imprisonment without the possibility of parole for the death of a law enforcement agent—as mandated by Article 308 of the Penal Code—would be found disproportionate.¹⁹⁶ Nevertheless, such punishment should be held invalid under the current state of the law, since in *Brunet Justiniano v. Hernández Colón* the court expressed that perpetual punishments were cruel and unusual under the Constitution of Puerto Rico.¹⁹⁷

A related outcome would be that the terms of the prison sentences currently enacted in the Penal Code and in the special laws would have to be more closely scrutinized. The Puerto Rican law of sentencing and punishment is characterized by the severity of its lengthy prison sentences, which led one commentator to affirm that the island “has one of the most punitive sentencing schemes in the Western hemisphere.”¹⁹⁸ Throughout decades, prison sentences in Puerto Rico have followed a trajectory towards longer terms,¹⁹⁹ despite empirical evidence demonstrating the lack of statistically significant correlation between increments in the length of sentences and a reduction in criminal activity.²⁰⁰

For example, in 2004 a new Penal Code was adopted in the Commonwealth to supersede the 1974 Penal Code, which had been amended more than 200 times and had considerably expanded the list of crimes and the length of the sentences.²⁰¹ However, with regard to sentencing, the 2004 Penal Code not only increased the prison terms for the most serious crimes, it also created a scheme of

195 This provides constitutional ground to the recognition of the interest in resocialization stated in Article 49 of the Penal Code: “[i]mprisonment should provide the prisoner with the opportunity to attain moral and social rehabilitation while serving the sentence; and should restrict his liberty in the least possible manner that is consistent with the consecution of the purposes consigned in this Code”. CÓD. PEN. PR art. 49, 33 LPRA § 5082 (2010 & Supl. 2017) (translation by author).

196 *Id.* § 5416.

197 *Brunet Justiniano v. Hernández Colón*, 130 P.R. Dec. 248, 271-72 (1992); *see also* *García v. Luciano*, 15 P.R. Offic. Trans. 823, 115 P.R. Dec. 628 (1984).

198 Luis E. Chiesa, *Comentarios al P. del S. 1210 P. de la C. 2155*, public hearing regarding P del S. 1210, Comisión Conjunta para la Revisión del Código Penal y para la Reforma de las Leyes Penales, Senado de Puerto Rico, 17ma. Asam. Leg., October 31, 2014, at 4 (translation by author).

199 *See generally* NEVARES-MUÑOZ, *supra* note 15, at. 47-58.

200 What the studies show is that there is a positive correlation between the perception of successful detection and prosecution of crime and a reduction in criminal activity. As Professor Chiesa expresses, this supports the argument that the Commonwealth would make a better use of its resources by improving the capacity and effectiveness of the criminal justice system, instead of keeping offenders in jail for excessively long periods. Chiesa, *supra* note 198, at 8-9.

201 *See* Statement of Motives, Penal Code of 2004, Act No. 149 of June 18, 2004, 2004 LPR 879.

real sentences not subjected to automatic bonuses and other deductions in order to promote that convicts serve the actual number of years imposed.

Despite this greater severity, in 2012 a new Penal Code was adopted to replace the 2004 Penal Code. Among the main arguments to justify its adoption, the Legislature held that “fundamental changes” had to be made to the “philosophical basis of the 2004 Penal Code, which has resulted in lenity towards the accused and convicted offender which has in turn destabilized the principle of equal due process that should govern the administration of justice.”²⁰² Accordingly, a new sentencing scheme with longer prison sentences was established and the alternative penalties that the 2004 Penal Code instituted for less serious crimes (such as domiciliary restriction, therapeutic restriction, or community services) were abolished.

Two years later, the 2012 Penal Code was amended to moderate some aspects of the sentencing scheme. Therapeutic restriction was reincorporated and the terms of imprisonment for some offenses were reduced.²⁰³ In 2017, however, a new wave of harsher amendments took place, increasing, for example, the period between crimes for purpose of sentencing as a predicate offender from five to ten years. Simple burglary, a misdemeanor that carried a maximum sentence of six months of imprisonment, was converted into a felony with a three years prison sentence, and the penalty for the theft of government property increased to fifteen years of prison.²⁰⁴ Prison terms in Puerto Rico, therefore, are still considerably longer than those available in developed democracies, as can be appreciated with just a brief comparison with some of the sentences in Germany and South Africa.²⁰⁵

For instance, first degree murder in Puerto Rico entails a mandatory sentence of imprisonment for ninety-nine years, with the possibility of conditional release available after serving thirty-five years; while second degree murder entails a sentence of fifty years of imprisonment, with the possibility of conditional release available after serving twenty years.²⁰⁶ In Germany, aggravated murder entails a sentence of life imprisonment, but conditional release is available after serving fifteen years; while murder entails a sentence of imprisonment that could range from five to fifteen years, with release on parole available after serving two thirds

²⁰² Statement of Motives, Penal Code of 2012, Act No. 146 of July 30, 2012, 2012 LPR 1322, 1327 (translation by author).

²⁰³ For example, the penalty for aggravated larceny was reduced from fifteen years to eight years when the value of the stolen good is greater than \$10,000, and from eight years to three years when the value of the stolen good ranges from \$500 to \$10,000. The penalty for robbery was also reduced from twenty years to fifteen years; and for aggravated robbery from thirty years to twenty-five years. See Cód. Pen. PR art. 73, 94, 33 LPR § 5252 (2010 & Supl. 2017).

²⁰⁴ The amendments also included the criminalization of conduct associated with protests, such as punishing as a misdemeanor the obstruction of access to construction sites, public educational institutions, and other governmental buildings. See Act No. 27 of May 19, 2017.

²⁰⁵ See discussion *infra* Parts III(A) and III(B); see also Chiesa, *supra* note 198, at 4-9 (comparing the sentences imposed in Puerto Rico for the crimes of rape, incest, robbery, aggravated robbery, and aggravated theft with those imposed for the same crimes in New York, California, Spain, and Germany, and showing that sentences in Puerto Rico were considerably higher).

²⁰⁶ Cód. Pen. PR arts. 94, 308, 33 LPR §§ 5143, 5416 (2010 & Supl. 2017).

of the sentence.²⁰⁷ In the case of South Africa, aggravated murder implies a sentence of life imprisonment, with conditional release available after serving twenty-five years; while murder implies a sentence of imprisonment for fifteen years, with the possibility of conditional release available after serving half of the sentence.²⁰⁸

For its part, rape in Puerto Rico entails a sentence of imprisonment for fifty years, with conditional release available after serving twenty years.²⁰⁹ In Germany, however, the sentence can range from two to fifteen years of imprisonment, with conditional release available after serving two thirds;²¹⁰ while in South Africa the sentence is ten years of imprisonment, with conditional release available after serving half of the sentence.²¹¹

The sentences in the Puerto Rico Weapons Act are also representative of the severity of criminal sentencing in the Commonwealth and in some cases even exceed the life expectancy of the convict.²¹² For instance, Article 5.04 of the Weapons Act, which bans the carrying or transportation of a firearm without a license, prescribes a sentence of imprisonment for ten years, which could be reduced to five or increased to twenty years depending on the presence of mitigating or aggravating circumstances.²¹³ Article 5.15 of the same Act prescribes a sentence of five years of imprisonment for aiming or discharging a firearm, which could be reduced to one year or increased to ten in the presence of mitigating or aggravating factors.²¹⁴ These sentences are mandatory, exclude all possibility of release on parole and must be served consecutively with respect to each other and to any other term of imprisonment that the offender may have to serve. Furthermore, Article 7.03 of the Weapons Act doubles any imprisonment term imposed under the Act when particular circumstances are met, such as when the weapon is used to commit a crime and another person suffers physical or mental harm as a result.²¹⁵

The nullifying effect of these provisions on the resocialization of the offender could be seen in *Pueblo v. Concepción Guerra*, a case in which the offender was convicted for first-degree murder and violations of Articles 5.04 (carrying a gun without a license) and 5.15 (firing a weapon) of the Weapons Act.²¹⁶ Because the

²⁰⁷ STRAFGESETZBUCH [STGB] [PENAL CODE] §§ 38, 57, 57(a). (as mentioned in *infra* section III(A), fifteen years is the maximum term of imprisonment for fixed-term sentences in Germany).

²⁰⁸ Criminal Law Amendment Act 105 of 1997 §§ 51 (1)–51 (2).

²⁰⁹ CÓD. PEN. PR arts. 130, 308 33 LPRA §§5191, 5416 (2010 & Sup. 2017).

²¹⁰ STRAFGESETZBUCH [STGB] [PENAL CODE] § 177(2).

²¹¹ Criminal Law Amendment Act 105 of 1997, § 51(2).

²¹² Dora Nevares-Muñiz, *Las penas en el nuevo Código Penal: A cinco años de su vigencia*, 79 REV. JUR. UPR 1129, 1161 (2010).

²¹³ Puerto Rico Weapons Act, Act No. 404 of September 11, 2000, 25 L.P.R.A. §§ 458c (2016 & Supl. 2017).

²¹⁴ *Id.* § 458n.

²¹⁵ *Id.* § 460b.

²¹⁶ *Pueblo v. Concepción Guerra*, 194 P.R. Dec. 291 (2015).

offender's convictions under the Weapons Act were aggravated and then duplicated by Article 7.03, in addition to the ninety-nine years of imprisonment for murder, the trial court sentenced him to forty years of imprisonment for violating Article 5.04 and twenty years for the violation of Article 5.15, for a consecutive prison term of 159 years with conditional release available after serving eighty-five years.²¹⁷ On appeal, the Puerto Rico Supreme Court upheld these sentences as a valid exercise of the Legislature's authority to penalize criminal conduct in order to protect society. No reference was made to the resocialization of the offender, the inviolability of human dignity, the requirement of proportionate punishment, or the cruel and unusual punishments clause.²¹⁸

Respecting the dignity of the offender, however, does not mean an abdication by the state of its role as guarantor of the community's safety. Serious crimes must be punished accordingly and that is why in the analysis of proportionality the harm caused by the offense is considered as an essential factor. However, the state cannot lose perspective that offenders retain their worth as human beings and that each life is a goal in itself. Punishment, therefore, must be proportionate and account for the gravity of the offender's conduct in having transgressed the rights and dignity of another person; but it shall also respect the dignity of the offender and his or her right to not be treated as less than a human being.

Likewise, the vindication of the human dignity clause of the Constitution of Puerto Rico should not be viewed as an undue interference with the authority of the Legislature to penalize criminal conduct. In our constitutional order, the Legislature enacts criminal laws and prescribes the corresponding punishment. By imperative of the system of separation of powers, the courts must act with deference towards this power of the Legislature and it is not their duty to second-guess the soundness of the measures adopted to respond to society's needs. However, that deference is not boundless and, as we have discussed throughout this article, its limits are found in the text of the Constitution.

Though the Legislature has discretion in this context to enact the laws that it considers necessary to protect society, those laws cannot infringe upon the guarantees of the Bill of Rights, such as the inviolability of human dignity and the protection against cruel and unusual punishments. It is the duty of the courts to intervene to protect those fundamental guarantees when they are encroached by disproportionately long sentences. Our system of separation of powers is not absolute, but mediated by checks and balances to impede the abuse of authority and

²¹⁷ That is, after serving the sixty years sentences under the Weapons Act and twenty-five years of the sentence for first degree murder. Because the crime occurred while the 2004 Penal Code was still in effect, Mr. Concepción Guerra could be, theoretically, considered up for parole in regard to his conviction for first-degree murder after serving the first twenty-five years of that sentence. See *Ley de la Junta de Libertad Bajo Palabra*, art. 3(a)(1), 4 LPRR § 1503. Under the 2012 Penal Code, as mentioned, a conviction for first-degree murder becomes parole-eligible after serving thirty-five years of the sentence. See *CÓD. PEN. PR art. 308*, 33 LPRR §5416 (2010 & Supl. 2017).

²¹⁸ See Iris Y. Rosario Nieves, *Derecho Penal Sustantivo*, 86 REV. JUR. UPR 487, 493-501 (2017), for a critique of this decision.

the infringement of individual rights. To vindicate the inviolability of human dignity and the right against disproportionate punishment is thus not an affront to that system, but a defense of its purpose.

CONCLUSION

Hersch Lauterpacht, the renowned international law scholar of the past century and an advocate for individual rights, wrote that “[t]he individual human being is the ultimate unit and end of all law.”²¹⁹ The protection of the humanity that resides in that *ultimate unit* is the purpose of human dignity as a legal concept. The case law of the German Federal Constitutional Court and the South African Constitutional Court attest to the feasibility of its interpretation and meticulous application to ensure that a person is not treated as less than a human being. In this sense, any difficulty in delimiting its content is not much different than with other broad terms that are prevalent in the law, such as liberty or due process. Like in those cases, the open-ended nature of human dignity cannot be viewed as an impediment to its development. In fact, because of this open-endedness, dignity serves a vital role guiding the interpretation and shaping the scope of human rights so they remain responsive to the demands of the times.²²⁰

In the case of Puerto Rico, the necessity of a thorough application of human dignity is nowhere more manifest than in the context of criminal sentencing. People are being sentenced to unduly harsh penalties and excessively long prison sentences without seldom any regard for their individuality and the circumstances of the crime. The limit on just punishment set by blameworthiness has been blurred by remarkably severe sentencing schemes that treat offenders as a mere instrument to advance the goals of the state or to obtain the electoral favor of a constituency.

Yet, a society where people convicted for the commission of crimes are condemned to disproportionately long prison sentences, with no concern for their autonomy and capacity for resocialization, is not the one contemplated in the Constitution. Since the dignity of the human being is inviolable, it is inviolable for everyone, including for those convicted of the worst crimes. A commitment to a constitutional order founded on the respect for human dignity cannot be reduced to a mere rhetorical phrase. The state must adhere to it in everything it does, including the way it punishes. Our courts must embrace it and project it with reason in their case law. Otherwise, the dignity of us all is violated.

219 HERSCH LAUTERPACHT, 1 INTERNATIONAL LAW BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT 149 (1970) (“[T]he principle that the rights and duties of States are but the rights and duties of man is of importance inasmuch as it lends emphasis to the idea—with which is bound up the progress of international law—that the individual human being is the ultimate unit and end of all law, national and international, and that the effective recognition and protection of ‘the dignity and worth of the human person’ and the development of human personality is the final object of law.”)

220 Christian Byk, *Is Human Dignity a Useless Concept?: Legal Perspectives*, in THE CAMBRIDGE HANDBOOK OF HUMAN DIGNITY: INTERDISCIPLINARY PERSPECTIVES 362, 364 (Marcus Düwell et al. eds., 2014).