

# HUMAN DIGNITY AND CAPABILITIES APPROACH: REFRAMING THE IDEA OF HUMAN DIGNITY IN THE ABORTION JURISPRUDENCE OF GERMANY AND USA

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## INTRODUCTION

In the United States, as Reva Siegel recently noted, the right to abortion has been increasingly linked by pivotal justices to the idea of individual human dignity.<sup>1</sup> There is emphasis on pluralistic formulation of dignity, based on autonomy and the construction of personhood through choices, thereby reinforcing a pregnant woman's claim to self-determination. Similarly, the German Federal Constitutional Court (GFCC) affirmed that "*access to abortion was supported or indeed probably required by the human dignity of the pregnant woman...her right to life and physical integrity, her right to personality.*"<sup>2</sup> This connection between ideas of human dignity and right to access abortion also finds support in broader comparative context, across jurisdictions such as Canada<sup>3</sup>, Brazil<sup>4</sup>, Australia<sup>5</sup> and Colombia.<sup>6</sup>

Likewise, at supranational level, recognition of inalienable right to human dignity and a guarantee to protect can be traced in several instruments. Article 7 of the International Covenant on Civil and Political Rights explicitly prohibits any state connect which is 'cruel and inhuman'. This word, according to United Nations Human Rights Committee prohibits state party from any action, which infringes "*the dignity and the physical and mental integrity*

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<sup>1</sup> Reva Siegel, *Dignity and the Politics of Protection: Abortion Restrictions under Casey/Carhart*, 117 Yale L.J. 1694 (2008) [hereinafter *Dignity and the Politics of Protections*]

<sup>2</sup> 88 BVerfGE I (1975).

<sup>3</sup> [1988] 1 S.C.R. 30.

<sup>4</sup> Debora Diniz, *Selective Abortion in Brazil: The Anencephaly Case*, 7 *Developing World Bioethics* 1471 (2007).

<sup>5</sup> *Department of Health v. JWB (Marion's Case)*, (1992) 175 C.L.R. 218.

<sup>6</sup> Columbian Constitutional Court Decision C-355 of 2006.

of the individual”.<sup>7</sup> Thus where carrying a fetus to term would involve significant physical or psychological harm to a woman, it has been directly held to violate guarantee of individual human dignity under Article 7.<sup>8</sup>

However, at the same time, idea of dignity as a constitutional value that supports right to access abortion remains under theorized despite several judicially and scholarly attempts to connect the idea of dignity to the specific abortion context. This is particularly so when it comes to the relationship between human dignity and women’s physical and psychological health or integrity. The same can be depicted by the abortion jurisprudence of United States<sup>9</sup> and Germany,<sup>10</sup> wherein the Courts have undermined women’s physical or psychological health to the extent necessary for protecting fetus life. Further, proposed women protective amendments by legislators in these states, stresses the need to support women in arriving at a decision about abortion. This is not to support her decision but to influence it and protect her from making an unwise decision, which she might regret later. Thus, inability of women to make reproductive decisions without guidance/counselling dominates the discourse, thereby undermining the conceptualization of dignity apropos women’s autonomy in decision-making.

The aim of this paper is to offer a more complete theoretical account to foster the value of dignity as a constitutional right that allows access to abortion. It will do so, by drawing on the Capabilities Approach (“CA”) as developed by theorist Martha Nussbaum<sup>11</sup> and by explaining the logical implications of employing such an approach in abortion context. I will argue that that employment of CA, will not only strengthen the link between the value of human dignity vis-à-vis women’s physical and psychological health. But it will also conceptualize human dignity as a vehicle to reinforce women’s autonomy in reproductive decision-making across several jurisdictions like Germany and United States.

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<sup>7</sup> See Office of the High Commissioner for Human Rights, CCPR General Comment No. 20 (1992), available online at: <http://www.unhchr.ch/tbs/doc.nsf/0/6924291970754969c12563ed004c8ae5?Opendocument>

<sup>8</sup> *Llantoy Humán v. Peru* (1153/03).

<sup>9</sup> *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007).

<sup>10</sup> 39 BVerfGE I (1975) (hereinafter “*Abortion I*” case); 88 BVerfGE I (1993) [hereinafter “*Abortion II*” case]

<sup>11</sup> Martha C. Nussbaum, *Capabilities as Fundamental Entitlements; Sen and Social Justice*, 9 Fem Econ.33 (2003); Martha C. Nussbaum, *Human Dignity and Political Entitlements*, in *Human Dignity and Bioethics: Essay Commissioned by the President Council on Bioethics* (2018) [hereinafter *Human Dignity and Political Entitlements*]; Martha C Nussbaum, *Constitution and Capabilities: Supreme Court Foreword: “Perception” Against Lofty Formalism*, 121 Harv. L. Rev. 4 (2007) [hereinafter *Constitution and Capabilities*]

Part II of the paper will review as to how the concept of human dignity has been articulated in the abortion jurisprudence across jurisdiction of Germany and United States. Part III of the paper will provide an outline of the CA; and will list out the capabilities most relevant to the abortion context. It will then proceed to employ the CA so explained to the abortion jurisprudence of Germany and USA and will depict how the same may provide for some form of ceiling, as well as floor, on the constitutional right to access abortion in these jurisdictions. Part IV is the conclusion of the paper.

## ARTICULATION OF HUMAN DIGNITY IN ABORTION JURISPRUDENCE OF GERMANY AND UNITED STATES

The human dignity as argued by Deryck Beyleveld and Roger Brownsword<sup>12</sup> is capable of bearing multiple meaning by recognizing that the concept can be used as both sword and shield. The idea of this section is to depict the tension between multiple and competing conception of dignity, which is particularly apparent in the abortion context. This part will explore two competing construction of dignity namely, dignity as empowerment and dignity as constraint in light of certain abortion cases across jurisdiction of Germany and United States. However, it will be shown that *first*, there is no explicit recognition of dignity as a constitutional value that supports woman's right to access abortion. Further, even though there is acknowledgment of human dignity vis-à-vis women's physical health or right to self-determination in these cases, it seems to be outweighed or restraint by relationship of human dignity apropos right to life of fetus. Thereby, depicting that the understanding of human dignity in the context of abortion has been mostly one sided.<sup>13</sup> *Second*, the cases also show that inability of women to make reproductive decision without guidance/counselling dominates the discourse.<sup>14</sup> The approach of the Court is more gender paternalistic, thereby subverting conceptualization of woman's dignity vis-à-vis her opportunity to practical reason.

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<sup>12</sup> D. Beyleveld and R. Brownsword, *Human Dignity in Bioethics and Biolaw*, Oxford: OUP, 2001.

<sup>13</sup> Reva Siegel, *Dignity and Sexuality: Claims on Dignity in transnational debates over abortion and same sex marriage*, (2012) 10 (2) I. Con 355. See further: *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007).

<sup>14</sup> "Abortion I" and "Abortion II" case, *supra* note 10.

### ***Abortion jurisprudence in Germany***

The articulation of human dignity in abortion context in Germany can be deduced by two cases i.e. *Abortion I* case and *Abortion II* case.<sup>15</sup> In the *Abortion I* case the Federal Constitutional Court of Germany invalidated Section 218a of The new Abortion Reform Act of 1974 which decriminalized abortion during the first twelve weeks of pregnancy for women, who received abortion-dissuasive counseling. The Court observed that Basic law protects unborn life as an objective value, by implicitly acknowledging an individual right to life of a fetus.<sup>16</sup> The Court reasoned that the affirmative duty of the state to protect unborn life was derived from Article 2 § 2 and Article 1 which obligated the state to protect right to life and dignity of man. This duty according to court was ‘comprehensive’, for it not only proscribes state infringement upon ‘developing life’ but also requires the state to affirmatively protect such life against illegal assault by private parties, including the pregnant woman herself. The Court perceived woman as an “aggressor”, and went ahead to even impose a criminal sanction to protect fetus life from its mother.<sup>17</sup>

Further in seeking to reconcile the conflicting right of the mother to the free development of personality with the right of the unborn child to life, the court holds that in weighing the constitutional values reference must be made to their relationship with the protection of human dignity. Nevertheless, the Court ultimately adopts a very one-dimensional view of dignity i.e. dignity as restraint by out rightly concluded that the objective hierarchy of values in the German Constitution commands that the fetus’s right to life outweighs the right to self-development of women (since it is not an absolute right in itself).<sup>18</sup>

On this principle, it also rejected the parliament’s efforts to devise any framework that reconciled and respected dignity of both women and unborn, by observing that ‘*the legal order may not make the woman’s right to self-determination the sole guideline of its rule making*’.<sup>19</sup> The language of the Court seems to reveal the superiority of objective communitarian values

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<sup>15</sup>Supra note 10.

<sup>16</sup> Donald P. Kommers, *Abortion and Constitution: United States of America and West Germany*, 25 Am. J. Comp. L. 255 (1977)

<sup>17</sup> Sam Haliday, *Protecting Human Dignity: Reframing the Abortion Debate to respect the Dignity of Choice and Life*, *Contemporary Issues in Law*, ISSN 1357-0374

<sup>18</sup> Udo Werner, *The Convergence of Abortion Regulation in Germany and the United States: A critique to Glendon’s Right Thesis*, 18 Loy.L.A. Int’l & Comp. L.J. 571. See further: supra note 10.

<sup>19</sup> Reva Siegel, *Dignity and Duty to Protect Unborn Life*, Chapter 30, The Chapter draws on Reva Siegel, ‘Constitutionalization of abortion’ in Michel Rosenfeld and András Sajó, *Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, 2012, 1057.

over woman's individual right of personality or her ability to take decision with respect to her pregnancy.<sup>20</sup>

The *Abortion II* case in 1994 brought in shift to the Abortion jurisprudence of Germany. While determining the constitutionality of new § 218a(1) St. GB, the Court firstly, clarified that it stood in conformity with the 1975 decision i.e. abortion *per se* is illegal except in circumstances where it would be unreasonable to impose a duty to continue the pregnancy, for example where a medical, criminological or embryopathic indication would justify termination. However, it also held that in absent of such justificatory indication, a woman could elect to terminate the pregnancy provided she underwent a pro-life counseling. One of the significant shifts between both the decisions is that the majority in the latter judgment moved from a duty to protect the fetus that categorized the women as an "aggressor", to a conception that framed her as an "corroborator", as someone whose cooperation is essential in safeguarding the fetus.<sup>21</sup>

It is pertinent to point out that even though the latter judgment liberalized abortion restrictions, it was not done so to balance or to give due recognition to the dignity of women vis-à-vis her right to self-determination or physical or psychological health. This is because the Court observed that § 218a(1) St. GB which described the voluntary interruption of pregnancy within the first three months as "not illegal", irreconcilable with the obligation of the state to protect unborn life. Consequently the provision was held to be void. It was the social reality of 1993 (post reunification of Germany), which was very different from that in 1975, which also forced the court to choose its stance wisely.<sup>22</sup> Thus, after the court had reconfirmed the constitutional principles in 1975, the judges had to reconcile their legal standpoint with the social reality that demanded easing of abortion restriction. They did so, by adopting the concept of 'preventive protection (of unborn) through counselling'.<sup>23</sup>

Even though Court found that such counselling would comply with the duty to respect the woman's dignity it is not the case so. This is because the normative goal of this counselling is not to support her decision to abort, but to influence it in a way to encourage her to continue pregnancy. Further, the Counselling is designed to assist her to reach a 'responsible and

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<sup>20</sup> *Supra* note 16.

<sup>21</sup> *Supra* note 17 at 300.

<sup>22</sup> Since 1972 i.e. post reunification of Germany, East German women had free access to abortion while the west abortion practice was characterized by an extensive utilization of the 'social indication' justification and abortion tourism. See: *supra* note 18.

<sup>23</sup> *Supra* note 18 at 592-594.



conscientious' decision about terminating the pregnancy.<sup>24</sup> Clearly the imposition of such a requirement treats women as less able to make a responsible decision without external assistance. There would appear to be little dignity in being forced to undergo pro-life counselling, to be told that fetus has right to life and terminating the same would be an unlawful act (although not a punishable offense). As the dissenting opinion noted, the label 'unlawful' contributes nothing to the state protection of unborn life. The stigma of abortion remains, women are labeled as law-breakers and the practical impact is that the direct cost of counselling based abortion will not be covered by the health care insurance provided by the state.<sup>25</sup>

### ***Abortion Jurisprudence in the United States of America***

This section will depict with the help of certain cases, as to how the conceptualization of dignity by the US Supreme Court have transformed over the period of time from invoking the value of dignity in the context of empowerment to reframing it in the context of restraint on the women's right to take decisions about her pregnancy. It will do so with the help three cases (i) *Roe v. Wade*<sup>26</sup> (ii) *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>27</sup> (iii) *Gonzales v. Carhart*<sup>28</sup>.

In *Roe* the Court extended the constitutional protection to women's decision of whether to continue or abort pregnancy by reading the right to abortion within the sphere of privacy. It did so by recognizing that government has an interest in regulating the potential life, but declared such interest to be insufficient to justify interference in women's right to undertake decision with respect to her own pregnancy. It is only at the point of fetal viability; in the third trimester of pregnancy did *Roe* allowed government to ban abortion, except when needed to protect women's life or health.<sup>29</sup>

In 1992, after two decades even though *Casey* affirmed the progressive approach as stated in *Roe*, it significantly narrowed it down and brought a shift to the approach. *Casey* adopted a conception of dignity that premised upon autonomy and construction of personhood through

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<sup>24</sup> *Supra* note 10.

<sup>25</sup> *Supra* note 17 at 301.

<sup>26</sup> 410 U.S. 113 (1973).

<sup>27</sup> 505 U.S. 833 (1992).

<sup>28</sup> 127 S. Ct. 1610 (2007).

<sup>29</sup> *Supra* Note 18 at 578.

choices, thereby reinforcing a pregnant women's claim to self-determination. However the limit/constraint to this choice is clearly set out in the judgment, which makes this right illusory in practicality.

*Casey* held that a woman is entitled to make the ultimate decision to have an abortion. However, the state could seek to manage, influence or regulate that decision provided in doing so it does not impose an undue burden upon her ability to elect a pre-viability abortion.<sup>30</sup> Based on this logic the plurality upheld a 24-hour waiting period in which a pregnant woman is given "truthful" "non-misleading" information (informed consent) designed to persuade her to carry pregnancy to term. Of course, complying with such an informed consent requirement would delay the performance of an abortion, requiring two separate visits to the abortion clinic, asking her to take more time off from work and other commitments, thereby increasing cost of accessing abortion. Nevertheless, the Court does not find such mandatory pre-abortion requirements as an undue interference in women's right. The Court fails to acknowledge that such practical restrictions upon her ability to exercise the right to access abortion render it illusory for those of limited means.<sup>31</sup>

Further this kind of informed consent regulation seems to deviate from the standard counselling. The goal of latter is to make available information about abortion in a way that maximizes the woman's autonomous decision – which would enable women to make decision that in *her* judgment best serve her self-interest and interest of those dependent on her.<sup>32</sup> The regulation in *Casey* seeks to communicate to a woman seeking an abortion her community's judgment that she reconsiders the decision that brought her to the scene of 'informed consent dialogue' and perhaps give different weight to the balance of considerations that led her to seek abortion. *Casey* also tells us that the government must persuade by "truthful and non-misleading" means. But even the reading of such dignity respecting constraints that undue burden framework imposes are necessary contextual. As Reva Siegel notes<sup>33</sup>, the questions remains about the kind of emotions law may interject into a women's decision making about abortion, and the context in which government can stimulate such emotions. Would

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<sup>30</sup> *Supra* Note 18 at 579-581.

<sup>31</sup> *Supra* Note 17 at 295.

<sup>32</sup> *Dignity and the Politics of Protection*, *supra* note 1 at 1756.

<sup>33</sup> *Dignity and the Politics of Protection*, *supra* note 1 at 1761. See Further: Jeremy A. Blumenthal, *Abortion, Persuasion, and Emotion: Implications of Social Science Research on Emotion for Reading Casey*, 83 Wash.L. Rev. 1, 27 (2008).

communications that target the woman obtaining an abortion at the moment of the procedure with her community's implicit or explicit recriminations count as persuasion or manipulation?

In *Carhart* the US Supreme Court not only further watered down the approach of *Casey* but also adopted a very different interpretation of dignity while upholding the Partial Birth Abolition Ban Act. After providing an emotive description of how a 'partial' birth abortion is performed the majority recognized that dignity is engaged in relation to fetus's life as well as woman's choices. Kennedy J upheld the Act since it "expresses respect for the dignity of human life", thereby vindicating state's interest in protecting potential life.<sup>34</sup> While doing so, he not only failed to develop his analysis of dignity as life but also gave no explicit consideration to the dignity of women. Given that the Act contains no exception to safeguard the health of women, it is suggested that Kennedy's understanding of dignity can at best be characterized as one-sided.<sup>35</sup>

The decision of *Carhart* is noteworthy because it suggests that the Court might soon recognize a new government interest in restricting abortion –an interest in regulating abortion to protect women<sup>36</sup>. Kennedy J emphasized on the need for women's decision to be fully informed, the purpose of the information being to protect women from the inevitable regret that women undergo after electing abortion. Minimally, advocates for such women protection rationale believe that a women who aborts a pregnancy is encouraged to 'defy her nature as mother to protect her child', and is likely to suffer significant psychological trauma and variety of life threatening illness ranging from bipolar disorder, suicidal ideation to breast cancer.<sup>37</sup>

Such women protection antiabortion arguments in the judgment seem to reinforce the old gender paternalistic tradition by upholding laws (1) based on stereotypes about women's capacity and women's roles that (2) deny women agency (3) for the claimed purpose of protecting women from coercion and/or freeing them to be mothers.<sup>38</sup> Thus even though *Carhart* takes its authority from *Casey*, it is significant to highlight that the such women

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<sup>34</sup> *Supra* note 28.

<sup>35</sup> *Supra* note 17 at 296.

<sup>36</sup> *Carhart*, *Supra* note 28 at 159.

<sup>37</sup> S.D. Task Force to Study Abortion, *Report of the South Dakota Task Force to Study Abortion*, 56 (2005). See further: *Dignity and Politics of Protection*, *supra* note 1.

<sup>38</sup> *Dignity and the Politics of Protection*, *supra* note 1 at 1792.



protecting rationale for restricting abortion is in deep and direct conflict with conception of dignity as equality and autonomy which *Casey* protects.

## **EMPLOYING THE CAPABILITIES APPROACH IN THE ABORTION CONTEXT**

The Capabilities Approach (“CA”) as developed by Martha Nussbaum, is a theoretical approach to quality of life assessment, which theorizes about basic wellbeing and social justice. Unlike other theories that focus on economic growth as main indicator of nation or region’s quality of life, the CA holds that the key question to ask while assessing societies for their decency and justice is – “What is each person able to do and to be?” In other words, like Kantian Approach it treats each person as an end, asking not just about the total or average achievements of the nation but about the opportunities set available to each person. It commits itself for people’s power of self-definition by focusing on choices or freedom holding that crucial things which a society must promote for their people is a set of opportunities or substantial freedom which people may or may not exercise in action: the choice is theirs.<sup>39</sup>

The primary claim of CA is that a minimally just society is that which is able to secure to all its citizens a threshold level of a list of ten central capabilities or opportunities, on the ground that such entitlements are requisite of a life worthy of human dignity<sup>40</sup>. Further, even though CA like Kantian Approach treats each person as an end and not merely as a means to an end, it understands the basis of dignity far more inclusively than Kant. This is because where Kant conceives of human dignity as residing entirely on rationality, human dignity as per CA inheres in sentience, emotion, affection, physical health, appetite as well as rationality. Thus, by this approach even persons with cognitive disabilities are treated as full equals in human dignity. Second, where Kant recognizes dignity as a diamond unreceptive to the blows of natural accident, the CA imagines it as vulnerable, when such assault occurs dignity is not removed,

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<sup>39</sup> *Constitution and Capabilities*, *supra* note 11. See further: Robeyns Ingrid, *The Capabilities Approach*, The Stanford Encyclopedia of Philosophy, Winter 2016 Edition.

<sup>40</sup> The Central human Capabilities under CA include: (i) Life (ii) Bodily health, (iii) Bodily Integrity (iv) Sense, Imagination and Thought (v) Emotions (vi) Practical reason (vii) Affiliation (viii) Other species (ix) Play, being able to laugh, to enjoy recreational activities (x) control over one’s environment. See Further: *supra* note 39.

but is profoundly harmed<sup>41</sup> (For example rape does not remove a women's dignity but does profoundly harm or violate it). Thus from the perspective of the CA, deprivation of health opportunities or opportunities for wellbeing are just as pertinent to the concept of human dignity as deprivation of liberty or choice/practical reason.

So what does this approach holds in the context of abortion rights? Since the CA unlike Kantian approach is not grounded in rationality alone, it recognizes variety of ways in which laws restricting abortion may burden or violate the dignity of women i.e. by restriction of liberty and choice, by damages or risks to health, bodily integrity, emotional well being and affiliations. Thus a life worthy of human dignity requires not just giving some food but giving "choices" regarding nutrition, not just health, but "choices" regarding health. It is only then these 'animal' functions will be performed in a way worthy of human dignity. Therefore, the policy which CA vouches for is clear i.e. law should not simply shield women from burdens rather it should create a full fledged capabilities or opportunities for choices in each area.

Bodily health and integrity is one of the central human capabilities, which a person is entitled to under CA. It obliges government to promote healthy capability (such as access to health insurance, medical facilities, nutritional and healthy choices) and not healthy functioning. Under this as Nussbaum notes,<sup>42</sup> the government's focus should not only be on disseminating accurate health information and promoting genuine choice but also ensuring that it does not penalize citizens if they choose to live otherwise or in a manner not consistent with that of politicians or doctors. Similarly, practical reason and choice are extremely important capabilities on the list of the CA, since that have an architectonic function, pervading and organizing all other. To explain, to be in a healthy condition without having an opportunity to exercise practical reason and choice with respect to one's health is to have an incomplete healthy condition, one that is not worthy of one's human dignity.<sup>43</sup> Currently recognition of both of these capabilities vis-à-vis human dignity is undermined as evident through the abortion jurisprudence of Germany and United States.

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<sup>41</sup> Rosalind Dixon and Martha Nussbaum, *Abortion, Dignity and a Capabilities Approach*, University of Chicago Public Law & Legal Theory Working Paper NO. 345, 201 [hereinafter *Abortion, Dignity and a Capabilities Approach*]

<sup>42</sup> *Human Dignity and Political Entitlements*, *supra* note 11 at 9.

<sup>43</sup> *Human Dignity and Political Entitlements*, *supra* note 11 at 8.

Employing the CA in the abortion jurisprudence of Germany and United States can be specifically helpful to foster a constitutional right to access abortion. This is because recognition of both of these capabilities not only strengthens the relationship of human dignity vis-à-vis women's physical and psychological health. But it also conceptualizes human dignity as a vehicle to reinforces, women's right to self-determination. The paragraph below, will further elaborate on this argument.

First, the abortion cases in both of the jurisdictions depict that the courts are reluctant to consider dignity as a constitutional value that supports women's right to access abortion as noted in Section II. This is particularly because both the constitutional courts have understood protection of right to life of fetus through the prism of its "relationship to human dignity" which seems to outweigh all other claims. It is pertinent to highlight that even the CA recognizes fetus possessing a particular type of human dignity. However, it argues that fetus merely has a dependent and potential human dignity under the CA - this status of human dignity is distinctive and hence not directly commensurable to the status of independent human beings.<sup>44</sup> Further, such a potential standing of a fetus under the CA, still cannot undermine a woman's right to access abortion in exceptional circumstances – in cases where a pregnancy seriously undermines a woman's physical and psychological health, because of the risks related to the pregnancy, trauma associated with bearing a child which is result of sexual assault/rape or subject to several impairments.<sup>45</sup> As noted above one of the key contribution of the CA is to explain why bodily health and integrity is a central capability to a woman's own dignity. One of the benefits of employing this approach is to make clear that any demand a women makes to access abortion on physical or therapeutic grounds should stand at the same pedestal with the type of normative claim made on behalf of fetus.<sup>46</sup> And this is exactly why it would be unreasonable for the state to prefer any one of these claims, thereby criminalizing abortion. (as it has done in several abortion cases). Thus, once the court adds recognition to human dignity vis-à-vis physical and psychological health of women and potential and pre-viable status of fetus as explained by the CA, the degree of normative force in the women's claim seems to grow stronger.

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<sup>44</sup> *Abortion, Dignity and a Capabilities Approach*, *supra* note 41 at 6.

<sup>45</sup> *Abortion, Dignity and a Capabilities Approach*, *supra* note 41 at 8.

<sup>46</sup> Judith Jarvis Thomson, *A defense of Abortion*, 1 *Phil & Pub. Aff.*, 47, 56 (1971).

As discussed, the abortion jurisprudence of both the countries depict that only way a women could elect abortion pre-viability was after undergoing counseling. The Apex Courts in both the jurisdictions have emphasized that such counseling need not be neutral, and the state could persuade women to continue pregnancy to a term. *Carhart* goes a step further to restrict abortion by advancing a women protecting, traditional, paternalistic view that women should be protected from poor decisions or from coercion based abortion which they seem to regret later. One can conclude that any such counselling based regulation clearly treats women as less equipped who is incapable to make decision about her own pregnancy without a responsible and professional medical practitioner. Admittedly there is little dignity in being required to undergo counselling in order to be put in a position to make a “responsible” and “conscientious” decision. However, employment of the CA can shift this approach, which articulates human dignity of women vis-à-vis her capability to practical reason. Thus where a women claims she is denied access to abortion, thereby losing a meaningful chance to determine future shape of her life – it would imply that women has been denied of an opportunity to exercise a central human capability.<sup>47</sup> Capacity to practical reason is not only a mere capability on the list: it also suffuses and shapes other, making their pursuit worthy of human dignity.<sup>48</sup> This strong articulation of human dignity vis-à-vis a women’s right to self-determination under the CA is bound reinforce women’s autonomy, thereby strengthening her constitutional right to access abortion.

Lastly, CA can not only be useful to alter the abortion discourse in the courtrooms but it can also provide a starting point for reproductive right advocates in seeking to make pro-abortion arguments. The CA can specifically be helpful in ongoing abortion controversies (regarding public funding for abortion or access to abortion services) in the US and Germany where there is some form of pre-existing commitment to recognize importance of human dignity in abortion context. By providing a theoretical vocabulary on capabilities and the way in which their interrelationships is to be articulated, CA gives advocates and policy makers a way of articulating abortion based claims, that is richer and more promising than Kantian or other economic approaches.

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<sup>47</sup> *Supra* note 39 and 11.

<sup>48</sup> *Human Dignity and Political Entitlements*, *supra* note 11.

## **CONCLUSION**

This paper attempts to employ the CA to strengthen the idea of dignity as a constitutional value that supports a right to access to abortion. The abortion jurisprudence of Germany and United States conceptualizes dignity as an express respect for the right to life of fetus, thereby outweighing the concept of human dignity vis-à-vis physical and psychological health. Secondly, the cases also show that inability of women to make reproductive decision without guidance/counselling dominates the discourse, thereby undermining the conceptualization of dignity apropos women's autonomy in decision-making. Employment of the CA in the abortion context helps us to show why, as a normative matter, right of access abortion should be understood in terms that refer both to barrier against state inference in reproductive decision making and to affirmative duties on the part of the state to provide support. The primary claim of CA is that minimally just society is that which is able to provide its citizen a threshold level of key central capabilities or opportunities, on the ground that such entitlements are requisite of a life worthy of human dignity. Thus the paper attempts to depict that such an approach can foster the constitutional right to access abortion by offering a more complete theoretical account on the link between idea of human dignity and women's physical and psychological health or integrity, thereby levelling it to the normative claim of fetus's right to life (vis-à-vis dignity). Finally, by acknowledging importance of practical reason as central capability of human being, the CA conceptualize human dignity as a vehicle to reinforce women's autonomy in reproductive decision-making. Thereby depicting us as to how denial of women's autonomy in the aspects of her *own* pregnancy makes her life less worthy of human dignity.