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Practical Application of the Human Dignity Clause : The German Example

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INTRODUCTORY REMARKS

The idea of human rights first emerged in Europe as an ethical principle. Its development and crystallisation at the religious and philosophical levels culminated in the famous statement of Immanuel Kant that a human being ought never to be treated by other individuals or by state authorities as a mere object but always as a purpose of their actions. After the Second World War, this postulation took on the form of a legal norm set forth in the constitutions of many democratic countries. The human dignity clause as enshrined in modern constitutions enunciates the highest value of the constitutional orders that inform the substance and spirit of the entire document [BverfGE 12, 45 (53); see also: BverfGE 27, 1 (6); 30, 173 (193); 45, 187 (227); 82, 60 (87)]¹ and governs the interpretation and application of the other fundamental rights and freedoms. It sets out “the fundamental constitutional principle that dominates all parts of the Constitution” [BverfGE 6, 32 (36); 87, 209 (228)]. Moreover, the principle of the dignity of man has become the legitimising basis of the state and its legal order. The respect for and protection of human dignity constitutes the supreme purpose of any political entity. The state’s objectives do not have an intrinsic value; they derive their legitimisation from the fact that they serve the individual in a definite way [Jarras, 2011: p. 38]. By proclaiming the principle of human dignity, lawgivers recognise the moral autonomy of each person, who is regarded as having their own unique vocation and destiny to be accomplished freely and responsibly within the society based on solidarity and fundamental equality between all people, where no one is merely an instrument or servant of another person or a state authority.

Having affirmed that human dignity provides the framework for all state actions, we leave the scope of the consensus about the legal role and the meaning of the human dignity clause in modern constitutions and enter the sphere of the disagreements and discrepancies of legal opinions on the issue. Above all, the indefinite wording of the human dignity clause raises the question of its direct applicability as the sole basis of an individual’s claim. The nature of the human dignity clause as a general principle should not be misleading as its concise and sometimes vague wording is characteristic of many fundamental rights and even of many statutory provisions. Nonetheless, the precise determination of the scope of the protection of the human dignity clause is fraught with difficulties. The objective of the paper is to provide some suggestions on the issue.

¹ The abbreviation BverfGE stands for the Series of the Decisions of German Federal Constitutional Court. The first number refers to the volume of the series, whereas the second number indicates the page.

When exploring the potential applicability of a fundamental freedom in any constitution, it is useful to resort to comparative argumentation. Taking into account the judiciary of a foreign country where the experiences with the application of a similar norm are vast and the discussion in legal doctrine is advanced can essentially enrich the domestic legal theory and practice [Sommermann, 2004: p. 636]. Adopting an open attitude towards foreign tendencies of the development of law ensures a high level of national law, as well as contributes to its acceptance by the society [Tokarczyk, 2000: p. 34]. As far as the interpretation of the human dignity clause is concerned, some distinguished accomplishments are to be credited to German constitutional theory and to the jurisdiction of the German Federal Constitutional Court. The remarkable German experiences with the application of the human dignity clause is worth considering as it can shed some light on the interpretation of the respective provisions in any other country.

NOTION AND CONCEPTIONS OF HUMAN DIGNITY AND THEIR IMPACT ON THE LEGAL INTERPRETATION OF THE HUMAN DIGNITY CLAUSE

In the first place, the concept of human dignity is loaded with two-and-a-half-thousand years of the history of philosophy [Pieroth, Schlink, 2012: p. 81]. That is why its interpretation is highly susceptible to the influence of the individual ideological stances of an interpreter. There are two general approaches of how to understand the concept of human dignity [Jabłoński, 2002: p. 82 et seq.]. The first conception can be called “a dower – approach” [Pieroth, Schlink, 2012: p. 81], since it portrays human dignity as a kind of gift bestowed by God or nature.² Such an assumption implies that human dignity is attributable to each being that belongs to the human race regardless of their specific physical and psychical traits. On the whole, human dignity can be defined as the ‘sanctity of a human person’ [Complak, 2002: p. 65]. As the consciousness of being is irrelevant for legal protection, some advocates of this concept argue that human dignity cannot be denied to the embryo as it is the potentiality of a human being. Furthermore, human dignity does not depend on the social worth of a person; it is not possible to lose or minimise one’s dignity, for example, as a consequence of undignified or criminal conduct. Human dignity is intrinsic to each individual and it is inalienable; thus, there is no self-deprivation of dignity seen from the perspective of law. On the other hand, the individual is not capable of increasing it through honorable deeds or achievements.

The proponents of the opposite approach, which can be called “a merit-based approach” [Pieroth, Schlink, 2012: p. 81], claim that the individual achieves their dignity through self-determined conduct and can augment it in the course of the development of their identity [Ossowska, 2009: p. 59]. Human dignity is expressed through self-determined behaviour. According to this concept, each individual decides autonomously what values and behaviour amount to the actualisation of their dignity.

² With respect to the Constitution of the Republic of Poland, the assertion of the lawgiver that human dignity is a source of human rights and freedoms interpreted as a reference to the doctrine of natural law [Banaszak, 1997: p. 60] in its humanist non-religious version [Gulczyński, in: Sokolewicz, 1998: p. 245] seems to validate this concept at the normative level.

The controversy between the two approaches is sharp especially in cases where an individual becomes voluntarily involved in or consents to an action that is generally perceived as incompatible with human dignity, such as being an actress in a peep show [BverfGE 64, 274]. Where the proponents of the “dower approach” would seek to curb the “undignified” behaviour (for example by closing peep-show establishments), the opponents would argue that the protection of human dignity is tantamount, among other things, to respecting individual autonomy in matters of ethical import. A compromise between these conflicting views is possible by accepting the assumption that protection on the part of the state against the will of the person concerned is not mandatory except for cases where the infringement results in a violation of the very core of human dignity. While the inalienable character of human dignity renders this right immune to individual disposition, it is still possible for an individual to waive or dispose of the right to the protection of their human dignity. For instance, it has been argued that even if it is to be assumed that the human dignity of the “actors” performing in the televised program *Big Brother* is violated due to the obliteration of boundaries between the private and the public sphere of the individuals concerned that is brought about by the loss of their intimacy, state authorities are not permitted to intervene unless “the core of the human image” is imperiled [Schmidt-Bleibtreu, Klein, 2011: p. 140].

In most cases, however, lawmakers and law-practitioners seem to adopt an eclectic position and try to reconcile both approaches by borrowing from each what appears to be axiologically acceptable. For example, the adoption of the “merit-based” concept of human dignity would be unsatisfactory in cases where a human being is incapable of “acquiring” dignity through the development of their personalities; respect for and protection of the mentally ill and other vulnerable groups of people is an unquestionable postulate that ensues from the “dower concept”. The eclectic approach to the opposing concepts of human dignity is justified by the fact that human dignity determines the legal position the individual occupies in the society perceived in the light of immutable values such as righteousness, goodness, tolerance etc, as well as those shaped by the variables inherent in the development of civilisation such as technological and scientific progress or moral evolution [Piechowiak, 1999: p. 346 et seq.]. The understanding and experience of individual dignity and self-esteem is influenced both by conditions intrinsic to the person in question and by exterior (e.g. cultural, social, religious) factors. In consequence, the subjective perception and experience of human dignity depends on the given historical conditions and is subject to temporal alterations. The contemporary perception of human dignity has crystallised on the basis of the experiences of situations in which the wellbeing of individuals was endangered or even negated. These experiences are reflected and perpetuated in particular fundamental rights [Hilti, 2008: p. 119].

This epistemological assumption on the nature of human dignity justifies the adoption of a situational approach when determining the scope of protection of the human dignity clause. Such an approach has been adopted by the Federal Constitutional Court that has neither formulated an abstract or over-arching definition of human dignity nor determined the scope of protection of the human dignity clause [BverfGE 30, 1 (25)]. It has proven to be more feasible and preferable in determining the circumstances under which the human dignity of an individual has been violated. This is, for instance, the case in which a person has been degraded, humiliated, persecuted, branded or ostracised [Michalowski, Woods, 1999: p. 99].

Furthermore, it is important to note that the scope of protection of the human dignity clause is not limited to a certain area of action or behaviour, as is the case with other fundamental rights such as the right to life, the right to express opinions, to assemble or to associate [Hoefling, 1995: p. 858]. That is why, the circumstances in which human dignity is violated cannot be determined in abstract terms but always within the context of a specific case. On the one hand, the human dignity clause comprises a right that can be depicted as a modal right, i.e., a right not to be treated in a contemptuous way or as a mere object of a state's activity. This approach to ascertaining a violation of human dignity provides general guidance as to the interpretation of the scope of protection of the human dignity clause. Nonetheless, it does not seem capable of covering all instances of its infringement. Whereas the intention of a contemptuous treatment provides an indication to that effect, the mere lack of negative intent is not sufficient to rule out a violation of human dignity if the act can be regarded as such for some objective reasons [Hoefling, 1995: p. 860]. On the other hand, the mere intention to debase or humiliate a person does not have to suffice for a given action to be regarded as an infringement of human dignity, although this factor can intensify its denigrating character and thus amount to a violation [Jarras, 2011: p. 43]. That is why each case still has to be adjudicated on its own merits.

HUMAN DIGNITY AS AN ENFORCEABLE INDIVIDUAL RIGHT

There is some debate as to the exact legal character of the human dignity clause. The controversy is related to the fact that the legal obligation to respect and protect human dignity indicates the purpose of all state activity but does not prescribe any concrete means as to how this objective is to be achieved. The Polish Constitutional Tribunal has adopted the position that the human dignity clause should be construed solely as "an axiological foundation" [Judgment of the Polish Constitutional Tribunal of 1.6.1999, SK20/98, OTK 1999/5/93] of the fundamental rights and freedoms guaranteed by the Constitution or as simply a directive that indicates some standards the state authorities should adhere to when carrying out their tasks. According to this approach, the human dignity clause fulfills a declaratory function; it stipulates human dignity as a category original and superior with respect to any state or legislative activity [Jabłoński, 2002: p. 91]. In consequence, it lacks the character of a subjective right, i.e., no individual claim that is enforceable before a court of law can be directly derived therefrom. In support of this approach, it has been argued that the catalogue of fundamental rights constitutes a sufficiently operative instrument for the actualisation of human dignity. The protection of human dignity requires the attribution of rights to individuals that enable them to defend their own style of life. It has been aptly said that human dignity is a "right to rights." [Enders, 1997: p. 103]

The opposing view espouses the interpretation of the human dignity clause as an enforceable human right whose infringement can be challenged by the individual before the court, although the practical relevance of the qualification of the human dignity clause as a subjective right is far less significant than it may appear at first glance. In all cases before the Polish and German Constitutional Courts in which the matter of human dignity arose, its alleged violation went along with a purported infringement of another individual right so that access to the court never hinged on the qual-

ification of the human dignity clause as the provision that enshrined an individual right.

Nevertheless, the majority of German writers are of the opinion that there is an enforceable, subjective right to human dignity set forth in the human dignity clause. The relationship of the right to human dignity to the other fundamental freedoms is one of superiority and subsidiarity at one and the same time. The relationship of superiority is reflected in the fact that the respect and protection of human dignity is the chief objective of all of the fundamental freedoms that are laid down in democratic constitutions. The human dignity clause primarily fulfills the role of an interpretative guideline for the other fundamental rights and thus contributes to determining their normative substance and the scope of their protection. In German legal practice, the human dignity clause is often invoked in conjunction with another fundamental right as a persuasive device that is employed with a view to reinforcing the line of argumentation adopted. The relationship of subsidiarity means that the prescriptive substance of the human dignity clause with respect to specified areas or aspects of human activity finds its expression and is actualised first and foremost in each fundamental right. Consequently, the individual can claim an infringement of human dignity by invoking the human dignity clause as the sole basis for their assertion provided that their case is not covered by any other more specific fundamental freedom, which is supposed to occur in exceptional circumstances. The human dignity clause as a fundamental right therefore provides only a rudimentary protection; it is designed to safeguard the identity of an individual and their personality structure as well as the core area of their self-determination. Moreover, it guarantees the principal equality of all people despite factual differences. That is why the interpretation of the human dignity clause should be cautious in order to preclude its inflationary use.

The peculiarity of the human dignity clause is that any encroachment thereupon is tantamount to a violation. This is not the case with the other fundamental rights, where interference with their exercise may be justified by invoking explicit or implicit limitation grounds [Lerche, 1992: p. 780 et seq.]. By contrast, the human dignity clause has an absolute effect so that there is no way to balance it against other legal interests, be they of other individuals or of the community. In other words, the principle of proportionality does not come into play where an intrusion upon human dignity has been established [Klein, 2002: p. 149].

CASE LAW

1. TERMINATION OF PREGNANCY AND OTHER INTERFERENCES WITH EMBRYOS

When deciding on the constitutionality of abortion, the most elemental applicable provision is the right to life. Nonetheless, recourse to the human dignity clause so as to underpin the constitutional requirement for the protection of an unborn life cannot be ruled out. The fundamental question that governs the application of the human dignity clause to the issue of the termination of a pregnancy is whether human dignity is inherent in human life or develops with the personality of a human being. Some authors conclude that the embryo is owed the full protection of human dignity [von Münch,

Kunig, 2012: p. 106 with further references] because the embryo has the potential to develop into a complete human being since all of the genetic information necessary for this development is already in place. Some authors, by contrast, tie human dignity to personhood and individuality. In this view, human dignity can only come into existence at birth when the child becomes an independent person with its own individual personality [Birnbacher, p. 77 et seq.]. According to the German Federal Constitutional Court, the obligation to protect all human life is derived directly from a right to life. “Additionally, this obligation follows from the express provision of Article 1 para. 1 of Basic Law; for the development of life also enjoys the protection that Article 1 para. 1 accords to the dignity of man. Wherever human life exists; it merits human dignity and whether or not the subject of this dignity is conscious of it and knows how to safeguard it is not a decisive factor. The potential capabilities inherent in human existence from its inception are adequate to establish human dignity.” [BverfGE 39, 1; 88, 203] Assuming that the right to life of an embryo is interpreted in the light of its human dignity, it should be accorded a principal priority in relation to the right to privacy and self-determination of the pregnant woman [BverfGE 39, 1(42)].

However, the assumption that the embryo is endowed with human dignity does not resolve the problem of the point at which the commencement of the protection is afforded by the human dignity clause. While some authors point to the moment of conception, others indicate the moment of nidation [Jarras, 2011: p. 42]. This issue gains some practical relevance in cases where the protection of stem cells is at stake. If it is to be assumed, as the majority of German authors do, that before the time of nidation there is no subjective right to human dignity, then the legal effects of the human dignity clause in determining the legal status of stem cells are only indirect. They come into play only as an objective principle informing the system of values of the legal order, which makes the weighing up of the conflicting interests possible. In practice this means that the use of stem cells before nidation for both therapeutic purposes and for research can be justified. The objective effects of the human dignity clause would nonetheless allow a restrictive approach as to the production of such cells with these ends in view. Furthermore, the human dignity clause would not have any implication as far as artificial insemination is concerned [Jarras, 2001: p. 47]. Indeed, *in vitro* fertilisation is perceived in German legal doctrine as “an instrumental use of human life accepted as a medical treatment” [Schmidt-Bleibtreu, Klein, 2011: p. 127]. Cloning is under no circumstances consistent with due respect for the singularity and individuality of human existence. Therefore, it constitutes a violation of human dignity [Schmidt-Bleibtreu, Klein, 2011: p. 130].

2. MINIMUM CONDITIONS FOR HUMAN LIFE

The human dignity clause explicitly stipulates the obligation of public authorities to take positive actions in order to ensure the protection of the basic rights of the individual; the provision not only calls for “respect” but also for the “protection” of human dignity, which implies that the individual has been conferred the entitlement to be guaranteed the minimum subsistence level. The legal duty to protect human dignity combined with the principle of the social state has been interpreted by the Federal Constitutional Court as a legal basis for a claim of an individual that necessary means should be granted in cases where a shortage of basic means is not the fault of

the claimant [BverfGE 82, 364] and that the minimum income that is indispensable to cover the cost of living should be exempted from taxation [BverfGE, 82, 60; 99, 246]. By contrast, it has been pointed out in Polish literature that such an approach presupposes the relative conception of human dignity that is dependent on the living conditions of actual individuals and thus leads to unfair gradations; the more material goods you have at your disposal the more dignity your life is suffused with. Therefore, human dignity has nothing in common with social and economic rights [Complak, 2002: p. 69 et seq.]. Indeed, according to the decision of the Federal Constitutional Court quoted above, the minimum amount of financial means that is to be exempted from taxation depends on “the general economic situation and on the basic needs of a taxpayer as recognised in the legal community.” [Schmidt-Bleibtreu, Klein, 2011: p. 133] This undisputedly results in a certain relativisation of the notion of human dignity since it is depicted as variable and conditional on the values cherished in a given society. Nevertheless, it should be borne in mind that only the core of the notion of human dignity can be regarded as timeless and immutable, whereas the peripheral components of the concept depend on the times and living conditions of a given society [BverfGE 45, 187 (229)]. This assumption corresponds with the approach to human dignity adopted by the Federal Constitutional Court, which neither aims at creating a precise definition of human dignity, nor attempts to determine its scope of protection in general terms, but rather applies a case-to-case methodology aimed at ascertaining the situations where human dignity has been violated.

Furthermore, human dignity is a value and values exist only in reference to an evaluating body that attributes the quality of being valuable to them. The assumption of the immutability of values seems to be predicated on the epistemological view that they exist in an ideal “world” that is extraneous to and independent of the social reality the human being lives in. Although human dignity is a legal category, it does not cease to be an ethical concept, which affects its interpretation as the constitutional principle. Due to its ethical aspect, the term human dignity has much in common with the legal term “public morals” that is contained in the European Convention on Human Rights as one of the grounds for the limitation of the right to privacy, freedom of religion, freedom of expression and freedom of assembly. Both terms have the character of an indefinite and general clause. That is why it can be useful to avail oneself of the approach to the interpretation of ‘public morals’ adopted by the European Court of Human Rights in order to elucidate the nature and substance of the human dignity clause. According to this approach, the substance of public morals is relative since it can vary considerably from state to state or even from region to region. The specific concerns of morals that lead to a justification for the limitation of a human right are determined by factors such as time, place, the set of values professed by a given society, the category of the individuals involved (the necessity to protect the youth or the mentally ill can require a further-reaching inference of state-authority), the extent of the publicity of the case etc. State authorities, therefore, enjoy an ample margin of discretion when resolving such cases. In my opinion, the same reasoning can be applied to the interpretation of human dignity. The general development of ethical standards justifies the perception of human dignity as a category that is susceptible to partial alteration, which undoubtedly affects its interpretation at the level of constitutional law. The openness of the concept of human dignity allows the interpretation of the human dignity clause to be the legal basis for a claim for basic means of maintenance.

3. CRIMINAL LAW

The human dignity clause plays an important role in criminal law in so far as it sets limits on the methods of prosecution and determines certain basic conditions of imprisonment and criminal sentencing. As far as criminal prosecution is concerned, the prohibition of breaking the will of an accused through the use of drugs, hypnosis or polygraph without their prior consent³ is derived directly from the human dignity clause [Schmidt, 2005: p. 118]. In the area of the administration of criminal justice, the human dignity clause informs the understanding of the nature and *raison d'être* of punishment, as well as the perception of the relationship between guilt and punitive measures. Every punishment must relate fairly to the gravity of the offence and the guilt of the offender. The principle of respect for human dignity means, in particular, that cruel, inhumane and degrading punishments are always a breach of human dignity even if they appeared to be justifiable or indispensable in order to save a human life. For example, this would be the case if a police officer decided to torture an apprehended kidnapper in order to get the accused to reveal the whereabouts of his seriously ill victim whose life is endangered because they are deprived of necessary medicines⁴ [Kimms, 1998: p. 59]. These issues have practical relevance in the context of asylum law as the prohibition against extraditing people to countries where they could be exposed to cruel, inhumane or degrading treatment. Furthermore, the human dignity clause mandates that the individual be always treated as a subject and not as an object in criminal proceedings. That is why an old and incurably ill man whose death is imminent is to be released from custody. To continue the prosecution under such circumstances would be lacking in any justification and would reduce the accused to a mere object of state measures [Judgment of Constitutional Court of Berlin in the Honecker case as reported in NJW 1993: p. 515].

Moreover, the state must not turn the offender into an object of crime prevention to the detriment of their constitutionally protected right to social worth and respect. That is why the application of so-called shame punishments e.g. ordering a shoplifter to walk and to carry a sign on which they publicly admit the crime in front of the store where they committed the offence would almost certainly not pass the standard set by the human dignity clause because of the inherent humiliating character of such a punishment [Walter, 1999: p. 30 et seq.]. The infliction of corporal punishment constitutes a breach of the human dignity clause in all cases [Schmidt-Bleibtreu, Klein, 2011: p. 118]. The imposition of a severe punishment for the sole reason of general crime prevention would also be contrary to human dignity, since in this case the offender would be converted into a mere tool of the state's fight against crime. However, the reasons related to general crime prevention may be taken into account among other considerations [Klein, 2002: p. 151].

Every offender (including an offender sentenced to life imprisonment) must have a definite and realistically attainable chance to regain their freedom at some point in

³ The use of a polygraph in criminal proceedings with the consent of the defendant does not contravene any constitutional principle [Schmidt-Bleibtreu, Klein: 2011, p. 138].

⁴ According to the opposing view such measures are qualified as a direct coercion which does not amount to torture or as affliction of pain that does not reach the threshold of the infringement of human dignity [see the references in: Schmidt-Bleibtreu, Klein: 2011, p. 121].

time [BverfGE, 109, 133 (150)]. However, extradition to a state where life-imprisonment is likely to be imposed is not illicit *per se* [BVerfGE 13, 154 et seq.]. The state strikes at the very heart of human dignity if it treats a prisoner without regard to the development of their personality and strips them of all hope of ever earning their freedom. Even with regard to prisoners who are sentenced to life imprisonment, penal institutions are under an obligation to work towards their rehabilitation, to maintain their ability to cope with life and to counteract any harmful effects the loss of freedom may have on the inmate's personality.

Respect for human dignity requires that the punishment should aim to rehabilitate the offender. As far as the conditions of imprisonment are concerned, inmates should be offered opportunities to work and receive therapy [BverfGE 109, 133]. In the case of the compulsory work carried out under a prison rehabilitation scheme, the remuneration should not be just nominal. Rather the amount should be adequate to convince the prisoner that work constitutes a reasonable means to create a foundation of one's life. In a separate opinion to this decision, it has been argued that whenever prisoners are subject to a regulation under which the connection between the required amount of work and a fair remuneration is interrupted, the core of human existence is called into question [BverfGE 98, 169]. Moreover, an arbitrary refusal of some privileges that is aimed at mitigating the imprisonment conditions, such as a three-hour-permit for unsupervised leave that is based on a sweeping reference to the need to ensure security or to the long duration of a sentence to be served without duly weighing up the conflicting interests and without regard to the rehabilitation objective of the penalty, constitutes a violation of human dignity [Schmidt-Bleibtreu, Klein, 2011: p. 147].

4. OBJECTIVE DIMENSION OF THE HUMAN DIGNITY CLAUSE

Not only does the human dignity clause impose a negative obligation to abstain from any action resulting in a breach of human dignity but it also lays down the duty to take any necessary measures aimed at its protection. However, these protective actions on the part of the state authorities and underpinned by a specific interpretation of the human dignity clause may sometimes prove irreconcilable with the individual's stance on the meaning of "their" human dignity. Therefore, the question arises as to what extent the state authorities when invoking their obligation to protect the dignity of an individual are authorised to interfere in the sphere of their freedom, especially in a case where such an intervention is effected against the will of the concerned.

When dealing with such cases, it should be borne in mind that human dignity is a term that not only refers to the individual human being but is also pertinent to human beings as a species. Judicial decisions on the issue thus require considering both the subjective judgments of the respective individual as to the meaning of their human dignity and the "objective" standards that prevail in a given society. Due to the objective dimension of human dignity, it would be erroneous to assume that it remains at the disposal of the individual [BverfGE, 87, 209 (228); Complak, 2002: p. 67, 79]. The rejection of the results of lie detector results as evidence in criminal proceedings even with the consent of the accused [BverfGE 17, 342] or the prohibition of some types of

distraction (“peep shows”, “dwarf throwing” etc)⁵ illustrate the application of the human dignity clause as an objective value that permeates the entire legal system. Another example is a case in which the German Supreme Court issued a prohibitive injunction against a company that tried to advertise a liquor by affixing labels conveying an (verbal and visual) insinuating message that a woman could be sexually available after consuming the beverage on the bottles. The German Supreme Court found against the defendant that the message was of a discriminatory character and thus constituted a violation of human dignity [BGH NJW 1995, 2486]. The influence of the human dignity clause on all branches of law leads to a recognition of the *Drittwirkung*-doctrine (third-party-effect), i.e., the obligation to interpret private-law relationships in the light of the basic right to human dignity.

The cases presented above show that the protection of the objective component of human dignity has sometimes been attributed more importance than respect for the autonomous decisions of individuals. Nevertheless, it is questionable whether the protection of human dignity is appropriate and justified where the person whose dignity is allegedly at stake has voluntarily consented to the “violation” or does not perceive the behaviour in question as a violation at all. The human dignity clause protects a person “as he/she sees himself/herself in his/her individuality and self-awareness. Part of this is that the human person can make decisions for himself and can autonomously determine his own fate.” [BverfGE 49, 286, 298] The concept of human dignity is very closely linked to the principle of individual autonomy, which means that where voluntary consent has been given, a violation of human dignity can be accepted only in extreme cases; otherwise, the very notion of human dignity would be reversed. Rather than protecting the individual against state interference, the human dignity clause would turn into a legal foundation for the obligation of state authorities to impose their concept of human dignity on individuals even against their express wishes [Gusy, 1982: p. 985 et seq.]. In consequence, it should be difficult for the state to justify why it has an interest and an obligation to protect the human dignity of an autonomous individual who does not perceive any infringement. The conflict between the diverging perceptions of the meaning of human dignity by the state and by the individuals concerned can be illustrated by a controversial case in which an injunction to run peep show establishments was justified on the grounds of human dignity [BverfGE 64, 274]. It has been argued that the authorities might have reasons not to grant licences for such establishments but they should base their actions solely on the grounds of morals and public policy rather than resort to the purported necessity to protect the “objective” human dignity of a person who neither wants nor needs the state protection. In contrast, child pornography always violates human dignity [BverfGE 111, 291].

5. A CHILD AS DAMAGES

The third-party effect of the human dignity clause can be applied in cases of family-planning damages. According to this concept, there is a civil law claim for compensa-

⁵ Dwarf throwing is an entertainment in the course of which very short people are thrown by the participants as if they were pieces of sport equipment. The Administrative Court in Neustadt rejected granting a licence to run such an entertainment arguing that it would be contrary to human dignity. The case was reported in: NVwZ 1993, p. 98 et seq.

tion against a doctor in a case of a so-called “wrongful birth”, i.e., the unwanted birth of a healthy child, as well as in a case of “wrongful life”, i.e., the birth of a severely handicapped child as a result of medical malpractice or poor genetic advice. The Second Senate of the German Constitutional Court, relying on the human dignity clause, refused to qualify expenses for child maintenance as “damages” [BverfGE 88, 203 (296)] and in consequence to grant the compensation that had been demanded. This approach was not followed by the First Senate [BverfGE 96, 375], which assumed that the child’s sustenance, and not the child as such, gives rise to a claim for compensation. The purpose of an award of damages is the just distribution of financial burdens without denying the child’s value as a human being. Moreover, the Court held that the purpose of a counseling contract with a doctor is to preclude that of any pecuniary burdens that arise from the birth of a severely disabled child.

6. RIGHT TO CONSCIENTIOUS OBJECTION

The unique position of human beings rests on their ethical endeavor, i.e., their capability of making free moral decisions by means of their contact with the realm of values. This endeavor finds its expression in the sense of responsibility for the consequences of the decisions that have a moral import [Makarska, 2005: p. 14]. The core of human dignity is thus reflected in the position of the individual as a subject, as well as in the autonomy and self-determination that arises from their rational and volitional faculties. The self-determination of an individual is actualised in the free choice of values and their realisation in daily life [Nogueira Alcala, 2006: p. 224]. In other words, the individual realises their dignity when they are able to defend their deeply cherished moral values and when their self-esteem is involved in that defense [Ossowska, 2009: p. 173]. The state makes the free space for the actualisation of the individual moral values available by guaranteeing the freedom of conscience. On the other hand, the human conscience is a sphere where the individual experiences that they are endowed with dignity [Buxade Villalba, 2007: p.185]. The direct link between freedom of conscience and the dignity of man has been recognised by the Federal Constitutional Court: “The Basic Law regards free human personality and their dignity as the highest legal value. In consequence, it has recognised in Article 4 para. 1 freedom of conscience and its decisions, in which the autonomous personality finds its direct expression, as inviolable” [BverfG 12, 53]. The specific axiological connection between the human dignity clause and freedom of conscience justifies a broad interpretation of the letter as a right that includes the general right to conscientious objection even in areas that have not been regulated by the ordinary lawgiver (for instance a right to conscientious objection within the ambit of a pharmacy). The human dignity clause, which incorporates the highest values and purpose of a democratic state and which constitutes the foundation of the legal order, has a superseding effect with respect to the principle of formal democracy in exceptional cases of conscientious objection [Nogueira Alcala, 2008: p. 13]. Such a general right emerges as a freedom *prima facie* that cannot be exercised in an unrestricted way but rather is subject to limitations that make their harmonisation with other constitutional values and protected interests possible by applying the principle of proportionality. This approach reflects the recognition of the impact of the human dignity clause on the interpretation of all fundamental rights. Where there are some competing interpretative options of a fundamental right or freedom, the individual or body apply-

ing the law should choose the one that realises the postulations that ensue from the human dignity clause to the greatest extent [Murawska, 2005: p. 206].

7. RIGHT TO PRIVACY AND TO THE DEVELOPMENT OF ONE'S PERSONALITY

The human dignity clause not only protects the individuality but also the personality of a human being. It guarantees some interior space that the persons themselves possess and where they can retreat from the outside world [BverfGE 27, 6]. That is why bugging or wire tapping the areas that comprise the core of someone's private life such as expressions of the most intimate feelings or sexuality in the privacy of one's home is a violation of human dignity. This is, however, not the case with respect to conversations that contain information about offences that have been committed [BverfGE 109, 211]. A secret recording of a conversation without the prior consent of the concerned party is not consonant with human dignity. It cannot, therefore, be justified by the need to collect evidence [BverfGE 34, 247]. Moreover, the human dignity clause prohibits doctors from publicising information about the state the health of their patients [BverfE 32, 379 et seq.].

8. RIGHT TO REPUTATION

Human dignity encompasses the sphere of human personality that is linked to the individual's self-esteem and finds its expression in the expectation that they be respected by others [Banaszak, 2009: 169]. Therefore, the human dignity clause imposes an obligation to respect and protect the reputation of the individual on state authorities. Although recognising human dignity as the highest constitutional value, the state cannot accord any rights, the exercise of which would be detached from responsibility on the part of the entitled, to anyone. That is why any indication of the name of a person who is guilty of the breakdown of a marriage in a divorce decree [BverfGE 15, 286] or any information about the detention on remand that is disclosed to the public without very important reasons [BverfE 34, 382 et seq.] constitute a violation of the human dignity clause. A politician involved in the crossfire of public debate does not waive their right to human dignity; any cartoon that portrays them in a way that is incompatible with the core of human dignity is not protected by the freedom of artistic expression [BverfGE 75, 369].

9. POSTHUMOUS PROTECTION OF HUMAN DIGNITY

The protection of human dignity is not extinguished upon the death of the person who is entitled to it. The Constitutional Court held that publishing a book that contains disparaging statements about the life and career of a dead person amounted to a violation of human dignity [BVerfGE 30, 173]. The posthumous protection of human dignity is justified by the social dimension of human life in that it fades away and finally disappears as time passes. However, the maximum time limit for the protection of the dignity of a deceased individual cannot be fixed in advance. It rather depends on the circumstances surrounding each particular case. The posthumous protection of human dignity has some practical implications within the ambit of organ transplanta-

tion; the unconditional lawfulness of taking organs from a dead body would infringe the human dignity of the deceased; however the individual's prior consent makes this measure legally permissible. Their presumptive consent or the consent of their family member would be sufficient [Schmidt-Bleibtreu, Klein, 2011: p. 130].

CONCLUDING REMARKS

The Federal Constitutional Court, notably influenced by Kantian conception of human dignity, perceives the human dignity clause as a normative foundation that determines the legal status of individuals in a democratic state as well as the framework of the entire state activity. The understanding of human dignity is informed by objective (universal and unchangeable) values, mutable cultural factors and individual's perceptions of their own self-esteem. Both the judiciary and legal doctrine in Germany unanimously regard the human dignity clause not only as an objective principle that pervades the interpretation of the entire legal system, but also as a source of a subjective right enforceable in court, although the latter function of the human dignity clause is of limited importance. The case law presented in this article shows two specific forms of the application of the human dignity clause. It is used by German Constitutional Court both as a tandem norm, i.e., as a tool of interpretation in order to reinforce conclusions already indicated by other constitutional provisions, and as a guideline for the interpretation and application of other norms. The human dignity clause, in most cases, has an auxiliary function. Furthermore, when dealing with the problem of any violation of human dignity, we sometimes approximate the realm of the moral values that are cherished in a given society or even are a part of the sphere of social taboos. There are cases where it is considered that some kinds of human behaviour or state actions violate human dignity even without any rational justification of this judgment. The human dignity clause will probably come into play only in exceptional circumstances. The courts will reserve the human-dignity argument for highly controversial matters, i.e., those that require first and foremost a choice of a principle (one might also say a choice of a policy) as opposed to the mere application of the legal rules that are already in place.

BIBLIOGRAPHY

- Banaszak B., *Prawa człowieka i obywatela w nowej Konstytucji Rzeczypospolitej Polskiej*, Przegląd Sejmowy 1997, no. 5.
- Banaszak B., *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2009.
- Buxadé Villalba J., *La objeción de conciencia en la función pública*, [in:] Sancho Gargallo I., *Objeción de conciencia y la función pública*, Consejo General del Poder Judicial, Madrid 2007.
- Birnbacher D., *Gefährdet die moderne Reproduktionsmedizin die menschliche Würde?*, [in:] Braun V., Mieth D., Steigleder K., *Ethische und rechtliche Fragen der Gentechnologie und der Reproduktionsmedizin*, ed. J. Schweitzer, München 1987.
- Commers D.P., *The Constitutional Jurisprudence of the Federal Republic of Germany*, Durham 1997.
- Complak K., *O prawidłowe pojmowanie godności osoby ludzkiej w porządku RP*, [in:] Banaszak B., Preisner A., *Prawa i wolności obywatelskie w Konstytucji RP*, C.H. Beck, Warszawa 2002.

- Enders Ch., *Die Menschenwürde in der Verfassungsordnung. Zur Dogmatik des Artikels 1. GG*, Tübingen 1997.
- Gulczyński M., *Konstytucjonalizacja nowego ładu społecznego w Polsce*, [in:] Sokolewicz W., *Zasady podstawowe polskiej konstytucji*, ed. Wydawnictwo Sejmowe, Warszawa 1998.
- Gusy Ch., *Sittenwidrigkeit im Gewerberecht*, Deutsches Verwaltungsblatt 1982.
- Hilti M., *Gewissensfreiheit in der Schweiz*, Zürich 2008.
- Hoefling W., *Die Unantastbarkeit der Menschenwürde – Annäherungen an einen schwierigen Verfassungsrechtssatz*, Juristische Schulung 2006, no. 35.
- Jabłoński M., *Rozważania na temat znaczenia pojęcia godności człowieka w polskim porządku konstytucyjnym*, [in:] Banaszak B., Preisner A., *Prawa i wolności obywatelskie w Konstytucji RP*, ed. C.H. Beck, Warszawa 2002.
- Jarras H., Pieroth B., *Grundgesetz für die Bundesrepublik Deutschland. Kommentar*, München 2011.
- Kimms F., Schlünder L., *Verfassungsrecht II – Grundrechte*, München 1998.
- Klein E., *Human dignity in German law*, [in:] *The Concept of Human Dignity in Human Rights Discourse*, ed. Kluwer Law International, the Hague–London–Boston 2002.
- Lerche P., *Grundrechtsschranken*, [in:] Isensee J., Kirchhof P., *Handbuch des Staatsrechts*, vol. 5, ed. Müller Verlag, Heidelberg 1992.
- Makarska M., *Przestępstwa przeciwko wolności sumienia i wyznania w Kodeksie karnym z 1997 roku*, Lublin 2005.
- Michalowski S., Woods L., *German Constitutional Court: the Protection of Civil Liberties*, Aldershot 1999.
- von Münch I., Kunig P., *Grundgesetz – Kommentar 1*, München 2012.
- Nogueira Alcala H., *Derechos fundamentales y garantías constitucionales*, Tomo 2, Santiago de Chile 2008.
- Nogueira Alcala H., *Lineamientos de interpretación constitucional y del bloque constitucional de derechos*, Santiago de Chile 2006.
- Ossowska M., *Normy moralne. Próba systematyzacji*, Warszawa 2009.
- Piechowiak M., *Filozofia praw człowieka*, Lublin 1999.
- Pieroth B., Schlink B., *Grundrechte*, Heidelberg–München–Landsberg 2011.
- Schmidt-Bleibtreu B., Klein F., *Kommentar zum Grundgesetz*, Köln 2011.
- Schmidt R., *Grundrechte sowie Grundzüge der Verfassungsbeschwerde*, Grasberg bei Bremen 2005.
- Sommermann K., *Funktionen und Methoden der Grundrechtsvergleihung*, [in:] Merten D., Papier H.J., *Handbuch der Grundrechte in Deutschland und Europa*, Band. 1., *Entwicklung und Grundlagen*, ed. C.F. Müller Verlag, Heidelberg 2004.
- Tokarczyk R., *Komparatystyka prawnicza*, Kraków 2000.
- Walter Ch., *Human Dignity in German Constitutional Law*, [in:] *The Principle of Respect for Human Dignity*, ed. Council of Europe Publ., Strasbourg 1999.