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The promise of human dignity and some of its juridical consequences, especially for medical criminal law

JAN C. JOERDEN

1 The protection of human dignity as a promise

"You are nothing, your nation is everything" (*Du bist nichts, dein Volk ist alles*). Slogans like these and the mindset connected to them were characteristic of Germany during the time from 1933 until its collapse in 1945. They express a state's creed according to which the state is not there for its citizens' sake, but rather the citizens were only allowed to exist for the state's sake. How little these citizens were considered to be worth was clearly seen in the inhumane extermination of whole demographic groups within their own state, and in the wastage of "human material" by fighting unjustified wars. After the state based on this concept collapsed, a radical new beginning was needed. Even though it was possible, to a certain extent, to depend on the experiences from the Weimar Republic, it was not sufficient simply to return to "business as usual," i.e. the time before 1933, not least because the Weimar Republic and its constitution were not able to prevent the rise of the so-called "Third Reich."

Article 1, Basic Law (*Grundgesetz*, the German Constitution),[522] which came into force in Germany in 1949, can be interpreted as a *promise* by the newly formed state to its citizens, and also to all people living within

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[522] Article 1, Basic Law, translates as follows: "(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world. (3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law." Translation of Basic Law, here and below, unless otherwise noted, by Christian Tomuschat, David

its territory: the state will no longer see itself as an end in itself but rather sees every single person as an end in itself, thus turning the relationship between the state and its citizens through 180 degrees. This may well be described as a Copernican Revolution in the understanding of what a state is. No longer should the citizen be there for the state, the state should now be there for the citizen.[523] If the proposition in Article 1, Basic Law, which is often – and not for nothing – referred to as the *guarantee* of human dignity (*Menschenwürdegarantie*) is interpreted as such as a *promise* by the state to its citizens,[524] it also establishes the juridical bindingness of the guarantee of human dignity. For a promise that is accepted (and this may be assumed, if the general acceptance of the Basic Law in Germany is taken into account) must be kept: *pacta sunt servanda*.

Besides the fact that this promise given by the German[525] state to every person within its state territory[526] is legally binding, the content it had,

P. Currie and Donald P. Kommers in cooperation with the Language Service of the German Bundestag, www.gesetze-im-internet.de/englisch_gg/englisch_gg.html.

[523] The first German post-war draft constitution, drawn up in 1948 on the island of Herrenchiemsee, explicitly stated this in its Article 1(1): "The state exists for the people's sake, and not the people for the state's sake," before mentioning "human dignity" in Article 1(2). Translation by Johannes Bochmann.

[524] Article 1, Basic Law, is seen by the Federal Constitutional Court, and most German legal scholars, as a human or basic right, and thus a subjective right, instead of a "mere idea" or objective postulation. Cf. the references given by Herdegen (2009), annotation 29 on the "promised human dignity," and Hofmann (1993), with different emphases than here, however (see References at the end of this chapter). On the function of human dignity, see Lohmann (2010). On other concepts of human dignity and its violation, see, in particular, Birnbacher (2008); Düwell (2001; 2010); Hilgendorf (1999); Hörnle (2008); Pollmann (2005); Rothhaar (2009); Schaber (2003); Stoecker (2003; 2004), each with additional references.

[525] Other states include the notion of human dignity and have a relevant phrase in their constitution. Similar reasons can be found for this as in Germany, namely the experience of an *Unrechtsstaat* in the past. See, for example, Article 2(1) of the 1975 Greek constitution ("value of the human being"); Article 1 of the 1976 Portuguese constitution ("dignity of the human person"). Both can also be seen as a promise, as they speak of a "primary obligation of the state" (Article 2(1), Greek constitution), and are protected from revision (see Article 288 of the Portuguese constitution). See also the Preamble of the 1978 Spanish constitution, which expresses a "will . . . to protect . . . the exercise of human rights," without, however, explicit reference to the notion of "human dignity."

[526] Apart from a state's "own citizens," legally such a promise can only refer to persons that are currently in the state's territory, including visitors, asylum seekers, etc. A duty to protect other states' citizens' human dignity can only be construed indirectly; this would be construed as a duty to prevent one's "own" citizens from behaving contrary to foreigners' human dignity. However, this duty exists only for reasons of consistency, not directly for legal reasons.

and still has, must be explored. It does not appear too far-fetched that the guarantee of human dignity is unsubstantial in the end.[527] This is true to a certain extent, as this guarantee must be filled with content. As will be shown, this content (in Germany) consists primarily of the human rights' guarantee which is found in Article 1(2), Basic Law.

The guarantee of human dignity, therefore, appears to be merely a "hull" that needs to be filled; however, even this "hull" itself includes a lot, by providing the *outline* for future developments in the area of constitutional law. For at least it brings across the idea that no longer should "the people," as an amorphous crowd, or the state itself, but rather every human being as an *individual*, form the centre of the constituted society.

2 Formative principles of the protection of human dignity

The promise of human dignity is not a promise of individuals' rights (these rights are needed, however, properly to fulfill the definition: see (3), below), but primarily the formative principles necessarily connected to such a promise given by the state to all individual persons within its territory in order for a constituted society – as described above – to exist. These formative principles can – at least practically – be characterized, speaking with Kant, as *conditions of the possibility* of a political system designed completely differently and new in such a way. The principles are formative because they must already be recognized (in this case: by the state) before any promise (and, here, in particular, that of human dignity) that is worthy of this name can be made at all.[528]

The first formative principle is the above-mentioned principle of *pacta sunt servanda*, or, in this case, referring to the promises given by the state: promises must be kept. For the fulfillment of this duty (i.e. to keep a promise that itself cannot be promised), the duty must always be assumed as a precondition of making a promise. If that precondition was not met, no promise – at least no promise meant seriously – would exist: in the same way as the rule *pacta sunt servanda* cannot be agreed upon but must already be recognized before entering any agreement.

[527] Hoerster (2002: 11 *et seq.*) argues in this direction. A constructively skeptical position, using the example of human dignity, is presented by Birnbacher (1996). In his contribution to this volume, Rene Urueña also asserts that human dignity is "void of any actual substance" and that the underlying principle of humanity is merely an "empty vessel."

[528] Cf. in greater detail Joerden (1988: 307 *et seq.*).

Article 79(3), Basic Law, the so-called "eternity clause" (*Ewigkeitsklausel*) of the Basic Law, can be interpreted as an affirmation that the promise of human dignity is essential for the newly founded state, and therefore is permanently binding.[529] This provision, which excludes any amendments to the Basic Law affecting (inter alia) the guarantee of human dignity, has sometimes been criticized as self-referential and thus in a way a paradox. In particular, one might ask whether or not Article 79(3), Basic Law itself may be changed in a first step, in order to abolish Article 1, Basic Law in a second step. This question can only be answered by taking the spirit and purpose of such an "eternity clause" into account. For the present context, it is necessary to realize that the constitutional power, by means of this so-called "eternity clause" (*Ewigkeitsklausel*) in Article 79(3), Basic Law, has clarified how serious it was about the promise of human dignity, and that there should be no option of taking back this promise later (at least not within the context of *this* constitution). If the state had said in substance: I promise to guarantee human dignity but this may be changed at a later date, this promise would not have been one from the outset.

Furthermore, the concept of a promise already implies that the state sees its citizens as individuals that *can* be addressees of a promise. This assumption, too, is a *necessary condition* for giving a promise, regardless of the content of such promise. For the promisee must already be recognized (as a person) because otherwise it would be senseless to give him or her any promise. Every promise needs an addressee (who is qualified and recognized as such). A tree, for example, cannot be promised anything. As a condition of the possibility of any promise, the *recognition* of the citizens as persons is therefore also a matter of the promise of human dignity.[530] The German Federal Constitutional Court, also well aware of the fact that human dignity is an empty hull which must be filled, consistently uses the so-called "object formulation" (*Objektformel*) to express this.[531] According to this formulation, which can be seen as an, albeit not undisputed,[532] attempt to clarify human

[529] Article 79(3), Basic Law, translates as follows: "Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible."

[530] On the notion of *recognition* of the other party, see Rothhaar (2008; 2009), with additional references.

[531] See Federal Constitutional Court judgments (BVerfGE) 27: 6 *et seq.*; 28: 391 *et seq.*; 45: 228 *et seq.*

[532] See Herdegen (2009), annotations 34 and 35, with further references to other attempts to define or clarify what "human dignity" means in Article 1, Basic Law.

dignity and is still used in German legal practice,[533] the promise of human dignity prohibits the state from treating humans as mere objects instead of persons.

In addition, the promise of protection of human dignity evidently is made towards *all* citizens (and beyond that, all humans within the state's territory; cf. above) *equally*.[534] That means that this promise at the same time includes the *principle of equality*, according to which all humans must be treated equally by government bodies in relevant equal situations, i.e. in this case: before the law. This, therefore, is also a necessary condition for promising a group (of people) something if the promisor does not differentiate in any way. For it would be contradictory to promise *all* humans (without any further specification) the protection of their dignity, but on the other hand keep back this protection from an individual (or from some individuals) belonging to this group. Thus, the principle of equality is also a formative principle of the promise of human dignity, independent of the question when certain situations must in fact be seen as "equal" or "unequal" to each other.

To promise someone something also means fundamentally to respect the promisee's *will* (*neminem laede*). If this was not a precondition, any promise would be senseless because one could (mis)treat the other person according to one's own will (in this particular case: the state's will) anyway and would not have to promise anything at all. Every promise as such, therefore, rests upon the idea that the promisee must be able to demand that the promise is kept – once again, irrespective of what the material content of this promise is. Accordingly, a promise gives the promisee a *legal right* (or claim) that the promise is kept. Here lies the basis of the so-called *prohibition to instrumentalize* (*Instrumentalisierungsverbot*),[535] prohibiting that the

[533] However, the Federal Constitutional Court itself has noted that general formulations such as the "object formulation" can only indicate "the general direction in which violations of human dignity can be found" (BVerfGE 30: 25), and thus acknowledges that even this "object formula" cannot clearly define what is human dignity. Nevertheless, despite clearer definitions, it is still used. See Herdegen (2009), annotation 36. A similar phrase has been used by the European Court of Human Rights in the case of *Tyrer* v. *The United Kingdom*, judgment from 25 April 1978, para. 33, *Neue Juristische Wochenschrift* 1979: 1090.

[534] Cf. BVerfGE 5: 205, in which the "principle of equal treatment" was described as a "self-evident postulate" for a free democracy.

[535] See, in particular, Dürig (1956), who deserves merit for transferring the notion of prohibition to "instrumentalize," originally developed by Kant (1785: 429 *et seq.*), referring to the relationship between two private persons, to the relationship between

state (in the words of *Kant*) uses its citizen merely as a means and not as an end. For each citizen's right that his will is investigated and respected is necessarily connected to the (permanent) promise of human dignity.

Nevertheless, this is a right that *all* citizens have equally (cf. above on the principle of equality). This, however, means that the execution of an individual's will is limited by the others' will. The state's task and meaning is to ensure that these mutual limitations are respected.[536] This means that instrumentalization, or, put more exactly, the use of *state force*, is only allowed if it can be justified by securing other citizens' (potential) rights. Only insofar as it is necessary (this is often referred to as the "principle of proportionality"), in this sense can it legitimately be considered to be "legal force."

Two further general legal principles that reflect long-understood rules in jurisprudence are connected to the promise of any right: *Volenti non fit iniuria* and *vim vi repellere licet*. The first rule is fundamental because there can be no legal claim if the right concerned is explicitly (and voluntarily) waived. For the right to waive one's own right is a direct consequence of the (state's) respect for one's will (which is also included in the promise; cf. above). The second clause expresses the right to self-defense.[537] It means that a right that is (unlawfully) attacked may be defended (if and insofar as the state is not able to use its monopoly on the use of force and thus ensure the defense of this right). The right to self-defense is therefore also fundamental for the legal system because if it were missing every right would become practically worthless, as it could not be protected in case of an attack (i.e. in the absence of government bodies prepared to offer protection). Otherwise, anyone attacking a legal right would only have to contrive that the state's protection would arrive too late in order legally to infringe someone else's rights.

the state and its citizens. On the prohibition to instrumentalize, see, further, Birnbacher (2008). For a fundamentally critical view on the prohibition to instrumentalize, see Hilgendorf (1999).

[536] Cf. Kant's "Universal Principle of Right" (1998: 24): "Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law." In German: "Allgemeines Princip des Rechts." "Eine jede Handlung ist recht, die oder nach deren Maxime die Freiheit der Willkür eines jeden mit jedermanns Freiheit nach einem allgemeinen Gesetz zusammen bestehen kann" (1797: 230).

[537] This term is used here in a broad sense, including not only the defense of oneself but also the defense of all other persons and their interests in cases of unjustified attack.

3 Content of the protection of human dignity

While the above-mentioned principles (*pacta sunt servanda*, recognition, equality, *neminem laede*, *volenti non fit iniuria*, *vim vi repellere licet*) can be seen as formative principles of *every* promise, as they must be generally accepted as valid for every promise, determining the *content* of the promise of human dignity requires an interpretation: the concrete meaning of the protection of human dignity in the Basic Law (and also what is *not* meant by this clause) must be clarified. For such an interpretation, it is relevant, first, what the promisor wanted to promise, and also secondly, what the promisee was able to understand (or was reasonably allowed to understand; cf. the so-called "objective horizon of the recipient" (*objektiver Empfängerhorizont*)).[538]

The constitutional legislature itself, however, delivered an essential guide to interpreting the *content* of the promise of human dignity by giving the acknowledgement of human or basic rights as reason for this promise. By doing so, this bill of basic rights becomes a legal specification of the term "human dignity," so that the latter can very well be understood as the source of the basic rights. In other words, although the "following basic rights" are not identical to the promise of human dignity (this promise can be seen as the broader term and must include more than the basic rights enumerated in the Basic Law), they are a valuable source of interpreting what the constitutional legislature meant by its promise of human dignity. At the same time, this opens the opportunity of "developing" further basic rights *per analogiam* up to now not explicitly mentioned in the Basic Law by interpreting the spirit and purpose of the protection of human dignity (*ratio legis*). One example for such a "developed" basic right is the (basic) right to informational self-determination which the Federal Constitutional Court derived from Article 1, Basic Law in conjunction with Article 2(1), Basic Law.[539]

Reflections of the formative principles mentioned above at section 2 can also be identified within the canon of basic rights. For example, a guarantee of the principle of equality is found in Article 3(1), Basic Law.[540] The perpetuation of the promise, and thus its seriousness, is (as mentioned) guaranteed by Article 79(3), Basic Law. The recognition

[538] This is a general rule for interpreting treaties and certain other "declarations of intent," at least in German law, which follows from sect. 157, German Civil Code (Bürgerliches Gesetzbuch – BGB).

[539] BVerfGE 65: 1 *et seq*.

[540] Article 3(1), Basic Law, translates as follows: "All persons shall be equal before the law."

of the promise as personal, as well as the rule *volenti non fit iniuria*, can be recognized – beside other content of this clause – in Article 2(1), Basic Law (free development of personality).[541] Self-defense, at any rate the basic idea behind this concept, can be found in Article 20(4), Basic Law, as this provision stipulates a right to resistance against acts aiming at abrogation of basic rights (and the constitutional order).[542] This rule is a particularly good demonstration of how seriously the constitutional legislature took the protection of human dignity. Would it otherwise have granted the individual a right to use force even against state organs?

Finally, the content of the promise of human dignity can be understood as including the citizen's right to securing his existence. For the constitutional legislature itself interprets the protection of human dignity, among others, as the right freely to develop one's personality (cf. Article 2(1), Basic Law). This possibility no longer exists if the minimum conditions for securing one's existence are not met. One might even interpret the state's promise of the possibility of free development of one's personality widely, namely as a duty on the state's side to strive for maximizing the possibilities of free development of personality. This duty is then limited by its capability and functionality (here, as for every duty, *ad impossibilium nulla est obligatio* applies), as it has undertaken a duty towards all citizens equally and accordingly must ensure that it is actually able to fulfill its duties.

By interpreting the guarantee of human dignity as a state's promise, however, at least one thesis is excluded: namely, the thesis that the notion of human dignity can also lead to a citizen's *duty* to behave in a certain way. Of course, the establishment of a legal order must allow delimiting each individual's rights (interests) from those of all other citizens in the state. This is, so to speak, the "inner limit" of the promise of human dignity given to all citizens, and a condition of the possibility of realizing it. Apart from that, no other duties arise from the promise of human dignity, simply because imposing duties cannot be interpreted as consequence of a *promise*. A duty is only placed on the promisor (namely, to fulfill his promise) but not on the promisee (except possibly the duty to accept the promised service if he

[541] Article 2(1), Basic Law, translates as follows: "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."

[542] Article 20(4), Basic Law, translates as follows: "All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available."

has accepted the promise; but never a duty to own services). In other words, only rights, never duties, can derive from a promise for the promisee. Wherever the state wishes to place obligations it must do so explicitly (cf., e.g. the regulation on Compulsory Military Service in Article 12a, Basic Law), obligations by all means do not result from the promise of human dignity. However, this also means that no duties of citizens to the state can be drawn from the promise of human dignity, even if it is attempted to pave the way for such duty by constructing "(legal) duties to oneself."

4 Unbalanceability and inalienability

From the fact that the promise of human dignity implies the above-mentioned *formative principles*, the conclusion can be drawn that at least these formative principles are unbalanceable (from the state's perspective). For every kind of balancing or weighing up these principles against others would contradict their character as *conditions of the possibility* of the promise of human dignity. At least in principle this thesis corresponds to the German Federal Constitutional Court's (*Bundesverfassungsgericht*) concept according to which basic rights cannot, at any rate not for the sake of other persons' interests or for any other reason, be limited so strongly that they practically completely lose their protective function; this idea is generally referred to in Germany as "*Wesentlichkeitstheorie*" (essence theory) of basic rights (cf. the corresponding constitutional interpretation of Article 19(2), Basic Law, according to which the "essence" of a basic right is an uncrossable limitation for any possible constraint of basic rights). At best, it is permissible mutually to limit the exercise of different persons' basic rights in the sense of practical concordance (*Praktische Konkordanz*).

With that said, it seems reasonable to distinguish between at least two degrees of (state-led) infringements of human dignity. On the one hand, there are infringements of the exercise of basic rights that do not touch the "essence" of this right; such infringements may be justified (with a respective reasoning). On the other hand, there are infringements of the exercise of basic rights that lead to a complete extinction of this basic right for the person concerned; these infringements can under no circumstances be justified, as they already negate the above-mentioned formative principles of the protection of human dignity. There is some indication that the "crimes against humanity" mentioned in the Rome

Statute fall within the scope of the latter kind of violations of human dignity, of course, without scoping out this field.[543]

A further consequence of the theses presented above in section 2 is that the notions of *inalienability of human dignity*, and basic rights (cf. Article 1(2), Basic Law), respectively, can only be interpreted in such a way that the state may not deprive its citizens of their human dignity (and must protect its citizens from corresponding infringements by third parties; cf. the "theory of indirect third-party-effect" (*mittelbare Drittwirkung*)).[544] In any other event, the state would not keep its promise of human dignity. On the other hand, nothing is said about the possibility of the citizen's self-renunciation of his/her human dignity (or, more precisely, his/her waiver of the right of the protection of his/her human dignity). Insofar as the rights of other persons are not involved, the clause *volenti non fit iniuria* must apply even here. Anything else cannot be drawn from the promise to protect human dignity. And any other thesis requires additional arguments, for example, the assertion of a *duty to protect one's dignity*. However, there is no persuasive reasoning which supports such a duty; at least not as a *legal* duty (this may be different for *moral* duties or other purely *ethical* duties).

5 Consequences of the promise of human dignity for medical (criminal) law

In the following paragraphs, some consequences of the concept of a juridical term of human dignity, as set out above, for medical (criminal) law will be outlined. This can only be an outline and thus only a few selected cases, problematic or worthy of discussion, are singled out.[545]

[543] Cf. the chapter by Roger Brownsword in this volume. Brownsword sees crimes against humanity as damaging the essential conditions for human social existence. See also the discussion of this view by Harmen van der Wilt in his chapter in this volume. Apart from attacking social existence, which refers more to humanity in the sense of "mankind," it is also arguable that crimes against humanity are directed against the humanity (i.e., the "being human") of each individual person affected by such crimes. This is true in particular for those crimes based on membership of a certain identifiable group (Article 7(h) Rome Statute). Victims are not seen as individuals but merely as part of a group.

[544] This theory was developed by the German Federal Constitutional Court in its famous "Lüth judgment," BVerfGE 7: 198 *et seq*., and states that basic rights influence all areas of law, including Civil Law, even though the state, which is primarily bound by basic rights, is not directly involved.

[545] On the meaning of the topos of human dignity for additional questions of medical law, see Joerden et al. (2011; 2012).

5.1 *Patient autonomy*

That an effective justification of medical intervention in a patient's bodily integrity (e.g. surgery) requires (informed) consent by this patient results directly from the principle of acceptance of the individual's will as long as he/she does not infringe other people's rights; a principle recognized by the state through its promise of human dignity.[546] An intervention in bodily integrity only affects the person whose integrity is concerned, and so only his/her consent is relevant. The goal of any treatment the doctor has in mind (though perhaps well-intentioned) is not relevant. For the field of medical law, this represents a somewhat classical case of the prohibition of instrumentalization. By disregarding the patient's will he/she is made a mere object (a "thing") for the doctor. By guaranteeing human dignity the state has promised to prevent this through relevant legal regulation.

However, this includes the fact that consent to medical intervention can be freely denied (with the consequence that any infringement is not justified, but rather punishable as causing bodily harm or duress). The motives for consenting must not be examined as to their "reasonableness" because the free decision to refuse treatment is all the more a manifestation of free will (if, as is preconditioned here, the patient is of sound mind; if he/she is not of sound mind, see below on presumed consent), and any bending or other disregarding of this will would amount to a violation of the promise of human dignity.

Accordingly, no "reasonability test" of consent given to infringements of bodily integrity is permissible. On the face of it, according to section 228 of the German Criminal Code, notwithstanding any consent, that consent is void if the act nonetheless violates public policy.[547] Meanwhile, newer court decisions correctly assume that this rather unclear recourse to "public policy" must be replaced by an objective limitation (regarding the severity of the infringement). If, according to this, infringements with freely given consent are illegal only if the infringement results in

[546] It might be noted that "informed" refers not only to the methods of treatment and its risks but also to the purpose of any medical treatment. Cf. the chapter by Kristof Van Assche and Sigrid Sterckx in this volume on the Havasupai case, in which consent had been given to examine blood for research on diabetes, while in fact other unauthorized studies took place.

[547] This section translates as follows: "Whosoever causes bodily harm with the consent of the victim shall be deemed to act lawfully unless the act violates public policy, the consent notwithstanding." Translation by Michael Bohlander, www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html.

grievous bodily harm as laid down in section 226, German Criminal Code,[548] the reasoning for this limitation can now only be the wish to safeguard other people's rights by protecting them from the (abstract) endangerment (e.g. by copycats who have not obtained consent, or by devaluing the taboo of causing bodily harm etc.). At least, this does not question the rule that even an "unreasonable" consent to bodily infringements (e.g. certain brain treatment for the purpose of enhancement, or excessive cosmetic surgery) is in principle justifying, as long as the consenting person is not insane (or anything else, e.g. a relevant error, excludes his/her personal freedom).

5.2 *Euthanasia*

In principle, this is also true even for active euthanasia. As a rule, the promise of human dignity here includes the state's duty to respect the (attributable) will of each individual, even if this individual's will is directed against himself/herself. Therefore, it would violate human dignity (ultimately) to keep a suicidal person from his/her plan, or, in case the suicide remains only an attempted suicide, to render this punishable. It may well be that the state is allowed (perhaps even under a duty) to encourage a person seeking suicide to consider thoroughly his/her plan and hinder at least the first suicide attempt's completion (e.g. through reanimation). However, in the long run, the state must not ignore the free will expressed by the individual. (If, as it will generally seem natural to suspect, the person seeking suicide is insane, this obviously must be evaluated differently.)

That section 216, German Criminal Code (killing at the request of the victim)[549] is not unconstitutional due to violation of the notion of protecting human dignity, is only because possibly third party's rights are (abstractly) endangered were this rule to be abolished (general

[548] Sect. 226, so far as relevant in this context, translates as follows: "(1) If the injury results in the victim, 1. losing his sight in one eye or in both eyes, his hearing, his speech or his ability to procreate; 2. losing or losing permanently the ability to use an important member; 3. being permanently and seriously disfigured or contracting a lingering illness, becoming paralysed, mentally ill or disabled, the penalty shall be imprisonment from one to ten years." Translation by Michael Bohlander, www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html.

[549] Sect. 216, Criminal Code, translates as follows: "(1) If a person is induced to kill by the express and earnest request of the victim the penalty shall be imprisonment from six months to five years. (2) The attempt shall be punishable." Translation by Michael Bohlander, www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html.

removal of the taboo against killing, false statements concerning the consent given by a killed person, etc.). This is true even more so for active euthanasia. (The proposition that suicide itself is not punishable, but that assisted suicide must always be punishable despite the victim's consent because the victim violates a "legal duty to himself/herself", is not plausible.)[550] As such, the (freely formed) will of any person wishing to die must be respected; in legal practice (cf. section 216, German Criminal Code), it is irrelevant only because it would otherwise lead to endangerment of other persons.[551]

This becomes especially clear when turning to so-called indirect euthanasia, which is generally accepted as permissible and concerns cases in which the patient receives strong painkillers as medication that are (unintentionally) life-shortening in many cases. This could not remain unpunished if respect for the patient's will (as is, as this article suggests, demanded by the protection of human dignity) was not the basis of the analysis here, too. For all other grounds of justification (including the so-called *duplex effectus* theory,[552] and reference to necessity as defined in section 34, German Criminal Code)[553] cannot support these cases or resemble circular reasoning.[554] The crucial argument for the lawfulness of indirect euthanasia is much more, that – unlike in the basic case of euthanasia (cf. above) – no third party's rights are apparently endangered if the administration of medication is done by a doctor and with informed consent by the patient. (Whether there could be parallel cases of active euthanasia may remain open at

[550] Cf. in greater detail Joerden (2009: 448 *et seq*.).

[551] However, the scope of sect. 216, German Criminal Code, has arguably become narrower by the judgment delivered by the Federal Court of Justice in 2010 in which it was held that "passive euthanasia through active behaviour" (i.e. switching off life-saving devices rather than simply discontinuing life support) is not punishable. The Federal Court of Justice explicitly affirmed consent as justification in these cases also. Cf. BGHSt 55: 191 *et seq*. and the discussion of this case by Uhlig and Joerden (2011).

[552] Cf. Joerden (2007) in the context of criminal law.

[553] Sect. 34, Criminal Code, translates as follows: "A person who, faced with an imminent danger to life, limb, freedom, honor, property or another legal interest which cannot otherwise be averted, commits an act to avert the danger from himself or another, does not act unlawfully, if, upon weighing the conflicting interests, in particular the affected legal interests and the degree of the danger facing them, the protected interest substantially outweighs the one interfered with. This shall apply only if and to the extent that the act committed is an adequate means to avert the danger." Translation by Michael Bohlander, www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html.

[554] Nonetheless, the Federal Court of Justice and many legal scholars tend to continue to argue with this legal figure. Cf. the references given in Uhlig and Joerden (2011: 372).

this point, albeit there is some indication for it.) The German Federal Court of Justice (*Bundesgerichtshof*) was therefore right to advocate the position that the patient's human dignity outweighs his/her right to live. However, the crucial point – that the Federal Court of Justice did not mention, but should have mentioned – is that it would be a violation of human dignity to refuse pain medication because of the formal prohibition of killing.

5.3 *Procedures with presumed consent*

Insofar as a patient's true will cannot be determined, for example owing to the patient's unconsciousness or insanity, his/her alleged will must be investigated. Once again, this must be done to meet the requirements set by the individual's human dignity, so that he/she is never treated merely as an object but in accordance with his/her, at least presumed, will. Here, the first question must be if there is any substantial evidence for the individual's true will at the time of surgery. This is the case if witnesses (e.g. relatives) can be asked, or there is an advanced health care directive (the advanced health care directive, however, only authenticates the patient's will *before* his insanity arose and thus is also merely an indication of his/her "true" will). The will based on such indications, and *therefore* presumed, must be taken as the basis for the decision.

If such indications cannot be found, one must, as *ultima ratio*, fall back to the objective interests and situation the patient is in.[555] In doing so, one must acknowledge that the patient's will to consent to medical treatment can be presumed only if the treatment is, on the whole, advantageous to him/her, i.e. the "balance of interests" is positive. Different from the examination of the patient's true will, presumed consent is subject to a "reasonability test" because the balance of interests is determined by an *objective* and therefore "reasonable" standard. For this reason, for example, an unconscious patient's life must always be saved, even if this is only possible by considerable interference with his/her bodily integrity (e.g. amputation, allogeneic blood transfusion). Consequently, as long as there is no sign of refusal of the operation (e.g. by a Jehovah's Witness), the operation must (and may) take place owing to the positive balance of interests from an objective point of view.

[555] The same is true if the patient's statements are contradictory regarding relevant aspects. Cf. Joerden (2003: 143 *et seq.*).

5.4 *Reproductive cloning*

If the question is raised whether (reproductive) cloning violates human dignity, the first thing to be noted is that two violations come into question. On the one hand, the original's human dignity, and on the other hand, the clone's human dignity. The original's human dignity is indeed not violated if it has given informed consent to the use of its own cells for the purpose of cloning. (The hypothesis that the original is not allowed to consent because this would violate his/her human dignity is legally not convincing already because the promise of human dignity simply does not generate legal duties; cf. above.) On the other hand, regarding the clone, nothing in the act of cloning that brings the clone into existence in the first place can be identified as violation of its dignity, especially as a clone that actually comes into the world has the right to full protection of his/her human dignity. Even possible misuse of the clone that takes place or is planned after its coming into being (e.g. "use" to build up a dictator's army), does not allow conclusions regarding the justification of an (absolute) prohibition of its mode of coming into existence.[556]

However, one must ask whether the production of a clone violates its presumed future will, as its production might represent the use of the clone as a mere means. Nonetheless, this cannot be assumed in "normal cases" because surely the clone will prefer its life to its non-existence, no matter what psychic problems its existence, which genetically derives from another person, might bring with it. At most, if the clone's existence was full of such severe sufferings that amounted to a situation that, under parallel circumstances, can be discussed under the heading of euthanasia, one must assume that presumed consent is missing. In such a case, cloning done anyhow, i.e. accepting this possible result, violates human dignity. As it presently cannot be excluded – but rather even must be assumed – that first attempts at cloning will lead to such consequences, this appears to be a sufficient reason completely to prohibit cloning for the time being. However, this could change if cloning (possibly in another country) is established as "secure" technology that could minimize the danger of the clone being exposed to severest sufferings from birth. This is true all the more if cloning technology one day is superior to the natural process of human development regarding possible dangers for the cloned child.

[556] Cf. Joerden (2003: 11 *et seq*., 17); Hilgendorf (2001), both including additional references.

5.5 *Germline modification and enhancement*

Informed consent at least by those individuals that come into existence later (the first, but also all following generations) to germline (gene) modification cannot be obtained. Therefore, only presumed consent comes into question and is, of course, necessary, if they are not to be treated in a way that violates their human dignity. Not in every case is it possible to say that medical treatment in the form of germline modification lies in the concerned (future) individuals' (objective) interest. However, if the genetic intervention is meant to prevent severe hereditary diseases it appears natural to assume such a presumed (future) consent. Things become more complicated if the germline modification is meant to "improve" the individual (i.e. enhancement, like higher intelligence, increased physical abilities, better eyesight, better hearing ability, considerably longer life, etc.). In such cases, presumed (future) consent may be accepted only if the procedure is reversible in principle, i.e. if the individual that comes into the world with such an enhancement could take back this enhancement again without grave consequences.[557] Therefore, an intervention undertaken in order to eliminate the future individual's hearing ability is not covered by presumed consent (thus, the wish expressed by deaf parents to have a deaf child violates human dignity). On the other hand, if the intervention leads to an improvement of the hearing ability (even beyond "normal" ability), this is covered by presumed consent at least if the improved hearing ability can be reduced back to the dimension normal today by another intervention if the individual then wishes so to do.

5.6 *Organ transplantation*

Organ transplantation by a living donor conforms with human dignity only if he/she consents to it; execution against his/her will would reduce him/her to a mere object. (Correspondingly, the same is of course true for the organ recipient.) If an organ that is not of vital importance is concerned, ex-vivo procedures and transplantations with the donor's consent are permissible. Restrictions by prohibiting payment for organ donations are only allowed insofar as this prohibition is justified by the protection of *other* individuals (e.g. danger of misuse if general organ trade is allowed, violence or duress used against non-consenting organ

[557] See in greater detail Joerden (2003: 98 *et seq.*).

"owners," etc.). From the viewpoint of human dignity and its violation, there is no conclusive argument against the model of a donation club or so-called cross-over donations.

The donation of vital organs (heart, lung) during one's life is particularly problematic. Meanwhile, the same arguments in favor of maintaining section 216, German Criminal Code can be used against liberalizing such organ donation. However, allowing this kind of donation would not violate the donor's human dignity. For the promise of human dignity does not generate any duties, not even a duty to continue living (cf. above).

For organ donations by persons no longer alive, the (brain) dead donor's presumed will is crucial. Admittedly, the question cannot be what will the donor would express right now if he/she were asked, because dead persons are no longer able to have a will. So, to be exact, the will needed is the one he/she has expressed in their lifetime (comparable to a last will and testament). Such consent is present if the donor has explicitly consented to a donation in case of his/her death in their lifetime. Additionally, it is conceivable to determine his/her presumed will by interviewing witnesses (relatives etc.) on his/her probable will. This argues for the so-called "extended opt-in" as regulated (to date) by the German Transplantation Act (*Transplantationsgesetz*). But also an "opt-out" solution (as is the law, e.g. in Austria) does not appear to be a violation of human dignity, at least if it is realized that after death only a limited protection of the deceased's will is necessary, and thus, in the absence of documented objection, other important legal interests (in particular, the organ recipient's life) can very well be taken into account.

5.7 Protection of the right to live at the end of life

The promise to protect human dignity also includes the protection of the right to live, in fact not only because life is the most important legal interest insofar as its existence is a necessary condition to exercise all other rights, but because of all things the killing of another person (as a rule, i.e. if he/she has not expressly demanded death) constitutes the mere instrumentalization of this person. For his/her will (to live) is deemed irrelevant by exactly this act of killing. (If this will cannot currently be ascertained it is at least a violation of his/her presumed will.)

Therefore, it is misguided to claim such a difference between killing and violation of human dignity that would lead to heterogeneity of both kinds of infringements. On the contrary, killing is a special case of

violation of human dignity, and in general the most condemnable (the latter, however, only because killing renders the exercise of all other rights impossible). This does not change even if it is considered that killing may be justified by self-defense. For, of all things, in a situation of self-defense the attacker is not instrumentalized at all, because *he/she*, by means of the attack that he/she can stop any time, is in control of the situation, and not the defender. The defender thus prevents the attacker from attempting illegally to instrumentalize someone (the defender, or a third person). For this reason, the right to self-defense (*vim vi repellere licet*) also belongs to the inalienable formative principles of the promise of human dignity (cf. section 2, above).

The question remains, until what *time* the right to live exists qua protection of human dignity. First, it must be noted that it cannot exist anymore if neither a real will (to live) nor a presumed will (to live) can be assessed. At the latest, *after* the so-called brain death no (current) true will can be formed. However, in particular cases (e.g. in comatose, part brain dead, but also sleeping and unconscious patients) it may also be that it is impossible to ascertain a (current) true will at an earlier time. Nonetheless, if the true will cannot be established it can be presumed under certain circumstances (cf. above). However, it is then necessary that this presumed will refers to something that is in fact possible. Regarding the legal interest of ownership, such presumptions remain possible because the testator's (previous) will with regard to his/her (previous) property can still be fulfilled (the assets can be transferred to his/her heirs). Also, his/her will that his/her honor is regarded can still be fulfilled by respecting certain rules of reverence.

Obviously, this is no longer possible concerning the will to *continue living after* brain death, because the physical–physiological preconditions of something like formation of will are missing completely. Nobody can seriously have the will to continue (physically) living after his/her death (such a will would be directed at something impossible, as simply no will can be formed without a functional brain). For this reason, such a will can also not sensibly be presumed. This is, of course, only true if it is truly impossible that the person concerned still continues living. Therefore, if someone suffers a cardiac arrest (a so-called clinical death), his/her (presumed) will to continue living can still be realized by resuscitation (or at least attempting to resuscitate, respectively). After the onset of brain death, however, this is no longer possible, at least according to the current state of the art. Should this state of the art change one day (although nothing seems to point that way), this observation perhaps

must be corrected. In other words, it is senseless to presume a brain dead person's will to continue living, and thus such presumed will can no longer justify protection of rights (in this case: the right to live).

5.8 *Protection of the right to live at the beginning of life*

The question when the protection of human dignity promised by the state should begin is also problematic. Obviously, the promise to protect human dignity given in the Basic Law was not directed only at the persons living at the time, but also at the persons living within German territory in the future, and so also at those that were not even born at the time. Such a promise to future generations is not ineffective a priori. This could suggest that all persons, even including future persons (and, with that, also embryos from the moment of fertilization), are full beneficiaries of the promise of human dignity.[558] However, if it is assumed that this primarily deals with respect for the citizen's true will (cf. section 2, above), the future individual's presumed will must be decisive alone in the first place. As this is about the full protection of the right to live, i.e. an absolute, unbalanceable prohibition of killing embryos, a future individual's merely future will cannot be decisive but rather, at most, the presumed will of an already existing individual. In order to explore a presumed will, however, it is sensibly necessary that a physical–physiological substratum actually exists that such a will (that must be presumed) can be ascribed to, because the presumed will is only to take the place of the true will.

Regarding humans, such a physical–physiological substratum that formation of will can be ascribed to, exists, at the earliest, at the beginning of brain activity, i.e. the moment that brainwaves first flow. For it is at this time, at the earliest, that one can say that a true will (in the wider sense) can be formed at all by this person; therefore it is at this time, at the earliest, that a presumed will can be ascribed to the individual concerned. Another reflection supports the thesis of this caesura:[559] If the end of life (and thus the end of full protection of the right to live) is identified as the onset of brain death (cf. above), the idea that life with the full right of protection of the right to live exists *before* the beginning of

[558] This is what the Federal Constitutional Court assumed in its first judgment on abortion. See BVerfGE 39: 1 *et seq*. The Federal Constitutional Court held that even "developing life" is protected by the promise of human dignity in Article 1, Basic Law (BVerfGE 41). This view was upheld in a further decision: BVerfGE 88: 203 *et seq*.

[559] See Joerden (2003: 37 *et seq*.); Lockwood (1990); Sass (1989).

brain activity can hardly be made plausible. This, however, does not mean that human life before the beginning of brain activity must be completely without protection. Precisely, only the *full* protection of the right to live (including, as a rule, unbalanceability as it derives from the promise of human dignity; cf. section 2, above) cannot sensibly be deduced from the promise of human dignity for this period of time.

In this context, it must be noted that this thesis indirectly demands a greater protection of prenatal (human) life in some respect than current German Criminal Law offers. For if the beginning of brain activity is decisive for the full protection of the embryo's or fetus's right to live, an abortion would only be legally acceptable within the first two months after conception because this is the time frame (taking a safety margin into account) in which one can assume that the embryo's brain activity has not yet begun. After this time full protection of the right to live emerges. For this reason, an abortion can now only be legally acceptable (namely, because of a defensive state of emergency) if otherwise the mother's bodily integrity is seriously at risk of severe harm.

On the other hand, from the perspective proposed here, some of the much-debated interventions that are connected to the killing of an embryo (*in vivo* or *in vitro*) are legally acceptable with regard to the aspect of killing if another legitimate interest is the reason for this, because the verdict on unbalanceability does not apply *before* the beginning of brain activity. This concerns the so-called therapeutic cloning (insofar as it implies killing of an embryo; on other aspects, cf. above), pre-implantation genetic diagnosis (here, again, only in cases of killing a totipotent cell for examination purposes), research on embryonic stem cells (so far as their production requires the killing of former embryos), and "consuming" embryonic research before the beginning of these embryos' brain activities.

5.9 Minimum health care

Finally, the promise of human dignity also leads to the citizen's right that minimum health care is provided. (On the reasoning for this right to services as product of the general right to a secure existence, cf. section 3, above.) This means that the state is under a duty towards its citizens to build up a functioning emergency system of health care, and provide for the opportunity of corresponding insurance systems. The state's duty is limited by the fact that the state has this duty towards all citizens equally and thus must fulfill its duty only to an extent that does not unsustainably

damage the state's financial power, as otherwise at the same time the possibility of minimum protection of all citizens would be taken. However, it does not appear that the promise of human dignity implies, for example, a duty to provide all those interested with access to methods of artificial insemination free of charge. For this possibility undoubtedly does not belong to the minimum security of the respective couples' existence. Of course, this does not exclude that the legislator imposes such a duty by statute on other grounds (i.e. not within the framework of protection of human dignity) – however, there is no constitutional obligation so to do.

6 Conclusion

After the Second World War, the notion of human dignity was placed at the beginning of the new German Constitution to underline its importance, especially after the Nazi era, during which humanity, both of individual victims and of mankind altogether, was completely set aside (section 1). Although human dignity may appear only as a "hull," the fact that it was promised by the state to all citizens already implies the recognition of every human being as a person (and not as a mere object, or part of a certain group), respect for the individual's will, and the principle of equality (section 2). Basic rights – for example, the right to free development of one's personality – and their interpretation are helpful to understand the term human dignity (section 3). As an unconditional promise, human dignity cannot be set aside by any unilateral state action; it is an unbalanceable and inalienable right (section 4). With this aforementioned interpretation of human dignity, answers to selected questions of medical criminal law can be given (section 5). Of course, this interpretation can apply to other areas of law too: crimes against humanity, for example, violate human dignity because the victim's humanity is negated by not protecting their right to live and also by disrespecting their will to live. Interpreting human dignity as a promise (which is additionally connected to the basic rights) may be seen as the result of violations of human dignity in the past. However, for the future, this promise and its immanent formative principles, allow the answering of completely new questions raised by new technologies and societal developments.

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