

## The Basic Law at 60 – Human Dignity and the Culture of Republicanism

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### A. The Concept of Dignity and Constitutional Theory

The German Basic Law is a resilient constitution. It has proved able to cope with both the new beginning of the constitutional tradition in Germany after the cataclysm of 1945 and German reunification after the fall of the Berlin Wall in 1989. To be sure, there is reason for some critical reflection concerning concrete questions and even fundamental issues—not the least of which is the question whether German reunification should have been marked by a process of constitutional self-reflection and renewal beyond what has been done. All in all, however, the Basic Law is, in historical perspective, a remarkable success. Therefore, it is not surprising that it has gained much international attention. Some aspects of the Basic Law have even become a kind of attractive export article not accounted for in Germany's foreign trade balance, but nevertheless of considerable importance.

The Basic Law has various features that distinguish it from other examples of modern constitutionalism. It creates a particular and recently reformed structure of federalism, a peculiar parliamentary democracy with two legislative bodies and a federal presidency with mainly representative functions. It contains not only classical elements of constitutionalism, like the rule of law and democracy, but also makes the social state a constitutional concept. Its rule on *wehrhafte Demokratie* (militant democracy) is the object of many debates. The Basic Law conceptualizes the religious neutrality of the state in an original, open way. Its relation to international law, including European law, is intricate but marked by a general openness to this legal sphere. A further example is the institutional structure of the German Federal Constitutional Court it creates, which has attracted international interest for its institutional features and its practice.

The normative heart of the Basic law—its catalogue of fundamental rights—possesses particular features as well, for example, the protection of a (subsidiary) general freedom of action or a differentiated system of limitations of fundamental rights. The bill of rights has

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been expanded through innovative jurisdiction, for example, as to a general personality right or data protection.

The norm, however, that most characterizes the Basic Law in the public perception and in scholarly reflection is the guarantee of human dignity.<sup>1</sup> This particular role is, to a large degree, a consequence of the German past. Nazism still legitimizes the guarantee of human dignity today by the abominable, vivid barbarism of its negation. The guarantee of human dignity formulates, however, not only the desire to refrain from fathoming yet another time a moral abyss, but a promise as well: the perspective to create a legal order that embodies principles of human dignity not only through the absence of misdeeds, but also through legally institutionalized structures of a republican culture of respect.

The Basic Law's guarantee of human dignity has had an impact beyond the German borders as well. This is true for national states and for the transnational arena. An example of the former is the guarantee of human dignity in the new Swiss Federal Constitution,<sup>2</sup> the formulation of which has been influenced by the example of the Basic Law.<sup>3</sup> On the international level, Article 1 of the Charter of Fundamental Rights of the European Union is a good example of the influence of the Basic Law's protection of human dignity: it reproduces verbatim the core formulation of the Basic Law.<sup>4</sup>

However, one should not overlook that human dignity has become quite generally a leading principle of the international human rights culture. For many, human dignity epitomizes the core of the normative project of human rights and civilized constitutionalism that was the imperative of the new beginning after 1945. The Charter of the UN and the Universal Declaration of Human Rights of 1948 have set the example in this respect. This is true for the formulation of the fundamental rights of the Basic Law as well, which have been heavily influenced by the new conception of universal fundamental rights. The Basic Law is, therefore, not the origin and kernel but just a part of this general development towards constitutional states and an international legal order consciously based on the rather ambitious aspiration of realizing in social life basic principles of human worth. One should not underestimate the surprising nature of this development. It is certainly not what many expected after the experience with human baseness before 1945.

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<sup>1</sup> See GRUNDGESETZ [GG] [Basic Law] art. 1.1 (F.R.G.) ("Human dignity is inviolable. To respect and protect it shall be the duty of all state authority.").

<sup>2</sup> See BUNDESVERFASSUNG DER SCHWEIZERISCHEN EIDGENOSSENSCHAFT [BV], CONSTITUTION FÉDÉRALE DE LA CONFÉDÉRATION SUISSE [Cst] [Constitution] art. 7 (Switz.).

<sup>3</sup> GIOVANNI BIAGGINI, BV: BUNDESVERFASSUNG DER SCHWEIZERISCHEN EIDGENOSSENSCHAFT art. 7, para. 2( 2007).

<sup>4</sup> Charter of Fundamental Rights of the European Union, art. 1, 2000 O.J. (C 364) 1, 9 ("Human dignity is inviolable. It must be respected and protected."). This was made mandatory through Art. 6 TEU, as amended by the Treaty of Lisbon. See Treaty of Lisbon, 2007 O.J. (C 306) 1, 13.

For example, when Hannah Arendt reflected on the aporetic structure of human rights, she concluded that the bitter truth was that when all depends on the respect for the naked humanity of human beings, the world shows no respect for this naked humanity at all.<sup>5</sup>

This leads to fundamental questions about the foundation of this development. Are there actually any sound theoretical reasons for this appreciation of human dignity as a legal concept? And if so—what are these foundations? These may sound like surprising questions, as human dignity seems to be an indubitable minimal standard of any mildly attractive legal civilization. However, these questions quickly lose their exotic appearance if one pays attention to the international contemporary debate about the concept of dignity. For many commentators it is far from clear what is really meant by this concept and how to legitimize it. Nor is it clear what concrete legal use it has in a given constitutional order or in any other legal regime. This skepticism is not a completely new phenomenon. It often has been asked, and with some emphasis, whether human dignity offers more than an empty but seductive pathos. Guarantees of human dignity appear to be intrinsically vague and, thus, normatively dangerous.<sup>6</sup> Under the cover of lofty “dignity,” all kinds of subjective, relative, and heterogeneous ideas could infiltrate human rights regimes. Human dignity has the potential to become, as one early skeptic put it, the “Trojan horse” of constitutional law corrupting the positive law.<sup>7</sup>

One possible consequence of this skeptical perception is the doctrinal downgrading of human dignity clauses. These guarantees are then not understood as full, subjective fundamental rights, but objective law that is not judicially enforceable by individual citizens,<sup>8</sup> or as a hermeneutical principle, that is, as a general maxim of interpretation.<sup>9</sup> Another option is to relativize the content of a dignity clause, for example, by differentiating between a core of dignity and its periphery, the latter being open to greater limitations with the concrete consequence of making the admissibility of torture possible.<sup>10</sup>

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<sup>5</sup> HANNAH ARENDT, 1 ELEMENT UND URSPRÜNGE TOTALER HERRSCHAFT 601 (1986).

<sup>6</sup> For an overview about such comments see MATTHIAS MAHLMANN, ELEMENTE EINER ETHISCHEN GRUNDRECHTSTHEORIE 100 (2008).

<sup>7</sup> Peter Schneider, *Die Menschenrechte in staatlicher Ordnung*, in PHILOSOPHIE DER MENSCHENRECHTE UND DER GRUNDRECHTE DES STAATSBÜRGERS, 77, 83 (1964); HORST DREIER, 1 GRUNDGESETZ: KOMMENTAR, art. 1 para. 49 (2d ed. 2004).

<sup>8</sup> See Günter Dürig, *Der Grundrechtssatz von der Menschenwürde*, 81 ARCHIV DES ÖFFENTLICHEN RECHTS 117, 119 (1956); Günter Dürig, in GRUNDGESETZ: KOMMENTAR GG art. 1, Rn. 15, 16 (Theodor Maunz & Günter Dürig eds.) [hereinafter Maunz/ Dürig], original commentary; see also WINFRIED BRUGGER, MENSCHENWÜRDE, MENSCHENRECHTE, GRUNDRECHTE 12 (1997).

<sup>9</sup> See CHRISTOPH ENDERS, DIE MENSCHENWÜRDE IN DER VERFASSUNGSORDNUNG 399 n. 130 (1997).

<sup>10</sup> Matthias Herdegen, in Maunz/Dürig, *supra* note 8, art. 1, para 44, 45 (where the former held position on the admissibility of torture is abandoned after considerable critique).

These debates are not limited to the Basic Law, even though its dignity clause is the object of decades of adjudication and offers particularly rich material for debate. On the international level there are equally skeptical voices, certainly not interested in diminishing the impact of human rights, who nonetheless regard dignity as a legal concept opening the possibility of “significant judicial manipulation.”<sup>11</sup> Consequently, dignity clauses should be applied prudently. Those legal systems that do not have such a clause are advised to carefully consider the consequences of the incorporation of this concept. This skepticism about human dignity has deep roots in the human history of ideas. Thomas Hobbes thought that the value of a person is, naturally, its price in society.<sup>12</sup> Arthur Schopenhauer, in his critique of Kant’s moral philosophy, declared the idea of human dignity to be the Shibboleth of all thoughtless moralists who want to hide their own lack of ideas and moral orientation behind this impressive concept.<sup>13</sup> This remark has become, oddly enough, something like a *leitmotiv* of the critique of dignity as a legal concept, mostly without

<sup>11</sup> Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 655 (2008). For some thoughts from the international discussion, see Jochen Abr Frowein, *Human Dignity in International Law*, in THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE 121 (David Kretzmer & Eckart Klein eds., 2002); Jens Meyer-Ladewig, *Menschenwürde und Europäische Menschenrechtskonvention* [Human Dignity and the European Convention on Human Rights], 57 NEUE JURISTISCHE WOCHENSCHRIFT 981 (2004); Christian Walter, *Menschenwürde im nationalen Recht, Europarecht und Völkerrecht* [Human Dignity in National Law, European Law and International Law], in MENSCHENWÜRDE IN DER SÄKULAREN VERFASSUNGSORDNUNG [Human Dignity in a Secular Constitutional System] 127 (Petra Bahr & Hans Michael Heinig eds., 2006); David Feldman, *Human Dignity as a Legal Value—Part I*, 1999 PUB. L. 682 (1999); David Feldman, *Human Dignity as a Legal Value—Part II*, 2000 PUB. L. 61 (2000); Jordan J. Paust, *Human Dignity as a Constitutional Right*, 27 HOW. L. J. 145 (1984); William A. Parent, *Constitutional Values and Human Dignity*, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 47 (Michael J. Meyer & William A. Parent eds., 1992); Frederick Schauer, *Speaking of Dignity*, in CONSTITUTION OF RIGHTS, *supra*, at 178; Louis Henkin, *Human Dignity and Constitutional Rights*, in CONSTITUTION OF RIGHTS, *supra*, at 210; Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740 (2006). For an attempt to connect dignity, liberty and equality see Susanne Baer, *Dignity, Liberty and Equality: A Fundamental Rights Triangle of Constitutionalism*, 59 U. TORONTO L. J. 417 (2009).

<sup>12</sup> THOMAS HOBBS, *LEVIATHAN* Chap. 10 (C. B. MacPherson, ed., Penguin 1985) (1651).

<sup>13</sup> ARTHUR SCHOPENHAUER, *PREISSCHRIFT ÜBER DAS FUNDAMENT DER MORAL* 64 (1841). Schopenhauer adds (anticipating much contemporary critique about the vagueness of the concept):

Aber dieser von allen Kantianern so unermüdlich nachgesprochene Satz, ‘man dürfe den Menschen immer nur als Zweck, nie als Mittel behandeln,’ ist zwar ein bedeutend klingender und daher für alle die, welche gern eine Formel haben mögen, die sie alles fernern Denkens überhebt, überaus geeigneter Satz; aber beim Lichte betrachtet, ist es ein höchst vager, unbestimmter, seine Absicht ganz indirekt erreichender Ausspruch, der für jeden Fall seiner Anwendung erst besonderer Erklärung, Bestimmung und Modifikation bedarf, so allgemein genommen aber ungenügend, wenig sagend und noch dazu problematisch ist.

ARTHUR SCHOPENHAUER, *DIE WELT ALS WILLE UND VORSTELLUNG* 477 (1819/1844).

further considerations for the background of Schopenhauer's critique: in the last instance a metaphysically grounded morality of pity based on the final unity of Self and Non-Self that is presumably not, for many today, a conception full of theoretical future. Another example is Nietzsche, who thought that the dignity of the many can only be derived from their service for the few—again not a position that makes criticism based on these kinds of assumptions very plausible.<sup>14</sup>

Consequently, it is useful to sketch the possible foundations of human dignity. To this end, some historical aspects of the debate about human dignity will first be recalled that are useful to remember if one wants to address problems of the present without naïveté.<sup>15</sup> Second, some features of the contemporary debate will be considered. Third, some elements of a possible answer to the question of the possible foundations of human dignity will be outlined. Fourth, some concrete problems will be assessed until, finally, some wider perspectives are discussed that lead beyond the Basic Law and its problems into the core of the contemporary legal epoch.

## **B. Some Historical Remarks**

### *I. Antiquity*

Human dignity is not a natural attribute of human beings, but a value predicate. The language used is not uniform but, in normative respects, human dignity means the specific value of human beings that is based on nothing but their humanity as such.

This intrinsic value of human beings was reflected upon already in antiquity, even though the concept of "dignity" was not necessarily invoked. Plato, for example, formulated the idea that human beings are not only god-like through their considered and virtuous comportment, they could also recognize themselves as beings that, through their reason, take part in a god-like essence.<sup>16</sup> In Hellenistic philosophy, the specific value of human beings was considered in Stoic thought.<sup>17</sup> The special value of human beings is derived from taking part in the Logos of the world. Other properties matter as well, like conceptual thinking, ideas of time, moral orientation or the ability to form cultures. A central feature of this reflection is the developed ethical cosmopolitanism. The value of human beings is

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<sup>14</sup> Friedrich Nietzsche, *Fünf Vorreden zu fünf ungeschriebenen Büchern*, in KRITISCHE STUDIENAUSGABE 776 (Critical Study Edition vol. 1, 1999) (1872) (five prefaces to five unwritten books 1872).

<sup>15</sup> For a fuller statement see MAHLMANN, *supra* note 6, at 97.

<sup>16</sup> See PLATO, NOMOI [Laws] IV 716d (2005); PLATO, THEAETETOS [Theaetetus]176b (2005); PLATO, POLITEIA [The Republic] 611e–612a, 613 (2005); PLATO, ALKIBIADES [Alcebiades] 132e–133c (2005).

<sup>17</sup> See the conclusions drawn from of the earlier stoic thought by CICERO, DE OFFICIIS [On Duties] 1, 105 (1999).

independent of belonging to a specific community. The world is one great *polis* ruled by uniform ethical principles.<sup>18</sup>

These are a few examples of an explicit reflection on human value. It would, however, be a fault to limit one's interests to such explicit reflections. Other forms of cultural expressions are important as well. The idea of human dignity is not only present in philosophical thought; its sources are, to the contrary, quite manifold and in no way limited to conceptual thinking. Antique sculpture, for example, is a rich resource of magnificent and shifting attempts to capture a certain vision of human existence and worth. Or consider literature. The concept of human dignity is, for example, not mentioned in the *Odyssey*. But is the longing for a return, the struggle to reach Ithaca, the confrontation with the dead and the shadowy afterlife, the survival of the changing winds and the revengeful acts of the Gods not relevant for the existential situation of human beings that is a foundation for respect?

If one extends one's view to these kinds of manifestations, one will quickly discover a property of the debate that is of crucial importance. The serious contributions to the debate about the intrinsic value of human beings are not sad examples of anthropocentric narcissism. To the contrary, they are marked by a profound knowledge of the ambivalence of human existence. A good example is Sophocles *Antigone*, where human beings appear as τὸ δεινόν, something great that is at the same time uncanny and constantly close to an abyss—if human beings lose their normative orientation, the step into the abyss is done.<sup>19</sup>

Consequently, one can only speak credibly about the value status of human beings if one is not silent about the many self-inflicted tragedies that mark human history and make it something other than the triumphant manifestation, the secular theodicy of the sublime nature of its subjects.

## II. World Religions

World religions are important sources for the conception of human dignity. An important example is the so called Judeo-Christian tradition, even though one should be careful not to assume a harmonious unity, which evidently did not exist in real history marked by prosecution and discrimination against the Jewish minority and confessional strife. Central to the idea of human dignity is the second of the two accounts about the creation of the world in the Pentateuch, the Thora, which reports that human beings are not just enlivened by God's *odem*, as in the first account,<sup>20</sup> but are actually created in the likeness

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<sup>18</sup> CHRYSIPP, STOICUM VETERUM FRAGMENTA III, 323.

<sup>19</sup> SOPHOCLES, ANTIGONE verse 332 (1995).

<sup>20</sup> Genesis, 2:7.

of God, an *imago dei*.<sup>21</sup> The textual reconstructions vary, but this textual layer is commonly considered to originate from the 6<sup>th</sup> century B.C.

In Judaism, the rabbinic tradition derived the concept of dignity (*kavod*) from the idea of a likeness of God with normative consequences—especially for the right to life.<sup>22</sup> The prescription in the Bible that demands the death of the perpetrator for killing another person<sup>23</sup> posed interesting problems and creates a tension as to the value of life.<sup>24</sup> These problems were solved through interpretation and the relativizing of the biblical demand for the death penalty. This is an interesting example to be kept in mind when considering the role of religious thinking for the foundation of legal ethics and concepts. It shows that scripture, though formulating rather clear commands, may have less determining power to fix the content of religious ethics than is sometimes and perhaps too quickly assumed.

In Christianity, the likeness of God, the *imago dei*, played an important role. In patristic thought this idea was linked to the concept of *dignitas*, which Cicero coined in taking up the ideas of earlier stoics.<sup>25</sup> In Scholastic thought, Thomas Aquinas adds Aristotelian ideas about human action: Humans are free, because they are the cause of their own actions and exist for their own sake (*propter seipsum existens*).<sup>26</sup> The position of human beings is, however, not independent from the teleological order of salvation. This has concrete consequences, as Thomas argues that killing sinners is justified in order to protect the whole order against corruption. Human dignity is not inalienable; the sinner loses the claim of its respect.<sup>27</sup>

A much discussed question within Christian thought is whether human nature is thoroughly corrupted through the Fall or whether it still possesses some residual value. An example for a rather strict disavowal of human nature is Luther, who thought that human beings have become devil-like through the Fall, an *imago diaboli*.<sup>28</sup> In consequence, the

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<sup>21</sup> *Genesis*, 1:26, 27.

<sup>22</sup> Yair Lorberbaum, *Blood and the Image of God: On the Sanctity of Life in Biblical and Early Rabbinic Law, Myth, and Ritual*, in *CONSTITUTION OF RIGHTS*, *supra* note 11, at 55.

<sup>23</sup> *Genesis*, 9:6.

<sup>24</sup> *MISCHNA MAKKOTH I, X, 9 DER BABYLONISCHE TALMUD* (Lazarus Goldschmidt trans., 1996).

<sup>25</sup> *Id.* at note 17.

<sup>26</sup> THOMAS AQUINAS, *SUMMA THEOLOGICA*, II-II, 64, 2.

<sup>27</sup> *Id.*

<sup>28</sup> Martin Luther, *Über das 1. Buch, Mose, Predigten 1527* [About the 1st Book of Moses, Sermons 1527], in *24 WERKE, KRITISCHE GESAMTAUSGABE* [Works, Complete Critical Edition] 51 (1900); 14 Martin Luther, *Predigten über das erste Buch Mose, gehalten 1523/24* [Preachings on the First Book of Moses, held 1523–24], in *14 WERKE*,

only way to redemption is faith. This perspective echoes in modern protestant contributions, which explicitly reject the idea of a religious humanism basing the value of human beings on human nature alone.<sup>29</sup> It has to be emphasized that today the Christian confessions, through somewhat different theological paths, strongly support the view that human beings are invested with dignity.<sup>30</sup>

Reflections on human dignity regularly mention the contribution of Judaism and Christianity for the concept of human dignity. Other world religions are less commonly considered in western texts. This is a shortcoming because the soil out of which conceptions of human value grow are not only fertile in some cultural territories. Considering Hinduism,<sup>31</sup> a religiously justified caste structure evidently flies in the face of conceptions of equal and intrinsic human worth. Yet Mahatma Gandhi derived his arguments against the caste structure and for the rights of the Untouchables explicitly from Hinduism.<sup>32</sup>

There is some debate about Buddhism and human rights. A topic of discussion is the contention that the Buddhist conception of the non-substantiality of the self and the spiritual need to transcend individuality are not reconcilable with the idea of an individual person that is the basis of human rights.<sup>33</sup> Ethically, however, Buddhism is committed to

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KRITISCHE GESAMTAUSGABE 111 (1895); Martin Luther, *Vorlesungen über 1. Mose von 1535-45* [Lectures on the First Book of Moses of 1535-45], in 42 WERKE, KRITISCHE GESAMTAUSGABE 166 (1911).

<sup>29</sup>For example, the Chairperson of the Council of the Evangelical Church in Germany till 2009. BISHOP WOLFGANG HUBER, GERECHTIGKEIT UND RECHT 274, 296, 302 (1996).

<sup>30</sup>See, e.g., Concilium Vaticanum II, *Constitutio Pastoralis Gaudium et spes*, 24, *Acta Apostolicae Sedis* 58, 1966, 1050; *Catechismus Catholicae Ecclesiae*, 357: "Humanum individuum, quia est imaginem Dei, dignitatem habet personae: non est solum res aliqua, sed aliquis" (emphasis in the original); *id.* 1929. For the protestant tradition, see, for example, HELMUT THIELICKE, 1 THEOLOGISCHE ETHIK 821, 823 (1951).

<sup>31</sup>J.B. Carman, *Duties and Rights in Hindu Society*, in HUMAN RIGHTS AND THE WORLD'S RELIGIONS 113 (Leroy S. Rouner ed., 1988); Kana Mitra, *Human Rights in Hinduism*, 19 J. ECUMENICAL STUD. 77 (1982); Vasudha Narayanan, *Hindu Ethics and Dharma*, in ETHICS IN WORLD RELIGIONS 177, 181 (Joseph Runzo & Nancy M. Martin eds., 2001); HAROLD COWARD, HUMAN RIGHTS AND THE WORLD'S MAJOR RELIGIONS: THE HINDU TRADITION 33 (2005).

<sup>32</sup>Mahatma Ghandi, *Young India*, 19 January 1921, in WAS IST HINDUISMUS 126 (2006).

<sup>33</sup>ROBERT E. FLORIDA, HUMAN RIGHTS AND THE WORLD'S MAJOR RELIGIONS: THE BUDDHIST TRADITION 9 (2005) Kenneth K. Inada, *The Buddhist Perspective on Human Rights*, 19 J. ECUMENICAL STUD. 72 (1982); Kenneth K. Inada, *A Buddhist Response to the Nature of Human Rights*, J. BUDDHIST ETHICS 55 (1995); Damien Keown, *Are there "Human Rights" in Buddhism?*, J. BUDDHIST ETHICS 11, 13 (1995).

universal respect.<sup>34</sup> As a consequence it is not surprising that influential spiritual figures emphasize the importance of human rights and dignity for Buddhism.<sup>35</sup>

Confucianism is in some debates equally taken as intrinsically hostile to ideas of human rights. But again, interesting things can be discovered. Roughly around the time of Stoic thought an important Confucian thinker, Meng-Trzu or Mencius, argued that human beings possess a divine nobility because of their moral orientation.<sup>36</sup>

Finally, there are various interesting passages in the Qu'ran that are of relevance for a transcultural history of human dignity. A good illustration of this is that human beings are described as the representative or successor of God on earth (depending on translation and interpretation).<sup>37</sup> This image underlines the particular closeness of human beings to God. The religious sources of Islam open, therefore, the door to a religious conceptualization of human dignity as wide as Judaic or Christian scripture.

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<sup>34</sup> Suttanipata 143–152, 149, in DIE REDEN GOTAMO BUDDHOS. SAMMLUNGEN IN VERSEN: DIE SAMMLUNG DER BRUCHSTÜCKE. DIE LIEDER DER MÖNCHEN UND NONNEN. DER WAHRHEITSPFAD (Karl Eugen Neumann trans., 1957).

<sup>35</sup> The XIV Dalai Lama, Speech at Non-Governmental Organizations United Nations World Conference on Human Rights, Vienna, Austria: Human Rights and Universal Responsibility (June 15, 1993) *reprinted in* DAMIEN KEOWN ET AL., *BUDDHISM AND HUMAN RIGHTS* xvii–xviii (1998):

Recently some Asian governments have contended that the standards of human rights laid down in the Universal Declaration of Human Rights are those advocated by the West and cannot be applied to Asia and other parts of the Third World because of differences in culture and differences in social and economic development. I do not share this view and I am convinced that the majority of Asian people do not support this view either, for it is the inherent nature of all human beings to yearn for freedom, equality and dignity . . . . As a Buddhist monk, I try to develop compassion within myself, not simply as a religious practice, but on a human level as well. To encourage myself in this altruistic attitude, I sometimes find it helpful to imagine myself standing as a single individual on one side, facing a huge gathering of all other human beings on the other side. Then I ask myself, "Whose interests are more important?" To me it is quite clear that however important I may feel I am, I am just one individual while others are infinite in number and importance.

*Id.*

<sup>36</sup> KE MENG, MONG DSI 132 (Richard Wilhelm trans., 1921); KWONG-LOI SHUN, MENCIOUS AND EARLY CHINESE THOUGHT 136 (1997).

<sup>37</sup> Qu'ran 2:30. On the debate on variations of translations, see Rotraud Wielandt, *Menschenwürde und Freiheit in der Reflexion zeitgenössischer muslimischer Denker*, in FREIHEIT DER RELIGION 187 (Johannes Schwartländer ed., 1993).

### *III. Religion, Ethics, and Secular Reflection*

It is possible to expand on the religious understanding of the value of human beings. This short overview, however, should be sufficient to illustrate some important conclusions. The sketched impressions of antiquity and world religions reveal that there are different theoretical, cultural and religious paths to a conception of the particular value of human beings. This must be emphasized because one sometimes finds in contemporary discussions the claim that human dignity is based on a certain religion, say Christianity and its conception of the *imago dei*.<sup>38</sup> It is certainly a long way from the outlined traces of dignity in the history of ideas to a fully unfolded, legally applicable concept. But it is clear that there is no prerogative of one culture or religion in this respect.

An important element of the religious conceptions of the value of human beings is that human dignity is derived from a transcendent source. The last order axiological foundation of dignity is of sacral nature. The idea and conceptualization of concrete sacral ethics has, however, necessarily secular roots itself as it is the product of human reflection and culture. Every religious ethics is a human ethics through the creation of the relevant religious texts or other authoritative sources, the interpretation of these sources and the differentiated discussion that unfolded over centuries with all the power that constitutes the magnificence that religious morality can embody. Some examples of this already have been mentioned. Religious ethics are consequently no more epistemologically secure than other secular approaches, because both are cut from the same kind of cloth—the fragile fabric of human thought. Religious ethics is developed by the reflection, the culture and practices of the believers of an epoch, and is as convincing and justified as the reasons and principles that support it explicitly or that are their tacit presuppositions.

With the dawn of modernity, three conscious consequences have been drawn from this state of affairs. Human insight becomes epistemologically the final yardstick of normative orientation. Axiologically, the justification of the intrinsic value of human beings rests on nothing but the properties of human beings as such. Finally, the moral law forms itself and solely the decisive motivation for moral action. This is the theoretical program of modern normative humanism.

### *IV. Normative Humanism and Its Critique*

Kant was, until today, the decisive example for this kind of normative humanism. He formulated the emancipation of practical considerations from religious sources programmatically: “So far as morality is based on the conception of the human being as

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<sup>38</sup> From the German debate see CHRISTOPH ENDERS, DIE MENSCHENWÜRDE IN DER VERFASSUNGSORDNUNG 177 (1997); Josef Isensee, *Menschenwürde: die säkulare Gesellschaft auf der Suche nach dem Absoluten*, 131 ARCHIV DES ÖFFENTLICHEN RECHTS 173, 206 (2006).

one who is free but who also, just because of that, binds himself through his reason to unconditional laws, it is in need neither of the idea of another being above him in order that he recognize his duty, nor, that he observe it, of an incentive other than the law itself.”<sup>39</sup>

Part of these laws of duty recognizable for human beings is the respect for human dignity. The content of this concept for Kant consists in a value status beyond relations of exchange. Humans have no price but are an end-in-themselves, a *Selbstzweck*.<sup>40</sup> Therefore the second, material version of the categorical imperative (which demands that every human being is never only used as means but always treated as an end) is for Kant the core of human dignity.<sup>41</sup> The idea (certainly not invented by Kant, but concisely formulated by him) of humans being as ends-in-themselves is, up to now, a central topic in discussions about the content of human dignity. It is the best instrument to criticize, by the way, those remarks of Kant that are not drawing the appropriate consequences from this principle, such as to the rights of women or servants.<sup>42</sup>

Kant offers not only a concretization of the content of human dignity but also a theory of its foundations as well. The central reason for the ascription of dignity for him is human autonomy. Autonomy means, however, nothing but freedom under a moral law. Consequently, morality is the central property of human beings that legitimizes their claim to dignity.<sup>43</sup>

Kant formulates four basic arguments for this claim:<sup>44</sup> The first argument points to the necessity of a final instance of purpose-setting. This instance can only be the moral law because only morality binds unconditionally and only the unconditional is able to set last-order purposes.<sup>45</sup> The second argument takes recourse to the assumption of an ideal

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<sup>39</sup> IMMANUEL KANT, DIE RELIGION INNERHALB DER GRENZEN DER BLOßEN VERNUNFT 3 (Akademie Ausgabe Bd. VI, 1914) (1793) (“Die Moral, so fern sie auf dem Begriffe des Menschen al seines freien, eben darum aber auch sich selbst durch seine Vernunft an unbedingte Gesetze bindenden Wesens gegründet ist, bedarf weder der Idee eines anderen Wesens über ihm, um seine Pflicht zu erkennen, noch einer anderen Triebfeder als des Gesetzes selbst, um sie zu beobachten.”); IMMANUEL KANT, RELIGION WITHIN THE BOUNDARIES OF MERE REASON 57 (George Di Giovanni trans., 2001) (same).

<sup>40</sup> IMMANUEL KANT, GRUNDLEGUNG ZUR METAPHYSIK DER SITTEN 434 (Akademie Ausgabe Bd. IV, 1911) (1785).

<sup>41</sup> *Id.* at 429; IMMANUEL KANT, METAPHYSIK DER SITTEN (Akademie Ausgabe Bd. VI, 1914) at 462.

<sup>42</sup> IMMANUEL KANT, METAPHYSIK DER SITTEN at 314.

<sup>43</sup> IMMANUEL KANT, GRUNDLEGUNG ZUR METAPHYSIK DER SITTEN at 435.

<sup>44</sup> For a detailed reconstruction see MAHLMANN, *supra* note 6, at 152.

<sup>45</sup> KANT, *supra* note 40, at 428, 436; IMMANUEL KANT, KRITIK DER URTEILSKRAFT 435 (Akademie Ausgabe Bd. V, 1913) (1790); CHRISTINE M. KORSGAARD, CREATING THE KINGDOM OF ENDS 122 (1996). “[R]egress on conditions,” based on

order. Morality is for Kant the *entre-billet* to the realm of ends in which the purposes of individuals are coordinated by an universal law. To be able to become part of the realm of ends renders a specific value unto human beings.<sup>46</sup> The third argument highlights the particular role of morality in human life: the moral experience, the ability to overcome even strong motivations and not to make non-moral interests the last reason for action “rouses a feeling of the sublimity of our own vocation than enraptures us more than any beauty.”<sup>47</sup> The fourth argument is derived from the riddle of liberty that is connected with morality. Through human freedom a humanity beyond phenomenal experience becomes evident.<sup>48</sup> Human dignity is thus nourished by the hidden, but sensed majesty of the *homo noumenon*.

These arguments are perhaps the most differentiated attempt in the history of ideas to give a justification for the ascription of dignity. They are, however, of variable and disputable merit.<sup>49</sup> The first argument from the necessity of final ends presupposes that a world without final ends is unthinkable. But this is far from true. From a relativist perspective this is exactly the kind of world we are living in. The second argument is circular. Human beings are taken to be ends-in-themselves because, due to their morality, they are, able to enter a realm of ends. The particular property of the realm of ends that dignifies its members is, however, that it is a *moral* realm of ends. The argument poses, as a consequence, the question of the reason for the value of morality again on the level of the realm of ends, but does not answer it. The third argument from the experience of morality raises some questions as well. The praise of duty is sometimes the object of critique, even derision. To some it appears as a poor, bandy-legged apotheosis of order and obedience. This critique, however, does not quite catch the core of Kant’s appreciation of morality. It is not just the sticky exuberance of exaggerated moralism. On the contrary, one can find in it a fine sense of the particularity of the moral world, that enables human beings to transcend their own narrow interests and to commit themselves to some care for others and principles of justice, sometimes, in the case of the few, even for the price of their lives. The fourth argument depends on a metaphysic that is not convincing. Nevertheless, there is perhaps something that can be rescued from it, namely, a sense for the more enigmatic properties of human beings that may be relevant for the theory of their worth.

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human nature with a “value-conferring status”: “The unconditioned condition of the goodness of anything is rational nature, or the power of rational choice . . .” *Id.* at 123.

<sup>46</sup> See KANT, *supra* note 40, at 433, 435, 462.

<sup>47</sup> IMMANUEL KANT, DIE RELIGION INNERHALB DER GRENZEN DER BLOREN VERNUNFT 23 (Akademie Ausgabe Bd. VI, 1914) (1793); Immanuel Kant, *Religion Within the Boundaries of Mere Reason in*, Religion and Rational Theology 72 (Allen W. Wood & George Di Giovanni eds., 2001) (same).

<sup>48</sup> IMMANUEL KANT, KRITIK DER PRAKTISCHEN VERNUNFT 86 (Akademie Ausgabe Bd. V, 1913) (1788).

<sup>49</sup> MAHLMANN, *supra* note 6, at 160.

Kant's arguments are consequently of ambivalent value. This has not diminished the force of the idea that human beings are ends-in-themselves. It nourished, for example, social movements that developed with the onset of the industrial revolution, notwithstanding their great heterogeneity, and whose basic aim was to overcome economical relations in which part of the society are nothing but means of production, not ends of the social association and its institutions. One can find traces of this idea even in theories that apparently pursue a quite different course. A good example of this is the classical critical theory that until today sets some of the tone for the discussion about the enlightenment and its moral concepts. In the *Dialektik der Aufklärung (Dialectics of Enlightenment)* Kant's ethics is the central example for the shortcomings of enlightened thought. It is described as the usual attempt of bourgeois thinking to legitimize the consideration of others without which civilization is impossible by other means than material interest or force—sublime and paradox as no other attempt before but as ephemeral as all before.<sup>50</sup>

This critique is famous but weak. The point of the formulated alternative to Kant's ethics in the framework of negative dialectics is namely exactly the prevention of the instrumentalization of human beings, the critique of their reification.<sup>51</sup> The critique of the practical reason of the enlightenment thus leads back to their core tenets.

Another example is post-modern ethics. A common thread is the respect for the Other, founded in the epiphany of the face, *le visage*.<sup>52</sup> This Other is the source of immediate respect. The question is, however, whether one can really reconstruct such a respect of the Other without recourse to a concept of the value status of this Other and, more precisely, the idea that human beings are ends-in-themselves. It seems therefore that post-modern ethics tries to free itself from the narrative and final languages<sup>53</sup> of the enlightenment but in fact, in its most convincing parts, speaks with the same tongue.

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<sup>50</sup> THEODOR W. ADORNO & MAX HORKHEIMER, *DIE DIALEKTIK DER AUFKLÄRUNG* 92 (1969) ("Es ist der übliche Versuch des bürgerlichen Denkens, die Rücksicht, ohne welche Zivilisation nicht existieren kann, anders zu begründen als durch materielles Interesse und Gewalt, sublime und paradox wie keiner zuvor, und ephemere wie alle.").

<sup>51</sup> Adorno illustrates this by formulas like: "There shall be no torture; there shall be no concentration camps," asserting that such sentences should not be rationalized. THEODOR W. ADORNO, *NEGATIVE DIALEKTIK* 281 (1997).

<sup>52</sup> A central reference point appears in EMMANUEL LEVINAS, *TOTALITÉ ET INFINI* 173 (1961).

<sup>53</sup> RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* (1989).

### C. Some Aspects of the Current Debate

In the current debate some of the classical positions continue to be present, especially religious ethics and Kantian philosophy. There are, however, new nuances as well. Some shall be mentioned now. Habermas, for example, derives human dignity from reciprocal relations of recognition through which the communicative life world constitutes itself. Human dignity is not a value predicate based on a creatural property but is ascribed in social, communicative interaction.<sup>54</sup> A somewhat related social-contractualist approach takes human dignity as the result of a mutual promise of a community.<sup>55</sup> A problem of such social-constructivist approaches is that human dignity concerns moral claims that are located on a deeper level than the fact of a specifically structured life-world or the normative consequences of a mutual promise. Human dignity is not only not the result of such life-worlds or promises, it *constitutes* the right to the creation of certain, humanely appropriate life worlds marked by the inclusion of the subjects into relations of communication and to the promise of respect embodied among other in a constitution based on social consent. The same is true for a right to reciprocal and universal justification mobilized sometimes in this regard.<sup>56</sup> Human beings are certainly entitled not to be submitted to obligations that are not reciprocally and universally justified. The very reason for this is, however, that they are ends-in-themselves. The right to justification is the product of human dignity, not its central content.

The attempt formulated by Margalit to found dignity on the ability of human beings to always start anew points back to the classical argument from liberty.<sup>57</sup> Ronald Dworkin has sketched an investment-theory of human value: In human life we are respecting the investments made that were necessary to create a human personality.<sup>58</sup> This theory does not sufficiently account for the idea underlying human dignity that human value is independent of any kind of investment and derived from humanity as such.

As a final example, systems theory formulates a specific kind of skepticism about dignity. Human dignity serves, from this perspective, the needs of social systems to generate variation of communications as this variation is guaranteed by subjects. Human dignity, as

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<sup>54</sup> Jürgen Habermas writes about dignity: "Sie ist nicht eine Eigenschaft, die man von Natur aus 'besitzen' kann wie Intelligenz oder blaue Augen; sie markiert vielmehr diejenige 'Unantastbarkeit,' die allein in den interpersonalen Beziehungen reziproker Anerkennung, im egalitären Umgang von Personen miteinander eine Bedeutung haben kann." JÜRGEN HABERMAS, *DIE ZUKUNFT DER MENSCHLICHEN NATUR* 62 (2004).

<sup>55</sup> Hasso Hofmann, *Die versprochene Menschenwürde*, 118 ARCHIV DES ÖFFENTLICHEN RECHTS 353 (1993).

<sup>56</sup> RAINER FORST, *TOLERANZ IM KONFLIKT* 420 (2003); Rainer Forst, *Die Würde des Menschen und das Recht auf Rechtfertigung*, 53 DEUTSCHE ZEITSCHRIFT FÜR PHILOSOPHIE 589 (2005).

<sup>57</sup> AVISHAI MARGALIT, *THE DECENT SOCIETY* (1996).

<sup>58</sup> RONALD DWORKIN, *LIFE'S DOMINION* (1994).

other human rights, is thus protected to keep the future of the social system open.<sup>59</sup> It is based on a functional rationale of the social system; it is not guaranteed to foster some inherent rights of human persons. This position, too, misses the most basic point of human dignity, which is to protect individuals against any kind of instrumentalization, including the fostering of systemic functions.

#### D. A New Perspective

The discussed examples illustrate that a theory of human dignity poses many problems that are not easy to solve. These findings, however, do not imply that the project of providing some kind of basis for human dignity is completely without hope. One possibility is a multilayered argumentation, the outline of which shall be sketched now.<sup>60</sup> The starting point is the observation that, for human beings, there is no need to justify their pursuit of happiness by reference to some higher purpose. Their well-being is a self-evident aim. As this is true for any human being and as it is a basic principle of justice to treat equal things equally, the status of a last-order purpose has to be universalized. Every human person is the justified last-order purpose of action, because human beings are, through their factual quest for happiness, a purpose for themselves. Universalization as a command of justice demands the ascription of this purpose-status to all.

As Pufendorf nicely formulated, human beings have a particularly fine sense of self-respect.<sup>61</sup> To protect this human need for respect is certainly justified purely because of a concern for the feelings of human beings. The fact of self-respect does not, however, answer the question whether this attitude is justified because the self is in fact worthy of respect, or whether the self-estimation of human beings is just a (pleasant) subjective illusion of what is really a worthless, conceited creature. This is an important and difficult question.

Still, if one looks at the existential properties of human life, *Selbstzweckhaftigkeit* or being-an-end-in-oneself seems to be based on some good reasons. The construction of a mental explanatory image of the world (and the acceptance of its sometimes challenging results), the aesthetical appropriation of human existence with its many—not always pleasant—attributes in art, the emotionally textured, potentially blissful but possibly tragically lost self-creation of transient human subjects faced with their own rather quickly-approaching end carried out in the mode of consciousness and self-determination, all confer particular value on human life—at least, it seems, from the only available human point of view.

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<sup>59</sup> NIKLAS LUHMANN, GRUNDRECHTE ALS INSTITUTION 48 (1965); NIKLAS LUHMANN, DIE GESELLSCHAFT DER GESELLSCHAFT 1075 (1997).

<sup>60</sup> MAHLMANN, *supra* note 6, at 262.

<sup>61</sup> SAMUEL PUFENDORF, DE OFFICIO HOMINIS VII, § 1 (1673).

This view is perhaps buttressed by another consideration already mentioned in passing in the short historical reconstruction: the argument that is based on the riddles that human existence poses and that for some are of decisive importance. A commentary on the *Zauberberg*, the *Magic Mountain* that Thomas Mann made in American exile about the searcher of the Grail, the 20<sup>th</sup> century embodiment of the quester legend Hans Castorp, illustrates this quite well: “The Grail is a mystery but humanity is that as well. Humankind itself is a mystery and all humanity is based on the reverence for the mystery of humankind.”<sup>62</sup>

## E. The Content of Human Dignity as a Legal Concept

### I. Legality and Legitimacy

This survey has yielded various results so far. It first answers what human dignity as a normative concept means. It includes, as has been said, a prohibition of the instrumentalization of human beings and—its positive mirror image—the imperative to respect human beings as the decisive subject of their personal and social life. It demands that human beings are not treated in a way that implies the negation of their belonging to humankind. These contents can be spelled out in more concrete terms and there is an ample body of judicial decisions on the matter.<sup>63</sup>

This concretization is far from being empty or nebulous. This is first of all true for fundamental orientations of the contemporary legal civilization. One should not forget the past in this respect. It is somewhat surprising that a normative principle is regarded as vacuous that is a key to the overcoming of central tragedies of human history. This is not just illustrated by an extreme case like Nazism. I will mention just three other obvious examples. The being-an-end-in-themselves of humans is a central reason for the illegitimacy of slavery. It also is the normative core of women’s struggle for equal rights and their attempts to overcome the idea and its many variations that women are not full

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<sup>62</sup> Thomas Mann, *Einführung in den Zauberberg*, in 11 GESAMMELTE WERKE IN DREIZEHN BÄNDEN 617 (1990) (“Der Gral ist ein Geheimnis, aber auch die Humanität ist das. Denn der Mensch selbst ist ein Geheimnis, und alle Humanität beruht auf der Ehrfurcht vor dem Geheimnis des Menschen.”)

<sup>63</sup> Problems abound. Among the most discussed are the indeterminacy of the scope of the right; its conceptualization as a subjective right and not only objective law, hermeneutical yardstick and the like; its horizontal effect; the protection of the species character through dignity clauses; the beginning and end of the (prenatal or postmortem?) protection of human beings through dignity clauses; its relation to particularly contentious legal questions like abortion, biomedical research (especially on embryos), new techniques of reproduction, or torture; the question of possible limitations or—alternatively—the absolute character of dignity clauses; the conditions for engagement in an interference; the relative or universalistic character of concretizations of human dignity, and the relation of interpretations of human dignity to the idea of the neutrality of the state. For a detailed doctrinal unfolding of human dignity as a legal concept considering these and other questions see MAHLMANN, *supra* note 6, at 282.

subjects, but, as Hegel put it, merely plant-like.<sup>64</sup> It is also at the heart of the project of the democratic constitutional state based on human rights that aims at securing and institutionalizing the positions of human beings as relevant subjects—to whatever ends they may use this normative status.

One should not underestimate these findings. They are more than the fodder for edifying but hollow Sunday speeches. They lead to central questions about the legitimacy of legal orders. In constitutional theory one sometimes finds the view that questions of legitimacy have ceased to be of legal relevance because of the positivity of fundamental rights. Questions of legitimacy are discussed and answered in the mode of the legality of human rights. The law has lost the burden of legitimacy through the incorporation of fundamental value decisions.

There are two reasons to be doubtful about these ideas. First, the source of the normativity of a legal regime is not a master rule like a *Grundnorm*, or a rule of recognition. Nor is it the reproductive mechanisms of a social system or the factual ability to enforce coercion. The last source of its binding force is the legitimacy of the constitutional order, the consciousness of which is secured by a legal culture—the legal-ethical orientations of its citizens. This legal-ethical conscience of citizens is a category that has no place in constitutional theories of existential decisions, of transpersonal integration, or autopoietic reproduction. For a republican constitutional theory it is, in contrast, a decisive element.

As a consequence, if one celebrates the success of a constitution—be it in Germany or elsewhere—one necessarily celebrates a legal culture as well that is not just the product of scholarly treatises of law. What is important about a legal culture is not a give-away in the toad-bag of history but the result of continuous political struggles that have to win the day against other visions of human life. Germany is an example, revealing that a country has to travel sometimes a very long way to formulate the constitutional promise of a republican, democratic, liberal and social order based on the rule of law. Furthermore, there is no guarantee that a legal culture will not turn in other, less attractive directions. As the impact of the “war against terror” on the legal system of the USA illustrates, this can happen even in a state with a constitution that set the example for the modern constitutionalist tradition. It may also occur, to take another recent example, in a community with a rather proud liberal and democratic history, as the plebiscite on the prohibition of minarets in Switzerland shows. The struggle for a republican legal culture—and this means in a world of legal interpenetration and dependence—, the struggle for a humane international legal culture, is therefore the sober demand of every day legal life for which concepts of legitimacy are urgently needed.

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<sup>64</sup> GEORG WILHELM FRIEDRICH HEGEL, GRUNDLINIEN DER PHILOSOPHIE DES RECHTS § 166 (1820).

*II. Concretization and Fundamental Rights Theory*

In addition to these considerations of constitutional theory there is a second reason for the importance of theoretical conceptions of human dignity derived from the analysis of fundamental rights. Fundamental rights are abstract norms, notwithstanding some examples of quite concrete regulations. It is a widely and rightly shared perception that the interpretation of a given human rights catalogue is dependent on an encompassing conception of particular fundamental rights and of the system of fundamental rights in general. Such an encompassing conception is a theory of fundamental rights.<sup>65</sup> A theory of fundamental rights fills the hermeneutical space that is the necessary result of the abstractness of human rights. Any doctrinal account of the content of human dignity depends therefore on a fundamental reflection of the content of this human right because this is the only way to rationally and transparently reconstruct the legal meaning of this guarantee. The idea of humans as ends-in-themselves is a central element of such a theory of human dignity as a constitutional norm. Germany, with its particularly differentiated jurisdiction, is a good example in this respect. The outlined principle is the positive kernel of the so-called “*Objektformel*”<sup>66</sup> stating that human beings shall never become a mere object of state power.<sup>67</sup> This implies, and is explicitly stated by the German Federal Constitutional Court in later decisions, the protection of the status as a subject and end of the constitutional order.<sup>68</sup>

The jurisprudence of courts is able, in Germany and elsewhere, to find practical solutions to problems that arise. Sometimes the fear is formulated that there could be an inflationary use made of dignity clauses—that they could become a card too quickly played in human rights cases. However, if one considers court practice this has not been the case, even though, as in the case of other human rights, some decisions of courts are less convincing than others. One oft-mentioned example from the German context is the claim that the wrong spelling of the name of a person in a telephone bill infringes human dignity.<sup>69</sup> That plaintiffs and their advocates develop arguments that display a sense of the legally fantastic is not a new phenomenon and not limited to dignity clauses. A problem would only arise if the courts followed these kinds of arguments. This, however, is not the case, in the spelling example and elsewhere.

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<sup>65</sup> On this matter MAHLMANN, *supra* note 6.

<sup>66</sup> This formulation is ascribed in the concrete German post-war context to G. Dürig, though there are similar formulations by others at that time. See Günter Dürig, *Die Menschenauffassung des Grundgesetzes*, 7 JURISTISCHE RUNDschau 259 (1952); Günter Dürig, *Der Grundrechtssatz von der Menschenwürde*, 81 ARCHIV DES ÖFFENTLICHEN RECHTS 117, 127 (1956); Günter Dürig, *in* Maunz/Dürig, *supra* note 8, art. 1, para 28; JENS KERSTEN, DAS KLONEN VON MENSCHEN 425 (2004) (some discussion about Dürig’s thought).

<sup>67</sup> BVerfGE 27, 1 (6). This jurisprudence was slowly developed. See MAHLMANN, *supra* note 6, at 179.

<sup>68</sup> BVerfGE 45, 187 (228).

<sup>69</sup> BVerwGE 31, 236 (237.)

In the concrete case of Germany, the guarantee of human dignity has played, all in all, a constructive and helpful role from fundamental questions to the fine tuning of procedural rights.<sup>70</sup> To take some examples: The German Federal Constitutional Court has derived from the guarantee the right to have a procedurally safeguarded chance to be freed ahead of time in case of lifelong imprisonment.<sup>71</sup> The reason is that only in this case is the convict regarded as subject that still can alter the course of his or her life—here through a comportment that testifies to his or her ability to rejoin society. Another example that illustrates an additional normative dimension is the decision that flooding a prison cell with feces infringes human dignity. In this case, there is no instrumentalization of the convict but a disrespect of his or her humanity—something that the German Federal Constitutional Court, astonishingly enough, had to clarify.<sup>72</sup> Such illustrations for the potentially positive role of dignity guarantees can be derived from contentious questions as well. A good case in point is abortion—a problem that is sometimes regarded as proving rather the opposite. There is internationally much debate about a convincing normative conceptualization of this problem. In the German case, as elsewhere, human dignity plays a differentiated role. In some opinions, the dignity of the embryo or fetus is the core of the matter. Considering the development of the jurisprudence, however, another dimension of equal importance is the growing consciousness that the dignity of the women concerned is equally at stake, a fact that prohibits her instrumentalization.<sup>73</sup> This creates a tragic constellation that law should at least try not to aggravate as has often been the case in the past through undifferentiated criminal sanctions. The complex jurisprudence of the German Federal Constitutional Court on abortion is certainly not beyond critique, although the result is basically a livable solution. The guarantee of human dignity forms, however, not the source of these shortcomings, but has been—through the mentioned emphasis on the dignity of women—a core element for moving away from less convincing conceptualizations of the past.<sup>74</sup>

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<sup>70</sup> For a detailed reconstruction, MAHLMANN, *supra* note 6, at 179.

<sup>71</sup> BVerfGE 45, 187.

<sup>72</sup> BVerfG, Case No. 1 BvR 1359/05, Dec. 27, 2005, [http://www.bundesverfassungsgericht.de/entscheidungen/rk20051227\\_1bvr135905.html](http://www.bundesverfassungsgericht.de/entscheidungen/rk20051227_1bvr135905.html).

<sup>73</sup> See the dissenting opinion of justices Mahrenholz and Sommer in the second abortion decision of the German Federal Constitutional Court. BVerfGE 88, 203 (347). These justices underlined explicitly the growing importance of the dignity of women in the debate leading to the reform of abortion after the Court's first abortion decision. For the first case see BVerfGE 39, 1. This debate is mirrored in the majority opinion and the dissenting vote. See BVerfGE 88, 203 (254, 340).

<sup>74</sup> For a detailed discussion of the matter MAHLMANN, *supra* note 6, at 198, 312.

### III. Some Challenges

#### 1. Torture

The idea of human beings as ends-in-themselves offers some orientation for contemporary challenges as well. A good example is torture. Repressive torture—torture in the framework of the prosecution of criminal acts—is hardly discussed and evidently a violation of human dignity. The interest of the state in criminal prosecution never justifies such acts. Preventive torture has become a contentious topic in the framework of the debates of the recalibration of the international legal culture because of the supposed imperatives in the “war against terror”, drawing not the least from theoretical ticking bomb scenarios.<sup>75</sup> Germany offers the interesting illustration of a case in which a police officer threatened a kidnapper with torture to disclose the location of the kidnapped child who at that time was, in fact, already dead. This threat by the officers resulted in criminal charges in which the violation of human dignity through torture was underlined by the court.<sup>76</sup>

This points in the right direction: The guarantee of human dignity demands an absolute prohibition of torture as envisioned by the Torture Convention and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).<sup>77</sup> There are three important reasons for that. First, one precondition of these theoretical scenarios does not regularly occur in real life: The knowledge that the tortured person is in fact the right person. Torturing suspects is, however, certainly a violation of human

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<sup>75</sup> For the permissibility of torture in some constellations from the German debate: Winfried Brugger, *Darf der Staat ausnahmsweise foltern?*, 35 DER STAAT 67 (1996); Winfried Brugger, *Vom unbedingten Verbot der Folter zum bedingten Recht auf Folter?*, 55 JURISTEN ZEITUNG 165, 167 (2000); Fabian Wittreck, *Menschenwürde und Folterverbot*, 56 DIE ÖFFENTLICHE VERWALTUNG 873 (2003). In international debate see ALAN DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 131 (2002). On the debate, see SANFORD LEVINSON, *TORTURE: A COLLECTION* (rev. ed. 2006); Dietmar von Pfordten, *Ist staatliche Folter als fernwirkende Nothilfe ethisch erlaubt?*, in *IST FOLTER ERLAUBT?* 149 (Wolfgang Lenzen ed., 2005); Ralf Poscher, *Menschenwürde im Staatsnotstand*, in *MENSCHENWÜRDE IN DER SÄKULAREN VERFASSUNGSORDNUNG*, *supra* note 11, at 215, 222; Michael Walzer, *Political Action: The Problem of Dirty Hands*, in *TORTURE: A COLLECTION*, *supra*, at 61 (emphasizing the dilemmatic structure of the problem).

<sup>76</sup> *LG Frankfurt*, NEUE JURISTISCHE WOCHENSCHRIFT 692 (2005); ECtHR, 30 June 2008, appl. No. 22978/05, *Gäfen v. Germany* confirmed that there has been a violation of Art. 3 ECHR which was remedied by the German state through the legal reaction to the threat of torture.

<sup>77</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2.2, Dec. 10, 1984, 1465 U.N.T.S. 85, 113. The ECtHR underlines for the ECHR: “Art. 3 of the Convention enshrines one of the most fundamental values of a democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim’s behaviour,” *Nevmerzhitsky v. Ukraine*, App. No. 54825/00, 43 Eur. H.R. Rep. 32, para. 79 (2005). On the absolute nature and lacking possibility of derogation see *Ireland v. United Kingdom*, Case No. 5310/71, 25 Eur. Ct. H.R. (ser. A) at para. 163 (1978).

dignity. Second, torture does not lose anything of its dehumanizing effects because of its purposes. This is not only true for the tortured persons, but for the torturer as well. Torture may be imaginable as an individual act of desperation. As an object of a necessarily abstract and general regulation in law, it is unthinkable, because it normalizes the inhumane.<sup>78</sup> Third, one should not forget that torture is a very old plague the abatement of which has become recently an even more pressing need. The only way to make progress in this respect is its prohibition without exception.

## 2. *Bioethics*

Modern bioethics poses many questions. Some fundamental positions are, however, not contentious. The breeding of humans to deliver organs for transplantation is not seriously debated. There is a fundamental reason for this. Such ideas are a clear violation of the principle of non-instrumentalization of human beings. On the basis of such evident cases one can try to solve more difficult problems, from pre-implantation diagnostics to stem cell research and quite generally about the beginning of a human life. Human dignity can play in this respect an important role to prevent the instrumentalization of human life.<sup>79</sup>

There is no reason in sight not to regard human dignity as a subjective right.<sup>80</sup> Beyond that it has a further dimension, that is, in constitutional systems like Germany's, it is understood as the dimension of objective law, leading to questions of species ethics. As we have seen, human dignity means that an individual has to be respected in its being as such as a last order purpose of human action. Human dignity as an element of a species ethics consequently must entail that humanity, in its defining properties, as created by natural history, has to be equally respected in its being as such. Human dignity is the normative self-confidence of the singular person and the species alike. There is no reason for narcissistic anthropocentrism, as indicated before. But if this self-confidence disappears, if humanity is regarded as a substitutable and improvable good, as it sometimes actually is in debates about liberal eugenics, important elements of a humane civilization and the value status of the individual slip out of sight.

## 3. *The Global Crisis and the Prospects of Democracy*

The global financial crisis provides a final case. The crisis has many dimensions, including concrete or pragmatic solutions, on one hand, and more general concerns, on the other

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<sup>78</sup> Richard Posner, *Torture, Terrorism, and Interrogation*, in *TORTURE: A COLLECTION*, *supra* note 75, at 291-294 ("Torture is uncivilized, but civilized nations are able to employ uncivilized means, at least in situations of or closely resembling war, without becoming uncivilized in the process. I suspect that this is particularly true when the torture is being administered by military personnel in a foreign country. *Inter arma silent leges.*").

<sup>79</sup> For a more detailed discussion, see MAHLMANN, *supra* note 6, at 321.

<sup>80</sup> MAHLMANN, *supra* note 6, at 288.

hand, that pertain to the architecture of social orders that aim to prevent economic disaster and maintain social equity. A further dimension concerns the concept of democracy and the question how human beings can stay relevant citizens in political developments that transcend the national legal sphere. The management of the crisis with its far-reaching consequences for individual citizens, not only through the accumulation of massive state debts, was certainly not marked by democratic inclusion and illustrates how human beings may become the mere objects of historical processes that have immediate and major impact on their lives. Human dignity reminds us, in this context, that persons have a fundamental right to remain the political subjects of their lives. Consequently, it legitimizes the claim to create legal orders and institutions that protect human autonomy in social associations and not only on the national but, as far as practically possible, on the international level as well. Human dignity is the critical sting of republican democracy, too.

#### **F. Human Dignity and Cosmopolitan Legal Science**

To sum up: Human dignity means the specific value status of human beings derived from their humanity as such. The reflection and justification of this value status is not the prerogative of just one culture or religion. A useful concretization is the idea that human beings form ends-in-themselves, their *Selbstzweckhaftigkeit*. This idea can be plausibly reconstructed through philosophical anthropology and principles of justice. The idea of human beings as ends-in-themselves forms the foundation for the unfolding of human dignity as a workable legal concept. Germany, which possesses, in international comparison, a particularly differentiated jurisprudence in this respect, exemplifies the fact that the concept can be applied successfully in daily legal work. The idea to protect human beings as subjects against objectivation and instrumentalization is helpful to master new challenges, such as torture, bioethics, or the principles of international democratic organization.

These reflections have illustrated that human dignity as a legal concept is rooted in a theory of fundamental rights. In addition, it plays a decisive role in theories of legitimacy, mirrored in republican legal cultures inclined to its protection.

These observations were mainly illustrated by the German example. This served as a useful expository device, not more. Human dignity has been made a legal concept by the international community and Germany is only one part in this wider development. Any legal conception should pay conscious tribute to this cosmopolitan origin of human dignity.<sup>81</sup>

A final remark: Human beings always have searched for a better life. Many conceptions have fascinated them, some marked by utopian exuberance, some by more sober visions.

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<sup>81</sup> On cosmopolitanism in the theory of human rights, see MAHLMANN, *supra* note 6, at 487.

The 20<sup>th</sup> century has certainly reformulated the lesson that human beings give as many reasons for fear as for these different kinds of hope. But this curious human search has certainly not come to an end. Law is sometimes regarded as not taking part in this endeavor as it forms nothing but a dusty technical exercise of little deeper human interest. This perception underestimates the law. Legal orders are the attempt to formulate an outline of a right life for a community of human beings, today even to a certain degree on the global level. This normative outline cannot and is not supposed to guarantee something like individual human happiness. But it can create conditions that enable human beings to pursue this aim, not the least through the protection of their dignity in a republic of human rights.

