

HUMAN DIGNITY AS A LEGAL CONCEPT. A VISION OF EUROPEAN CULTURE

DOI: [HTTPS://DOI.ORG/10.37873/LEGAL.2019.2.1.48](https://doi.org/10.37873/LEGAL.2019.2.1.48)

I. INTRODUCTION

When Germany assumed the presidency of the European Council at the beginning of 2007, the German chancellor Angela Merkel gave a speech to the European Parliament focusing on the following question: „What holds Europe together in its innermost being? What defines the European Union? (...) We have to find Europe’s soul.“¹ Angela Merkel thought to have found the value that unites European diversity in peace: tolerance: „That quality is tolerance. Europe’s soul is tolerance. Europe is the continent of tolerance.“

But is that really it? To practice tolerance? What exactly does that mean? In light of the inflationary use of this term, Merkel’s response confirms the insight that the term seems arbitrary, indefinite, and decorative.² According to Merkel, tolerance is the necessary form of dealing with diversity. In her opinion, “tolerance is the quality that leads to freedom in responsibility for others”. “Tolerance is a demanding virtue. It requires the involvement of both heart and mind. It requires something of us. Yet by no means must it be confused with arbitrariness and sitting on the fence. And what is more: tolerance, as

1 A Merkel, Speech in front of the European Parliament given on 17 January 2007 in Straßburg, Bulletin of the German Federal Government, 18 January 2007, No. 04-2 <<https://www.bundesregierung.de/breg-de/service/bulletin/rede-von-bundeskanzlerin-dr-angela-merkel-797836>> accessed 3 March 2020.

2 B Steffens, *Toleranz?* (*Zeit Online*, 14 October 2010) <<https://community.zeit.de/user/bert-steffens/beitrag/2010/10/14/toleranz-o>> accessed 3 March 2020.

we need it in Europe, does not merely mean refraining from violence, does not simply mean putting up with ‘otherness’, but actively welcoming it.” But how can I want one thing and the complete opposite at the same time? At least, I won’t be allowed to want the evil. And so Merkel formulates, following Thomas Mann³: “Tolerance becomes a crime when applied to evil.” Thus, Merkel finally arrives at the formula summarizing her interpretation of tolerance: “Tolerance without acceptance of intolerance is what makes us human.” The listener and reader remain somewhat perplexed. “What is this obscure value, called ‘tolerance’, that can become a crime?”⁴

³ T Mann, *Der Zauberberg* (S. Fischer 1954) 731.

⁴ Steffens (n 2).

The vagueness, in fact arbitrariness, of this term did not prevent but rather promoted tolerance to indeed become a fundamental value of the European Union. Tolerance stands alongside pluralism, non-discrimination, justice, solidarity, and equality between women and men (art. 2 section 2 TEU). However, as politically correct as this may be, it misses the decisive factor.

On closer consideration, tolerance itself is not a value, but a specific attitude towards the pluralism of values given in modern societies. A peaceful coexistence of people with vastly different, possibly even contrary values is only possible if there is a mutual readiness for tolerance. It does not mean approval of what one firmly rejects, but acceptance only for the sake of peace. Tolerance is therefore the maxim of a political ethic that places peace above truth. In this sense, the Chancellor of the King of France, Michel de l’Hôpital, had already formulated in 1562 that it is not important what the true religion is, but how one can live together. A good 60 years ago, Germany, Europe, as well as the ideologically European-dominated international community of states, knew what united them despite all differences of political views and opinions - the unshakeable belief in human dignity as the basis of indispensable pre-state human rights.

No, not wanting one and the other at the same time is the essence of a civilised European legal culture, but recognising the other in his otherness as having equal dignity and, therefore, respecting and protecting his elementary rights and legal interests.

II. HUMAN DIGNITY AS A COMMON EUROPEAN LEGAL VALUE

In fact, the return to the idea of human dignity after the end of World War II was a common European good.

In a political resolution at its congress in The Hague from May 7th to 10th, 1948, the European unity movement had already demanded that the soon to be founded European Union or Federation should have a Charter of Human Rights. The Charter would set the “standards to which a State must conform if it is to deserve the name of a democracy”. It was founded on the belief that every European citizen

5 Political Resolution of the Hague Congress (7-10 May 1948) <https://www.cvce.eu/obj/political_resolution_of_the_hague_congress_7_10_may_1948-en-15869906-97dd-4c54-ad85-a19f2115728b.html> accessed 3 March 2020.

6 Kulturelle Resolution des Kongresses von Den Haag (7-10. Mai 1948) <https://www.cvce.eu/collections/unit-content/-/unit/de/02bb76df-d066-4c08-a58a-d4686a3e68ff/5c35593d-484a-4f53-b0bd-a6605110c3b3/Resources#f9f90696-a4b2-43fd-9e85-86dee9fb57a5_de&overlay> accessed 3 March 2020.

7 Council of Europe, *Collected Edition of the "Travaux Préparatoires"*, 1975, vol I, 60.

8 *ibid* 54.

9 *ibid* 64.

10 *ibid* 82.

11 *ibid* 102.

12 *ibid* 70, 122.

13 *ibid* 54.

should have the possibility to legally claim a violation of these standards in front of a Supreme Court, including “adequate sanctions for the implementation of the Charter”.⁵ In a cultural resolution adopted at the same time⁶, the Hague Congress reaffirmed its conviction that human rights are essential for building a united Europe. Moreover, a Charter of Human Rights by itself was deemed insufficient unless it would be legally binding through an agreement between the member states of the future European Union. There was a firm belief that, regardless of national, ideological, or religious differences, the true unity of Europe, lay “in the common heritage of Christian and other spiritual and cultural values, as well as the common loyalty to human fundamental rights”.

When, in 1949, the Council of Europe, embarked on its statutory mission to preserve and develop human rights and fundamental freedoms (art. 1b) and set about developing a collective, legally binding guarantee of human rights at the European level, the parliamentary assembly held a fundamental debate in September of 1949. This quickly led to the popular opinion that the fundamental human rights were part of Europe’s “common cultural heritage”, “its very foundations”⁷. Europe was less conceived as a geographical, geopolitical, or strategic concept than “a Europe with a common spiritual basis in its views on man, his dignity, and his rights”⁸. They summoned the “genius of Europe”: “is not the belief in the existence of human rights the real greatness of western civilisation, of European culture?”⁹ The protected human rights were regarded as an expression of European civilisation: “What, in fact, does European civilisation stand for in our eyes? [...] Quite simply, it is the dignity of the human being, the conviction shared by us all, that every man is worthy of respect, that every man has the right to live in safety and dignity, that no man can be the subject of indifference to us however weak or however near to death he may be”¹⁰.

From this, it is evident, that originally, the foundation on which a common Europe should be built was less the idea of a common market but, above all, the belief in human rights based on the inviolable dignity of man. The planned instrument of a European Convention on Human Rights with a judicial enforcement mechanism was accordingly understood as an integral part of the European (integration) project. The soon to be created European Court of Human Rights was seen as its first supranational body.¹² „If we look further into the future we may hope to see the day when we achieve European legislation on matters of common concern, side by side with the national legislation in the individual states. The European Court will then have the special task of being the supreme organ for enforcing this legislation“¹³. „[...] the creation and working of the machinery for the agreement and enforcement of human rights will be an effective

method of promoting integration in Europe by means of functional co-operation¹⁴. „Let us, with the European Court of Human Rights, make the first attempt at the European Court of Justice”.¹⁵

The European Convention on Human Rights was, thus, conceived as “the first basis of our federation”.¹⁶ While today we are accustomed to differentiating the human rights convention system from European law in the narrow sense, this was not the original intention. From this point of view, the reintegration of the convention law standards into the law of the European Union can be legitimately described as late realisation of original integration goals. The same applies to the institutional integration of the judicial legal protection system that would occur if the EU was to join the ECHR. These original goals were initially directed towards the protection of human rights as a genuinely common European concern that was even regarded as more important than economic integration.

The Convention on Human Rights makes no explicit reference to human dignity; but without any doubt it includes its guarantee. In the preamble, the convention states reaffirm “their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend.” This passage contains a “creed” to the idea of universal human rights that is linguistically and content-related to art. 1 section 2 of the German Basic Law. It is the commitment to the view, shared by all convention states, that the guarantee of fundamental freedoms is a prerequisite for peace and justice in the world. According to the preamble, pre- or over positive human rights form the basis of fundamental freedoms that are derived from these rights, as well as equipped with a collective international guarantee. The fact that these freedoms and fundamental human rights themselves are based on the assumed dignity of the human being is shown by the debate of the Parliamentary Assembly of the Council of Europe. In addition, this is also indirectly reflected in the paragraph of the preamble, in which “a common heritage of political traditions, ideals, freedom and the rule of law,” possessed by the convention States, is invoked.

III. THE EUROPEAN BELIEF IN THE UNIVERSALITY OF HUMAN DIGNITY

Even the community of states, organized in the United Nations, but still dominated by European Atlantic States, declared, in the Charter from 1945, its “faith in fundamental human rights, in the dignity and worth of the human person”. It was precisely for this reason that the community of states committed itself to the goal of

14 *ibid* 114.

15 Council of Europe, *Collected Edition of the ,Travaux Préparatoires’, 1975*, vol II, 180

16 *ibid* 156.

promoting universal respect and realization of human rights and fundamental freedoms for all without distinction of race, sex, language or religion (UN-Charter, art. 1 section 3, art 55 lit c). Adopted by the General Assembly of the United Nations in fulfilment of their mandate to promote human rights, the Universal Declaration of Human Rights, which was first postulated as a non-binding ideal under international law, reaffirms the common conviction that the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”. This formulation may have inspired the creed¹⁷ of the German people in art. 1 section 2 of the German Basic Law: “The German people therefore (namely for the sake of human dignity; C.H.) acknowledge inviolable and inalienable human rights as the basis of every community, peace and justice in the world.”

¹⁷ See also Ch Hillgruber, ‘Der internationale Menschenrechtsstandard – geltendes Verfassungsrecht?’ in Burkhard Schöbener and others (eds), *Iustitia et Pax* (Commemorative writing for Dieter Blumenwitz, Duncker Humblot 2008) 123, 134 with fn 46.

IV. WHAT DOES HUMAN DIGNITY MEAN IN A LEGAL SENSE?

In the second half of the 1940s, there was obviously a trend to make the respect for human dignity and the protection of human dignity a core task of political control. This zeitgeist was based on the experience of an unprecedented desubjectivation and collectivisation of man. As an absolute barrier of a political communitarization, the irreplaceable value of every human being and every human life is set against it without any exception.

The discovery of human dignity as a legal category immediately after World War II and the end of the Nazi regime gave fundamental and human rights a new, deeper foundation than they ever had before. Human dignity was to become the basis of fundamental rights. The recognition of human dignity as a legal entitlement, as the basic “right of rights” took place in response to the destruction of every individuality, the systematic depersonalization, and self-alienation by the ideology and practice of National Socialism.¹⁸

As a result, the awareness of the inner vulnerability of the human being had grown. The legal response was to create a protection zone around every individual.

By declaring human dignity inviolable (untouchable), the “noli me tangere” has been elevated to the principles of law and man has been declared a sacred district. To invade it became a sacrilege. With the dignity granted to him, man is elevated into the sphere of the sacred and sacrosanct. Therefore, the protection of autonomy is not the core of the human dignity guarantee, as many currently mistakenly claim. Rather, it is the personal identity¹⁹ as well as the necessary physical and psychological integrity of the individual human being, as Hans Joas rightly states. The guarantee of human dignity makes them the Archimedean point of the legal system. The inviolable human dignity,

¹⁸ See also Ch Goos, *Innere Freiheit. Eine Rekonstruktion des grundgesetzlichen Würdebegriffs* (V&R unipress 2011) 116ff, 127ff.

¹⁹ H Joas, *Die Sakralität der Person* (Suhrkamp 2011) 217

which was even removed from the constitutional legislator's power,²⁰ now occupies "the void of the sacred and unavailable in a world which is aligned by immanence and contingency".²¹

But what does that mean, "having dignity"? Having dignity firstly means to be a legal subject. Every human being is a recognized person. Consequently, the life of a human being is not in the state's jurisdiction. If the state demands something from a human being, it has to address him as a person that is held accountable. The state must be able to justify legal obligations to the person on whom it imposes duties.²² Secondly, having dignity means never existing without rights. Everyone brings a certain minimum of rights into the state legal system. This legal system has to ensure that these pre-state rights are protected. The state can endow everyone with further rights, but it cannot deprive an individual of these minimum rights. On the other hand, everyone can be burdened with obligations only to the extent that this minimum of rights permits. In a nutshell: from a legal perspective, no human being starts from scratch. No human being must hope to be granted any rights according to his or her level of worthiness from a legal system made by man. Everybody brings along a basic stock of inviolable and inalienable human rights – as basic equipment, so to speak – because they are human, only because they are human. Each person retains those rights regardless of what they do wrong. It is utterly impossible for the state to exclude human beings from the circle of human rights and, thus, deprive them of the owed respect and protection.

In 1949, Hannah Arendt describes in an impressive manner what it means to be excluded from the legal community as a human being, what it means to be without rights and that there is such a thing as "a right to have rights": "The misfortune of the rightless is not that they are deprived of their life, freedom, pursuit of happiness, equality before law or freedom of opinion; their misfortune cannot be covered by any of those formulas designed to solve problems within given communities. Their lawlessness arises solely from the fact that they no longer belong to any kind of community. (...) Even the Nazis robbed the Jews of their legal status (at this time the status of second-class citizenship), squeezed them into ghettos and concentration camps, cut them off from the world of the living before they began their extermination. Thus – and this is crucial – a situation of complete lawlessness was established before the right to life was called into question. (...) The existence of such a category of people holds danger. (...) It could happen that we are no longer fully aware of the fact that a person has been murdered if he has practically ceased to exist before."²³ Hannah Arendt knew what she was talking about. She had witnessed and suffered the deprivation of rights of the Jews in National Socialist Germany prior to their murder. In order to prevent any repetition of such a development in the future, the fathers and mothers of the

²⁰ See for Germany art 79 para 3 of the German Basic Law.

²¹ M Jestaedt, *Grundrechtsentfaltung im Gesetz* (Mohr Siebeck 1999) 291.

²² See more on this topic in *Ch Enders, Die Menschenwürde in der Verfassungsordnung* (Mohr Siebeck 1997) 430.

²³ *H Arendt, 'Es gibt nur ein einziges Menschenrecht' (1949) 4 Die Wandlung* 754, 759ff, 765.

24 Term according to Vaclav Havel, Speech in the Polish Parliament (Sejm) on 25 September 1990 reproduced in extracts in <<http://www.visegradgroup.eu/the-visegrad-book/havel-vaclav-speech-in>> accessed 3 March 2020 who has understood this term political-cultural.

25 BVerfGE 45, 187 (229).

26 BVerfGE 87, 209 (228).

German constitution of 1949 declared the human dignity in art. 1 section 1 of the German Basic Law to be untouchable, sacrosanct. In this point, they were in complete agreement with the new guiding idea of European legal culture as I have demonstrated. The recognition of human dignity in the Basic Law of the Federal Republic Germany was, therefore, something like Germany's normative "return to Europe".²⁴

To be a recognized legal subject, endowed with an inalienable minimum of rights - that is precisely what constitutes human dignity in a legal sense. The right to life, the right to physical integrity, the fundamental legal right to freedom and equal treatment are part of this core set of rights.

Dignity is not considered as an award earned through achievement, like a special rank, but as a promise of legal personality especially in the state of imperfection and weakness. Therefore, it is obviously not the Giovanni Pico della Mirandola model of dignitas of a human being, allegedly "free of all restriction", creator of himself, being destined for self-improvement, which underlies the legal guarantee of human dignity. The appeal to Pico completely misjudges the foundation and meaning of the legal guarantee of human dignity.

The image of humanity on which the guarantee of human dignity is based is rather that of a legal subject whose dignity must be protected in the state community regardless of its capacity for self-determination. Therefore, the attribution of dignity protects the individual in his natural freedom, but also in his imperfection. Dignity itself cannot be taken from any human being as it is "something unavailable"²⁵; but the right to respect and protection that results from it is vulnerable.²⁶ This respect for and protection of basic rights by the state is especially important for those people, who are not, not yet or no longer, because of their state of development, their mental health or other circumstances, in a position to assert rights for themselves to which they are entitled as human beings.

The guarantee of human dignity highlights - as the memory of democracy (Paul Kirchhof) - that even their fate must not be arbitrarily determined by other people, without regard for their legal status as a person. It marks a "taboo in a liberal state".

V. THE THREAT TO HUMAN DIGNITY POSED BY WEAKNESS IN LEGAL AWARENESS

Not only, but also and especially in the bioethical debate, it has become clear that this taboo limit is in danger of becoming permeable and thus worthless - a tacit agreement no longer exists.

This is exemplified by the approval of so-called pre-implantation genetic diagnostics (PGD) in many European countries. PGD, which makes it possible to examine artificially created embryos intended

for transfer by examining a cell that has been cleaved from them for genetic defects in order to refrain from implantation in the event of a positive result, is untenable if the embryo is recognized as a human being with inherent rights to dignity and life, i.e. as a person. By removing a cell for diagnostic purposes (so-called blastocyst biopsy), the embryo in vitro is impaired in its basic right to physical integrity. Already this alone, since it is not a curative intervention, cannot be justified constitutionally, but triggers a state obligation to protect against the encroachment contained therein. Furthermore, due to the automatic selection mechanism inherent in PGD, there is a concrete danger that the embryo will not be transferred due to a positive result, a risk which, as we well know, is usually realized.

PGD is only carried out for the purpose of „sorting out” unwanted embryos, the production of which is subject to „quality control”, which casts doubt on their unconditional right to exist. The underlying examination criteria are irrelevant for the determination of the resulting violation of human dignity; for without any exception every human being has dignity, regardless of the nature of his genes. Even if PGD is used to prevent serious hereditary diseases, the damaged embryo is denied the right to exist solely on the basis of its genetic defect. However, if a person is only recognized as such if he fulfils certain conditions, he is not unconditionally considered a subject.

This cannot be objected with the argument that PGD is only a dependent intermediate stage of an overall reproductive process which is aimed at the birth of a human being who is also viable after birth and is not burdened by severe suffering. Irrespective of the test result, each individually tested embryo has its own right to life and dignity, and this right does not have to yield to the parental wish for a healthy child. In fact, PGD does not guarantee the birth of a healthy child at all, but only allows for the selection of embryos based on genetic predisposition, i.e. selection. A violation of human dignity could hardly be more obvious. And yet this violation is mostly negated. Therefore, we can no longer be sure that we all mean the same thing when we talk about human dignity. This is true at national level, but even more when we consider Europe. It is true that the legal value of human dignity has also found its way into the primary law of the European Union, in art. 2 section 1 TEU and especially in art. 1 of the Charter of Fundamental Rights of the European Union, which is recognisably based on the German guarantee of human dignity in art. 1 section 1 of the German Basic Law. But do they really mean the same thing?

Doubts are justified: During the consultations for the Convention of Fundamental Rights the decisive question of what constitutes the content of the legal concept of human dignity or rather on which European intellectual-historical basis the term should be founded was ignored and, thus, left for future practice.²⁷ Some legal scholars

27 Ph Wallau, *Die Menschenwürde in der Grundrechtsordnung der Europäischen Union* (V&R unipress 2010) 59.

28 *ibid* 34.

openly propagate that with regard to the general legally binding nature of the European guarantee of human dignity its interpretation can only rely on “the consensus of practical deductions of the spiritual doctrines of origin,” but not on the spirit sources themselves, because the European society is heterogeneous and ideologically deeply divided.²⁸ Can a common European legal concept of human dignity then be defined at all? And if possible, how could it be defined?

According to the preamble of the Charter of Fundamental Rights, the people of Europe “conscious of their spiritual, religious and moral heritage” want to rest the Union on “the indivisible and universal values of human dignity, freedom, equality and solidarity”. But what is really about this consciousness? Does Europe not suffer from a dramatic unconsciousness in this respect?

In order to remedy this situation, Europe urgently needs to return to its spiritual (and religious) foundations.

The belief in human dignity that shapes the legal culture and thus the identity of Europe cannot be separated from Christianity with its *Imago Dei* doctrine. It is no coincidence that the idea of human rights based on human dignity has developed in the cultural space of Christianity and finally was politically and legally enforced here and nowhere else.

The warning of John Paul II must therefore be heeded: “If the religious and Christian foundation of this continent should be marginalised in its function as an inspiring source of ethics and in its social effectiveness, then not only the entire heritage of Europe’s past would be denied, but – even more – a future for European people, moreover every European, religious or unbelieving, would be seriously endangered.”²⁹

29 Address to the Parliamentary Assembly of the Council of Europe in Strasbourg held on 8 October 1988.

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ABSTRACT

The article identifies the belief in human dignity as indispensable human right as the essence of European legal culture. From a historical point of view, it lines out that, originally, the foundation of a common Europe should be, first of all, the belief in human rights based on the inviolable dignity of man. The article examines the meaning of human dignity in a legal sense, identifying the core of human dignity as “the promise of legal personality especially in the state of imperfection and weakness”. In a next step, attention is drawn to the fact, that the practice of pre-implantation genetic diagnosis (PGD) casts doubt on the validity of this concept of human dignity as common European legal value. As a consequence, Europe is called to return to its spiritual and religious foundations under which the legal concept of human dignity developed.

ABSTRAKT

Godność człowieka jako pojęcie prawne. Wizja europejskiej kultury

Artykuł utożsamia wiarę w ludzką godność jako niezbędne prawo człowieka z istotą europejskiej kultury prawnej. Z historycznego

punktu widzenia pierwotnym fundamentem wspólnej Europy powinno być przede wszystkim przekonanie o prawach człowieka zakorzenionych w nienaruszalnej godności człowieka. W artykule zbadano znaczenie godności ludzkiej w prawnym znaczeniu, identyfikując jądro godności człowieka z „obietnicą zachowania prawnej osobowości zwłaszcza w stanie niedoskonałości lub słabości”. Następnie, zwrócono uwagę na fakt, że praktyka przeprowadzania badań preimplantacyjnych (PGD) poddaje w wątpliwość ważność koncepcji godności człowieka jako wspólnej europejskiej wartości prawnej. W konsekwencji, Europa powinna powrócić do swoich duchowych i religijnych fundamentów, z których wywodzi się prawne pojęcie godności człowieka.

KEYWORDS:

human dignity, common European legal value, inviolable dignity of man, fundamental rights, pre-implantation genetic diagnostics (PGD)

SŁOWA KLUCZOWE:

godność człowieka, wspólna europejska wartość prawna, nienaruszalna godność człowieka, prawa fundamentalne, diagnostyka preimplantacyjna (PGD)