

# **A RIGHT TO HAVE RIGHTS – THE GERMAN CONSTITUTIONAL CONCEPT OF HUMAN DIGNITY**

*Christoph Enders\**

*The German constitution declares in its first Amendment that human dignity is inviolable and declares its protection a duty of the state. The following text explores the concept of human dignity as “a right to have rights” that can be derived from this constitutional passage. References to different decisions of the German Federal Constitutional Court reveal the importance and complexity of this concept and its meaning for the understanding and interpretation of the German Constitution as such.*

## **I. INTRODUCTION**

### ***A. LEGAL, MORAL AND POLITICAL MEANING OF THE COMMITMENT TO HUMAN DIGNITY***

Article 1 of the Basic Law of the Federal Republic of Germany<sup>1</sup> states:

- (1) Human dignity shall be inviolable. To respect and protect it shall be duty of all state authority.
- (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
- (3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

Like a mighty tree deeply rooted in the tradition of humanity, the commitment to human dignity towers above the landscape of German constitutional law – a tree that protects against wind and weather, that provides pleasant shadow, and most of all, provides plenty of fruit upon which people live day by day. However, to reach the inner core of the ramified structure, one has to dispose lots of proliferation and ivy that may look pretty at first sight, but is not part of the tree and might even be harmful to it. Hence, the interest in human dignity demands that the constitutional jurist, like a good gardener, proceeds with certain strictness to extract how the constitutional clause of the inviolability of human dignity is understood correctly. Yet, this effort towards stringency is not only required by

---

\* *Professor at the University of Leipzig, Faculty of Law, Chair for Public Law and Institute of the Fundamentals of Law.*

<sup>1</sup> Grundgesetz (*hereinafter* GG).

jurisprudential seriousness but also by political culture. Josef Isensee claimed in an essay that behind this constitutional clause there hides the ‘article of faith of a civil religion’.<sup>2</sup> This describes very well the social and political reality where the guarantee of human dignity is worshipped as an article of faith. Certainly, opponents of this ‘civil religion’ will not be banned completely from the community like J.J. Rousseau once suggested.<sup>3</sup> Though, whoever disregards human dignity, or what it is considered to be, and thus stands out as an opponent of the ‘civil religion’, is morally unacceptable and excluded from the social and political discourse. In other words, the one who fights for human dignity does not need additional arguments for his justification. Human dignity marks the line between ‘good guys’ and ‘bad guys’. So we see that it is important to find out the meaning and function of this constitutional clause as precisely as possible, not only because it is an important constitutional rule and jurists are therefore obliged to work very carefully, but also because of its moral and political importance.

### *B. THE MEANING OF ARTICLE 1 GG: INTENTIONS OF THE FRAMERS OF THE CONSTITUTION AND THE CLAUSE'S POSITION IN THE CONSTITUTION*

The meaning of human dignity cannot be disclosed by a strictly textual approach. The precise meaning of this clause, in the context of the German Basic Law, only emerges from the clause's origin and the constitutional text's system.

The Parliamentary Council (*Parlamentarischer Rat*), the political institution that drafted the German Basic Law in 1949, intended the entire regulation of Article 1 to serve as a ‘preamble’ for the chapter of fundamental rights and to clarify its spirit and purpose. No less and no more. Hence, the statement on human dignity should not provide a new fundamental right. The intention of the Parliamentary Council was to make the ‘classical’ fundamental rights directly applicable and binding. Positively standardized guarantees should exhaustively interpret the open, and without normative concretion not executable ‘un-interpreted thesis’ of human dignity.<sup>4</sup>

These intentions of the Parliamentary Council are clearly reflected in the constitutional system. The commitment to human dignity opens the chapter on fundamental rights of the German Basic Law, i.e. the individual's rights primarily addressing and restricting the state. Article 1 of the German Basic Law states that human dignity is the reason why the German people commit themselves to human rights.<sup>5</sup> The Basic Law, furthermore constitutionally guarantees, as Article 1, §3

<sup>2</sup> Josef Isensee, *Menschenwürde - die säkulare Gesellschaft auf der Suche nach dem Absoluten*, AöR 131 (2006) 173-218.

<sup>3</sup> J.J. ROUSSEAU, *SOCIAL CONTRACT*, Chapter 8 (2002).

<sup>4</sup> CHRISTOPH ENDERS, *DIE MENSCHENWÜRDE IN DER VERFASSUNGSORDNUNG. ZUR DOGMATIK DES ART 1 GG* 410, 416 (1997); *supra* note 2, §26 with further references.

<sup>5</sup> German Basic Law, Article 1, §2.

indicates, specific ('following') fundamental rights that give a precise legal meaning to the notion of human rights so they can be applied.<sup>6</sup>

### C. HUMAN DIGNITY AS 'RIGHT TO RIGHTS' AND ITS FUNCTION IN THE CONSTITUTION

Constitutional legal practice soon defied those limits of interpretation that were given to possible legal effects of the principle of human dignity. Requirements of the legal practice and of politics led into a different direction and encouraged a more substantive understanding. Today, the German Federal Constitutional Court (*Bundesverfassungsgericht*) characterises human dignity as the supreme principle of the Constitution<sup>7</sup> and every now and then also as a fundamental right.<sup>8</sup>

However, if we stay with the unbiased interpretation of the constitutional text regardless of later result or situation-oriented modifications and additions, we must state: the constitutional rule of human dignity does not contain a legal guarantee, because this quality of individuals is a constitutional *a priori* and cannot be subject to legal regulation. The individual as such, irrespective of governmental organization, is subject to rights and duties, and precisely this constitutes his or her dignity. So, the constitutional principle of human dignity recognises the individual as a moral person and postulates his or her original *right to have rights*.<sup>9</sup> Hence, if the individual was not subject to specific rights that he or she owned without presuppositions, he or she would be a mere object of the arbitrariness of others.<sup>10</sup>

Consequently, we should emphasize that no overall and absolute 'super-basic-right' can be derived from Article 1 of the German Basic Law. Normally, human dignity is sufficiently protected by the special fundamental rights. Hence, the commitment to human dignity is to be understood as a constitutional principle that reminds of the *raison d'être* (reason of existence) of the constitutional state under the rule of law (*Rechtsstaat*) and that postulates human beings' *original right to have rights*. However, human dignity cannot be referred to as a 'passepartout' as this would undermine the carefully worked out interdependency of the explicit provisions set up in the constitution and level their normative differences.

<sup>6</sup> German Basic Law, Article 1, §3.

<sup>7</sup> Federal Constitutional Court, January 16, 1957 (BVerfGE 6, 32, 36) and February 15, 2006 (BVerfGE 115, 118, 152).

<sup>8</sup> Federal Constitutional Court, February 5, 2004 (BVerfGE 109, 133, 181).

<sup>9</sup> *Supra* note 4, 427-431, 433, 502.

<sup>10</sup> Gunter Dürig, *Der Grundrechtssatz von der Menschenwürde. Entwurf eines praktikablen Wertsystems der Grundrechte aus GG Art 1 Abs 1 iVm Art 19 Abs II des Grundgesetzes*, AöR 81 (1956) 117-157.

## II. THE PROTECTION OF HUMAN DIGNITY BY MEANS OF FUNDAMENTAL RIGHTS

### *A. THE 'NORMAL' CASE CONCERNING FUNDAMENTAL RIGHTS*

The German Federal Constitutional Court has occasionally considered human dignity as a fundamental right.<sup>11</sup> When giving it a closer look, one can see that this rather is held in *obiter* or in cases where human dignity was not of decisive relevance. Also, in some cases the Court terms human dignity as an individual right; in fact, it treats it as if it was an objective principle. The reason is that a 'fundamental right to human dignity', because of its absoluteness that does not tolerate relativisation, is unmanageable as a fundamental right. Plus, there is no need for such a fundamental right, since human dignity is adequately protected by the fundamental rights that follow the 'preamble' of Article 1 of German Basic Law.<sup>12</sup> These fundamental rights derive, as acknowledged by the Federal Constitutional Court, from the general right of the individual to be treated as a person, i.e. to be treated lawfully. This right is recognised in Article 1 of the GG.

### *B. SPECIAL CASES OF THE CONSTITUTIONAL PROTECTION OF INDIVIDUAL FREEDOM AND INTEGRITY*

Moreover, the German Basic Law explicitly regulates particularly important cases concerning the protection of individual freedom and integrity, for instance by proscribing death penalty or the physical and mental abuse of detained persons.<sup>13</sup> This indicates that these guarantees, although they surely are essential for the self-fulfilment and the maintenance of the individual, do not derive self-evidently from the commitment to human dignity.

### *C. INTERPRETATION AND JUSTIFICATION OF THE GUARANTEE OF FREEDOM FROM THE PERSPECTIVE OF HUMAN DIGNITY*

#### 1. Interpretation: The so-called "*allgemeines Persönlichkeitsrecht*"

These explanations do not want to deny that a glance at human dignity can enlighten the purpose of particular fundamental rights. The most important example of this role of the constitutional commitment to human dignity is the

---

<sup>11</sup> *Supra* note 8.

<sup>12</sup> See German Basic Law, Article 1, §3: "the following fundamental rights"

<sup>13</sup> Art. 102 of German Basic Law states: "Capital punishment is abolished." According to Article 104, §1, 2<sup>nd</sup> Sentence of German Basic Law: "Persons in custody may not be subject to mental or physical mistreatment."

interpretation of Article 2, §1 of the German Basic Law.<sup>14</sup> It is generally accepted that this fundamental right primarily protects the so-called general freedom of action (*allgemeine Handlungsfreiheit*), i.e. the freedom to do whatever one wants, which is only limited by the equal freedom of every other person. The German jurisdiction connected this fundamental principle of external freedom with human dignity and named this synopsis of Article 1 and Article 2, §1 of the GG '*allgemeines Persönlichkeitsrecht*'<sup>15</sup> (general right of the human personality), to make clear that the external freedom of the individual is based on internal preconditions.<sup>16</sup> The commitment to human dignity highlights the interrelation of the particular facets of the '*allgemeine Persönlichkeitsrecht*'. Their common centre of reference is the individual's self-determination.<sup>17</sup> This aspect has recently been enhanced by the Federal Constitutional Court to the fundamental right to privacy and integrity of IT-systems.<sup>18</sup>

## 2. Fundamental Rights of Unborn Children?

One should not overestimate the possibilities of human dignity, for instance: in cases concerning the legal status of the embryo. The question that arises is whether the embryo can be considered as a human being that is entitled to human dignity and hence to the right to life in the sense of the Basic Law or not. Consequently, if we consider the embryo to have human dignity, its status as a legal person and holder of fundamental rights is determined. Thus, that would mean that the extinction of unborn life for any reason beyond the well-being of the upcoming life is generally illegal.

The German Federal Constitutional Court solves this problem by applying the so called 'thesis of continuity', stating that the development of the fertilised ovum to a born child forms a process that disallows any gradation of legal protection.<sup>19</sup> The German Basic Law, however, does not make a statement with regard to the particular date of the beginning of a person's legal status. In fact, legal systems have always independently interpreted and accentuated the natural-biological continuity.

---

<sup>14</sup> Article 2 of the German Basic Law: (1) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law. (2) Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.

<sup>15</sup> See e.g., Federal Civil Court, May 25, 1954 (BGHZ 13, 334), April 2, 1957 (BGHZ 24, 72), Federal Constitutional Court, June 3, 1980 (BVerfGE 54, 148).

<sup>16</sup> This fundamental right includes the protection of privacy (right to privacy). It protects not only a person's physical space or solitude, but also the self-determination of the individual as such (including information privacy or the right to one's own picture etc.).

<sup>17</sup> That is why corporate bodies cannot claim some of those legal guarantees.

<sup>18</sup> Federal Constitutional Court, February 27, 2008 (BVerfGE 120, 274).

<sup>19</sup> Federal Constitutional Court, February 25, 1975 (BVerfGE 39, 1) and May 28, 1993 (BVerfGE 88, 203).

At this point, one has to remember that the constitutional commitment to human dignity is a commitment to fundamental rights only within their traditional meaning. According to this meaning, the legal status as a person begins with a person's birth. In Europe, this was the well-defined position of the modern civil legislation, influenced by the declarations of human rights. Under §1 of the German Civil Code (*hereinafter* BGB), a human being is capable of holding rights only with the completion of his or her birth. Hence, the established parlance of the dignity and rights that every human individual is born with is valid also for the Basic Law. Moreover, this interpretation that the legal status of a person only begins with his or her birth is in compliance with common European legal standards. The European Court of Human Rights (*hereinafter* ECHR) has so far stated in two cases that the right to life<sup>20</sup> does not apply to the embryo since it is not a legal person.<sup>21</sup>

Such a perspective does not prevent a society from protecting the unborn human life by means of criminal law. And this indeed might be indicated by a general respect for human life. This is what the ECHR meant when it stated that unborn life required protection "in the name of human dignity". However, these measures are not linked to, and therefore are not demanded by a personal right to life.<sup>22</sup>

### III. THE CONSTITUTIONAL REQUIREMENT TO RESPECT AND PROTECT HUMAN DIGNITY (LIMITATION AND JUSTIFICATION OF INTRUSIONS INTO FREEDOM)

#### *A. TWO SIDES OF LEGAL EFFECT – STRUCTURAL DIMENSIONS*

Solely from the commitment to human dignity, a fundamental right of its own does not derive. Individual protection of human dignity is ensured by the 'following fundamental rights', Article 2 seqq. The relation to human dignity only sets the benchmark of constitutional interpretation that should not be used to level (particular) substantial and legal conditions. Thus, another function of this commitment is more important: it establishes a constitutional rule that marks the reason and foundation of all legal forms of freedom and therefore does not take into account the particularities and contingencies of a concrete case. Therefore, it is not open to any weighing approach that is trying to balance opposing interests.

---

<sup>20</sup> See ECHR, Article 2.

<sup>21</sup> *Vo v. France*, ECHR No. 53924/00, July 8, 2004; confirmed in *Evans v. United Kingdom*, ECHR No. 6339/05, March 7, 2006.

<sup>22</sup> The decisions of the German Federal Constitutional Court concerning abortion (*supra* note 19) have shown that it is only a short step from the principle of absolute protection of the embryonic existence to modifications that undermine the same principle and are not really convincing.

That has two effects: On the one hand, the commitment to respect and protect human dignity restricts the authorities, especially if they infringe fundamental rights. Human dignity delivers the absolutely insurmountable barrier to governmental measures inflicting fundamental rights ('*Schranken-Schranke*'), may they be justified in other respects. By crossing this barrier, the individual, contrary to his or her status as a legal person, would be treated as a mere object. This is strictly prohibited to the authorities. On the other hand, reasons that *justify restrictions of freedom* also may result from the imperative to respect and protect human dignity. Any violation of human dignity is prohibited to anyone, even to private individuals. Legislation is called to statutorily implement this prohibition and the courts are to enforce those rules.

### *B. THE LIMITATION OF GOVERNMENTAL INTERFERENCE WITH FREEDOMS, ESPECIALLY IN FAVOUR OF PRIVACY*

In the major decisions of the Federal Constitutional Court, *human dignity* operates as an absolute barrier to governmental interferences with individual fundamental rights. For the first time this concept was applied in the decision concerning the constitutionality of an amendment allowing wiretapping.<sup>23</sup> Further, it was applied in the decision concerning the constitutionality of life imprisonment.<sup>24</sup> Here the Court had to decide whether life imprisonment, because of its duration, violates human dignity and therefore constitutes an infringement of personal liberty.<sup>25</sup> Most recently human dignity served as an absolute barrier for state measures infringing the right to life in the decision that dealt with the statutory allowance of the armed forces to shoot down aircrafts (Article 2, §2, Sentence 1 of the German Basic Law).<sup>26</sup> The Court had to decide whether the lives of uninvolved passengers and crew of a hijacked aircraft may be sacrificed in order to fight terrorism or if this would amount to an illegal balancing of human lives with other rights and legally protected interests.<sup>27</sup>

Mainly, human dignity fulfils this function of restricting the legislator in cases concerning the protection of an absolutely inviolable sphere. A second glance at these questions might be useful not at least because they arise in regard to criminal investigation. The Federal Constitutional Court for instance had to decide whether it is allowed to use a personal diary as evidence against the accused in a criminal trial,<sup>28</sup> or whether (secret) acoustical surveillance could be allowed by a constitutional amendment of the fundamental right guaranteeing the

---

<sup>23</sup> Federal Constitutional Court, December 15, 1970 (BVerfGE 30, 1). See also the German Basic Law, Article 10.

<sup>24</sup> Federal Constitutional Court, June 21, 1977 (BVerfGE 45, 187).

<sup>25</sup> See German Basic Law, Article 2, §2, Sentence 2.

<sup>26</sup> Federal Constitutional Court, February 15, 2006 (BVerfGE 115, 118), see *supra* note 7.

<sup>27</sup> See *infra*, §IV.1.

<sup>28</sup> Federal Constitutional Court, September 14, 1989 (BVerfGE 80, 367).

inviolability of the home (Article 13 of the German Basic Law).<sup>29</sup> Yet, the legal effect of the ‘dignity-argument’ in these cases is of lesser relevance than its claim for absoluteness. The absolutely inviolable realm (of privacy) is defined (from case to case) with regard to the social relevance of the behaviour involved and thus depends on the security concerns of the general public. If a person, perhaps along with others, plans a criminal act, it does not matter in which form or in which place these plans become apparent as long as they affect third parties or the community and touch upon the social sphere. Hence, the general public has a legitimate interest to find out about these plans to prevent damages. For this purpose it is irrelevant whether the suspected person is naked or dressed, showers or lies in a marriage bed or speaks to the family circle, while making such plans. Same principles apply to criminal investigation.

The authorities, therefore, are allowed to gain the information needed in case of reasonable suspicion even if this means taking notice of purely private circumstances. Otherwise, the suspicion could never be substantiated or nullified. It is the surveillance itself that shows whether an activity is purely private or relevant under legal aspects, especially concerning criminal law. Thus, there is no absolutely protected sphere of privacy. The Federal Constitutional Court therefore speaks of the “protection of the core area of privacy on two levels”.<sup>30</sup> First level: As a general rule, personal data is not to be collected unless it is relevant data in legal terms. However, to verify or falsify this relevance, they must be collected in the first place (in case of suspicion). Second Level: If the collected personal data turns out to be irrelevant it must be deleted immediately, and most of all may not be presented to a court for evidence. This proves that an absolutely protected area of privacy does not exist. Only absolutely uninteresting data enjoys absolute protection.

### *C. THE JUSTIFICATION OF LIMITATIONS OF LIBERTIES THROUGH HUMAN DIGNITY*

Further, the principle of human dignity may be invoked to justify limitations of liberties. There are a number of prohibitions, partly concerning criminal law that are or might be connected to the protection of human dignity (For instance, disturbance of the peace of the dead, §168 of the German Criminal Code (StGB), or disparagement of the deceased’s memory, §189 of the German Criminal Code, constitute criminal offences). In fact, to some extent they protect individual interests and also public interests, especially culturally-rooted customs of decency, comity and propriety (cultural identity), that usually are summarized under the term ‘moral law’.<sup>31</sup>

---

<sup>29</sup> Federal Constitutional Court, March 3, 2004 (BVerfGE 109, 279).

<sup>30</sup> *Id.*

<sup>31</sup> See German Basic Law, Article 2, §1.



In any way, it is problematic when legislature and legal practice invoke human dignity to impose imperatives and prohibitions of certain behaviour as self-evident and maintain them even if the behaviour does not affect any other individual against his or her will.

#### IV. ABSOLUTE BOUNDS TO GOVERNMENTAL MEASURES (PROBLEMATIC CASES)

##### *A. SHOOTING DOWN AIRCRAFTS: THE RELATIVITY OF THE PROTECTION OF LIFE*

Human life is only relatively protected. The state, under certain circumstances, can (legally) take away life. However, the limits of the admissible seem surely crossed if a plane hijacked by terrorists is shot down together with crew and passengers to avert danger to the community. In this situation, it is not only a decision on the right to life of the ones responsible for the attack, who would have to face defence (anyway), but, also, on the rights of the uninvolved innocent persons. They are sacrificed in the name of the community's integrity. Their right to exist, which every human being is entitled to by virtue of being human, seems to be balanced with other interests and subordinated as inferior. However, to scale the persons' value and to compare them to one another would be inadmissible. Yet, this consideration ignores the point that human life is not protected as a pure natural-biological fact. The right to life, however, *as a right* is subject to the condition of the 'state of law', without which no enforceable law would exist. Thus, in extremely exceptional cases, for example in a state of war and also in other states of emergency, where the defence of the civil society against systematic attacks otherwise would not be possible, it is allowed to sacrifice the life of individuals. These individuals are the beneficiaries of the legal state and are sacrificed to preserve this legal state. Shooting down an aircraft under these conditions therefore does not infringe upon human dignity. The question whether this is proportional is however, a different one.

In 2006, the German Federal Constitutional Court ruled differently. The authority to shoot down a hijacked plane (as given in the Aviation Security Act<sup>32</sup>) was held to be unconstitutional.<sup>33</sup> The Court dealt with my argument as presented here and – not without internal antilogy – did not completely rule out the possibility that there might be situations, where the sacrifice of human lives does not violate the constitution. Otherwise, one could hardly imagine how to justify the sort of soldiers, especially of draftees.<sup>34</sup>

---

<sup>32</sup> Luftsicherheitsgesetz, BGBl I 2005, 78.

<sup>33</sup> *Supra* note 26.

<sup>34</sup> Christoph Enders, *Der Staat in Not. Terrorismusbekämpfung an den Grenzen des Rechtsstaates*, DÖV (2007) 1039-1046.

## B. ABSOLUTE LIMITATION: DENEGATION AND EVASION OF LAW

It seems as if numerous questions that are debated in legal literature and praxis should not be discussed under aspects of human dignity, but instead be solved from the perspective of individual fundamental rights and the principle of proportionality. Still, there are absolute bounds to authorities. However, these bounds do not result in detail from Article 1, Section 1, Sentence 1 of the German Basic Law, but from the principle laid down in Article 1, §§1 to 3 of the German Basic Law. According to this principle authorities are legally bound because the individual does not only hold (legal) obligations but also rights. Any systematic denial or evasion of law therefore violates Article 1 of the German Basic Law. If the state disregards the necessity to use formally as well as substantially lawful means, then the individual's legal status is denied and he or she is treated as a mere object. Such infringements undermine the rule of law as such and, hence, may not be justified under any circumstances, not even in states of emergency.

From this, a presumption of freedom in favour of the individuals follows. Governmental restrictions of the individual sphere of freedom are not legitimated merely by their good intention. They must be justified, namely, by contributing to constitute and to enforce obligations of (external) conduct. Only obligations of conduct in a certain way can constitute legal obligations. Any behaviour that might not be subjected to such a legal obligation (for instance one's internal attitudes that do not show) cannot be legally demanded. Another consequence of the state's obligation to justify their measures is a minimum standard of legal, i.e. jurisdictional, control.

## C. PARTICULAR CASES OF DENEGATION AND EVASION OF LAW

### 1. Cases of denegation of law

The pursuit of certain purposes is denied to the authorities because of their obligation to act lawfully. A modern constitutional state has to avoid paternalism. Moral acting or a decent conduct of life must not be dictated, for the state is not a reformatory. Most of all, the authorities are not allowed to systematically interfere through coercive measures with the internal process by which the individual sets his or her purposes. This would diametrically oppose the idea of self-determination (autonomy). When being (coercively) influenced by the state, the individual is driven into an irresolvable (internal) conflict with his or her self-determination. The independent development of an identity, hence, would be rendered impossible and the autonomous individual would be made an object of heteronomous purposes. An other-directed power over the internal process of identity-building cannot be subjected to an effective external legal obligation. Attempts in that direction go beyond the legal scope and corresponding measures therefore are forbidden. That is why torture is unconditionally prohibited

and not even a constitutional amendment could make it legal. Also, the privilege against coercive self-incrimination (*nemo tenetur se ipsum accusare*) results from these considerations.

## 2. Cases of evasion of law – the obligation to justify governmental measures

Not only is the state prohibited from denying the law, state authorities must also not evade it. Although privacy is not absolutely protected, any secret investigation is basically illegal. If they are carried out nonetheless in the better interest of all or any person, they must be disclosed to the person affected when they have finished. Otherwise, this person would have no possibility to obtain judicial control and the state's duty to give reasons and thereby justify its action would, hence, become useless.

A similar argument applies to governmental measures taken against unsuspected persons. As a result of the duty to justify their measures, the public authorities at least have to substantiate the suspicion that certain behaviour is dangerous or harmful. If there was a general competence to restrict individual rights without any given suspicion, the state would again systematically undermine its obligation to justify its action. That would be an absolutely unacceptable reversal of the general presumption of freedom and a disregard for the requirement for justification that goes along with it. Evidence obtained by secret investigation or by investigation against unsuspected persons is inadmissible.

These considerations are clearly taken into account by the Federal Constitutional Court in its decision on public surveillance using malicious spyware to get access to computers.<sup>35</sup> The Constitutional Court, however, based its decision on the principle of proportionality. Yet, this argument is not convincing. The principle of proportionality is intended to provide solutions in individual cases and therefore is, by any reckoning, a blunt instrument. The more broadly the purpose of governmental measures is defined (like the preservation of the state's existence or the maximum safety for everybody), the more and more severe measures become admissible. Moreover, complete safety may only be achieved if the presumption of freedom is abandoned and replaced by a general suspicion against everybody. An absolute boundary is thus not drawn by the principle of proportionality but only by the requirement for justification, which is subsequent to the rule of law. Also, situations where the Constitutional Court upheld exceptions allowing such measures in favour of intelligence operations (protection of the constitution) can only be explained and reasonably confined by defining concrete public tasks, on the one hand, and on the other hand, strictly limiting them according to this purpose. Only then, the normal situation can to some extent be distinguished from its exceptions.

---

<sup>35</sup> *Supra* note 18.

## V. CONCLUSION

The commitment to human dignity as expressed in Article 1, Section 1 of the GG indeed constitutes a constitutional concept. It stipulates that all law has to emanate from the individual's status as a legal subject; furthermore that all law is to be construed and interpreted from that status and has to converge in that status. Thus, the state is put under the rule of law. The relation between citizens and government is one of mutual rights and duties, basically just like social interrelations between citizens. This means that if one is sure about how such a state is constituted, which according to the German tradition is known as '*Rechtsstaat*' (constitutional state under the rule of law) – then there is no need to emphatically proclaim human dignity as the very purpose of statehood. A state that does not base its legal order on the commitment to human dignity may still be a constitutional state under the rule of law. However, the opposite is also true. If in a certain historical and social situation, the requirements of the rule of law fall into oblivion, then even the incantation of human dignity and its inviolability is void. After considering these arguments, human dignity is not more than a buzzphrase that does spare neither the assumption of political responsibility nor careful jurisprudential work.

Still, the commitment to human dignity reminds the legislator, the courts and other jurists to always keep clearly in mind that the human is a self-conscious intellectual and ethical being and therefore worthy of respect. It is another difficult and yet, unsolved question whether this ideal, that has its roots in the ideas of Enlightenment, in the revolutionary declarations of human rights, and in religious traditions, will be sustainable and really have universal validity in a globalised world. The answer to this question has to go beyond the national constitutional context and is not at all certain.