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## **Bielefeld Memorandum**

### **The Importance of Human Dignity in the Field of Medicine<sup>1</sup>**

#### **A. Introduction: human dignity as a guide value of a pluralistic state**

In current ethical and legal debates a central role is assigned to the protection of human dignity. Concerning the Federal Republic of Germany, Art. 1 of the Basic Law even defines that human dignity shall be unimpeachable and that any state authority ought to be oriented towards this requirement. As a consequence of this prominent position human dignity acts as a guide value both in the legal and moral field. Human dignity owes its present position not least to the moral and political postulates of the Enlightenment so that we find numerous overlaps with the protection of human rights. What exactly is 'human dignity' and how far should it be protected – that is a subject of controversial discussions, however.

#### **B. Problematic issues of the discussion about human dignity**

The discussion about human dignity deals with the following problem areas:

##### **I. Inflationary usage**

In Art. 1 paragraph 1 of the German Basic Law the entire state authority is under the obligation to protect human dignity. State acts that are contrary to human dignity are per se prohibited. This superior position of human dignity in the German Constitutional Law may be interpreted as a reaction of the drafters of the constitution on the unprecedented Nazi crimes

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during the Third Reich. The term 'human dignity', however, is characterized by a significant degree of vagueness, frequently there is debate about whether concrete actions or omissions are consistent with the guarantee of human dignity. Thus it is not surprising that the term 'human dignity' is also used in order to underline one's own moral or political values and opinions. Sometimes, the topos 'human dignity' is even misapplied as a passe-partout for almost any legal policy problem. This threatens its acceptability as a moral and constitutional lead value; some skeptics thus argue that the term should no longer be used at all. In view of the great number of related questions that are still open a skeptical attitude towards the term 'human dignity' seems justified, but this skepticism should aim at both the destruction ill-founded arguments and the construction of well-founded arguments.

## **II. Different concepts of human dignity**

In order to make sure that the term 'human dignity' is accepted on a permanent basis, it must be defined in a way that explains its range of application, at least basically. For this purpose, a number of different concepts of human dignity have been developed. A 'concept of human dignity' should comprise statements regarding its methodological foundation, the normative content, and the application field of human dignity. At least the following important concepts of human dignity may be differentiated:

1. Human dignity as protection of self-determination (Kant)
2. Human dignity as relation of mutual recognition (Fichte)
3. Human Dignity as a right to secure the subsistence minimum and the satisfaction of further basic wants (social understanding of human dignity)
4. Human dignity as protection of basal rights (ensemble theory of human dignity)
5. Human dignity as protection against humiliation.

## **III. Diverging arguments for concepts of human dignity**

To be distinguished from the normative content and scope of human dignity is the justification put forward for this concept. The question is: why should a particular concept of human dignity be accepted. Here, too, fundamentally different approaches are advocated, e.g. by referring to particular philosophical or constitutional traditions or the intent of the historical constituent power. A more recent approach interprets human dignity as a states promise of protection to all citizens. Others refer to basic interests common to all mankind

that are considered to be anthropological constants and may therefore serve as moral foundation of basic rights.

In view of these quite heterogeneous approaches to justification, which are frequently reflected in different content-related definitions of human dignity, arguments are raised that oppose the idea to see human dignity as a basic concept of practical philosophy but to grant it – at best – the status of an ideal. Others keep the idea of a well-defined concept - also with a view to the constitutional establishment of the protection of human dignity in Art. 1 of the Basic Law; they concede, however, that further conceptual elaboration of the content, justification and scope of application of human dignity remains necessary.

#### **IV. Who is entitled to human dignity?**

It is hardly deniable that any human being that was born is endowed with human dignity - factors such as age, gender, nationality or religious affiliation of the human being irrelevant for having human dignity. It is rather controversial, however, whether human life, still unborn in its mother's womb, is also entitled to human dignity or whether this applies only to an individual outside its mother's womb. Of the numerous approaches to justification only three should serve as illustrative examples here: Barely convincing is the potentiality argument which says that the potential of a cell to grow into a born human being with human dignity leads to the conclusion that a cell already possesses human dignity (and even further rights a human being that was born is entitled to). This argumentation ignores that in legal terms it is not possible to draw the actual legal status of an entity from its having a potential for it.

Another argument draws on the development of the brain and claims that human dignity can be assumed only after the brain becomes functional – i.e. about two months after fusion of egg and sperm. This view is supported by the fact that the brain must be seen as the physical base of awareness and personality. In addition, a parallel to the criterion of brain death can be drawn, according to which human life – and the ownership of human dignity - ends with the (total) brain death.

A third opinion concedes human dignity to human beings only after they have been born. This view in particular avoids contradictions to the popular established moral and legal appraisals of pregnancy terminations, since - based on the opinions mentioned before - is it hardly conceivable in which way, beyond narrowly understood medical and social grounds for abortion, killing a being entitled to human dignity in the womb might be legitimized.

## **V. The relation of human dignity to human rights**

Concerning the relation of human dignity to human rights, different positions are advocated. According to some authors, human dignity itself is an element of human rights, for others is the foundation on which human rights are based. The relation of human dignity to the right to life is particularly vague. Some authors consider any violation of life to be a violation of human dignity too, since life provides the vital basis of human dignity. The counter argument suggests that in the Basic Law human dignity and life are protected in different articles (Art.1 sect 1 vs. Art. 2 sect. 1). In addition, in the Basic Law the protection of life is subject to legal proviso, i.e. it may be restricted, which does not apply to human dignity. Finally it should be pointed out that life not only constitutes the vital basis of human dignity, but that the capacity to have rights is generally bound to a living right holder. It might be possible, though problematic, to assume that killing a person would – at the same time – violate his/her right to vote, the right to conclude contracts or his/her right of free movement.

## **VI. Can human dignity be balanced against other rights?**

A very difficult problems arise if the human dignity of a particular person can only be protected by violating the human dignity of another person. Even the daily press discussed the question as to whether the human dignity of a kidnapper may be violated by torture in order to protect the human dignity of his/her innocent victim. Provided human dignity is primarily understood to be protection of freedom, weighing of interests is more likely compared to cases where the protected area of human dignity is confined to safeguarding very narrow basic rights that are then considered inviolable. In the field of medical ethics and health care law problems such as the protection of unborn life in the womb arise, if the opinion is maintained that even unborn life may already be entitled to human dignity.

## **VII. Human dignity and the image of humanity**

The concept of the ‘image of humanity’ must be differentiated from the concepts of human dignity discussed above. The ‘image of humanity’ is characterized by perceptions about a human being’s origin, background and status within the cosmos and his/her position with respect to the surrounding nature and society. Frequently, a particular image of humanity is used not only to indicate certain anthropological assumptions, occasionally it is also evoked to dismiss concrete developments (e.g. in the field of medicine technology) as being not or no

longer compatible with the respective image of humanity. Talking about the 'image of humanity' thus also plays a political role.

In the bioethical and bio-legal context assumptions on freedom of the human will and the human capacity to accept responsibility are particularly important; they are frequently associated with a particular image of humanity. The concept of the 'image of humanity in the Basic Law', however, is quite vague, since in the German constitution hardly any explicit statements on the themes just outlined can be found. Consequently, it cannot be claimed that the German Basic Law protects a particular image of humanity in a special way, and much less a particular visual identity of humans.

### **C. Human dignity and human biotechnology**

#### **I. Basics**

Even if different concepts of human dignity and their respective justification are controversially discussed, two basic statements may be outlined with relation to the importance of human dignity.

1. The concept of human dignity should not be used as container for any moral or legal policy-related insights. In particular concerning the controversial questions in the field of human biotechnology, human dignity does not present definite solutions, at best it defines a frame within which solutions have to be developed by means of legal policy.
2. Not only the guarantee of human dignity contained in the Basic Law but also the philosophical understanding of human dignity primarily aims at protecting human autonomy and freedom. Human dignity is, therefore, suited to a very limited extent only as criterion for specifically regulating or even banning technological progress.

#### **II. Applications in the field of medicine**

Despite the justified scepticism of using the concept of human dignity in moral and legal discourse in view of the controversies of its specific content, human dignity is an important orientational value. Moreover, German Basic Law requires taking into account human dignity in medical law. On this background the impact of human dignity can be expressed in the following theses.

1. *Thesis:* Bodily integrity may only be interfered with (e.g. through surgical intervention) if an (informed) consent is available. There is no control of the reasons underlying this consent regarding its ‘rationality’. In particular the validity of that consent is not limited by ‘(legal) obligations on oneself’ or ‘morality’ (see § 228 dStGB, criminal code) since the principle of human dignity does not generate obligations on the part of the bearer of human dignity but only rights. If a consent is missing, the intervention is considered to be a criminal assault (or duress) and thus liable to prosecution (for exceptions see thesis 2). If consent is available, the act can be punishable only if it affects or endangers the rights of further persons. Such threat posed to further persons has generally to be assumed in cases of extreme bodily injury (even if the victim has given his/her consent) since they may constitute a breach of taboo that could lead to a general lowering of the social inhibition threshold regarding bodily injuries (even if a consent is missing).
  
2. *Thesis:* In case an explicit informed consent is missing (e.g. if the patient is unconscious) a surrogate informed consent may replace the informed consent. Based on evidence (e.g. information obtained from a living will or from relatives) it is evaluated whether the patient might have agreed, had one had the opportunity of asking him or her. This recourse to the assumed will avoids instrumentalizing a human being thereby endangering her human dignity. If no further evidentiary facts can be found, the objective range of interests must be referred to. Since this has to be assessed from an objective perspective, a ‘control regarding the rationality’ is done in these instances.
  
3. *Thesis:* Criminal liability for *active euthanasia* can only be justified if further persons are exposed to danger through a potential cancellation of the punitive norm (§ 216 dStGB, criminal code ‘voluntary euthanasia’) (danger of undermining the taboo against killing, danger of faked informed consents etc.). In principle, here, too, the general principle of *volenti non fit iniuria* (to a willing person no injury is done) should be applicable. Only in those cases where the rule is interpreted as an ‘abstract expose to danger’ is §216 German Criminal code considered not to be contrary to human dignity. The latest jurisdiction by the German Federal Court of Justice regarding admission of – at least – specified forms of active voluntary euthanasia provided this is done in the context of medical treatment, points in this direction.

4. *Thesis:* The widely accepted so-called indirect euthanasia (the physician administers to the consenting patient strong painkillers that are potentially life-shortening) is admissible because refusing those painkillers would be contrary to human dignity. Prohibiting indirect euthanasia would constitute an instrumentalization of the patient and violate the statement of *volenti non fit iniuria* with a view to maintaining an unexceptional (formal) prohibition to kill, without further persons being exposed to danger through the admittance of indirect euthanasia.
5. *Thesis:* The principle of protecting human dignity is of essential importance as an orientation guide for clinical medicine and care. In particular geriatric and psychiatric patients frequently have an insufficient ability to achieve respect for their human dignity that persists even if these patients have a lacking or restricted decision-competence. In view of the situations these patients are in, the idea of protecting autonomy as a central normative criterion of medical ethics is valid only to a limited extent and – at best – with the aid of constructions such as an implied or subsidiary will. For these groups of patients, however, human dignity takes effect in the sense of protection against (extreme) humiliation, which prevails also if the patient is not able to notice humiliating behavior towards him or her.
6. *Thesis:* Legitimacy of so-called enhancement (e.g. cosmetic surgery, but also increase or enlargement of bodily or mental capabilities) should also be measured by the principles of informed consent. A ‘control of rationality’ of the consent to such measures should not take place; only if impairment (or endangerment) of rights of further persons is to be expected, imposing a prohibition may be justified. In these cases, however, it has to be examined carefully to what extent the capacity to consent may be limited due to a psychiatric disorder.
7. *Thesis:* In case of an intervention into the germ line an explicit informed consent is a priori out of the question, since the individual concerned does not yet exist or is not yet able to give his/her consent. However, the question of an implied (future) consent of the individual to come into being has to be considered. In special circumstances this consent may be assumed, if this intervention is suitable for preventing a severe (genetic) disease; a genetic intervention in order to avoid infectibility with, e.g., HIV

seems also justifiable. In the case of interventions aiming at an enhancement, an implied consent seems acceptable only if the intervention with adult individuals can – principally – be revoked. Interventions to create deaf descendants of deaf parents (even if this is their express wish) are prohibited, whereas interventions to regain the hearing ability of basically deaf future individuals are permissible since the consequences are – in principle – later revocable.

8. *Thesis:* In the case of reproductive cloning, there may be - *prima facie* - a violation of human dignity of the ‘original’ as well as that of a ‘copy’, the clone. Human dignity of the original is not violated, however, if he/she has given an informed consent to use his/her own cells for the cloning. Claiming an offence against the alleged ‘duty (of the original) against oneself’ through the consent does not convince, since no duties of the bearers of human dignity themselves can be deduced from the principle of human dignity. Human dignity of a clone, too, is basically not violated by the act of cloning since it may be assumed that the clone is likely to consent in future to the act of his/her creation. Only in this way can the clone come into existence, and (as is generally assumed) in case his/her existence is realized his/her human dignity has to be protected, too, just as that of any other person. Moreover, a clone is expected to prefer an existence to a non-existence. An exception to that can be granted only if the clone would be born profoundly disabled – mentally and physically; in these cases an informed consent cannot be assumed, and it would be contrary to human dignity to bring him/her nevertheless into the world. Since – at present – it is seriously to be expected that such consequences may occur, a (relative, if necessary, provisorily) general prohibition of (reproductive) cloning can be justified.
  
9. *Thesis:* The attribution of the protection of the right to life presupposes the existence of a physical-physiological substrate to which this protection can be attributed. If an imponderable, absolute protection of the right to life in the context of the protection of human dignity is involved, the existence of a human brain and brain activity may be considered (in particular at the beginning and at the end of a human life). This is in accordance with the (prevailing) opinion that the so-called brain death indicates the end of the absolute protection of the right to life. If this opinion were true, it would be very difficult to make it plausible why – prior to the beginning of brain activity (i.e. up to about two months after the fusion of egg and sperm cell) - absolute protection of the

right to life is attributed (this thesis, however, is controversial regarding its limits). In case of such caesura, interventions before or after the brain activity are not downright prohibited but if balanced against further important legally protected interests they may, possibly, underlie. For reimplantation diagnostics, e.g., the so-called therapeutic cloning and the ‘consuming’ embryo research, this means that these techniques cannot be confronted with the argument of prohibited killing of an embryo, which is contrary to human dignity.

10. *Thesis:* Concerning the development of chimera and hybrids between man and animals it may be stated that – under the prerequisites of the thesis mentioned before on the beginning of the protection of the right to life - it may be tolerable if it is guaranteed that as a result of the relevant measures no being with brain activity develops. When inserting material of human brain cells in animal brains or animal brain cells in human brains it will be decisive whether the quantity of material is sufficient so that human behavior or properties in animal brains (in particular self-confidence) or animal behavior in human brains may develop. If such development is foreseeable, this would offend against the protection of human dignity.
  
11. *Thesis:* A consequence of the principle of the protection of human dignity finally is that a minimum degree of health care must be guaranteed by the state, for the protection of human dignity also comprises the ‘free development of the individual’ (see Art. 2 I GG), which is possible only if the elementary requirements of the human existence (life, food, physical integrity) are available. The commitment of the state in this matter is bounded, however, by the possibilities it has to guarantee this kind of protection all persons in the state in equal measure (*ultra posse nemo obligator*).