Liber Amicorum

Benedita Mac Crorie

Volume I

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LIBER AMICORUM
BENEDITA MAC CRORIE

Volume I

SUMÁRIO

SOME THOUGHTS ABOUT HUMAN DIGNITY

Holger P. Hestermeyer*
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Among my cherished memories of Benedita Mac Crorie is a discussion between us one evening in Heidelberg some twenty years ago. At the time, Benedita was working on her doctoral thesis[1]. That evening, she set out to explain to me her approach to the concept of the waiver of fundamental rights and its limits, particularly related to human dignity. Moving effortlessly between German dogmatic thought and a Socratic method of questioning my assumptions Benedita gave me a *clase magistral* on fundamental rights. We met again several times over the years and I had the privilege of meeting her family and her students and calling her my friend. But it was this discussion that showed me what academia can be at the best of times: a place for the exchange of ideas, to strive together to better understand the world and maybe even to improve it a little. What better way, then, to honour Benedita than to offer some thoughts on human dignity. If they are

* Professor of International and EU Law, King's College London. E-mail: Holger.Hestermeyer@kcl.ac.uk

[1] See Benedita MAC CRORIE, *Os Limites da Renúncia a Direitos Fundamentais nas Relações entre Particulares,* Coimbra, Almedina, 2013.

incomplete or even incoherent, it is because of the absence of our friend, who certainly would have found time to challenge and thereby improve them.

1. The inviolability of human dignity in the German Constitution, the Objektformel and the *Bundesverfassungsgericht's* decision on the *Luftsicherheitsgesetz*

After the crimes committed by Germany during the third Reich, the drafters of the German *Grundgesetz* consciously put the protection of human dignity into its first article: Article 1(1) proclaims that "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority"[2]. Somewhat like the protection of human dignity in the Portuguese Constitution, the protection of human dignity in the *Grundgesetz* serves several functions[3], to the extent that some have doubted whether it actually contains a right. The *Bundesverfassungsgericht*, however, clearly thinks so[4]. But the wording of Article 1(1) creates a significant problem for the application of the provision as a right: the reference to inviolability means that unlike other rights, the protection granted by Article 1(1) is absolute. The provision cannot be weighed against other rights, nor can the right be limited[5]. This has been criticized by some authors e.g. in the context of bioethics, who argued in favour of ceasing the dogmatic special treatment[6]. Nevertheless, inviolability continues to be the leading approach and has been defended – and vigorously so – as essential for a constitution that wants to enable a life in dignity[7].

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[2] Translation by Christian TOMUSCHAT, available at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0019 [01.09.2022].

[3] Benedita MAC CRORIE, "O recurso ao princípio da dignidade da pessoa human ana jurisprudência do tribunal constitucional", in AAVV, *Estudos em comemoração do 10.° Aniversário da Licenciatura em Direito da Universidade do Minho*, pp. 152, 154 ff. See in Germany: Martin NETTESHEIM, "Die Garantie der Menschenwürde zwischen metaphysischer Überhöhung und bloßem Abwägungstopos", *AöR*, vol. 130, 2005, pp. 71, 98 ff.

[4] E.g. BVerfGE 28, 243, 264 – *Dienspflichtverweigerung*.

[5] BVerfGE 75, 369, 380 – Strauß-Karikatur; BVerfGE 93, 266, 293 – "Soldaten sind Mörder".

[6] Matthias HERDEGEN, "Art. 1(1) GG", in Maunz/Dürig (eds.), *Grundgesetz*, 2003, para. 56 ff.; Manfred BALDUS, "Menschenwürde und Absolutheitsthese", *AöR*, vol. 136, 2011, pp. 529, 551.

[7] See in particular Jochen VON BERNSTORFF, "Der Streit um die Menschenwürde im Grund- und Menschenrechtsschutz: Eine Verteidigung des Absoluten als Grenze und Auftrag", *JZ*, 2013, pp. 905 ff. See also Wolfram HÖFLING, "Art. 1",

1.1. Interpreting human dignity: the *Objektformel*

The inviolability of the right puts an enormous burden on the proper interpretation of human dignity, as – in contrast to other rights – that interpretation alone decides where the line between acceptable behaviour and a violation of human dignity is drawn: the scope of the right simultaneously defines what constitutes a violation[8]. Unfortunately, attempts to properly define the scope of human dignity have been underwhelming. References to Christian or natural law views about human nature might explain the basis of the right, but do little to clarify its content. Listing acts that violate human dignity show that there is consensus with regard to many acts of violation, but can hardly replace a positive attempt to define the scope of the right[9]. The most popular definition and the one frequently used by the Bundesverfassungsgericht is the so-called "object formula" (*Objektformel*): "Human dignity is connected to the claim of social value and respect for a human being, which prohibits reducing it to the mere object of the state and to treat it in a manner that puts its quality of a subject into doubt. Human dignity in this sense is not just the individual dignity of the person at issue, but also the dignity of the human being as a being belonging to a species. All human beings have that dignity, without regard to their characteristics, achievements or social status"[10].

The formula begs the question, though, when exactly a human being is reduced to being treated as the mere object of the state. Consider two examples.

in Sachs (ed.), *Grundgesetz*, 7th ed., 2014, paras 10 ff.

[8] Wolfram HÖFLING, "Art. 1", *op. cit.*, para. 11.

[9] See with regard to both Wolfram HÖFLING, "Art. 1", *op. cit.*, paras 14 ff.

[10] "Mit der Menschenwürde ist der soziale Wert- und Achtungsanspruch des Menschen verbunden, der des verbietet, ihn zum bloßen Objekt des Staates zu machen oder einer Behandlung auszusetzen, die seine Subjektqualität prinzipiell in Frage stellt. Menschenwürde in diesem Sinne ist nicht nur die individuelle Würde der jeweiligen Person, sondern auch die Würde des Menschen als Gattungswesen. Alle besitzen sie, ohne Rücksicht auf Eigenschaften, Leistungen oder sozialen Status". BVerfG 2 BvR 1845/18 order of 1 December 2020, para. 60 (translation by the author, internal references deleted). See also BVerfGE 27, 1, 6, BVerfGE 45, 187, 228, BVerfGE 109, 133, 149 f.

1.2. Testing the *Objektformel*

First, consider the case of a police officer who tortures a person he considers guilty of abducting a child to obtain information about the child's whereabouts. There is general agreement that torture is a violation of human dignity whatever the motivation. The prohibition of torture benefits from special protection even under international law[11], both as a treaty norm and as one of those rare instances of *jus cogens*[12], a norm that the international community considers so vital that no state can diverge from it through treaty provisions[13]. But is the torture victim being reduced to a mere object by being tortured to obtain knowledge he might have or acknowledges the police officer's crime the subjectivity of the victim through acknowledging what the police officer believes the victim did? Is "object" or "subject" really under all circumstances the right framework to analyse what is a fragrant mistreatment of a human being? The object formula seems to be of little help.

Secondly, consider the state drafting its budget. Human resources will be budgeted side by side with costs for investment, pencils, desks. While there can be no rational doubt that a state can legally establish a budget including the cost of the salary of its officials without violating their human dignity, it is far less clear what result would be reached by applying the object formula.

While the two examples might seem extreme (and constructed), they do show that the object formula is of limited help in applying the right to human dignity. At best, the formula seems to justify an outcome reached by other means. At worst, it is misleading.

1.3. The *Objektformel* in practice: the *Luftsicherheitsgesetz* case

It is worthwhile to look at how the *Bundesverfassungsgericht* has applied the formula in practice in the case of the *Luftsicherheitsgesetz*[14]. The case concerned a constitutional complaint against a provision of the

[11] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, 1465 UNTS 85.

[12] Erika de wet, "The Prohibition of Torture as an International Norm of *jus cogens* and Its Implications for National and Customary Law", *European Journal of International Law*, vol. 15, 2004, p. 97.

[13] Article 53 of the Vienna Convention on the Law of Treaties of 23 May 1969 (referring to *jus cogens* as peremptory norms), 1155 UNTS 331.

[14] BVerfG 1 BvR 357/05, judgment of 15 February 2005.

Luftsicherheitsgesetz, an act passed by the German Parliament as a response to the September 11 attacks in the USA, in which passenger planes were abducted by terrorists who flew them into the World Trade Centre in New York and into the Pentagon[15]. § 14(3) of the *Luftsicherheitsgesetz* would have allowed the use of force against a plane if that plane were to be used against the life of human beings and the use of force would have been the only means to defend against the danger. The complainants argued, amongst others, that this provision violates both human dignity and the right to life[16], as it allows the state to consciously kill human beings who are not perpetrators of a crime, but its victims (namely the crew and passengers in the abducted plane)[17]. The defenders of the act argued in that regard that it was not the state, but the hostage-takers who robbed the passengers of their dignity and reduced them to mere objects[18]. The Court held that the provision violates the right to life in conjunction with the provisions of the *Grundgesetz* on competences as well as the right to human dignity[19]. § 14(3) would have allowed interferences with the right to life, as it provided the state with a legal permission to shoot down a plane under certain very limited circumstances. That interference according to the Court cannot be justified constitutionally both because there is no competence for the federal level to base such a provision on (in particular the provision does not comply with the constitutional provisions on the armed forces)[20], and because the provision allows the state to shoot down a plane, the crew and passengers of which are victims rather than perpetrators of an attack[21]. It is this last argument that is of interest to us as it was here that the Court brought the right to human dignity to bear on the case. The Court stated that the right to life can under certain circumstances be restricted by an act of parliament. However, that act needs to be read in light of the right to human dignity. Human dignity

[15] The Court also referred to a 2003 incident in Germany, in which a plane was abducted by a mentally ill man who threatened to crash it into the ECB.

[16] In concreto Articles 1(1), 2(2)1 in connection with Article 19(2) GG.

[17] BVerfG 1 BvR 357/05, paras 35 ff.

[18] BVerfG 1 BvR 357/05, para. 46.

[19] BVerfG 1 BvR 357/05, para. 84.

[20] BVerfG 1 BvR 357/05, para. 92.

[21] BVerfG 1 BvR 357/05, para. 118.

becomes relevant in two respects in the case: the state cannot interfere with the right to life in violation of the right to human dignity and the state has to protect all human life, including against illegal attacks from others[22]. While the concrete consequences that flow from the right to human dignity cannot be stated in general and for all times, it is clear that the obligation to respect human dignity prohibits reducing human beings to mere objects of the state[23]. This – according to the Court – happens when the state shoots down a plane that is used by hostage-takers as a weapon against the life of others. The passengers and crew of the plane used as a weapon are, writes the Court, not just the object of the hostage-takers, a state that shoots down such an abducted plane also "treats them as mere objects of its rescue operation to protect others"[24]. Crew and passengers of the abducted plane are defenceless and helpless – and will be killed. "Such a treatment disregards the affected persons as subjects with dignity and inalienable rights. They are objectified and deprived of rights by the fact that they are killed as a means to safe others; through the unilaterally disposal of their lives by the state the people in the plane, who are themselves worthy of protection as victims, are denied the value each human being has for its own sake"[25].

The Court proceeds to point out that, according to convincing testimony before the Court, it is unlikely that the state could establish the facts the act requires to justify shooting down the plan with a sufficient degree of certainty by the moment a decision to shoot down the plane would have to be taken, namely that the plane has been abducted and that the hostage takers intend to use it as a weapon. Decision-makers, following the complex decision-making procedure under the act, thus would generally have to decide on suspicion rather than on the basis of established facts[26].

While such uncertainty is at times unavoidable when the state has to act against dangers, it is unacceptable when that action infringes on human dignity. The Court then proceeds to dismiss a number of counterarguments,

[22] BVerfG 1 BvR 357/05, paras 119 f.

[23] BVerfG 1 BvR 357/05, para. 121.

[24] BVerfG 1 BvR 357/05, para. 124.

[25] BVerfG 1 BvR 357/05, para. 124.

[26] BVerfG 1 BvR 357/05, paras 125 ff.

in particular the argument that crew and passengers of the abducted plane would die anyways. According to the Court, human life and dignity benefit from protection without regard of the duration. This is all the more true, as the prognosis in the given case is uncertain[27]. Nor does the Court accept the argument that the obligation of the state to protect those against whom the plane will be used, justifies it being shot down. While the state is under an obligation to protect human lives, it can only resort to means that are constitutional and that is not the case for shooting down a plane with an innocent crew and passengers on board, as these, too, benefit from the state's obligation to protect life[28]. Accordingly, the Court struck down § 14(3) of the *Luftsicherheitsgesetz* as unconstitutional.

1.4. Criticising the Court's decision in the *Luftsicherheitsgesetz* case

What is most striking about the Court's decision is that even though the Court repeatedly refers to the uncertainty of the decision-making processes that would lead to a decision to shoot down an abducted plane, the Court's application of human dignity is categorical. The Court's application of the object formula comes to the result that shooting down a plane with an innocent crew and/or passengers that the hostage-takers intend to use as a weapon is impermissible, as the innocent crew and passengers are reduced to objects. The categorical nature of human dignity means that mitigating arguments can no longer change this outcome. The fact that the plane would be used as a weapon and the passengers would be killed anyways is irrelevant as the state cannot judge what duration of life is relevant. The fact that other human beings would be protected is similarly irrelevant: you cannot weigh one life against another in the application of human dignity. The outcome is counterintuitive and – to the ears of a neutral observer – even shocking: The logic of the court's argument implies that in a hypothetical event like September 11 shooting down the planes is impermissible even if the facts that the plane has been abducted and is to be used as a weapon can

[27] BVerfG 1 BvR 357/05, paras 132 f.

[28] BVerfG 1 BvR 357/05, paras 138 f.

be established with certainty. I have serious doubts that this outcome does justice to the human dignity of the hostages on the abducted plane. And to some extent, the Court seems to harbour doubts as well, as it repeatedly points to out that decision-makers usually would have to make such a call in conditions of uncertainty.

The Court's repeated references to that uncertainty point to another astonishing aspect of the case: the Court's resort to human dignity and categorical arguments in that regard seem to have been wholly unnecessary. The convincing testimony about the uncertainty of the decision-making processes involved in reaching the decision to shoot down a plane implies that the Court could have reached the same outcome it reached by arguing with the right to life alone, applying a thorough proportionality analysis.

For the purposes of this contribution, there are two lessons that can be drawn from the *Luftsicherheitsgesetz* case with regard to human dignity: the first one is the confirmation that the object formula is an unreliable tool in understanding the content of human dignity. The second one is that human dignity should not be resorted to lightly: if it is to serve as a categorical, inviolable right, it should be used as a final defence.

2. Will human dignity be a final defence? The *Bundesverfassungsgericht* and *identity control*

Arguably, another development of the case law of the *Bundesverfassungsgericht,* however, does not bode well for a sparing use of human dignity. That development regards the well-known case law of the Court relating to its power to control EU acts. Several prongs of that case law can be distinguished: According to *Solange II* the Court refrains from analysing the compliance of secondary EU law with German fundamental rights as long as the EU provides for an effective protection of fundamental rights generally equivalent to that of the *Grundgesetz*[29]. However, the Court will analyse compliance of EU law with the German *Grundgesetz* in concrete

[29] BVerfGE 73, 339 – *Solange II*. See also BVerfGE 1 BvR 276/17 – *Recht auf Vergessen II* and Fn. 32.

cases in two instances[30]. Firstly, it will inquire whether legal acts of the EU remain within the scope of the competences conferred ("*ultra-vires control*"). Secondly, the *Bundesverfassungsgericht* analyses whether the inviolable core content of the constitutional identity of the *Grundgesetz* is respected. It is this so-called "*identity control*" that is of interest for the argument here. The dogmatic basis for the *Bundesverfassungsgericht's identity control* is that the *Grundgesetz* explicitly mandates participation in the EU in Art. 23(1), but subjects that participation to Art. 79(2)(3). As the Court states: "The primacy of EU law is limited by the core principles of the constitution, which is put beyond the reach of European integration by Art. 23(1)3 in conjunction with Art. 79(3)"[31].

The protected core content of the *Grundgesetz* under Article 79(3) consists of a very limited number of fundamental principles: the division of the Federation into *Länder*, their participation in principle in the legislative process, and the principles laid down in Articles 1 and 20. Unsurprisingly given the history of the *Grundgesetz* and its elevation of human dignity to the first rank of fundamental rights, human dignity is one of these few principles. Accordingly, under the *identity control* prong the Court will control the compliance of EU acts with the tenets of human dignity[32].

In theory and principle, *identity control* is a very limited judicial tool that allows the *Bundesverfassungsgericht* to step in and provide for protection in extreme cases (and only in extreme cases). The hurdles imposed on the Court taking action are high. They also need to be high, as protection in such cases is appropriately granted by the Court of Justice of the European Union[33]. The imposition of a limited, rather theoretical control mechanism fits with

[30] See in that regard BVerfGE 123, 267, 353 f. – *Lissabon*; BVerfGE 126, 286 – *Honeywell*; BVerfGE 140, 317 – *Europäischer Haftbefehl II*. See Holger HESTERMEYER, *Eigenständigkeit und Homogenität in föderalen Systemen*, 2019, pp. 181 ff.; SCHWERDTFEGER, "Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts", *EuR*, 2015, pp. 290 ff.

[31] BVerfG 2 BvR 2735/14 para. 36.

[32] This control is an exception to the *Solange II* approach, SAUER, "Solange geht in Altersteilzeit", *NJW*, 2016, pp. 1134, 1136 ff. Note also that the *Bundesverfassungsgericht* more recently stated that it will review the domestic application of EU law on the basis of EU fundamental rights where rights of the *Grundgesetz* are inapplicable due to the primacy of EU law. The full extent of this new approach is not yet clear. BVerfGE 1 BvR 276/17 – *Recht auf Vergessen II*.

[33] The *Bundesverfassunsgericht* argues that *identity control* does not violate the principle of sincere cooperation under Article 4(3) TEU, as it can rely on Article 4(2)1 TEU.

the Court's traditional approach to its judicial conversation with the Court of Justice of the European Union, under which the *Bundesverfassungsgericht* in almost all cases follows the Court of Justice and in very rare, exceptional cases issues warnings and imposes limits, but does so sparingly and for extreme cases, potentially improving rather than endangering EU integration.

From a litigation strategy point of view, however, the lesson to be drawn from the *identity control* mechanism established by the Court is different: The mechanism opens a door that had been shut after *Solange II*. An individual trying to obtain protection against an EU act from the *Bundesverfassungsgericht* based on fundamental rights can now try and do so, but has to couch the complaint in terms of a violation of human dignity, as the *Bundesverfassungsgericht* does not analyse the violation of other rights under the *Solange II* case law. Diligent lawyers will not have too hard a time to frame their arguments as falling under human dignity, as human dignity underlies the value system of the *Grundgesetz*. It then falls to the Court to not give in to the temptation to allow a mechanism conceived for extreme, theoretical cases, to indirectly become an every-day recourse for fundamental rights through an argument based on human dignity and with that to blur the concept of human dignity as a last line of defence.

Such restraint will not necessarily be easy, as the example of the European arrest warrant shows: Here, cases reaching the Court usually concern a human being in an extreme situation and any court confronted with such cases will want to proceed carefully and ensure that an individual's rights are protected. For the Court, Article 1 is the only realistic tool available to do so. This was the case in *Europäischer Haftbefehl II,* where the *Bundesverfassungsgericht* had to deal with a European arrest warrant against a US citizen convicted in Italy *in absentia* to a 30-years sentence. The Court activated its identity control with regard to human dignity, under which criminal punishment requires guilt[34]. The case straddles a fine line: On the one hand, the Court held that the *Oberlandesgericht* Düsseldorf violated the human dignity of the accused by accepting the extradition without sufficiently analysing the alleged inability of the accused to defend himself

[34] BVerfG 2 BvR 2735/14, para. 48.

under Italian procedural law[35]. The Court explicitly stated that the tenets of EU law, including the CJEU's *Melloni* decision[36], which also concerned the execution of a European arrest warrant issued by Italian authorities for a judgment handed out *in absentia*, do not relieve Germany authorities from the duty to ensure compliance with human dignity[37]. On the other hand, however, the Court held that the relevant provisions of EU law comply with human dignity[38]. The case demonstrates that the Court is, when push comes to shove, willing to step in to protect individuals – using human dignity as the entry point. This entails the risk that the categorical protection of human dignity, which is not necessarily well suited for the complex weighing processes involved in everyday cases, becomes a more common argument.

3. Conclusion

The discussions about human dignity have not quieted down since those days in Heidelberg when Benedita worked on the topic. If anything, they have become ever more complex, ever more difficult to resolve. It is hard to believe that I will not have the possibility to continue the discussion with my friend Benedita.

[35] BVerfG 2 BvR 2735/14, para. 125.

[36] CJEU, Case C-399/11 *Melloni,* EU:C:2013:107.

[37] BVerfG 2 BvR 2735/14, para. 83.

[38] BVerfG 2 BvR 2735/14, paras 84, 125. See also C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru*, ECLI:EU:C:2016:198.