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## BALANCING HUMAN DIGNITY, LIFE AND SECURITY. ON DOGMATIC STRUCTURES OF FUNDAMENTAL RIGHTS IN TIMES OF TERRORISM<sup>1</sup>

### Introduction

Since 9/11 the rule of law – or better, in the German and French continental version, *Rechtsstaat/l'état de droit* – has changed. 9/11 has become the metaphor for the globalization of terrorism as well as for threat to personal and national security. After 9/11 we lost our virginity of lawfulness, trying to counter the powers of evil. In the early times of the new millennium, the reaction of the Government of the United States of America was prompt: The USA Patriot Act, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism, enacted in 2001<sup>2</sup>, increased and aggravated a lot of laws to make them fit against terrorist activities, but restricting fundamental rights and freedoms at the same time. One of the steps was the “Authorization for Use of Military Force”, established by the Congress in September 18, 2001, and renewed in March 2006, which authorized the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harboured such organizations or persons, in order to prevent any future acts of international

<sup>1</sup> The presented paper is the text of a lecture delivered at the Andrzej Frycz Modrzewski Kraków University College, on April 21, 2008 in connection with the award of an honorary professorship of the University College to prof. R. Grawert, with amendments.

<sup>2</sup> H.R.3162.

terrorism against the United States by such nations, organizations or persons". This Joint Resolution of the Congress expressively refers to the War Power. A very special supplement of these acts are the Camp Delta Standard Operating Procedures (SOP), established by the Joint Task Force Guantanamo of the Department of Defence on March 3, 2003.<sup>3</sup> The American writer Louis Begley, born in Poland 1933, compared<sup>4</sup> these "Procedures" with those established for the French Jewish Officer Dreyfus in 1895 when he was imprisoned on the Île du Diable in French-Guyana, not very far away from Guantanamo.

The European reaction to 9/11 was timely at first. But the later perfection of measures against terrorism became rather difficult, mainly because of two reasons. Firstly: According to the Treaty on the European Union, its foreign affairs and security are objectives of common policies and not of common regulations. Secondly: Most of the Member States have difficulties to harmonize the demands for security and the constitutional rule of law. Already on September 21, 2001 the Council of the Union had declared terrorism to be a real challenge to the world and to Europe, and stated that the fight against terrorism will be a priority objective of the European Union. Some weeks later, on the December 27, 2001, the Council established its Regulation (EC) No 2580/2001<sup>5</sup> on specific restrictive measures directed against certain persons and entities with view to combating terrorism. Especially to combat the funding of terrorism, the Regulation enacted the meanwhile famous list of persons and entities committing, or attempting to commit, participating in or facilitating the commission of any act of terrorism.<sup>6</sup> This list has become famous because it is regarded as illegal, and because the European Court of Justice had corrected it several times. Nevertheless, the Union decided to focus its efforts in the fight against terrorism on four main objectives: prevent, protect, pursue and respond.<sup>7</sup> Meanwhile, two special European institutions work to fulfil this programme: Europol, which works as a European police office for the cooperation with data, and Eurojust, which should work as a centre of cooperation and coordination of judicial activities.<sup>8</sup> But, of course, mainly the Member States are competent and responsible for the necessary implementations and legal activities. For instance in France official control of internet communication was allowed at

<sup>3</sup> Cf. [blog.wired.com/27bstrokeb/gito-sop.pdf](http://blog.wired.com/27bstrokeb/gito-sop.pdf).

<sup>4</sup> L. Begley, *What is the Value of one Man?*, Festvortrag anlässlich der Verleihung der Ehrendoktorwürde der Universität Heidelberg (Lecture on the award of an honorary doctorship at the University of Heidelberg), February 8, 2008.

<sup>5</sup> Cf. EC regulation 2580/2001: [eur-lex.europa.eu](http://eur-lex.europa.eu).

<sup>6</sup> Council Common Position 2005/936/CFSP of 21 December 2005 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Position 2005/847/CFSP, Annex: List of persons, groups and entities referred to in Article 1, "Official Journal of the European Union", 23.12.2005, L 340/81.

<sup>7</sup> J. Solana, *Terrorism in Europe: How does the Union of 25 respond to this phenomenon?*, Lecture of October 7, 2004, Berlin (SO 266/04: [ue.eu.int/ueDocs/cms\\_Data/docs/pressData/en/discours/82163.pdf](http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/discours/82163.pdf)).

<sup>8</sup> Cf. Council of the European Union. Justice and Home Affairs Council. Implementation of the Action Plan to Combat Terrorism, December 1, 2005 (Doc. 11158/05: [ue.eu.int/Newsroom](http://ue.eu.int/Newsroom)).



once, but with the restriction that the law should be effective only for a certain time. Later, the permission to control was extended, and the deadline was left out, in spite of many legal doubts.

In the following remarks, I will examine the legal situation in Germany, that is to say from the point of view of the Basic Law for the Federal Republic of Germany in the interpretation of the Federal Constitutional Court.

### **Constitutional and dogmatic concepts**

The Basic Law for the Federal Republic of Germany, established in 1949, begins with the section Basic Rights, and the first paragraph of its first article formulates a constitutional and political leitmotif: “Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.” The second article guarantees every person the rights to free development of his personality and to life. But these two rights could be limited: The right to free development of one’s personality is limited by the rights of others as well as by the constitutional order and the moral laws, whilst the right of life may be interfered with pursuant to a law. The following articles guarantee special freedoms, sometimes expressing their inviolability and sometimes legal limitations. The meaning of this system seems to be rather evident: The rights define the sphere of personal identity and freedom, and the limitations define the sphere of social contacts and authoritative order.

But the terms used to express the different guarantees and limitations, are abstract and therefore open to interpretation and development by interpretation. What does “inviolability” mean when the Basic Law confirms that human dignity is inviolable as well as the freedom of the person and of his home, and declares in the same context that - in contrary to the guarantee of human dignity – these freedoms shall be limited by laws? When we take only the written wording, we may conclude, on the one hand, that human dignity is absolutely inviolable, because its guarantee has no written limitation. On the other hand, we may conclude that the freedoms of personality, person, life, home and so on are only relatively inviolable, i.e. only as long as the legislator does not exercise the constitutional permission to limit the rights in favour of more favourable goods, especially in favour of the rights of others or of common goods. To say it once more in other words: The literal text of the Basic Law indicates very special rights with different limitations, and because of these differences neither the rights nor their limitations must be combined or confused. Insofar the understanding of the rights corresponds to their history: The constitutional history shows that fundamental rights have been developed as special answers to special situations during the development of state power. From the historical point of view it remains remarkable by which situation human dignity got a positively legal expression: After centuries of Greek, Roman, Christian, and enlightenment philosophy, human dignity was legally established after the Second



World War, at first in 1948 by the General Declaration of Fundamental Rights and one year later in the Basic Law of the new Federal Republic of Germany, then namely to overcome the Nazi-Regime, and today to overcome modern inhumanity.<sup>9</sup> The incoming Treaty on the European Union only confirms, that the Union is “based” on the “respect” to human dignity; the term “respect” means perhaps less than “inviolable”. Nevertheless: the German Basic Law stresses the term “inviolable”, and so does the Federal Constitutional Court.

But during a period of more than sixty years, the real circumstances and constitutional problems have changed, and so has changed the development of the Basic Law by interpretation, namely by the jurisprudence of the Federal Constitutional Court. I will explain this development with regard to the constitutional terms “human dignity”, “personality” and “proportionality”.

Sometimes, the Federal Constitutional Court realized that the principle of human dignity – the Court stresses the term *principles* instead of the term *right*<sup>10</sup> – is rather abstract and therefore does not define its meaning very strictly. Notwithstanding the variety of philosophies, the Court explained “human dignity” in the sense of a prohibition of treating a person as a mere object of power.<sup>11</sup> I will remind you this interpretation once more. But before that, I will add that the Court said, too, that “human dignity”, taken as principle, may be concretized and that its concretions may be modified because of proper reasons. Though the Basic Law prohibits a condemnation to death<sup>12</sup>, some police laws of the German Länder allow killing a kidnapper in order to save a hostage, even if the police or the fighter pilot are not and could not be absolutely sure only to hit the kidnapper or the hostage, too. Whether those laws conform with the Basic Law is an open, controversial question. A critic may ask if in that case, the criminal is neither a human being nor an object. I will remind you later of this question.

Another constitutional development by interpretation was the invention of the so-called general right of personality and of its specializations. Article 2 Paragraph 1 of the Basic Law guarantees, as I mentioned before, the right to free development of one’s personality. “Personality” seems to identify a person. But the Federal Constitutional Court decided that it means the general freedom of any conduct, of any activity.<sup>13</sup> Because of this extension, the constitutional protection of human existence by fundamental rights is without a gap. Corresponding to this extension, the limits have been extended: The right may be limited by any reasonable law. To escape this conclusion and to escape the politics of changing political parties in a case the core of a personality is threatened, the Court invented another

<sup>9</sup> Cf. the history of Article 1: K. B. von Doemming, R. W. Füsslein, W. Matz, *Entstehungsgeschichte der Artikel des Grundgesetzes*, “Jahrbuch des öffentlichen Rechts der Gegenwart. Neue Folge”, Band 1, Tübingen 1951, p. 48 sqq.

<sup>10</sup> BVerfGE 6, 32, 36; 109, 279, 311.

<sup>11</sup> BVerfGE 27, 1, 6; 30, 1, 25; 109, 279, 312 sq.

<sup>12</sup> Article 112: “Capital punishment is abolished.”

<sup>13</sup> BVerfGE 6, 32, 36 sq.

fundamental right: the right of personality – not: the current development of personality, but the stable status of a person.<sup>14</sup>

Meanwhile, the Federal Constitutional Court has split this constitutional status of a person into different parts again. The right shall protect the name, the picture, the fate of a person as well as his personal data and, since a few weeks ago, the confidence and integrity of technical systems of information, that means: computers.<sup>15</sup> The Court placed these status-rights not in a distinct rule, but in a combination of rules, that is to say, in Article 1 Paragraph 1 “in connection with” Article 2 Paragraph 1. This connection is the dogmatic consequence of the thesis that the Basic Law not only guarantees isolated rights, but also a coherent system of rights. At the top of this system ranges human dignity. It spreads to and contains the essence of such personal freedoms as for instance those of the person, of faith, of home.<sup>16</sup> Whilst on the one hand, the consequence of this thesis is a perfection of protection, it is on the other hand a connection of limitations. And this has become a source of problems, especially by combining Article 1 Paragraph 1 and Article 2 Paragraph 1, i.e.: an inviolable and a limitable right. Which protection or which limits should be more effective?

As far as fundamental rights may be limited, the limiting legislator has to observe the principle of proportionality. The written constitution does not mention this principle. But it is one of the most important and effective parts of the rule of law (*Rechtsstaat*). It is the expression of justice – not in the meaning of a formal, processual justice, but in the meaning of an Aristotelian *suum cuique*. The application of this principle of proportionality on limitations of fundamental rights is shaped along three main questions: What is the legitimate objective – a common good or interest – of the limitation? Is the limitation suited for that objective? Is the limitation necessary to succeed to the objective in a reasonable way? If the legislator decides to restrict a personal right “in connection with” human dignity, he and afterwards the Court have to examine which right shall be more authoritative: the inviolable or the limitable one, and which objective shall be more valuable than the personal protection by that dominant right.

## A judicial review

I will explain these problems by discussing some case-law of the Federal Constitutional Court and by demonstrating its consequences for the protection of common security and for the prevention of international terrorism.

<sup>14</sup> BVerfGE 54, 148, 153 sq.

<sup>15</sup> Cf. the survey in: G. Leibholz, H.-J. Rinck, *Grundgesetz. Rechtsprechung des BVerfG. Kommentar*, Köln 2006, Article 2, No. 26 (Allgemeines Persönlichkeitsrecht).

<sup>16</sup> BVerfGE 107, 275, 284.

In 2004, the Court had to decide if it was legal to control acoustically private homes of suspicious persons by bugging.<sup>17</sup> The Court decided in accordance with the guidelines it had developed over time. It applied Article 1 Paragraph 1 of the Basic Law, that is to say, the rule on the inviolability of human dignity. The Court declared that this rule contains the recognition of a core of the substance of private life, and that this substance contains living-rooms as spheres of confidential communication. Human dignity shall be effective as a highest constitutional value. It is the fundamental of all other basic rights, and therefore it shall not be possible to balance human dignity with other special rights, values, or interests. Especially the interest of punishment does not have a higher value. Only a secret acoustical controlling or a secret observation outside a home does not “generally” violate human dignity.

In February 2008, the Court had to examine the law of Northrhine-Westphalia, which allowed the intelligence service to organize and practise online-controlling, i.e. to interfere secretly in internet-communications by special technical systems of interference without any information to the relevant persons or entities. The law brought before the Court followed the American pattern and European strategies. Since June 2007, the Federal Police FBI has used a program named “Computer and Internet Protocol Address Verifier” (CIPAV) which enables it to verify the IP address of a suspicious person so that the police can register this person. A judicial permission is necessary. In Great Britain the Regulation of Investigative Power Act of 2000 permits the secret police to electronically control individuals in the interest of “national security”.<sup>18</sup> But in Germany, a heated debate between politicians, advocates and lawyers arose about the compatibility with the constitution.

Only some weeks ago, the Federal Constitutional Court rationalized this discussion by its decision of February 27, 2008.<sup>19</sup> The decision invented a new special right: the guarantee of confidence and integrity of technical systems of information, arguing that the development of computer technology requires the adjustment of personal rights. The Court placed the constitutional basis of this right within the connection of Article 2 Paragraph 1 with Art. 1 Paragraph 1. Because the limitable right of Article 2 was cited before the inviolable human dignity, the Court was able to formulate some very special restrictions of those guarantees: Secret technical infiltrations of computer-systems in order to make secret controlling possible may be allowed only on grounds of a special judicial permission and if it is concretely evident that superior important interests are concretely endangered. Such interests shall be life and freedom of a person or common goods, the threat which concerns the basis of the existence of the state or of people. The Court demanded to balance the personal right limited by law on the one side and the interests favoured by that law on the other side with respect to the special case. Nevertheless, the law must

<sup>17</sup> BVerfGE 109, 279 sqq.

<sup>18</sup> Cf. dpa in: PC-Welt of September 19, 2007: [www.pcwelt.de](http://www.pcwelt.de).

<sup>19</sup> Decision of the First Senate of February 27, 2008 – 1 BvR 370/07, 1 BvR 595/07, [www.bundesverfassungsgericht.de/entscheidungen/rs20080227\\_1bvr037007.html](http://www.bundesverfassungsgericht.de/entscheidungen/rs20080227_1bvr037007.html).

protect the core, the essence of private life – that is the very part belonging to human dignity.

Two other decisions concern human life in connection with human dignity. These decisions are referred to as “Schleyer” and “air security”. Dr. Schleyer was the President of the union of employers in 1997. He was kidnapped in Germany by a German criminal group, the so called Red Army Fraction (AF). This group demanded that the German government release their imprisoned comrades. Under these circumstances, the captured Dr. Schleyer appealed to the Federal Constitutional Court to oblige the German Government to fulfil the demands of that group, otherwise he should be killed. The situation was much more serious because an Arab group had kidnapped a German passenger plane with 91 passengers at Mogadishu/Somalia at the same time demanding the same as the German criminals: the release the imprisoned terrorists. The Court refused Dr. Schleyer’s appeal with remarkable arguments.<sup>20</sup> It stressed that life is one of the highest constitutional values. Therefore the state is obliged to protect life because of Article 2 Paragraph 2 in connection with Article 1 Paragraph 1 of the Basic Law. By this connection, the Court combined the inviolable human dignity with the value of life, which, of course, is the vital basis of dignity. Nevertheless, the Court authorized the German Government to choose the adequate measures of protection. The Court argued that it were of more interest than the protection of an individual life that the State and its Government remain incalculable for terrorists. Therefore the Court tolerated the decision of the Government not to release the imprisoned terrorist, because they would continue their terrorism afterwards, endangering many other persons. Some days later, the plane in Mogadishu was rescued by special forces, and Dr. Schleyer was killed. The moral of this decision? The state may omit a rescue of life when it weights up the life of one person and the lives of several people.

In the case of the law on air security, established in 2005<sup>21</sup>, there was the question if the state may kill human beings actively. This law allowed the use of military forces within the German frontiers in the case of a “very special serious accident”. The legislator in Berlin imagined a case like 9/11, and would authorize especially the interceptor planes of the German Army to shoot a civilian aeroplane hijacked by terrorists. The Court declared this law unconstitutional and incompatible with Article 1 Paragraph 1 in connection with Article 2 Paragraph 2.<sup>22</sup> In this case the inviolability of human dignity dominated the limitable guarantee of life. The Court argued that the law declassifies pilots and passenger to mere objects of an act of the state – and referred by this argument to the interpretation of human dignity in the sense of the so-called object-theory. From this point of view, the law allowed the state to kill kidnapped persons intentionally though they are not

<sup>20</sup> BVerfGE 46, 160 sqq; cf. also BVerfGE 46, 214, 222 sqq.: In this case, the German Government released an imprisoned criminal in order to save the kidnapped Berlin politician Peter Lorenz.

<sup>21</sup> Bundesgesetzblatt 2005 I, p. 78, § 14, par. 3.

<sup>22</sup> BVerfGE 115, 118 sqq (First Senate).



criminals, but helpless victims of criminals. Dr. Schleyer was helpless as well. But the difference between his and this case was: In 1997 the state omitted a necessary help and risked a killing by omission; in the case of a kidnapped aeroplane the state would kill itself actively. Does this difference justify the different judgements?

I will add another, more practical argument of the Court: The pilot of the interceptor plane will not have time enough to recognize clearly and with no doubt the hijackers' criminal intentions. I will clarify that on the example of the situation in Germany. It takes a civilian aeroplane only one minute to fly from the airport in Munich to the football arena in Munich; the two squadrons of interceptor planes, stationed in the south and in the north of Germany, at their best need eight minutes to rise, and reach each point of Germany within at least fifteen minutes. The consequence of this long run is evident: Even if a interceptor plane will reach a hijacked civil plane within fifteen minutes, the pilot scarcely has enough time to understand the situation properly. Obligated to shoot the terrorists, he has to decide to shoot and to kill only on the basis of a vague probability. But a mere probability would not fulfil the requirements of the rule of law in the meaning of the Federal Constitutional Court. On the other hand, the Court tolerated shooting a civilian plane if the shooting pilot is somewhat sure that there are only criminals on board – somewhat, not quite sure! I mentioned already that this exception could not be explained by the object-theory, but by the argument that kidnapers risk their human dignity by themselves (a thesis which demands a deeper discussion on the origins and values of the terms “human” and “dignity”).

### **Dogmatic escapes out of the judicial dogmatic**

Considering these cases and judgements, we may conclude that the Federal Constitutional Court has raised high barriers around fundamental rights and against security legislation. Within the last years, the Court has fortified its opinion that human dignity is an absolute value which should never and because of no other interest be limited. The extension of this value is rather broad, since the Federal Constitutional Court shaped it as the centre of all the other fundamental rights. Its jurisdiction argues with the dogmatic figure “in connection with”. Based on Article 1 Paragraph 1 of the Basic Law, human dignity is “in connection with” other fundamental rights not only a moral, but a constitutional value, binding the legislation, the executive, and the judiciary as directly applicable law. Its inviolability therefore results from an absolute protection of human dignity. Strictly taken, no other private or common interest or good justifies any limitation of human dignity, neither life nor freedom nor common security. From this point of view, human dignity represents something like a super-constitution. But what about common security and about the existence of the state if they really conflict with human dignity?





The scientific and the political discussion of this problem is rather varied. That is not astonishing because the answer of my question concerns some other difficult problems, too: torture, abortion, genetic manipulation, etc.. Each problem concerns human dignity.

A dogmatic solution of these problems with human dignity could be to reduce its extensions or to vary its consequence of inviolability. Some modern commentators of the Basic Law propose to distinguish within Article 1 Paragraph 1 different standards of human being and human dignity and to distinguish also corresponding authorizations to balance human dignity with other constitutional values.<sup>23</sup> Those commentators can point at distinctions within the judgements of the Constitutional Court, for example the distinction between helpless passengers and terrorists, both of them, of course, human beings. Those commentators propose moreover to distinguish between human genes, human foetus, and grown-up human beings. If you look at the age of these authors, you will see that they belong to a post-war-generation and that they therefore are “more cool” than those who went through the cruelties of the World War II and of the Nazi regimes. But regardless of this more psychological argument, the thesis of a distinction of human being and human dignity has become a political question. One of its representatives is pointed to as the upcoming President of the Federal Constitutional Court, but conservative politicians and representatives of the Catholic Church argue his unsuitability for that office because of his interpretation of human dignity. Up to today, this problem remains open, along with a general acceptance of that interpretation.<sup>24</sup>

Other jurists propose to amend the guarantee of human dignity by limitations in favour of other values which they judge higher, especially in favour of the fate of the state and its society. But though there does not exist any political force to manage an amendment like this, Article 79 Paragraph 3 of the Basic Law regulates that amendments to the Basic Law affecting the principles laid down in Article 1 shall be inadmissible. Because the term “principle” is an open one, it could be subject to interpretation. And, of course, such interpretation will not be done without any affirmative objective. Nevertheless it will contradict the effective interpretation of the Federal Constitutional Court. A journalist wrote: “No passing Karlsruhe.”<sup>25</sup>

More interesting is the modern theory of “civil victims”. For several years, a discussion has been led about civil society and about an Aristotelian society of citizens. The source of this discussion is the American sociological and political theory of communitarism.

<sup>23</sup> Cf. as examples: H. Dreier, *Grundgesetz. Kommentar*, Band I, Tübingen 1996, Article 1 I, No. 45 sqq.; *Schulze-Fielitz*, I. c., Article 2 II, No. 41 sqq.

<sup>24</sup> Meanwhile the cited Professor Dreier was definitely refused and another colleague was elected as President of the Federal Constitutional Court.

<sup>25</sup> P. Bahners, *Kein Vorbeikommen an Karlsruhe*, “Frankfurter Allgemeine Zeitung”, No. 290 of December 13, 2007, p. 35.

In Germany, some jurists speak about “civil victims” or “victims of a citizen” and, more directly, of “the victim of life”.<sup>26</sup> That theory will explain that a citizen has not only rights, but duties, too, especially the duty to sacrifice his goods and, at least, his life for his society and its state, if a sacrifice would be absolutely necessary to save those entities, which are the bases of his own existence. This theory is a theory about the nature of humans as well as about the origin of “dignity”: God? society? nature in the sense of “*natura naturans*”? And therefore it is a very strong and deep source of a social interpretation of the guarantee of human dignity and human life. Of course, this theory contradicts the development of modern individualism during the last five centuries. But it is a theory which enables a consistent construction of a mass-society. Representatives of this theory argue therefore, for example, that the passengers of a hijacked aeroplane should be thought to agree to being shot down and killed in order to save the common infrastructure or the people living at the place where the terrorist plane will explode. I would explain the theory of “civil victim” and “human sacrifice” as a theory on denaturalizing citizens.

Another attempt to solve the difficulties deriving from the inviolability of human dignity “in connection with” life. This solution neglects the constitution and lays the responsibility only on the pilot of the military plane. It should be he who is asked to be prepared to cross the constitutional dogmas by choosing a pragmatic, courageous and spontaneous strike against the enemy. Some jurists think – or hope – that the pilot will shoot really in the very moment he meets the hijacked plane. And they think in the same way that a policeman will torture a criminal, perhaps secretly, in order to force him to reveal the hiding-place of his victim or of his bomb or of his comrades. No doubt, the shot or the torture will be illegitimate. But some people are of the opinion that there are exceptional situations, beyond the constitution, which demand exceptional solutions. The solution in the cited cases could be the following: The shooting pilot or the torturing policeman will be personally accused, but – perhaps - justified or excused afterwards. It is very interesting that the acting President of the Federal Constitutional Court, who emphasises the inviolability of human dignity, considers this possibility. In contrary to him, I am of the opinion that a democratic state is not allowed to burden a single pilot or policeman with its constitutional problems. If you may ask me for the morality of this pragmatic solution, I would answer with Kant. He condemned the political doctrine of *fac et excusa* as absolutely immoral.<sup>27</sup>

Confronted with this moral verdict, let me consider a rather radical legal proposition to escape our “cross of the present” (Hegel): What about changing our civil constitution, a constitution prepared only for a state of peace, where legisla-

<sup>26</sup> B. Schlink, *Das Opfer des Lebens*, “Merkur 99”, 2005, p. 2021 sqq., and in: *Freiheit des Subjekts und Organisation von Herrschaft*, ed. Ch. Enders, J. Masing, “Der Staat” 2006, Band 17, p. 43 sqq.; O. Depenheuer, *Das Bürgeropfer im Rechtsstaat*, [in:] *Staat im Wort. Festschrift Josef Isensee*, ed. M. Heintzen, M. Jestedt, P. Axer, Heidelberg 2007, p. 43 sqq.

<sup>27</sup> I. Kant, *Zum ewigen Frieden. Ein philosophischer Entwurf*, Anhang: *Über die Mißhelligkeit zwischen der Moral und der Politik – mit der Absicht auf den ewigen Frieden*, Königsberg 1795.



tors make laws and judges stabilize the interior peace, transforming this constitution into a constitution for war? Not very few politicians and jurists argue that the traditional difference between peace and war and between internal and external threats are wiped away by the global terrorism. Therefore – so goes the argument – it should be necessary to accept that terrorism has become a permanent, border-crossing, anonymous war within the state and, moreover, within the society. The consequence of this development should be that state and society must become fit for the diffuse circumstances. I will not explain the international law on war. I will only remind you that the international law allows “collateral damage”. The term “collateral damage” has become rather famous because Mr Rumsfeld liked to use it. The term means hurting or killing civilians in connection with an attack, if those damages are necessary to fight enemies and if the damages are proportional to that target. You may read this thesis in respect to Afghanistan and Gaza. The conclusion: In times and under circumstances of war, we have to accept “collateral damage” within our state and society, too. From this point of view, a collateral damage could occur to private passengers of a hijacked plane or ship or bus. But I fear this might be only the beginning. I remember Göbbels’s promotion of the “total war”. “Total war” means: there is no difference between warrior and civilian; the civil society is a part of that war as well as the army; the civil freedoms, established for a state which defends its people against external enemies and which secures inside peace, those freedoms cannot be guaranteed as before. I doubt if this is necessary, and if we should dare to risk our freedoms because of terrorism.

All these proposals to escape the dilemmas of terrorism and freedom are proposals of jurists thinking in legal terms and rules, but in different methodical ways. Those who argue on the basis of values like dignity and freedom, argue fundamentally. Those who try to legitimate limitations of those values in order to secure people or state, argue teleologically. Whilst fundamentalist thinking calculates with an open end, a teleological, purposeful thinking has a defined target. Which way is the right one, is difficult to decide. The principle of proportionality is no real solution, because it presupposes what we are looking for, that is the normative and casual priority. Because we have to deal with norms and values, the formal logic cannot really be helpful. At the end I must confess – and a Professor is a scientific confessor – that most of the cited solutions can lead to acceptable reasons. Therefore let me save myself by an excursion to ethics. This excursion is not too far away from jurisprudence, because the Basic Law and the European law sometimes refer to morality. But to which morality?

I do not want to bore you with old-fashioned moralists. But perhaps it is interesting to listen to the biologist Marc Hauser from the Harvard University who wrote the stimulating book *Moral Minds: How Nature Designs our Universal Sense of Right or Wrong*.<sup>28</sup> His thesis is that mankind has evolutionarily developed an universal ethic – he says: an ethical grammar – for millions of years, and he has

<sup>28</sup> New York 2006.





proved his thesis by psychological experiments and statistics of interviews. He started his experiments with theoretical concepts of moral philosophers. Together with them you may imagine the following cases: A railway wagon rolls on a railway track without a master and threatens five people. The signalman A is able to turn aside the wagon onto another track, but on this track works, as Mister A knows, the worker B who cannot be informed. Most of the students asked were of the opinion that it was ethically correct to kill B, a single man, in order to save five men. Let us continue the experiment: What about the situation when the railway track leads toward a railway bridge and the wagon could be stopped by throwing a very heavy stone on the track? There would be no doubt that this would be acceptable. But imagine that there is no stone on the bridge, but a very heavy man: Is it right to throw him down in order to stop the train and to save the five passengers? Most of the asked persons answered: no. But what is the difference between this situation and that with the signalman A? Is the difference: risking respectively omitting vs. acting, which is the clou of the difference between the Schleyer case and the air security case? I could adapt these experiments in relationship to soldiers, and the answers would not change very much.

Another theoretical example. Imagine there are five dying patients staying in a clinic who are missing different organs. All of them could be saved by special transplantations, if a donor were available in time. At one moment the surgeon realizes that there is a man in the waiting room whose organ are very good. In this case nobody would argue that it would be right to take the man's organs by force. Why? Immanuel Kant argues that a man should never be used as a measure to an objective against his will, even if the objective could save the life of other men. That is the essence of the so-called objective theory practised by the Federal Constitutional Court concerning human dignity. Do you agree with it?

Professor Hauser complicated his theoretical experiments; as a result, the answers became more difficult. Rather often, we will have a feeling what to do, but do not know to present consistent reasons. Why do we know acceptable decisions? Professor Hauser developed his answer by an ethnological experiment. He told the railway-story to the Kuna, a small Indian tribe who has little connection with white men and who do not have an institutionalized religion. Of course, he had to modify the story: Instead of a railway he took a crocodile which threatens a canoe. Astonishingly, the answers of those people were nearly the same as those of the American students.

The conclusion of this experiments: The ethical rules are principally harmonized. Though the engaged persons live within very different cultures and believe in very different higher entities and have very different religions, they held the same direction. The biologist may conclude: That depends on a common evolution of men. The rationalist may argue: That is a consequence of similar reasons of groups to survive. Both may emphasize that ethics has little to do with religion, especially with the Christian religion. But the question: Who is competent to rec-





reate ethical rules and to explain and to practise them? still remains. If we focus our interest on this question, we will probably notice that ethical rules and codes practically differ correspondingly to the different cultural circumstances and that a rule which seems to be universal has different meanings and purposes. Therefore I doubt the universality of ethical rules and codes, and I think that their universality is not proved.

Let us only think about allowing vs. prohibiting of killing people and how they depend on definitions and purposes. Many leading Spaniards of the 16<sup>th</sup> century were sure that the South-American Indians were not men like themselves.<sup>29</sup> Another problem of definitions: Whether destroying a foetus means killing a human being depends on a consensus about the nature of a foetus/man. We know that different opinions exist even in Europe. As to purposes: Some cultures allow to kill a man because a god demands a victim or in order to fulfil a rule of vendetta or to repair the honour of the family or because he is an enemy of the state. In contrast to such culture-based rules, the force of legal rules on human dignity, life and freedom depends on a positive legislation, on judicial decisions and on administrated sanctions. All together, those measures may form a consistent system of legal values, following a leitmotif about man, society and state.

At the end of my lecture, I am sorry not to be able to show you an elegant solution of the problems discussed. I think we stand at a crossroads. If we develop our constitutional system according to the developments of the threats of international terrorism, we are forced to limit the traditional rule of law and most of the individual rights, especially the guarantee of human dignity. Otherwise we must accept that life is dangerous, especially in a globalised world, and that we have to live with the threats trying to preserve our freedoms as long as possible. So long as terrorism remains a matter of occasional events, it is not necessary to overthrow a constitutional system that took centuries to become as accepted as Rechtsstaat.

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<sup>29</sup> To this problem: R. Grawert, *Francisco de Vitoria. Naturrecht – Herrschaftsordnung – Völkerrecht*, “Der Staat“ 2000, No. 39, p. 110 sqq.

