

Chapitre 6

THE ROLE OF HUMAN DIGNITY IN THE SWISS LEGAL SYSTEM.

Arguing for a dualistic notion of human dignity

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I. INTRODUCTION

Human dignity does not play a crucial normative role in the Swiss legal system, even though it is often referred to both in political discourse and in legal doctrine. The rhetorical presence of human dignity contrasts with its significance in legal practice. Nevertheless, the Swiss conception of human dignity is

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interesting for constitutional experts because it offers a solution to resolve the problems which usually arise when dealing with human dignity as a legal norm. This has to do with the fact that human dignity, as it is stated in the Swiss Constitution, has two different origins. One origin is the international bioethical discussion about the limits of medically assisted reproduction and gene technology in the 1980s. The other origin is the German Basic Law in which human dignity is anchored in Article 1 paragraph 1 as a founding principle of the State and the fundamental rights. These two lines of development provide grounds for distinguishing two fundamentally different interpretations and functions of human dignity.

II. HISTORICAL VIEW

It is instructive to briefly consider the history of human dignity as a constitutional concept. This can be divided into two periods: the period before and that after the New Swiss Constitution of 1999 was introduced. In the text of the Old Constitution, which dated back to 1874, the notion of human dignity did not appear at all. The Swiss Federal Court nevertheless referred to human dignity from time to time, particularly within the context of the treatment of accused persons and prisoners¹, but also in relation to medically assisted reproduction² and with regard to the treatment of corpses³. In these cases, human dignity functioned as an abstract constitutional principle without having much practical effect either on the outcome or on the reasoning of the decisions of the court. The protection of the individual was mainly left to the liberty rights; among these rights, the right to personal liberty played a central role because it was conceived as the ultimate subsidiary right⁴.

This situation did not change despite the introduction of human dignity into the text of the Swiss Constitution in 1992. Article 24^{novies}, today's Article 119 provided a series of bans in the field of reproductive medicine and gene technology, such as prohibitions on germ line interventions, hybrids, embryo donation and all forms of surrogate motherhood. From an international perspective, such detailed prohibitions on biomedical methods at the level of the

¹ BGE (Bundesgerichtsentscheid = Decision of the Federal Supreme Court) 90 I 29 consid. 3c p. 37 (making drunk an accused person for a medical expertise); 97 I 45 consid. 3 p. 49 (obligation to work in pretrial detention).

² BGE 115 Ia 234 consid. 10b p. 269; 119 Ia 460 consid. 12c p. 501 (prohibition of embryo research).

³ BGE 98 Ia 508 consid. 8b p. 522 (removal of organs for transplant purposes); 111 Ia 231 E. 3b 233 (autopsy).

⁴ BGE 97 I 45 consid. 3 pp. 49-50 (leading case).

Constitution are still a singular phenomenon which can be attributed to the Swiss system of direct democracy. It is interesting to note that these prohibitions were explicitly seen as serving human dignity, personal liberty and the family, as follows from the constitutional text, specifically from the second sentence of paragraph 2. Human dignity appears side by side with personal liberty which in turn comprises the right to life, to integrity and to privacy. Hence, if human dignity is to play an independent role in this context, it can only be understood as a constitutional principle which protects aspects not covered by the above mentioned personal rights⁵.

The next important step in the history of human dignity in Switzerland was marked by the complete revision of the Constitution in 1999. This revision had the modest goal of updating the earlier Constitution by including the constitutional law which had developed over decades especially as a result of the jurisdiction of the Federal Court⁶. This would have led to human dignity finding its way into the New Constitution as a mere constitutional principle. However, the Constitution-maker went further. It seized the opportunity to place human dignity at the beginning of the fundamental rights' catalogue. In doing so, it was guided systematically and textually by Article 1 paragraph 1 of the German Basic Law, with one difference: the inviolability of human dignity was not mentioned. The reason for this deviation was twofold: on the one hand, it was stressed in the parliamentary debates that the inviolability of human dignity according to the German Basic Law had a very specific historical background and could not therefore be transferred into Swiss constitutional law⁷; on the other hand, the reasoning behind it was that the State could not – and should not – enforce human dignity in an absolute way in order to prevent all kinds of violations of human dignity in every day life (e.g. the defamation of politicians in the media)⁸.

Since then, human dignity has become primarily important for the legislator in the field of biomedicine. In this context, the role of human dignity has consisted in justifying restrictions on fundamental rights like the freedom of scientific research, the right to health care access or the guarantee of economic freedom. In this context the Federal Act on research involving embryonic stem

⁵ See Bernhard Rütsche, *Rechte von Ungeborenen auf Leben und Integrität*, Dike/Nomos 2009, p. 307-308.

⁶ Dispatch of the Federal Council on a New Federal Constitution, BBI (Bundesblatt = Federal Papers) 1997 I 28-30, 36-48.

⁷ AB (Amtliches Bulletin = Official Bulletin) 1998 N (Nationalrat = National Council) 151 (vote Koller, Federal Councillor).

⁸ AB 1998 N 149 (vote Vallender), 151 (vote Koller, Federal Councillor). See also BBI 1997 I 141.

cells⁹ and the Act on the transplantation of organs, tissues and cells can be mentioned¹⁰. A very recent example is the draft Federal Act concerning research on human beings¹¹. In these cases, human dignity was used as an argument to restrict or ban research on human embryos¹², commerce with human organic material¹³ and removal of organs from deceased persons¹⁴.

In the case law, the normative relevance of human dignity has not increased significantly since the adoption of the New Constitution. The Federal Court has, however, since its coming into force mentioned human dignity more often in its decisions. Moreover, the Federal Court has provided a more precise definition of human dignity according to Article 7 of the Swiss Constitution. This definition can be found in a case dating back to 2001. It reads as follows:

«Human dignity refers to the very essence of the human being and human beings, which, in the end, cannot be comprehended. It is, in additional consideration of collective views, directed towards the recognition of every single person in its own value, its individual uniqueness and potential difference»¹⁵.

III. UNIQUENESS AS A REASON FOR HUMAN DIGNITY

Having referred to the Federal Court definition, it is now possible to embark on finding an answer to the question of what human dignity really means in Swiss Law. First of all, the Federal Court refers to the value of each individual

⁹ Dated 19 December 2003, SR (Systematische Rechtssammlung = Official Reports) 810.31.

¹⁰ Dated 8 October 2004, SR 810.21.

¹¹ Draft by the Federal Council, dated 21 October 2009, BBI 2009 8163 (for the Federal Assembly).

¹² See Dispatch of the Federal Council on a Federal Act on research involving embryos, BBI 2003 1187-1188, 1236; AB 2003 S (Ständerat = Council of States) 165-166, 177-178, 180, 183 (votes Bieri, rapporteur), 168 (vote Bürgi), 171 (vote Berger), 176 (vote Stadler), 178 (vote Couchebin, Federal Councillor); AB 2003 N 1348, 1366 (votes Randegger, rapporteur).

¹³ See the parliamentary debates on Article 119 paragraph 3 Federal Constitution, AB 1997 N 2410 (Philipon, rapporteur); dispatch of the Federal Council on a Federal Act on the Transplantation of organs, tissues and cells, BBI 2002 67-68; dispatch of the Federal Council on a Federal Act on research involving human beings, BBI 2009 8100. See also Amstadt Report, BBI 1989 III 1098, 1120.

¹⁴ See dispatch of the Federal Council on a Federal Act on the Transplantation of organs, tissues and cells, BBI 2002 132, 143-144.

¹⁵ BGE 127 I 6 consid. 5b pp. 14-15; confirmed in BGE 132 I 49 consid. 5.1 p. 55

person. As can be deduced from earlier decisions¹⁶, what the Court means is the *intrinsic value* of the person. The notion of «intrinsic value» has also been used by the Federal Council, the head of the executive power¹⁷. In this respect, the Swiss notion of human dignity corresponds to the concept of dignity that is generally recognised in Philosophy and Law. It is the concept that each and every human being is, by virtue of its dignity, in itself valuable, regardless of its usefulness to anyone or for anything. The value of the human being lies in itself, not in his utility to achieve something. Human beings are not mere means to achieve ends but ends in themselves¹⁸. This classical Kantian approach expresses precisely what is meant by intrinsic value and, therefore, by human dignity.

That human dignity protects the intrinsic value of the individual is a first substantive concretisation of this notion and lends a non-instrumental character to each individual human existence. Yet the question remains: what does the intrinsic value consist of and from where does it derive? In the quoted clause, the Federal Court refers to the «individual uniqueness and potential difference» of the individual. In a more recent judgement, the Federal Court refers to the «individual being-as-it-is» and its corresponding «particularity» both characteristic for human dignity¹⁹. These statements appear, at first glance, to be new judicial creations, partly inspired by the doctrine²⁰. A closer look however, reveals a continuity that can be traced back to the parliamentary debates on the constitutional article on reproductive medicine and gene technology which took place at the beginning of the 1990s. In this debate, former Federal Councillor Arnold Koller defined human dignity as follows:

«Without any doubt, human dignity plays a very central role in the protection of human beings against technological risks. It is therefore not only a matter demanding an ostensible protection of physical integrity – in the sense of mere security measures; the protection is directed at the human being as a person and as a *singular, distinctive subject*. (...) *Individuality and imperfection* are inherent

¹⁶ BGE 97 I 45 consid. 3 p. 49; 98 Ia 508 consid. 8b p. 522; 111 Ia 231 consid. 3b p. 233 («*valeur propre*»); 123 I 112 consid. 4a p. 118.

¹⁷ Dispatch of the Federal Council on a New Federal Constitution, BBl 1997 I 140 f. See also Amstadt Report, BBl 1989 III 1081, 1131; Dispatch of the Federal Council on the Federal Act on medically assisted human reproduction, BBl 1996 III 222.

¹⁸ IMMANUEL KANT, Groundwork of the Metaphysics of Morals, 1st ed. dated 1785, Academy Edition p. 66-67. See also KANT, Metaphysics of Morals. Doctrine of Virtue, 1st ed. dated 1797, Academy Edition p. 140.

¹⁹ BGE 132 I 49 consid. 5.1 p. 55.

²⁰ See Jörg Paul Müller, Grundrechte in der Schweiz. Im Rahmen der Bundesverfassung von 1999, der UNO-Pakte und der EMRK, 3rd ed., Stämpfli 1999, p. 4 f.

to the human being. Measuring the human being against general norms which are – after all – always more or less arbitrary profoundly violates its dignity.»²¹

It is no coincidence that the singularity and distinctiveness – in other words the uniqueness – of the human being were brought into play as substantive elements of human dignity within the context of the constitutional provision on reproductive medicine and gene technology. Genetic interventions aiming at an enhancement of human nature are paramount examples of the disregard of this uniqueness which includes all defects and imperfections of a human being.

This understanding of human dignity in the sense of uniqueness may match with our intuition. But it doesn't withstand rational scrutiny. The mere fact that a human being is unique as an individual cannot sufficiently explain its intrinsic value. Otherwise, the intrinsic value attribute would have to be applied to each concrete phenomenon in this world, each mouse, each tree and each stone. Obviously, such conclusions are not drawn by the Constitution with its anthropocentric character. The notion of uniqueness must therefore have a point of reference that allows for a moral and legal difference between humans and other beings.

In search of such a reference point, we come to define general properties which qualify the human species as outstanding – unique – within nature as a whole. The most obvious properties which could be used are the ability of human beings to think rationally and to choose freely. Consequently, it is the properties of reason and autonomy which distinguish the members of humankind as unique and endow them with dignity. According to this interpretation, human dignity simply means dignity of the person, understanding «person» in the original philosophical sense of an individual endowed with reason and autonomy²².

But the reference point of uniqueness can also be a very different one, namely that of subjective awareness. According to this interpretation, the moral quality of uniqueness is derived from the fact that the human individual appreciates itself in its singular, unparalleled and unrepeatable personality. The fact that the human being is able to comprehend the uniqueness of its own existence, to care for it and to respect it, is in a sense greatly fortunate perhaps however, also something of a calamity. This subjective reference to its own uniqueness is in itself reason for the

²¹ AB 1990 S 487; AB 1991 N 598 (emphasis added). See also Amstadt Report, BBI 1989 III 1082.

²² See namely CICERO, De officiis, 1st book, 107; ANICIUS M. BOETHIUS, Theological Tractates, Tractate V, Contra Eutychen III, 1-5 («naturae rationabilis individua substantia»); THOMAS AQUINAS, Summa Theologica, I q. 29; JOHN LOCKE, An Essay Concerning Human Understanding, 2nd ed. dated 1694, II.XXVII.9; KANT, Groundwork of the Metaphysics of Morals, 1st ed. dated 1785, Academy Edition p. 65.

self-care and self-respect which human beings have for themselves. According to this approach, human dignity protects the self-respect of human beings²³.

IV. HUMAN DIGNITY AS A FUNDAMENTAL RIGHT AND OBJECTIVE CONSTITUTIONAL PRINCIPLE

We thus have two fundamentally different options to interpret the notion of human dignity. Either human dignity protects the unique properties of human beings as persons, or it protects the subjective esteem of the self-experienced uniqueness. Which interpretation of human dignity is adequate? In the case law of the Federal Court and in other legal sources no explicit clues can be found to aid in deciding between these two options. It is not necessary however to decide between these concepts of human dignity. In fact, Swiss constitutional law offers normative instruments for both concepts.

One of these instruments is Article 7 of the Swiss Constitution which institutes human dignity as a fundamental right. The other is Article 119 paragraph 2 which codifies human dignity as a constitutional principle. My thesis is this: As a fundamental right, human dignity protects the subjective relationship of an individual to its uniqueness, in other words, it protects the individual's self-respect, whereas human dignity as a constitutional principle protects the uniqueness of the human being as a person.

Let us begin with the function of human dignity as a fundamental right. It belongs to the formal properties of rights that they protect individual interests. In contrast, the protection of general or public interests can never be the purpose of rights even if the use of rights is able to have, as a side-effect, a positive impact on public interests²⁴. The subjective awareness of the own uniqueness constitutes without any doubt an individual interest. We are talking about a basic need of the human being, the need to be respected and protected as a unique individual. As a fundamental right, human dignity therefore protects the need of the individual to be recognised in its own, *subjective value*. This need is so fundamental for human well-being that it merits absolute protection. From this it follows an

²³ This interpretation of human dignity is namely held by Avishai Margalit, *The Decent Society*, Harvard University Press 1996, p. 51; Robin S. Dillon, Introduction, in: *Dignity, Character, and Self-Respect*, ed. by Robin S. Dillon, Routledge 1995, p. 6-7; Peter Schaber, *Menschenwürde als Recht, nicht erniedrigt zu werden*, in: *Menschenwürde. Annäherung an einen Begriff*, ed. by Ralf Stoecker, öbv & hpt 2003, p. 125-127.

²⁴ See BERNHARD RÜTSCHE, *Rechte von Ungeborenen auf Leben und Integrität*, Dike/Nomos 2009, p. 358-360.

absolute prohibition of human humiliation by means of torture, discrimination, slavery or in other ways.

As a constitutional principle, human dignity has a different content and a different legal effect. As a constitutional principle, human dignity protects the intrinsic value of the human being as a rational and autonomous person. Thereby, the protection extends not only to actually rational and autonomous individuals but also to developing human life (embryo and fetus) and to deceased human life (dead body). In its role as a constitutional principle, human dignity thus protects all human life that is a person, will be a person and has been a person. This wide scope can be derived from the Constitution itself. The fact that human dignity is mentioned in Article 119 (as well as in Article 119a on transplant medicine) *in addition to* personal freedom only makes sense if it has a wider scope than personal freedom. The developing and the deceased human life which are not bearers of personal freedom rights need therefore to be protected by the constitutional principle of human dignity in these provisions.

The dignity of the person is based on a value judgement by the human moral community. Human beings have an intrinsic value in the eyes of the moral community because they possess the faculty of reason and autonomy. Such a judgement by the moral community is made from an external point of view and is insofar an objective judgement. Accordingly, the intrinsic value of human beings has the structure of an *objective value*. The protection of such an objective value is in the interest of the public whose moral assessment generates the value. As a constitutional principle, human dignity therefore protects a public interest. In this function, human dignity lacks the subjective rights dimension why it is more precise to speak of an «objective constitutional principle».

The protection conferred by such an objective constitutional principle is significantly weaker than the protection afforded by fundamental rights. The protected goods are ultimately the *moral sentiments* of an undefined multitude of persons. Moral sentiments are nourished by moral concepts that are largely dependent on personal attitudes and cultural factors. As opposed to this, *basic needs* protected by fundamental rights are to a considerable degree universal. This means that human dignity as a constitutional principle has to step back in collisions with fundamental rights, if such collisions are unavoidable, since the concerns of part of the society need not prevail over the individual good common to all human beings. Universal interests have priority over particular moral

²⁵ See John Rawls, Theory of Justice, Oxford University Press 1999, p. 392-396; idem, The Priority of Right and Ideas of the Good, in: Philosophy and Public Affairs 17 (1988), p. 251-276; Jürgen Habermas, Erläuterungen zur Diskursethik, Suhrkamp 1991, p. 199-208; Martin Seel, Versuch über die Form des Glücks. Studien zur Ethik, Suhrkamp 1995, p. 321-363.

concepts. This priority rule follows from a principle that is familiar in political philosophy, that is to say the principle that the right is superior to the good²⁵. This principle guarantees a liberal political system by preventing that particular moral ideas, conventions, customs, in short: particular forms of life turn against the individual and suppress it.

The Swiss legal practice does not, however, go as far as that. The legislator has underlined on several occasions that it is making trade-offs between the human dignity of embryos and conflicting fundamental rights. In particular, the Federal Act on research involving embryonic stem cells is the result of trade-offs between the human dignity of embryos and the freedom of research. From this it follows that the legislator implicitly assumes that moral sentiments in the population towards pre-personal human life can be brought down to a common denominator. On the national level, such an assumption might be legitimate. On an international level, though, it would barely be justified in view of the much greater pluralism of moral attitudes.

V. CONCLUSION

With this, we have brought together the constitutional and ethical discourse on human dignity. The particular history and codification of human dignity in the Swiss Constitution means that we do not have to search for a uniform concept of human dignity. We are rather urged to assert a *dualistic notion of human dignity*: on the one hand, human dignity as an inviolable fundamental right protecting the intrinsic value that each human being attributes to him- or herself, on the other hand, as an objective constitutional principle protecting the intrinsic value that every human life has for the moral community.