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THE PROTECTION OF HUMAN DIGNITY (ARTICLE 1 OF THE BASIC LAW)

*Ernst Benda**

“The dignity of man is inviolable. To respect and protect it shall be the duty of all public authority.”¹

I. THE PRINCIPLE AND CONSEQUENCES OF THE PAST

THE interpretation of Article 1 of the Basic Law (protection of human dignity), in one of the most prestigious commentaries on the German Basic Law—the five-volume “Maunz-Dürig”—was written by Günter Dürig in 1959, over forty years ago. So far, it has never been updated. The “Maunz-Dürig” is a loose-leaf publication which issues partial updates twice a year. Somehow it failed, or found it unnecessary, to amend the comments on what is considered to be the central provision of the Basic Law. Dürig died in 1996, and no one has provided a more updated interpretation. Over forty years have passed since Dürig made his insightful interpretation, and since then, there have been countless efforts to interpret the clause on human dignity. We have the jurisdiction of the Federal Constitutional Court, but the most prominent book on the Basic Law refers to an interpretation of another era. Dürig, of course, is still highly readable, but his viewpoint is that of the fifties, and not of the end of our century. Modern problems such as privacy in the electronic age, bio-ethics, gene-transfer, and cloning—fields in which the reference to human dignity is now commonplace—did not exist then.

In 1985, when the Law Faculty at Tübingen celebrated Dürig’s sixty-fifth birthday, Graf Vitzthum pointed out that Dürig’s “interpretation of Article 1 GG is restrictive and no longer sufficient: Recent developments affecting not only the already existing concrete person but potentially the person per se, the human being in itself. . . . In the field of genetic engineering we enter a territory in which the danger concerns not the individual and his dignity but the destruction of what is violable.”² Vitzthum called for a new dogmatic approach which, he said, would need a personality “with the passion, status and dignity of Günter Dürig.”³

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1. GRUNDGESETZ [Constitution] [GG] art. 1, § 1 (F.R.G.).

2. Wolfgang Graf Vitzthum, *Die Menschenwürde als Verfassungsbegriff*, 1985 JZ 201, 209.

3. *Id.*

This remark correctly points to the changing relevance of Article 1. Until recently, it has been generally accepted that the principle of the protection of human dignity deals with the concrete human individual, an existing person whose dignity may be at risk. This does not apply to mankind as a whole.⁴ To be protected in one's dignity is, according to this position, an *individual* fundamental right enforceable by a constitutional complaint before the Federal Constitutional Court.⁵ Dürig denied that fundamental-right character of Article 1, but the Constitutional Court found otherwise. If we had to deal only with an aspirational, but ultimately empty and unenforceable proclamation of a lofty ideal, no further discussion would be necessary. But this has never been the position of the Basic Law. When the Parliamentary Council, in discussing the new West German Constitution, referred to the United Nations Universal Declaration of Human Rights of December 1948,⁶ it recognized the difference between an international law declaration and a constitutional provision.⁷ The United Nations frequently refers to the principle of human dignity. One recent example is the Unesco's "Universal Declaration on the Human Genome and Human Rights" of November 1997. It says, for instance, that "research [in this field] should fully respect human dignity."⁸ Moreover, Section A deals with many applications of the principle of human dignity to various aspects of the human genome.⁹ All these, no matter how noble, are general principles and non-binding declarations. Article 1 of the Basic Law means much more than that. It guarantees protection of an individual's human dignity; it is both "the supreme constitutional principle" and a fundamental right.¹⁰ Therefore, it does not deal with an abstract idea of mankind, but with real men and women. These are the people whose dignity needs protection, especially

4. See J.M. BOCHENSKI, DIE KOMMUNISTISCHE IDEOLOGIE UND DIE WÜRDE DES MENSCHEN 19 (Bonn 1957); I. VON MÜNCH (HRSG), GRUNDGESETZKOMMENTAR, Bd. 1 (München 1981), Rdn. 8 zu art. 1; NIPPERDEY, GRUNDRECHTE Bd. II (HRSG) v. NEUMANN/NIPPERDEY/SCHAUER 3 (Berlin 1954); WILHELM WERTENBRAUCH, GRUNDGESETZ UND MENSCHENWÜRDE 24 (Köln/Berlin 1958); Wintrich, Zur Auslegung und Anwendung des art. 2 Abs. 1 GG, STAAT UND BÜRGER, Festschrift für W. APELT 1 (München/Berlin 1958) 2.

5. See ZIPPELIUS BK (fn. 4), Rdn. 24 ff. m. w. N.; WERNER KRAWIETZ, GEDÄCHTNISCHRIFT F. KLEIN 245 (1977); STARCK ET AL., v. MANGOLDT/KLEIN/STARCK GG (n.2), art. 1, Rdn. 17 f.; I. VON MÜNCH, I. VON MÜNCH (HRSG), GRUNDGESETZKOMMENTAR 3 (Aufl. 1985), Rdn. 27 zu art. 1 GG; PODLECH AK (Fn. 2), Rdn. 61; BVerfGE 61, 126 (137); ERNST BENDA ET AL., HANDBUCH DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 2 (Aufl. 1994), Rdn. 8; THEODOR MAUNZ, & GÜNTER DÜRIG, MAUNZ-DÜRIG, GRUNDGESETZ (1959), art. 1, Rdn. 4.

6. See Protokoll des Ausschusses für Grundsatzfragen des Parl. Amerikanischer Rats, v.18.11.1948 (22 Sitzung vom S. 2).

7. GG art. 1, § 2 ("The German people therefore uphold human rights as inviolable and inalienable and as the basis of every community, of peace and justice in the world.").

8. *United Nations Educational, Scientific and Cultural Organization; Universal Declaration on the Human Genome and Human Rights*, 29th Session (1997); see also UNESDOC (visited Mar. 29, 2000) <<http://unesdoc.unesco.org/ulis/cgi-bin/ulis.pl?database=gctd&sess=29&by=5>>; *Towards a Declaration on the Human Genome* (visited Mar. 29, 2000) <<http://www.unesco.org/ibc/uk/genome/index.html>>.

9. See *id.*

10. BVerfGE 61, 126 (137).

in this century of barbarism. Whatever the human being may lack in the light of an idealistic concept and however imperfect he or she may be, his dignity may not be denied. In Immanuel Kant's words: "*Der Mensch ist zwar unheilig genug, aber die Menschheit in seiner Person muß ihm heilig sein.*"¹¹ I believe this means that by respecting everyone's dignity, we also pay respect to the nature of mankind.

The Basic Law of 1949 was obviously an answer to the system of National Socialism. On May 8, 1945, the Third Reich finally collapsed. Germany was destroyed, defeated, and humiliated. Four years later, the western part of the divided country, on orders of the occupation powers, undertook the task of establishing a constitution. Since the Parliamentary Council hoped for reunification in the near future, it intended to create—as the Preamble of the Basic Law suggests—a new order for a time of transition. However, by establishing the principle of protecting human dignity at the very beginning, and making it the central guiding principle of the Basic Law (unchangeable under the "eternity clause" of Article 79, Section 3 GG even by a qualified majority), a much higher claim was made. If one takes the principle laid down in Article 1 seriously (there is no doubt that this is the purpose of the provision), and if it is also the clear jurisdiction of the Constitutional Court, then it is not an idea for a period of transition, but a fundamental guideline for all times. It could be abolished only by a revolution. Unification finally came, much later than expected in 1949, and it was a complete surprise that it was consequential to not give up the fundamental law in favor of a new constitution—as Article 146 GG provided for—but to have the former GDR join the Basic Law under Article 23 GG.

The Parliamentary Council passed the Basic Law on May 8, 1949 (it was officially proclaimed on May 23, 1949 after the state parliaments had approved it). The date was no accident; the Council intentionally chose this day to recall the unconditional surrender exactly four years earlier. The meeting started at 3 p.m. and, as it turned out, it was near midnight when a number of members still wanted to speak, and the final vote had not been taken. Konrad Adenauer, the Council's president, asked everybody to be as short as possible in order to get the vote on May 8th. A few minutes before midnight, Adenauer proposed to take the vote first and continue the discussion afterwards, and so it happened, and the Basic Law was passed on May 8, 1949.¹² Theodor Heuss referred to this date, saying: "I am not sure how to grasp the symbolic meaning of this date. This 8th of May, in essence, is the most tragic and questionable paradox in our history. Why? Because we have, at the same time, been redeemed and destroyed."¹³

11. IMMANUEL KANT, *GRUNDGESETZ UND MENSCHENWÜRDE* 24 (Wertenbrauch ed., 1958).

12. *See Parlamentarischer Rat*, Sten. Ber. (10 Sitzung S. 139).

13. *Id.* at 136.

This is the historical background of Article 1 GG, and of the entire new constitution. This is essential for a correct understanding of the Basic Law. At an earlier conference of the Dräger Foundation on the German Basic Law, W. Cole Durham, in discussing the Basic Law from an American point of view, remarked on the influence of the different thoughts, values, positions, and socio-economic structures, saying that similar ideas can produce different cultural results.¹⁴ Thus, he said, the meaning of human dignity has a somewhat different understanding in the German and in the American cultures:

In the USA, dignity is connected with self-confidence. If here one talks about dignity, one example is the worker living close to poverty but not prepared to accept public support. To treat everybody with dignity means to help them and to respect them but not to undermine their self-confidence. In Germany the concept of dignity has more to do with duty, the ideal of the moral law as seen in Kant's philosophy. To take a more concrete example, in the USA, the right-to-life discussion in the American abortion cases does not imply the recollection of the Nazi atrocities as in the German abortion controversy.¹⁵

It is true that in this and other examples, the memory of the Nazi past influences the general political discussion, as well as the Constitutional Court jurisdiction. In one of its early decisions, in Volume 1 of the official collection of the cases, the Court rejected the claim that the principle of human dignity supports a right to social assistance for the needy:

If Article 1 states that the dignity of man is inviolable it intends only a negative protection against attack. The second sentence, . . . it is the obligation of all state authority to respect and to protect it does oblige the state to the positive action of protection. This does not mean, however, protection against material needs but protection against attacks on the dignity by others, like humiliation, torture, prosecution etc. . . .¹⁶

This obviously refers to the experience of the Nazi past. Only a later jurisdiction acknowledged that human dignity can also be impaired by material need, and that Article 1, therefore, gives everyone the claim to at least the minimum standard of living depending on the generally accepted level.

In its decision of 1975 declaring the liberalization of abortion unconstitutional, the Court said:

The Basic Law contains principles . . . which can only be explained by the historical experience and by the moral-ethical recollection of the past system of National Socialism. The almighty totalitarian state demanded limitless authority over all aspects of social life and, in pursuing its goals, had no regard for individual life. In contrast to this, the Basic Law established a value-oriented order which puts the

14. See W. Cole Durham, *Eine Grundsätzliche Bewertung Aus Amerikanischer Sicht, in DEUTSCHLAND UND SEIN GRUNDGESETZ* 1993, at 63.

15. *Id.*

16. BVerfGE 1, 97 (104).

individual and his dignity into the very center of all its provisions The [Basic Law] demands the unconditional respect for every life, however seemingly without "social value;" it is therefore inconceivable to take this life without justifying reasons . . . This does not reflect in a derogatory way on other legal systems which did not have the experience with an unjust system and which decided otherwise on the basis of a different historical development and state-philosophical conceptions.¹⁷

The dissenting opinion of two members of the Court sharply rejected this argument. The dissenters pointed out that obviously Article 1 and Article 2 (the right to life) were a reaction against the inhumane ideology and practice of the Nazi regime. However, they said, it would be a complete misunderstanding to derive from this a constitutional necessity to prevent abortion by criminal law. On the contrary, the principal decision of the Basic Law to distance itself from the totalitarian National Socialist state should lead to a more cautious approach to criminal law, "the abuse of which has led to unending suffering in the history of mankind."¹⁸

Even today, more than fifty years after the end of the Nazi regime, this experience still influences German constitutional thinking. But, as the abortion case proves, different and contrary conclusions can be drawn from it. Another example is the discussion on whether "history" teaches that Germany should refrain from military actions as in the NATO Kosovo situation, or on the contrary, whether one should conclude that never again should deportation and "ethnic cleansing" be tolerated and, therefore, military intervention is necessary if other means fail.

II. ADAPTING TO THE NECESSITIES OF OUR TIME

In the fifty years since the establishment of a new order in Germany, the republic has developed into a stable modern democracy. It is a respected country, a member of the United Nations, a partner in the NATO alliance, and its democratic character and respect for the rule of law has never been in doubt. The Basic Law is the binding guideline for all state authority, including, of course, the central provision of Article 1. Human dignity is respected not primarily because the Constitution demands it, but because the political and social order provides the climate and the cultural foundation which prevents any repetition of what happened before in our country and what unfortunately still happens in other parts of the world. Of course, every country has to avoid being too overconfident that "it could not happen here" or "it could not happen in our time." One of the reasons why it did happen in Germany is that many of the population's educated groups and classes (including a number who became victims because of their optimism and their confidence that it "could not happen here") believed that the existing high standard of civilization and culture would prevent a totalitarian regime. But if anything

17. BVerfGE 39, 1 (67).

18. BVerfGE 39, 68 (76).

can be predicted about an uncertain future, we can be fairly sure that the democratic constitutional order established in 1949 will continue to be stable and strong.

This means, in the context of Article 1, that the constitutional safeguards against the recurrence of acts of barbarism like those mentioned by the Constitutional Court in Volume 1 are not obsolete, but there is no actual need for them. To this extent, one might say that Article 1 deals with virtual, but not actual dangers, and we can hope that this will be the situation in the foreseeable future. Of course, offenses against the dignity of man are still possible, and they happen, but they are not part of the system as in the time of dictatorship. If they happen, the Constitutional Court can be called upon by a constitutional complaint. In fact, in the many instances of constitutional complaints—more than 100,000 complaints have been made since the establishment of the Court in 1951—a violation of Article 1 is claimed, often in combination with the alleged violation of other fundamental rights. But only in very few cases did the Court find that such claims had merit. The risk that the high principle of protecting human dignity deteriorates into “small change,” sometimes in a more or less ridiculous context, is greater than the danger that any serious violation of the principle passes undetected, or without sanction. For example, the Constitutional Court had to deal with the claim that the changing of the official titles of judges from “Verwaltungsgerichtsdirektoren” to the simpler and unified title “presiding judge at the administration court” violated Article 1, because according to the claim, it meant a “degradation.”¹⁹ The Court also rejected the claim that a statute providing for the obligation of certain traffic offenders to attend a traffic instruction course, even if not necessary under the circumstances of the case, violates human dignity.²⁰ The Court also refused to find an obligation to bury the urn of a deceased person in a cemetery rather than in a private garden.²¹ Another example of such petty claims is the seriously considered opinion in a law journal that it violates human dignity if one has to obey traffic lights because human actions are regulated by a soulless automatic machine.²² Many similar unfounded claims, sometimes very close to the ridiculous, could be added.²³ If one compares these petty cases with the historical origins of, and the reasons for, Article 1, one would be relieved to find that problems of this kind are among the most pressing concerns of our times.

This does not mean, however, that human dignity is not in danger, in Germany or in any other country. Again, the historical developments, the cultural diversity, and the principal value conceptions of a society help to define the content and the borderlines of human dignity. This

19. See generally BVerfGE 1, 38.

20. See generally BVerfGE 22, 21.

21. See generally BVerfGE 50, 256.

22. See H. Schirmacher, *Gehorsam für automatische Farbzeichen*, DÖV 146 (1957).

23. See I. v. MÜNCH, I. VON MÜNCH (HRSG), GRUNDGESETZKOMMENTAR Rdn. 4 zu art. 1.

applies even to societies which share a common cultural and religious heritage, as in the case of the United States and Germany. While in the United States the death penalty is under dispute but it is not considered to be an offense against human dignity, the Basic Law abolished it in the light of the Nazi experience.²⁴ I share the opinion that even the qualified majority for a constitutional amendment could not reestablish the death penalty because Article 1 prohibits it,²⁵ and because Article 1 demands that every person convicted, even of a major crime, should be re-socialized if at all possible. The Constitutional Court upheld, under Article 1, the obligatory life sentence in murder cases, but added the condition that after a lengthy period of imprisonment there should be a review as to whether the individual should be released, in light of the offender's personality and society's right to be protected against violent criminals.²⁶ Clearly, this does not quite reflect public opinion. After a series of cases against child murders, according to a public opinion poll last year, a majority of 55% demanded the death penalty's re-introduction.²⁷

Criminal law and criminal procedural law are major fields for the defense of human dignity. These are the real test cases for a principle which is easily applicable to people living up to the ideal concept of man dignified by his ability to make a free ethical decision. This is one of the criteria for the uniqueness of human beings and the foundation of their claim to dignity.²⁸ Any closer definition is difficult. According to Theodor Heuss, the Basic Law thesis of human dignity is "not interpreted."²⁹ As the philosopher Hans Jonas said, all we can achieve is the "Heuristik der Furcht: Wir brauchen die Bedrohung des Menschenbildes, um uns im Erschrecken davor des wahren Menschenbildes zu versichern . . . Die Erkennung des malum ist uns unendlich leichter als die des bonum. Was wir nicht wollen, wissen wir viel eher als was wir wollen . . ." ³⁰ And how does one define the dignity of socially unadjusted persons, the mentally insane, and the uncorrectable criminals? A more modest definition restricts itself at least to the potential and abstract ability to live in dignity and with responsibility.³¹ The people most in danger are the racial or religious minorities, the people living on the borderlines of society, and the unadjusted. Under the dignity clause, even in hopeless cases, the states should not pass the final verdict on anyone but must try, however difficult it may seem, to save at least the remnant of dignity hidden in

24. See GG art. 102.

25. See PODLECH AK (n. 2) Rdn. 43; STARCK ET AL., v. MANGOLDT/KLEIN/STARCK GG (n. 2) art. 1, Rdn. 29; A. ZIPPELIUS BK (n. 4) art. 1, Rdn. 70; ERNST BENDA (Anm. 7) Rdn. 21.

26. See generally BVerfGE 45, 187.

27. See generally ZITELMANN, DIE WELT (1998).

28. See H.C. Nipperdey, Die Würde des Menschen, in NEUMANN/NIPPERDEY/SCHNEIDER, DIE GRUNDRECHTE Bd. II (HRSG) 1954, at S. 1; THEODOR MAUNZ & GÜNTER DÜRIG, GRUNDGESETZ (1959) art. 1 Rdn. 18.

29. Vgl. Doemming/Fßlein/Matz, Entstehungsgeschichte der Artikel des GG, 1 JÖR N.F. 49 (1951).

30. HANS JONAS, DAS PRINZIP VERANTWORTUNG 63 f (Frankfurt 1980).

31. See THEODOR MAUNZ & GÜNTER DÜRIG, GRUNDGESETZ (1959) art. 1 Rdn. 18.

every human being. In practice, this affects the treatment of criminals or of socially unstable or mentally ill people. Again, the conclusions are somewhat different from the practice in the United States. Thus, according to the Constitutional Court's and the Supreme Criminal Court's jurisdictions, the lie detector and similar means of finding out the truth by the forced cooperation of the accused, violate Article 1 and are therefore prohibited, even if the accused person wishes to establish his innocence.³²

In the field of privacy, the American and the German concepts are in much closer proximity. The modern state has the tendency to invade, to an ever-expanding extent, into its citizens' personal affairs. To administer problems of social security, taxing, or other fields affecting a large part of the population, and to attend to individual justice which takes into consideration the different personal aspects of each situation, the state needs even more detailed information. The modern technology of the computer age makes this possible. This means that all necessary information can be brought together and collected in a very short time. Such information, however, can also be abused. Data protection, therefore, is one of the most urgent tasks of our day. The Constitutional Court has established the principle that, under Article 1, everyone has the right to what has been called "informational self-determination." The American term "privacy" better expresses the right to protection of the individual private sphere. The "right to be let alone" and the "right of the individual to decide for himself, with only extraordinary exceptions in the interests of society, when and on what terms his acts should be revealed to the general public"³³ are, according to the Constitutional Court's jurisdiction, a necessary consequence of the state's obligation to respect individual dignity.

Of course, exceptions are unavoidable. If a modern state is to provide the means of subsistence for people unable to live by their own efforts in accordance with a minimum standard, it cannot avoid intruding into very personal matters. The state, under Article 1, has this obligation. In particular, a social state cannot avoid the necessity to learn about its citizens and their very personal matters. This is one of the dangers of the European-style welfare state, and it indicates one of the constitutional limits of that type of state. The problem is how to draw the line between information the state needs to fulfill its legitimate duties and the collection of data which is unnecessary or too extensive. It also becomes important to prevent information which may be legitimate for one agency from being transferred to another without valid reasons. The information itself is not

32. See Vgl. schon E. Fechner, *Zu den Gefahren der praefontalen Lobotomie und Leukotomie im Bereich der Psychochirurgie*, DIE SOZIOLOGISCHE GRENZE DER GRUNDRECHTE 15 (Amm. 6) (1954); THEODORE MAUNZ & GÜNTER DÜRIG, GRUNDGESETZ (1959) (n. 4) art. 1, Rdn. 35, art. 2 Abs. 1, Rdn. 35 ff.; PODLECH AK (n. 2), art. 1 Abs. 1, Rdn. 47; zum Lügendetektor BGHSt 5, 332; BVerfGE NJW 1982, 375; zurückhaltender ZIPPELIUS, BK (n. 4), art. 1, Rdn. 86. Most recently, for more practical than constitutional reasons, see BGH, F.A.Z. v. 18.12.1998, S. 13.

33. ALAN F. WESTIN, *PRIVACY AND FREEDOM* 42 (1967).

the main problem as long as it is necessary for a legitimate and clearly defined purpose. The main problem is the “dysfunctional” information which does not serve such a purpose and which can be transported uncontrolled.³⁴

The Constitutional Court’s decision dealing with these principles makes an important and more general observation. The Court notes that if a citizen is uncertain about who knows detailed information about him, he will become cautious, he will hesitate to exercise his citizen’s rights, and he will generally distrust the state. This impedes the individual’s development as a citizen, but it also works against the interests of the community: “Self-determination is a necessary functional precondition of a liberal and democratic community depending on the ability of its citizens to act and to participate in the public affairs.”³⁵ This is one of the foundations of Article 1—free society depends on the freedom and dignity of its citizens. The respect for human rights, as Article 1, section 2 says, is “the basis of every community, of peace and justice in the world.”³⁶

III. ARTICLE 1—FUTURE DEVELOPMENTS

Under the conditions existing in 1949, the creators of the Basic Law could not have foreseen the later developments in science which have since changed the face of at least the developed countries. Computers, genetics, bio-chemistry, and other fields open up new opportunities, and at the same time, new risks to humanity. In political, social, economic, and cultural spheres the world and Germany are completely different from fifty years ago. When unification came in 1990, it was said that the Basic Law, forty years old at that time, would be “too old” to serve as the constitution of the united country. Political considerations aside, this was the argument of Thomas Jefferson who wanted a new constitution every twenty years. In the case of the United States Constitution, it could be claimed that a 200-year old constitution created for a small rural society is not quite the answer to the problems of the leading industrial power of the 20th century. Still, continuity has its merits, creating, in particular, a sense of history and tradition, and thereby the citizens’ loyalty. But changing circumstances need to be accommodated. If the constitution is to answer the needs not only of the past but of the present and of the future as well, it must be flexible. It should be able to adapt to the changing circumstances. The idea of “original intent” discussed in the United States during the Reagan administration misunderstands the idea of the Constitution as a “living organism.” The Constitution, in the words of Justice Brandeis, “is capable of growth, of expansion and of adaptation to new conditions. Growth implies changes. . . . political, economic, and social Because our Constitution possesses the capacity of adaptation,

34. See Ernst Benda, *Privatsphäre und Persönlichkeitsprofil*, FS GEIGER 37 (1974).

35. BVerfGE 65, 1 (43).

36. GG art. 1, § 2.

it has endured as the fundamental law of an ever developing people.”³⁷

The concept of human dignity necessarily claims universal validity, applying to every human being regardless of race, color, citizenship, or any other factor. It also must claim validity in any time; it is either valid no matter how circumstances may change, or it is not valid at all. Obviously, Article 1 was the answer to the violations of human dignity known during the time of the Nazi regime. These dangers do not exist anymore, at least in principle, and hopefully they will not reappear. But new dangers exist or may exist in the future. If the goal of protecting human dignity is still valid, which the Basic Law claims for all eternity,³⁸ it is necessary to consider future risks, and to react to them no matter whether the creators of the Basic Law have, or could have, foreseen them in 1949. If the concept is to function under the changing conditions, it has to adapt to the change and has to realize the historical conditions under which human dignity may be endangered. Thus, as the Constitutional Court said, “the judgment on what conforms with the dignity of man depends on the current state of insight; it cannot claim timeless validity.”

It is true that the completely new questions concerning the manipulation of human genes could not be foreseen when the Basic Law was written, and the makers of the Constitution could not have realized the problems the new techniques might pose in the light of Article 1. Therefore, it was not their “original intent” to answer these problems. However, the conclusion that these are not constitutional questions at all but have to be decided by the political bodies alone³⁹ is not correct. Article 1 intends protection against any form of danger to human dignity, and it does not matter whether any particular form of danger existed in 1949.

But then we have to re-examine what the object of protection is in Article 1. As mentioned in the beginning of this article, the opinion was widely shared that Article 1 deals with real existing persons, not with an abstract idea of what mankind is supposed to be. Article 24 of the UNESCO’s “Universal Declaration on the Human Genome and Human Rights” of November 1997 invites the International Bioethics Committee (“IBC”) to identify “practices that could be contrary to human dignity, such as germ-line interventions.”⁴⁰ More explicitly, the Declaration declares in Article 11 that “practices which are contrary to human dignity, such as reproductive cloning of human beings, shall not be permitted.”⁴¹ These are two of the new questions of human genetics which are widely discussed in many countries, and it is remarkable that, after a very inten-

37. Zit. nach WALTER HALLER, SUPREME COURT UND POLITIK IN DEN USA 11 (Bern 1972).

38. GG art. 79, § 3.

39. ZIPPELIUS, BK, art. 1, Rdn. 78.

40. *United Nations Educational, Scientific and Cultural Organization; Universal Declaration on the Human Genome and Human Rights*, 29th Sess. (1997); see also UNESDOC (visited Mar. 29, 2000) <<http://unesdoc.unesco.org/ulis/cgi-bin/ulis.pl?database=gctd&sess=29&by=5>>; *Towards a Declaration on the Human Genome* (visited Mar. 29, 2000) <<http://www.unesco.org/ibc/uk/genome/index.html>>.

41. See *id.*

sive and controversial discussion, a consensus on these problems could be achieved among the representatives of almost every country in the world. The non-binding declaration appeals to the member countries to develop legislation aligned with this position. In Germany, such legislation has existed since 1990.⁴² New developments, particularly in the field of cloning, indicate that these are not science fiction scenarios, but are clear and present dangers threatening not so much any individual, but the future of mankind as a whole. Apparently, the temptation exists to "improve" the less-than-perfect human being. But the object of such manipulation, and therefore the object of protection, is not an abstract notion of what should define human beings in the future, human "Dollys," or different, individual personalities. In trying to protect the human nature with all its imperfections,⁴³ our legislation takes Article 1 seriously. It protects not only a vague idea; it protects future generations which have a right not to be the product of social and genetic engineering, or cloned copies of somebody else, but to be individual personalities, with all their weaknesses and imperfections.

To some scientists, these seem to be completely naive, old-fashioned ideas not consistent with modern times, and are fruitless efforts to stop what is considered to be the inevitable progress of mankind, the speed and direction of which will be decided not by political bodies or by some out-of-date constitutional lawyers, but by science and its disciples. In other countries, notably in the United States, Canada and Australia, the reluctance to go full-speed into whatever seems possible from a technological point of view seems blatantly reactionary. We share the same cultural heritage, come from the same religious beliefs, and have, on the whole, similar conditions in our political and social scene. Yet after attending a number of international conferences on questions like those connected with human genetics, one has to conclude, hesitantly, that there is not really a common concept of what dignity of man means, even though this is the subject of countless international resolutions and declarations. It is not surprising that authoritarian regimes, even those who signed the United Nations Universal Declaration on Human Rights in 1948, have, at least in their practice and often in their ideology, quite different concepts of human dignity. For instance, they may point more to group rights, and refer to social needs more than to the individual fundamental rights which we take seriously, and generally agree upon. Yet, when talking about human dignity, this quite often has a different meaning even in the countries of the western world. This may be understandable in light of our respective history and present cultural and social conditions. It is comparatively easy to agree on the necessary defense of individual rights against the oppressions so familiar in this century, and in

42. Embryonenschutzgesetz, v. 13.12.1990 (BGBl. I S. 2746).

43. See Ernst Benda, *Erprobung der Menschenwürde am Beispiel der Humangenetik*, AUS POLITIK UND ZEITGESCHICHTE 35 B 3 (1985); Wolfgang Graf Vitzthum, *Die Menschenwürde als Verfassungsbegriff*, 1985 JZ 201, 208.

particular, so frequent and bitter in Europe only a few years ago, and even today. But to understand and to agree on what are the limits of the seemingly "humane" means of improving man and mankind as a whole, this will be the main battlefield of human dignity in the future. We should make a serious effort to begin forming a consensus on this. It will not be easy, but we should begin it now.