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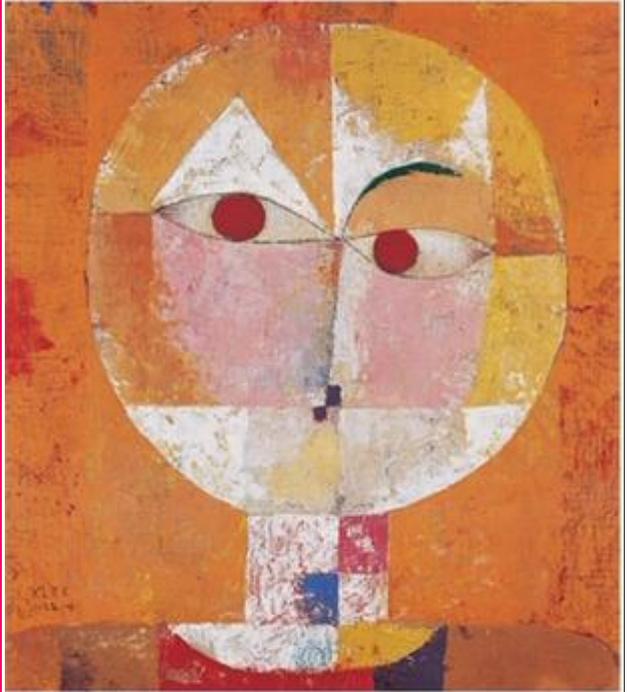
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Human dignity and human rights

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Abstract

The article answers the questions of what human dignity is and why it is important via ethical theories. As a result, the central idea regarding the concept of human dignity in the German constitution is the renouncement of the Nazi past and the grave human rights abuses that characterized it. In the shadow of the Holocaust, lawmakers made dignity the cornerstone of Germany's legal architecture binding all three powers. In conclusion, human dignity and human rights are inseparable, and in order to be accepted as a human right, it shall have a strong link with dignity.

Keywords: Human, Dignity, Rights, Germany, Kant.

Dignidad humana y derechos humanos

Resumen

El artículo responde a las preguntas de qué es la dignidad humana y por qué es importante a través de teorías éticas. Como resultado, la idea central con respecto al concepto de dignidad humana en la constitución alemana es la renuncia al pasado nazi y los graves abusos contra los derechos humanos que lo caracterizaron. A la sombra del Holocausto, los legisladores hicieron de la dignidad la piedra angular de la arquitectura legal de Alemania que vincula a los tres poderes. En conclusión, la dignidad humana y los derechos humanos son inseparables, y para ser aceptado como un derecho humano, debe tener un fuerte vínculo con la dignidad.

Palabras clave: Humanos, Dignidad, Derechos, Alemania, Kant.

1. INTRODUCTION

Human dignity being a basis for human rights has often been neglected in the human rights conversation (Villalobos&Ganga, 2016). Human dignity is perceived to be more philosophical substance rather than legal. Human dignity is central to human rights. This view is reflected in the preambles to a number of human rights treaties, which commonly refer to human dignity as one of the objects of protecting human rights and fundamental freedoms. Dignity often described as a ground of rights. The constitutional courts and human right judicial bodies frequently refer to human dignity while adjudicating cases concerning human rights violation before them. Furthermore, the doctrine of human rights is understood “as the one that supports human dignity based on understanding of the vital environment as the only one capable of containing the prevailing subjectivity” (VILLALOBOS and RAMIREZ, 2018; RAMÍREZ, VILLALOBOS and HERRERA, 2018; RAMÍREZ, AVENDAÑO, ALEMAN, LIZARAZO, RAMÍREZ and CARDONA, 2018).

However, more and more international organizations, tribunals and courts refer to human dignity while delivering decisions or statements. The article looks at the definitions and notions of human dignity. In addition, the jurisprudence of national and international judicial bodies considered in order to give a glance at how the concept of human dignity is used to adjudicate the case. VILLALOBOS and RAMIREZ (2018) and VILLALOBOS, RAMÍREZ and DÍAZ-CID (2019), point out that “Dignity as a founding element of human rights is described from various essentials, since the ways of exercising political power based on controls of human corporality have been diverse in the technoscientific era”.

2. METHODS

The explanatory theory is used in this article, the aim of it is to derive an expectation of the research problem solution. In this paper, ethical theories are used as explanatory theories in order to answer the research question. I will be using two ethical approaches: The Kantian theory of ethics also known as deontology and the Bentham theory of ethics. According to Kantian theory, a moral human being will not consider the outcome of the situation when deciding about the action they should take. The Bentham theory of utilitarianism measures actions based on their consequences. The aforementioned theories will be evaluated and applied to the reasoning of judicial bodies and academic opinion. I will consider what theory is being applied under the current jurisprudence and whether a new standard can or should be applied.

3. RESULTS AND DISCUSSION

In *Bouyid v. Belgium* case, a case that stated that one slap to the face of a handcuffed man by a police officer was sufficient to cross the threshold of degrading treatment under Article 3 ECHR, the ECtHR greatly referred to the concept of human dignity. It held that even if the treatment does not involve actual bodily injury or intense suffering, where the treatment humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be declared as degrading and fall within the prohibition set by Article 3 (DUPRE, 2009; HERNÁNDEZ, VILLALOBOS, MORALES and MORENO, 2016).

Human dignity is frequently found in close proximity to human rights. Human dignity is a concept that is increasingly used in legal discussions and has become a standard ingredient of, *inter alia*, the right to life, integrity and fairness. The German courts and ECtHR extensively refer to human dignity when adjudicating cases concerning violation of the right to life and the right not to be tortured. Therefore, the discussion of the concept of human dignity cannot be left aside for the purposes of this research (SCHROEDER, 2012; MIRZAEI & ALIAKBARI, 2017; RAMÍREZ, ESPINDOLA, RUÍZ and HUGUETH, 2019; HURSEN & BAS, 2019).

The discussion of the human dignity concept is a challenging task. The reason is the unclear, non-uniform meaning of dignity. A clear definition is of crucial importance as the content of the concept influences debates about its inviolability or violability and the justifications to that end. Problems regarding the inviolability of human dignity arise frequently and regarding diverse scenarios, such as euthanasia debates, conjoined twins and the balancing of rights (TASIOULAS, 2014).

Most of the principal international human rights documents contain a provision regarding human dignity. The UN Charter states that the members of the UN determined to reaffirm faith in ... the dignity and worth of a human person. The UDHR and the ICCPR also refer to dignity. Common Article 3 of the Geneva Conventions states that outrages upon personal dignity, in particular, humiliating and degrading treatment shall be prohibited (WALDRON, 2012).

After the apartheid period, the African countries incorporated dignity in the African Charter on Human and People's Rights as a right to

the respect of the dignity inherent in a human being. The American Convention on Human Rights mentions dignity three times. Originally, the European Convention of Human Rights did not contain any specific provision concerning dignity. However, Protocol 13 amended the Convention to include a provision according to which the abolition of the death penalty is crucial for the acknowledgment of the inherent dignity of all human beings. In addition, the European Court of Human Rights, in its jurisprudence, has repeatedly recognized that dignity is an element of several rights in the Convention (SUNSTEIN, 2003; CHUMACEIRO, HERNÁNDEZ, YORI and ZIRITT, 2013).

Furthermore, a considerable number of European countries have provisions concerning human dignity in their constitutions. In states where the constitution does not recognize human dignity as a human right, courts have found that the recognition and protection of human dignity are implied by the enumerated.

SENSEN (2011) states that one of the main reasons for which states decided to keep the concept of human dignity vague and unspecific during the drafting of the UN Charter drafting was the objective of maintaining all the States' agreement to sign the treaty. Doris Schroeder stated that the success of the human dignity concept lies in its vagueness (MAXINE & GOODMAN, 2015; HERNÁNDEZ, CHUMACEIRO, ZIRITT and ACURERO, 2018).

The view that history and tradition influence the human dignity provisions is not shared by some authors. Cass R. Sunstein, for instance, claims that traditions are irrelevant as the protection of human dignity

derives from democracy as a whole and the universality of human rights (SCHROEDER, 2012).

There is agreement that human dignity is a central element of human rights. In order to be recognized as a human right, a right must have a link with human dignity. Human dignity provides the theoretical foundation for human rights and assists in the interpretation of the latter. Tiedemann supports this idea by stating that human dignity is the source of human rights. Neumann asserted that human dignity is a right to be treated with respect. Schroeder believes that human rights and human dignity should be separated as, *inter alia*, the unclear concept of human dignity complicates the concept of human rights considerably (DONALD & KOMMERS, 1971).

Aharon Barak, in his turn, claims that every constitution interprets the concept of human dignity as the humanity of human beings (HERNÁNDEZ, 2007). Jeremy Waldron sees human dignity as the status which entitles a person to the ability to control and regulate their actions in accordance with their own apprehension of norms. He identifies human dignity as a status rather than value. In addition, Waldron argues that ECHR case-law interprets human dignity in a similar manner to the concept of self-determination (SENSEN, 2011).

Despite the fact that there is a considerable number of the theories on human dignity that look at it from different angles, the aftermath of World War II renewed a natural rights theory. The common idea emerging from theorists is that a core postulate of any just and universal system of rights shall include a recognition of the autonomy. Human dignity consists of the freedom of choice of human beings and the autonomy of their will

(HERNÁNDEZ, CHUMACEIRO, ZIRITT and ACURERO, 2018; HERNÁNDEZ, CHUMACEIRO, RAVINA-RIPOLL and DEL RÍO, 2019); it is freedom from humiliation and degradation. It protects individuals from being turned into a means of satisfaction of the will of another. This understanding came from the idea of human dignity as autonomy that attributed to Immanuel Kant. Autonomy is a unique characteristic that differentiates humans from animals.

This understanding is connected to the Kantian approach, which considers dignity as prohibiting the treatment of persons as means, rather than ends are. According to this idea, it is not acceptable to use a person as a tool to achieve a goal. The main critique of the concept is that it equates autonomy with dignity. Since many people cannot fully exercise their autonomy, dignity is regarded as unequally distributed.

David Feldman stated that the notion that dignity can itself be a fundamental right is superficially appealing but ultimately unconvincing. According to Glenn Hughes, describing the drafting of UDHR, the concept of human dignity is a Christian idea with a religious background. Roman Catholic writings viewed human dignity as the unique worth and sacredness of human beings.

Barak believes that despite the vagueness of the concept, the judiciary's role of judges is to develop its meaning case-by-case, just as they have done when interpreting other contested concepts such as equality and liberty (SHAOPING & LIN, 2012).

Due to the fact that the notion of human dignity has been incorporated in the German Constitution and has been used extensively in the case law, it seems to be a good case-study to look to.

The central idea regarding the concept of human dignity in the German constitution is the renouncement of the Nazi past and the grave human rights abuses that characterized it. In the shadow of the Holocaust, lawmakers made dignity the cornerstone of Germany's legal architecture binding all three powers.

In the First Abortion case, the German Constitutional Court decided whether the unborn baby possesses human dignity. In that case, the GCC held that as far as human life exists, it recognizes human dignity. Whether the subject is aware that he/she possesses human dignity is not relevant to its existence. In accordance with the position of the GCC in the Mephisto case, human dignity does not automatically end with the end of human life. In that case, the GCC decided that the publication of a novel about the deceased actor Gustaf Gruendgens, who worked with Nazis and prostitutes his talent for the sake of some tawdry fame and transitory wealth would be incompatible with the constitutional provision on the inviolability of human dignity.

Accordingly, the obligation imposed by Article 1 of the German Constitution to protect the individual from attacks on his dignity does not end with death. Therefore, human dignity is inviolable even after the person has died. Importantly, according to German case-law, human dignity cannot be voluntarily renounced or denied. Thus, the government may intervene even if the person believes that his right is not violated, or consents to its violation for remuneration.

The importance of the historical and social background was confirmed by the GCC in the First Abortion case when it stated that the provisions of the GC should be explained and understood in light of the

historical experience and moral-ethical reconsideration of the past Nazi system. The totalitarian state demanded boundless authority over every aspect of peoples' lives. In contrast, the GC encompasses a value-oriented approach, which places the individual and his dignity at the heart of the normative system. Therefore, Article 1 of the GC is a reaction to past abuses and a safeguard against their repetition.

The Kantian philosophy influences German human dignity perception considerably. In accordance with the categorical imperative, it is immoral to use a person as a means to an end. Rather, a person may be treated only as an end in themselves.

In the Micro census case, it was stated by the GCC that human dignity is at the very top of the value order of the GC. The commitment to the dignity of man dominates the spirit of Article 2 (right to life), as it does all other provisions of the GC. It was held that a State could not take any measure that violates human dignity beyond the limits that Article 2 establishes. In addition, the GC referred to the Kantian treat persons as ends paradigm.

4. SUMMARY

There are several conceptions of human dignity. In addition, these conceptions are not static and the meaning of the concept can change through time. Nevertheless, the current trend in the jurisprudence demonstrates a preference for the Kantian definition of dignity. For this reason, the Kantian understanding of human dignity will be used in this article.

5. CONCLUSION

In order to get a full understanding of what human dignity is, it is crucial to find an appropriate definition. However, as the article showed it might not be always an easy task.

There are several factors that indicate why there is no universally accepted definition of human dignity. Firstly, due to cultural diversity, the concept of dignity varies between and within states. History, religion and traditions influence what constitutes dignity in a given community. Secondly, the different aspects of dignity matter. There is still no consensus as to whether human dignity is a fundamental right or merely a sum total of characteristics, nor as to whether dignity is only a characteristic of individuals or of groups of people or society as well and whether it should be based on an objective assessment or a subjective assessment or both. While everyone has its own understanding, there is a consensus that human dignity and human rights are inseparable, and in order to be accepted as a human right, it shall have a strong link with dignity.

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