DEVELOPMENTS

Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-terrorism Provision in the New Air-transport Security Act

By Oliver Lepsius[*]

A. Anti-terrorism Laws in Germany and the Balancing of Security and Liberty

In a remarkable decision the Federal Constitutional Court has declared a prominent provision of a new German anti-terrorism law unconstitutional and void.[1] The decision attracted wide attention for its treatment of constitutional questions of human life and dignity as well as the constitutional limitations of so-called "security statutes."

After 11 September 2001, Germany saw an incredible increase in security legislation. The lawmakers of both *Bund* (federation) and *Länder* (federal states) enacted several new statutes intended to ameliorate the general level of security in the country.[2] Almost all of these statutes curtailed civil rights by limiting

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[*] Professor for public law, foreign public law and philosophy of law at the University of Bayreuth, Germany. Email: Oliver.Lepsius@uni-bayreuth.de.

[1] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 59 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 751 (2006). Procedurally, the case was triggered by a constitutional complaint (*Verfassungsbeschwerde*) by the former vice president of the Bundestag, Burkhard Hirsch. *See* Burkhard Hirsch, *Verfassungsbeschwerde gegen das Gesetz zur Neuregelung von Luftsicherheitsaufgaben – Bemühungen zur Abwehr des finalen Rettungstotschlags*, 89 KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT (KritV) 1 (2006).

[2] For good overviews, *see* Johannes Saurer, *Die Ausweitung sicherheitsrechtlicher Regelungsansprüche im Kontext der Terrorismusbekämpfung*, 24 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT (NVwZ) 275 (2005); Helmuth Schulze-Fielitz, *Nach dem 11. September: An den Leistungsgrenzen eines verfassungsstaatlichen Polizeirechts?*, *in* RECHT IM PLURALISMUS. FESTSCHRIFT WALTER SCHMITT GLAESER 407 (H.-D. Horn ed., 2003); Kay Nehm, *Ein Jahr danach. Gedanken zum 11. September 2001*, 55 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2665 (2002). For official documentation, *see* BUNDESMINISTERIUM DES INNERN, NACH DEM 11. SEPTEMBER 2001: MAßNAHMEN GEGEN DEN TERROR (2004). *See also Bericht der*

individuals' freedom.[3] They triggered an intense debate in the academic literature about the balancing of security against liberty.[4] For the political branches, however, infringements of civil rights were of little concern; security issues always trumped individual freedom. One could even say that the executive and legislative branches lost an appropriate understanding of individual liberty.[5] The general perception in politics rather emphasizes security as the basis for all freedom and belittles conflicts between liberty and security. According to this perception, more security generally enhances individual freedom. The state, consequently, has a political as well as legal duty to guarantee individual safety.

One of the most prominent statutes to emerge from this new security-oriented paradigm was the so-called Air-transport Security Act (*Luftsicherheitsgesetz*), enacted by the Bundestag in June 2004. The Act entered into effect on 15 January 2005,[6] after Federal President Horst Köhler put aside his concerns about constitutionality and signed the law.[7] The law rearranged provisions of existing statutes under the rubric of the new Air-transport Security Act. It also introduced new competencies for the security agencies. The most prominent provision of the statute contained a somewhat hidden § 14 (3). This section empowered the minister of defense to order that a passenger airplane be shot down, if it could be assumed that the aircraft would be used against the life of others and if the downing is the only means of preventing this present danger. Section 14 (3) was clearly drafted with the attacks of 9/11 in mind. The Bundestag framed the statute as a response to 9/11 and as an effort to prevent attacks patterned after those that occurred on 11 September 2001. Therefore, the statute empowered the minister of defense, as the

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Bundesregierung zu den Auswirkungen des Terrorismusbekämpfungsgesetzes, BT-Innenausschuß A-Drs 15(4)218, available at http://www.cilip.de/terror/gesetze.htm.

[3] For a previous analysis, *see* Oliver Lepsius, *Liberty, Security, and Terrorism: The Legal Position in Germany*, 5 GERMAN LAW JOURNAL (GLJ) 435 (2004), *at* http://www.germanlawjournal.com/article.php?id=422.

[4] Amongst the many publications here is only a brief selection: SICHERHEIT STATT FREIHEIT? (U. Blaschke et al., eds., 2005); WINFRIED BRUGGER, FREIHEIT UND SICHERHEIT. EINE STAATSTHEORETISCHE SKIZZE MIT PRAKTISCHEN BEISPIELEN (2004); Winfried Brugger, Christoph Gusy, *Gewährleistung von Freiheit und Sicherheit im Licht unterschiedlicher Staats- und Verfassungsverständnisse*, 63 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 101, 151 (2004); PETER-TOBIAS STOLL, SICHERHEIT ALS AUFGABE VON STAAT UND GESELLSCHAFT (2003); MARKUS MÖSTL, DIE STAATLICHE GARANTIE FÜR DIE ÖFFENTLICHE SICHERHEIT UND ORDNUNG (2002).

[5] *See* Oliver Lepsius, *Das Luftsicherheitsgesetz und das Grundgesetz*, *in* FESTSCHRIFT BURKHARD HIRSCH 47, 68-72 (F. Roggan ed., 2006).

[6] Luftsicherheitsgesetz [Air-transport Security Act], 12 January 2005, BGBl. I at 78.

[7] BT-Drs. 15/2361; BT- Plen.Prot. 15/10536-10545; BR-Drs. 827/03, 509/04.

commander of the German Air Force,[8] to undertake appropriate counter measures if a hijacked plane is believed to have been converted for use as a terrorist weapon. In this setting, § 14 (3) provides for the ultimate counter measure: shooting down an airplane if there is no other possibility to clear the situation.

It was this provision, in particular, that triggered widespread uproar both in the general public and among lawyers. The issues involved in the case became rather fundamental:[9] May the law empower an official to lawfully sacrifice the life of innocent people for the presumptive sake of the public's safety? May the state legally decide upon the life of those in the plane? Is there a constitutional duty for the state to protect its citizens, which, in turn, may require such a power? Can the death of those innocent citizens in the aircraft be justified with the presumptive rescue of those on the ground, which otherwise would have to die, if the hijacked airplane were to be allowed to hit its target? Is the state, in a case of emergency, allowed to weigh the lives of those in the plane against those in the target areas? Section 14 touched on fundamental issues in German constitutional law. The balancing of security and freedom here came to the ultimate question whether security concerns may override the life of individuals. Does the German Basic Law permit such provisions?

Definitely not, the German Federal Constitutional Court concluded in its judgment of 15 February 2006, as it declared the said provision unconstitutional.[10] The upshot of the decision is this: causing the deliberate death of innocent people as the result of shooting down the plane violates the fundamental right to life of Art. 2 (2)

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[8] Art. 65a Basic Law.

[9] For previous assessments of § 14 (3) air-transport security act, *see* Arndt Sinn, *Tötung Unschuldiger auf Grund § 14 III Luftsicherheitsgesetz – rechtmäßig?*, 24 NEUE ZEITSCHRIFT FÜR STRAFRECHT 585 (2004); Michael Pawlik, *§ 14 Abs. 3 Luftsicherheitsgesetz – ein Tabubruch?*, 59 JURISTENZEITUNG (JZ) 1045 (2004); Wolfram Höfling/Steffen Augsberg, *Luftsicherheit, Grundrechtsregime und Ausnahmezustand*, 60 JURISTENZEITUNG (JZ) 1080 (2005); Jens Kersten, *Die Tötung von Unbeteiligten, 2005 NVwZ 661; Torsten Hartleb, Der neue § 14 III LuftSiG und das Grundrecht auf Leben*, 58 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1397 (2005); Friedhelm Hase, *Das Luftsicherheitsgesetz: Abschuss von Flugzeugen als "Hilfe bei einem Unglücksfall"?*, 59 *DÖV* 213 (2006).

[10] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 59 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 751 (2006). For reviews of the decision, *see* Karsten Baumann, *Das Urteil des BVerfG zum Luftsicherheitseinsatz der Streitkräfte*, 28 JURA 447 (2006); Manfred Baldus, *Gefahrenabwehr in Ausnahmelagen*, 25 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT (NVwZ) 532 (2006); Christof Gramm, *Der wehrlose Verfassungsstaat?*, 121 DEUTSCHES VERWALTUNGSBLATT (DVBl.) 653 (2006); Wolf-Rüdiger Schenke, *Die Verfassungswidrigkeit des § 14 III LuftSiG*, 59 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 736 (2006); Daniela Winkler, *Verfassungsmäßigkeit des Luftsicherheitsgesetzes*, 25 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT (NVwZ) 536 (2006).

sentence 1 and Art. 1 (1) of the Basic Law. If one looks closer, the Court's judgment contains basically three parts which will be discussed in the following.

B. Enumerated Powers and Federalism Issues

The first part of the ruling deals with the question whether the federation has the constitutional power to pursue such action. Article 30 of the Basic Law generally presumes the legislative and administrative jurisdiction of the *Länder*. The *Bund* may only regulate and take action if the Basic Law specifically allows it to do so. As in the United States, the German federal level is confined to enumerated powers. In the case of the Air-transport Security Act, the Court found two different powers to be in conflict. On one hand, ensuring public security is the legal responsibility of the *Länder*. The *Länder* are in charge of the police powers and possess the police forces. Hence, the prevention of terrorist attacks by the police lies in the *Länder's* field of responsibility, both in executive and legislative terms. In fact, security law is one of the areas over which the *Länder* still exercise primary legislative competencies. On the other hand, the *Bund* has (apart from special border control forces) no security forces at its disposal. In the area of public security the *Bund* is constitutionally limited to a supportive role, *i.e.* to providing intelligence services. Yet, the *Bund* is in charge of the military forces (Art. 65a, 87a of the Basic Law). However, they generally may not be deployed within a domestic context. Article 87a (2) provides that, apart from defense, the Armed Forces may be employed only to the extent expressly permitted by the Basic Law.

With regard to shooting down airplanes the law provides complicated legislative competencies. The *Bund*, of course, has the power to shoot down aircraft in military combat, in a case of a state of defense pursuant to Art. 87a (2) of the Basic Law. The Basic Law, hence, permits the *Bund* to undertake measures pursuant to § 14 (3) of the Air-transport Security Act if shooting down an aircraft could be called an act of defense, or, if the Basic Law contains another article permitting the domestic employment of the Armed Forces. The *Länder* are generally in charge of security measures but they do not have the military means for shooting down aircraft. The *Bund*, on the other hand, has the military means but may not generally use them in a domestic setting apart from defense purposes.

In the legislative process two arguments were raised in order to justify military action against civil aircraft pursuant to § 14 (3) of the Air-transport Security Act. The first argument draws on a loose interpretation of the term "defense" in Art. 87a (2) of the Basic Law. This term, it was argued, should be construed with regard to new security challenges. Nowadays, defense should not only mean an attack by armed forces (as is mentioned in Art. 115a (1) of the Basic Law) but should also comprise terrorist attacks. The argument reflects the American usage of "war,"

which is also disconnected from military attacks by armed forces ("war on terrorism", "war on drugs").[11] The Federal Constitutional Court, however, did not accept this argument. The Court asserted a traditional view of the concept of "war" (defense against military attacks by armed forces), as it had in several previous decisions.[12] Therefore, the Court saw no need to construe the term any further. An extensive interpretation of the term "defense," the Court concluded, provided no solution.

The second argument drew on the rather remote provision of Article 35 (2) and (3) of the Basic Law. Article 35 (2) and (3) provide for the *Bund's* assistance to the *Länder* in a case of a natural disaster or an especially grave accident. In these circumstances a *Land* may request the assistance of the police forces of other *Länder* or the Federal Armed Forces. If the disaster or accident endangers a region larger than a single *Land*, the Federal Government may use the Armed Forces to support the police forces of the relevant *Länder*. The Court concluded that neither provision was suited for the grant to the *Bund* by the Air-transport Security Act. The Court, in its interpretation of Article 35 of the Basic Law, made it quite clear that, under Article 35, neither the *Länder* nor the federal government gain additional powers. If the Armed Forces assist the *Länder* police forces under the authority of Article 35 of the Basic Law, they act under state law and hence are confined to the same rules applying to the *Länder* police forces. Even under Article 35 of the Basic Law the *Bund* cannot use its military powers for domestic purposes. In other words: In Article 35 (2) and (3) the Basic Law allows for the technical assistance and supply of personnel but it does not alter the powers of the *Länder* or the *Bund* respectively. This, however, is what would be required under § 14 of the Air-transport Security Act, because § 14 empowers the federal minister of defense with police powers that are legally confined to *Länder* authorities and, at the same time, provides for military means that the constitution only permits in defense or combat situations. The Court's interpretation of Article 35 of the Basic Law was strictly literal. It also stressed the legislative history of Article 35 (2) and (3) of the Basic Law, which was amended in 1968 as a reaction to the Hamburg flooding catastrophe of 1962. In that

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[11] The issue was discussed controversially in the legal literature, *see, e.g.,* Burkhard Hirsch, *Einsatz der Bundeswehr in inneren Krisen*, 36 ZEITSCHRIFT FÜR RECHTSPOLITIK 378 (2003); Manfred Baldus, *Art. 87a*, *in* GRUNDGESETZ margin number 13f., 35ff (von Mangoldt et al., eds., 5th ed. 2005); Manfred Baldus, *Streitkräfteeinsatz zur Gefahrenabwehr im Luftraum*, 23 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT (NVwZ) 1278 (2004); Mattias Fischer, *Terrorismusbekämpfung durch die Bundeswehr im Inneren Deutschlands?*, 59 JURISTENZEITUNG (JZ) 376 (2004); Tobias Linke, *Innere Sicherheit durch die Bundeswehr?*, 129 ARCHIV DES ÖFFENTLICHEN RECHTS (AöR) 489 (2004); Henriette Sattler, *Terrorabwehr durch die Streitkräfte nicht ohne Grundgesetzänderung*, 23 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT (NVwZ) 1286 (2004).

[12] BVerfGE 28, 243 (261); BVerfGE 48, 127 (160); BVerfGE 69, 1 (21).

instance the Armed Forces assisted the City of Hamburg's police forces with equipment and personnel.

The Court's construction of Article 35 of the Basic Law merits praise. The clause clearly appeals only to matters of technical support and assistance and conveys no intention on the part of the framers to shift competencies from the *Länder* to the federation. With its literal construction the Court also prevented all efforts to circumvent Article 87 (2) of the Basic Law and to establish a domestic use of the military. Instead the Court's ruling maintained a clear boundary between military purposes and police powers and, therefore, between war and the prevention of danger.[13] The holding of the Court on this part of the decision was absolutely clear: Under the Basic Law the federal government lacks the authority to pursue the measures outlined in § 14 (3) of the Air-transport Security Act. Thus, the statute violates the constitutionally enumerated powers of the federation and therefore had to be declared unconstitutional and void.

C. Fundamental Right to Life and Human Dignity

The Court could have stopped its reasoning with the declaration of a violation of enumerated powers, *i.e.* a lack of constitutionally awarded competence. It went on, however, and scrutinized the statute also under the fundamental rights provisions of the Basic Law. By amending the Constitution (Art. 79 (1), (2) of the Basic Law) the legislature (*Bundestag* and *Bundesrat*) could overcome the formal obstacles and establish a new federal power to employ military forces domestically. According to Article 79 (3) of the Basic Law, a constitutional amendment is foreclosed, however, if it touches (among others) the realm of human dignity. The Court, therefore, took the opportunity to decide the matter also on the merits of the fundamental right to human life and dignity. It decided more than it had to decide, and bowed to public expectations. In fact, it was the issues of human life and dignity that stirred the public's acute interest in the legislation. In the second part of its reasoning the Court stated that the relevant provision of the Air-transport Security Act also violated the fundamental right to human life in Article 2 (2) of the Basic Law as well as the human dignity clause in Article 1 (1) sentence 1 of the Basic Law. The Court quoted both provisions jointly ("Art. 2 (2) in conjunction with Art. 1 (1) sentence 1 Basic Law", as the Court usually puts it[14]).

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[13] For a clear constitutional separation of defense (military action) and the prevention of danger (police powers), see Christoph Gusy, *supra* note 4, at 186.

[14] DONALD KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 305 (1989) (observing: "The human dignity clause is almost always read in tandem with the general liberty interest secured by the personality, inviolability, and right-to-life clauses of Article 2. The relationship between Article 1 and Article 2 is symbiotic; all of their provisions nourish and reinforce one another.").

I. Human Life and Dignity

The application of this constitutional standard to § 14 (3) of the Air-transport Security Act led to a foreseeable outcome. A federal statute allowing the sacrifice of innocent life in order to save the lives of others violates the constitution.

1. Violation of Art. 1 (1) Basic Law

The state must respect human beings' constitutional right to dignity. The Court concluded that § 14 of the Air-transport Security Act showed no respect for the well-being of those on board the target airplane. They are simply treated as part of the aircraft, which has to be destroyed since it has become a weapon. The Court explained that, under these circumstances, the state has given up the passengers' lives for the purpose of the presumptive prevention of a severe danger. The Court found that such a legal treatment neglects the constitutional status of the individual as a subject with dignity and inalienable rights. When the law takes their death into account as unavoidable damage for the benefit of other objectives, the Court explained, it transforms persons into things and delegalizes them (*verdinglicht und zugleich entrechtlicht*). The state denies the protection of the law to those who, as passengers-turned-victims in the aircraft, ought to be protected. Doing this, the Court reasoned, the law denies to those on board the value the constitution attributes to every human being.[15]

The Court explained that it would reach a different result if there are no innocent people on board. If there are only terrorists on the plane the state may shoot down the aircraft.[16] In this case the offenders may not benefit, neither from the fundamental right to life nor from the human dignity clause. They are not treated without dignity because they have acted intentionally. The legal order does not deny the offenders' status as a legal subject. On the contrary, it imputes the offenders' behavior to them. They are responsible for their behavior and treated alike. The Court explained that the state does not deny human dignity to the offenders and, therefore, may shoot down the plane if there are no hostages affected.

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[15] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 59 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 751, at C. II. 2. b) aa) and bb) (2006).

[16] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 59 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 751, at C. II. 2. b) cc) (2006).

2. Disconnection of Human Life and Dignity

The judgement of the Court in this part is interesting for three reasons. First, the Court strikes down a statute by saying that it violates Article 1 (1) sentence 1 of the Basic Law, the human dignity clause of the constitution. Human dignity is the ultimate legal protection provided by the German constitution,[17] and, therefore, should not be invoked lightly.[18] The major legal effect of the dignity clause lies in its absolute protection.[19] Any violation of human dignity immediately calls for the unconstitutionality of the statute or the administrative action. In contrast to the fundamental rights provisions in the Basic Law, the dignity clause does not allow for a legal limitation. The difference may be shown by contrasting dignity (Art. 1 (1) sentence 1 Basic Law) with the fundamental right to life (Art. 2 (2) Basic Law). The right to life, according to Article 2 (2) sentence 3 of the Basic Law, entails a limitation: Statutes may infringe the right to life if they can be legally justified under the proportionality principle (*Grundsatz der Verhältnismäßigkeit*).[20] The

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[17] For some illuminating remarks by American authors on the concept of human dignity in German constitutional law, *see, e.g.,* Edward Eberle, *Human Dignity, Privacy and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963, 971-978; EDWARD EBERLE, DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES 41-53 (2002). With regard to criminal punishment and the law of insult, *see* JAMES WHITMAN, HARSH JUSTICE 84-92 (2003); James Whitman, *Enforcing Civility and Respect*, 109 YALE L. J. 1279, 1332, 1386 (2000). For a comparative survey, *see* KIRSTEN LEHNING, DER VERFASSUNGSRECHTLICHE SCHUTZ DER WÜRDE DES MENSCHEN IN DEUTSCHLAND UND DEN USA (2003); WINFRIED BRUGGER, LIBERALISMUS, PLURALISMUS, KOMMUNITARISMUS 381-410 (1999).

[18] For warnings against belittling the dignity clause, *see* Peter-Alexis Albrecht, *Vom Ende des Unverfügbaren. Anmerkungen zur Politik tektonischer Zerstörungen menschlicher Würde*, 87 KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT (KritV) 121 (2004); Friedhelm Hufen, *Erosion der Menschenwürde?*, 59 JURISTENZEITUNG (JZ) 313 (2004); Ralf Poscher, "*Die Würde des Menschen ist unantastbar*", 59 JURISTENZEITUNG (JZ) 756 (2004); Thomas Groß, *Terrorbekämpfung und Grundrechte*, 35 KRITISCHE JUSTIZ 1 (2002).

[19] *See* Hans Michael Heinig, *Menschenwürde*, *in* EVANGELISCHES STAATSLEXIKON 1516, 1519-1521 (W. Heun et al., eds., 2006). *See also* CHRISTOPH ENDERS, DIE MENSCHENWÜRDE IN DER VERFASSUNGSORDNUNG. ZUR DOGMATIK DES ART. 1 GG (1997); Günter Dürig, *Der Grundsatz von der Menschenwürde*, 81 ARCHIV DES ÖFFENTLICHEN RECHTS (AöR) 117 (1956). For an excellent analysis of the philosophical implications of the concept, *see* Hasso Hofmann, *Die versprochene Menschenwürde*, 118 ARCHIV DES ÖFFENTLICHEN RECHTS (AöR) 353 (1993); and Hasso Hofmann, *Menschenwürdeinterpretation am Scheideweg der Disziplinen*, 46 DER STAAT (forthcoming 2007).

[20] The proportionality principle was developed by the German Federal Constitutional Court as a limitation of the limitation clauses of the civil rights provisions of the Basic Law. The most prominent being the Pharmacy Case BVerfGE 7, 377 (1958). More recently the Court also attributed the proportionality principle as part of the *Rechtsstaat* (rule of law), *see* BVerfGE 92, 277 (325-326). It has become one of the core principles of German constitutional jurisprudence. The first monograph to establish the principle under the synonym *Übermaßverbot* was: PETER LERCHE, ÜBERMAß UND VERFASSUNGSRECHT (1961). Lerche's 2nd edition contains a new preface, which furnishes an overview of

dignity clause, however, does not contain any limitation clause. In contrast to all other fundamental rights provisions in the German constitution it leads to an all-or-nothing approach and gives unlimited, absolute protection. Human dignity, therefore, is a truly sharp weapon in German constitutional law, and it also practically denies the parliament any regulatory action in the respective area. Hence, the Court should use the human dignity clause only as an ultimate remedy.

The jurisprudence of the Constitutional Court, however, invokes Article 1 (1) of the Basic Law rather frequently. It has become quite common for the Court to cite the provision in conjunction with a specific basic right. The purpose of this reasoning is to establish a core protection in the specific basic rights that does not underlie the usual limitation clauses. With this technique, applying human dignity partially to specific basic rights provisions, the Court could establish stricter scrutiny in touchy areas of individual freedom. Quite recently, for instance, it struck down a federal law which allowed the interception and wire-tapping of dwellings (*großer Lauschangriff*) as (among others) a violation of human dignity.[21]

This approach, to apply Article 1 (1) of the Basic Law partially within the area of specific basic rights, establishes a core protection of these individual rights. It also conflicts with the absolute and ultimate character of the human dignity clause.

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its development since the 1960s. PETER LERCHE, ÜBERMAß UND VERFASSUNGSRECHT (2nd ed. 1999). *See* Peter Lerche, *Übermaß und Verfassungsrecht. Bemerkungen zur Wiederauflage*, *in* AUSGEWÄHLTE ABHANDLUNGEN 244-268 (R. Scholz et al., eds., 2004). *See also* BODO PIEROTH/BERNHARD SCHLINK, GRUNDRECHTE, STAATSRECHT II § 6 IV 4 (21st ed. 2005); Lothar Michael, *Verhältnismäßigkeit*, *in* EVANGELISCHES STAATSLEXIKON 2571-2577 (W. Heun et al., eds., 4th ed. 2006); Bernhard Schlink, *Der Grundsatz der Verhältnismäßigkeit*, *in* II FESTSCHRIFT 50 JAHRE BUNDESVERFASSUNGSGERICHT 445-466 (P. Badura/H. Dreier eds., 2001); Andreas von Arnauld, *Die normtheoretische Begründung des Verältnismäßigkeitsgrundsatzes*, 55 JURISTENZEITUNG (JZ) 276 (2000); Klaus Stern, *Zur Entstehung und Ableitung des Übermaßverbots*, *in* WEGE UND VERFAHREN DES VERFASSUNGSLEBENS. FESTSCHRIFT FÜR PETER LERCHE 165-175 (P. Badura/R. Scholz eds., 1993). How the proportionality principle is now becoming an integral part of European Community Law and influences the constitutional law of other European countries is sketched by Juliane Kokott, *Grundrechtliche Schranken und Schrankenschranken*, *in* I HANDBUCH DER GRUNDRECHTE IN DEUTSCHLAND UND EUROPA 853, 896-903 (D. Merten/H.-J. Papier eds., 2004). *See* Eckhard Pache, *Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung der Gerichte der Europäischen Gemeinschaften*, 18 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT (NVwZ) 1033 (1999).

[21] BVerfGE 109, 279. For a discussion, *see* Oliver Lepsius, *Der große Lauschangriff vor dem Bundesverfassungsgericht*, 27 JURA 433 (part I), 586 (part II) (2005); Fredrik Roggan, *Unerhörte Intimsphäre*, *in* SICHERHEIT STATT FREIHEIT? 51 (U. Blaschke et al., eds., 2005); Jutta Stender-Vorwachs, *The Decision of the Bundesverfassungsgericht of March 3, 2004, Concerning Acoustic Surveillance of Housing Space*, 5 GERMAN LAW JOURNAL 1337 (2004), at http://www.germanlawjournal.com/pdf/Vol05No11/PDF_Vol_05_No_11_1337-1348_Public_Vorwachs.pdf.

Dignity has become, as David Currie put it, a pretty flexible concept.[22] But, it generates rigid outcomes (all-or-nothing approach). This approach dates back to 1975 and was created in the Constitutional Court's first abortion decision.[23] In this decision the Court applied the right to life in conjunction with the human dignity clause in saying that human dignity comprises at least the right to live.[24] It hence combined Articles 1 (1) and 2 (2) of the Basic Law and, with this technique, outstripped the limitation provision in Article 2 (2) sentence 3. The effect was that abortion laws were, to a large extent, unconstitutional because they violated the absolute right of the fetus to live; at least Article 1 (1) of the Basic Law blocked the justification of abortion that could be undertaken within the interpretation of Article 2 (2) sentence 3.

This flexible (with regard to the cases) and rigid (with regard to the outcomes) approach came under increasing criticism in the legal literature.[25] Especially the combination of dignity and life lead to unforeseen problems in new areas of regulation such as biotechnology and genetics or a right to a decent death for the incurably ill. Statutory regulation in these areas is menaced by the verdict of a violation of Article 1 (1) of the Basic Law as soon as the issue of life comes up. In order to mitigate the all-or-nothing consequences, jurists have argued for a gradual approach with regard to human dignity. In the literature, dignity became a concept

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[22] DAVID CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 315 (1994). KOMMERS, *supra* note 14, at 305 (Kommers calls the dignity clause "a fertile source of constitutional litigation" and compares its open meaning to the due process clause in American constitutional law."). According to Eberle, the Court has been rather freewheeling in this regard [the definition of dignity], "consistent with its desire to set up proactively a new legal order." EBERLE, *supra* note 17, at 43. Eberle also concludes that "human dignity in Germany is most like the American concept of modern substantive due process, particularly rights of privacy." Id. at 53.

[23] BVerfGE 39, 1. See EBERLE, *supra* note 17, at 161-188; KOMMERS, *supra* note 14, at 360-362. For a comparison with the U.S., *see* WINFRIED BRUGGER, DEMOKRATIE, FREIHEIT, GLEICHHEIT, 211-225 (2002).

[24] BVerfGE 39, 1 (41-44).

[25] There is a vast legal literature concerning the contemporary application of human dignity. For some aspects of the more recent issues, *see* Ulfried Neumann, *Die Tyrannei der Würde*, 84 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 153 (1998); Werner Heun, *Embryonenforschung und Verfassung – Lebensrecht und Menschenwürde des Embryos*, 57 JURISTENZEITUNG (JZ) 517 (2002); GENTECHNIK UND MENSCHENWÜRDE (O. Höffe et al., eds., 2002); Ernst-Wolfgang Böckenförde, *Menschenwürde als normatives Prinzip*, 58 JURISTENZEITUNG (JZ) 809 (2003); Martin Nettesheim, *Die Garantie der Menschenwürde zwischen metaphysischer Überhöhung und bloßem Abwägungstopos*, 130 ARCHIV DES ÖFFENTLICHEN RECHTS (AöR) 71 (2005); Christian Starck, *Embryonic Stem Cell Research According to German and European Law*, 7 GERMAN LAW JOURNAL 625 (2006), *at* http://www.germanlawjournal.com/pdf/Vol07No07/PDF_Vol_07_No_07_625-656_Articles_Starck.pdf.

which grew and increased in the same way the life of the embryo materialized.[26] The legal literature, hence, did not question the conjunction of dignity and life but tried to establish a gradually shifting understanding of dignity that enables flexible solutions and avoids rigid absolute protection.

The new decision of the Federal Constitutional Court, however, applies the dignity clause differently. Literally, the Court reasserts the conjunction of Articles 1 (1) and 2 (2). For its reasoning the Court does not need to draw upon the right to life at all, although it is mentioned in the judgment. The decision could have limited the reasoning to the human dignity clause alone and could have let Article 2 (2) fall into oblivion. Hence it was not the rejection of the right to life but the mere treatment of individuals as objects without a proper legal protection at all that caused the unconstitutionality of the statute. The Court made an allusion to the older "object-formula" of the 1950s.[27] This formula interprets the dignity clause without any references to individual human life; it only alludes to the abstract way human beings are treated by the legal order. Thus, it has the advantage of disconnecting life and dignity again, and, therefore, reversing a development in German constitutional interpretation that was never truly convincing, that created unforeseeable inconsistencies and contradicted the wording of the Basic Law, which clearly distinguishes between dignity (with absolute protection) and life (with limitable protection).

The interesting development in the *Air-transport Security Act* case concerning Article 1 jurisprudence consequently can be summarized as follows. The Court practically gave up the long standing connection of life and dignity and reversed the jurisprudence it had been pursuing since the 1970s. Instead it invoked an older approach toward human dignity which seemed to have been overcome in the literature. However, the Court was either not courageous enough to declare so openly or it did not realize the remarkable shift away from the right to life that it was taking.

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[26] For an overview see Matthias Herdegen, *Art. 1*, *in* GRUNDGESETZ KOMMENTAR margin numbers 30-47 (Maunz-Dürig eds., 2003 suppl.).

[27] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 59 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 751 (2006). According to BVerfGE 45, 187 (227), this formula meant: "It is contrary to human dignity to make the individual the mere tool of the state. The principle that 'each person must always be a end in himself' applies unreservedly to all areas of law; the intrinsic dignity of the person consists in acknowledging him as an independent personality." Translation from CURRIE, *supra* note 22, at 314.

II. Balancing Liberty in Favor of Security

The Court's jurisprudence of dignity and life in this case entails another consequence. Only at first sight might it seem a little paradoxical that the constitutional protection of those in the aircraft is thwarted when one refers to the individual right to life and is strengthened when one concentrates on the rather objective concept of human dignity. However, the right to life in Article 2 (2) sentence 3 of the Basic Law contains a limitation clause the *Bundestag* (federal parliament) could invoke in this case. It could be argued that the said statute, on the one hand, sacrifices the lives of the innocent on board, but it does so, on the other hand, with the goal of rescuing an unknown number of victims on the ground. The state finds itself in an emergency and has to balance the larger against the lesser evil. Hence shooting down the plane could be constitutional when the state is constitutionally compelled to rescue the lives of the victims on the ground. In this view the right to life becomes an ambivalent right: The state may only save the lives of some by sacrificing the lives of others.

The Court foreclosed such an argument. In a way, it denied the parliament the right to make tragic choices. When such decisions must be made, those who have to act at least cannot rest upon the authorization of the law. The law does not give an easy answer in advance, for instance, permitting the state to easily balance the amount of possible deaths. A far-reaching implication of the decision also signals the authorities that collective goods may not, under any circumstances, outstrip individual rights. The collective right to safety at least is not in a constitutionally privileged position in contrast to individual rights. Therefore, the Court has readjusted the balancing of liberty and security and has given individual liberty a higher stake than collective security. This balancing, in general, contrasts pointedly with the approach lawmakers have been promoting over the last years. The decision of 15 February 2006 fits into a coherent line of other decisions in which the Federal Constitutional Court also emphasized the value and importance of individual rights against collective security interests.[28] The Court, hence, has become the most reliable safeguard against the silent erosion of individual rights in the aftermath of 11 September 2001.

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[28] *See*, *e.g.*, BVerfGE 109, 279 (wiretapping of apartments); BVerfGE 110, 33 (interception of international telecommunication); BVerfGE 113, 348 (interception of national telecommunication with the aim of prevention of danger); Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 1 BvR 518/02 (4 April 2006), http://www.bverfg.de/entscheidungen/ rs20060404_1bvr051802.html (grid searches of German Muslims after 9/11).

III. No Room for "Duties of Protection"

With reference to life and human dignity the decision merits attention in a third regard. Astonishingly, the Court did not use the concept of a duty to protect in this case. The conjunction of Articles 1 and 2 in the first abortion case in 1975 also lead to the creation of constitutional "duties to protect" or affirmative duties (*Schutzpflichten*).[29] These affirmative duties have been controversial ever since.[30] The Court itself downplayed their role from case to case although the justices never explicitly gave up their judge-made law.[31] In the legal literature and among jurists, however, the duties to protect were mostly highly welcomed.[32] They provided a pleasant way to bind the parliament positively and build up constitutional expectations drawing upon the authors' personal interpretation of the Basic Law.

In this case the duties to protect could have played a major role in the legal argument. One could have argued that the state confronts a constitutional duty to rescue the lives of those on the ground, and in order to do so must sacrifice the lives of those in the plane. In fact, politicians like then-Federal Minister of the Interior, Otto Schily, and his legal consultants, have made this argument. The Court, however, did not take up their reasoning. Instead it further downplayed the role of the duties to protect and barely mentioned them. There is only a brief passage in the judgment, basically stating that constitutional duties to protect were not applicable in the case. The aim of the statute had already violated human dignity.

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[29] *See* David Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986); W. Cole Durham, *General Assessment of the Basic Law*, *in* GERMANY AND ITS BASIC LAW 37 (P. Kirchhof/D. Kommers eds., 1993).

[30] *See* BVerfGE 39, 1 (73) (dissenting opinion of Justices Rupp-v. Brünneck and Simon). For critical assessments of the protection duties, *see* Eberhard Denninger, 21 KRITISCHE JUSTIZ 1 (1988); Rainer Wahl/Johannes Masing, *Schutz durch Eingriff?*, 45 JURISTENZEITUNG (JZ) 553 (1990); Peter Preu, *Freiheitsgefährdung durch die Lehre von den grundrechtlichen Schutzpflichten*, 46 JURISTENZEITUNG (JZ) 265 (1991); Karl-Eberhard Hain, *Der Gesetzgeber in der Klemme zwischen Übermaß- und Untermaßverbot*, 108 DEUTSCHES VERWALTUNGSBLATT (DVBl.) 982 (1993); Christoph Enders, *Die Privatisierung des Öffentlichen durch die grundrechtlichen Schutzpflichten und seine Rekonstruktion aus der Lehre von den Staatszwecken*, 35 DER STAAT 351 (1996); OLIVER LEPSIUS, BESITZ UND SACHHERRSCHAFT IM ÖFFENTLICHEN RECHT 394-98 (2002).

[31] The duties, again, have been invoked in BVerfGE 114, 1 (33) and BVerfGE 114, 73 (89). In neither case does the Court justify the application of the *Schutzpflichten*-concept.

[32] JOSEF ISENSEE, DAS GRUNDRECHT AUF SICHERHEIT (1983); GERHARD ROBBERS, SICHERHEIT ALS MENSCHENRECHT (1987); JOHANNES DIETLEIN, DIE LEHRE VON DEN GRUNDRECHTLICHEN SCHUTZPFLICHTEN (1996); IVO APPEL, STAATLICHE ZUKUNFTS- UND ENTWICKLUNGSVORSORGE 94-99, 112-116 (2005).

Therefore, a justification with respect to duties to protect was foreclosed.[33] That the Court did not refer to its own judge-made duties to protect is even more remarkable since the prospect of shooting down aircraft offered a prominent case to clarify the concept. One could not imagine a better case for a positive argument regarding duties to protect. That the Court has not taken up this opportunity clearly indicates that the duties to protect have seen their heyday and rather must confront their jurisprudential death.[34]

D. Questions of Fact and Proportionality

The Court, thirdly, addresses very interesting factual questions.[35] It does so by practically applying the proportionality test to the Air-transport Security Act. However, it does not effectively apply the test since the case was already resolved by relying on the dignity clause. Usually, the proportionality-test applies when a statute limits civil liberties. Whether this is in accordance with the fundamental right's limitation clause is mainly checked with a test of proportionality:[36] The statute must pursue a legitimate end. The means of pursuance, then, must fulfill three requirements, they must be: suitable (*geeignet*); necessary (*erforderlich*); and appropriate or reasonably fair (*angemessen*). The test enables the Federal Constitutional Court to address questions of fact and ask whether the parliament has chosen appropriate means for specific purposes. One can compare the test's requirements roughly with reasonableness in U.S. constitutional law.

In the *Air-transport Security Act* case the implicit application of the proportionality test led to truly interesting observations about the parliament's view of the reality and the level of security. The parliament was convinced that shooting down airplanes was a feasible means to increase the level of security. The Court's investigation, however, showed a different picture, and it was not the least this revelation that convinced the Court of the statute's unconstitutionality. The statute, simply, could never achieve what it pretended to pursue. The information at the time of the downing will be unclear. Any order to down the aircraft will be made under uncertain conditions. The Minister of Defense may only gain a rough knowledge of the actual situation. How can he know that the plane will be used as a terrorist weapon and will be forced to crash? Terrorists won't announce their intentions. Pilots won't give such information either (in the event they could) because, in doing so, they would sign their own death verdict. The authorities, then, may only gain the necessary information of what is going on by external means, let's say by the air force's monitoring of the aircraft from an accompanying military jet. But what will they see? It is almost impossible to look into the

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[33] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 59 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 751 at C. II. 2. b) aa) (2006).

[34] *See* Oliver Lepsius, *Das Luftsicherheitsgesetz und das Grundgesetz*, *in* FESTSCHRIFT BURKHARD HIRSCH 47, 62-64 (F. Roggan ed., 2006).

[35] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 59 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 751 at C. II. 2. b) bb) bbb) and ccc) (2006).

[36] *See supra* note 20.

cockpit windows from the outside in the air. Hence, the Federal Constitutional Court concluded that the Minister necessarily has to take his or her decision in a state of uncertainty. He or she cannot know whether the plane actually creates a danger or, rather, is an accident without a terrorist cause. The downing order, then, inevitably will be based on a presumption. Conjecture, however, does not suffice as a rationale for the most severe infringement of civil rights, namely death. This conjecture becomes even more problematic since there are dubious incidents in air traffic every other day. It is quite common that planes lose radio contact and that the tower has lost control over a flight. If one would accept uncertain information as a sufficient base for downing decisions there would be a significant danger of fatal errors with regard to the amount of unclear situations in today's air traffic.

One thing at least is clear. The downing order will kill all on board. It remains unclear, however, for what purpose. The authorities presume that the order will save the lives of others. Yet, this is and remains a mere presumption, and the authorities won't get sufficient information on this particularly crucial fact. The Court calls the situation "speculative" – and this is far from sufficient for such a difficult and weighty decision. Consequently, the statute assumed a situation which actually will never happen. It therefore failed the proportionality test because the statutory means are not suitable (the Court does not draw this conclusion explicitly, however).

Further doubts arise concerning the technical feasibility of a downing. It will take the Armed Forces around 15 minutes to reach the aircraft. If one takes into account an alarm period of another 15 minutes, an action could be taken only after half an hour. Considering also the fact that the territory of Germany may be overflown within 60 minutes, it seems highly unlikely that there ever will be sufficient time for the military forces to react, and for the Minister to be called, informed and be in a state to order the downing. The whole setting the statute presumes, then, is at odds with reality. It draws upon a speculative situation which hardly ever will occur.

One cannot but call the statute a rather symbolic act. If one did not have 11 September 2001 in mind one would never accept the legislatures' factual presumptions. The statute, then, is clearly modeled after these attacks; it reacts to a single act and at the same time presumes its reiteration. The drafting of the statute discloses a rather weird expectation: It pretends to prevent something which will hardly happen again in this way. It was also this gap between the factual speculation on the one hand and the determination to sacrifice the lives of innocent people on the other hand, which facilitated the outcome of the case.

E. Conclusion

This is a remarkable decision, particularly in three regards. Firstly, the Court, with impressive consistency, again struck down a prominent anti-terrorism statute. The

Karlsruhe Court corrects the parliament's watering down of individual liberties and, at the same time, effectively limits contemporary statutory approaches to presumably increase the level of security by decreasing the level of civil liberties. In the legislative process the balancing of freedom and security has become one sided. It is the Federal Constitutional Court, not parliament, that guards individual freedom in these days.

Secondly, the judgment implicitly announces a re-introduction of an Article 1 jurisprudence that concentrates more on an autonomous understanding of the human dignity clause of the German Constitution and disentangles its understanding from the fundamental right to life in Article 2 (2) of the Basic Law. Human dignity, again, will be violated if the state treats individuals as objects or denies them the status to be an end in themselves. In the long run this development will, in my view, tend to provoke sound effects since the conjunction of Articles 1 (1) and 2 (2) in the aftermath of the 1975 abortion decision lead to considerable problems in the Court's jurisprudence and did not lead to reasonable outcomes with regard to new questions surrounding genetics, human life and death. If the Court keeps on separating both constitutional provisions from each other, the interpretation of the Basic Law will benefit from both an increased flexibility with regard to life issues and a stricter standard concerning challenges of human dignity. The reluctance to apply the concept of duties to protect also merits support. One can only hope that the Court will further downgrade this idea from the 1970s.

The third beneficial effect calls for the implicit denial of special constitutional justifications in an emergency.[37] Obviously the Court is not impressed with worst case scenarios. It did not bow to claims for the effectiveness of state action against terrorist attacks. There is no tendency in the judgement that the Court will lower either factual or normative requirements in order to justify infringements of civil rights in an emergency. Rather, the Court emphasized the importance of a strictly text-based legal interpretation (*strikte Texttreue*)[38] and, hence, objected to functional interpretation of the constitution with the purpose to empower the Armed Forces to fulfil domestic tasks apart from defense against an enemy's military attack. In general, the Constitutional Court proved to be a reliable guardian of the constitution both in civil rights issues and competencies (enumerated powers, federalism).

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[37] For a brief discussion of this problem (without reference to the case), see Erhard Denninger, *Normalfall oder Grenzfall als Ausgangspunkt rechtsphilosophischer Konstruktion?*, *in* GRENZEN ALS THEMA DER RECHTS- UND SOZIALPHILOSOPHIE 37 (W. Brugger/G. Haverkate eds., 2002).

[38] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 59 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 751 at C. II. 2. a) bb) aaa) (2006).