



## The Basis of Constitutional Adjudication in Germany

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<p><b>Keywords:</b> Constitutional Court; Constitutional Interpretation; Federal Human Rights Protection; Human Dignity; Judicial Independence.</p> <p><b>DOI:</b> <a href="https://doi.org/10.25041/fiatjustisia.v16no1.2419">10.25041/fiatjustisia.v16no1.2419</a></p>	<p><i>The Federal Constitutional Court of Germany leads the judiciary's independence by protecting human rights within the Basic Law's legal framework. In this case, the jurisdiction of the Court is essential to analyse comprehensively. The first and foremost function is interpretation. It is concerned with the extent of a supreme federal authority's rights and duties and the citizens who can enjoy the fundamental rights under the Basic Law. The rest are abstract judicial review, constitutional complaint, and concrete judicial review. These all seem to depend on the Court's interpretation and the supremacy of human dignity. Therefore, the issues lie when human dignity becomes a constitutional principle to resolve economic, social, and political disputes within the constitutional framework both in Germany and the European Union in practice. This research will use qualitative approach method. According to the literature reviews, human dignity is supreme, but it does not mean absolute.</i></p>

### A. Introduction

The German legal system belongs to the civil law tradition. Civil laws are characterised by codifications and deductive methods of legal reasoning. The German legal traditions firmly frame constitutional interpretation and jurisprudence.<sup>1</sup> The Federal Republic of Germany is based on the rule of law. The idea to establish a Constitutional Court is an attempt to uphold the rule of law principle and provide maximum protection for democracy and

<sup>1</sup> Werner Heun, *The Constitution of Germany: A Contextual Analysis* (London: Hurt Publishing, 2011), p. 3-4.

the human rights of citizens.<sup>2</sup> An essential element of the rule of law under the constitution is the division of powers, and it implies a distinction between legislative executive and judicial functions.<sup>3</sup> The political system that aspires to law considers judicial independence indispensable.<sup>4</sup>

The basic principles of the constitution, such as the rule of law, the focus of a social state, federalism, and democracy under Article 20 (1), inviolable of human dignity due to the first Article of the Basic Law, may not be altered even by the constitutional amendment by the majority vote of the legislature. Therefore, an amendment to the Basic Law affecting the Federation's division into *Länder*, their participation in the legislation procedure, or the constitutional principles set up in Articles 1 and 20 shall not be admissible.<sup>5</sup> It is to protect the constitutional democracy and to prevent its' enemies.<sup>6</sup> Notably, the Federal Constitutional Court (FCC)'s legal reasoning should be connected to the state's principles of federalism, parliamentary democracy, and the rule of law. All are comprehensively covered with human dignity.

This research will discover the solutions to the political and social problems within the legal framework that are not contrary to the Basic Law and study the term of human dignity and technical interpretation of the Federal Constitutional Court by exploring the case-law of the Court within the qualitative approach method. Historical analysis is applied to investigate the origination of human dignity in the world's legal system. Focusing on textual analysis is also essential to collecting the necessary data. Furthermore, the case study approach is utilised to conclude by analysing the cases before the Federal Constitutional Court and the European Courts regarding the legal reasoning on human rights issues. This research can be an example of getting more ideas for the countries with Constitutional Courts and developing their states' constitutional notions through interpretation.

## B. Discussion

### 1. Basic Law and Human Dignity

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<sup>2</sup> I Dewa Gede Palguna, "Constitutional Complaint and The Protection of Citizens The Constitutional Citizens," *Constitutional Review* 3, no. 1 (2017): 1–23, <https://doi.org/10.31078/consrev311>.

<sup>3</sup> Gotthard Wöhrmann, "The Federal Constitutional Court: An Introduction," German Law Archive, 2013, <https://germanlawarchive.iuscomp.org/?p=363>.

<sup>4</sup> Alexander Hamilton, "Federalist No. 78" (1788); Tomas Plank, "The Essential Elements of Judicial Independence and the Experience of Pre-Soviet Russia," *William and Merry Will of Rights Journal* 5, no. 1 (1996): 1–74, <https://scholarship.law.wm.edu/wmborj/vol5/iss1/2/>.

<sup>5</sup> Article 79 (3) Basic Law of 1949

<sup>6</sup> Jutta Limbach, "How a Constitution Can Safeguard the Democracy: The German Experience," 2016, [https://ccpl.law.hku.hk/content/uploads/2018/03/Pub/Conf\\_Seminar/JuttaLimbach.pdf](https://ccpl.law.hku.hk/content/uploads/2018/03/Pub/Conf_Seminar/JuttaLimbach.pdf).

The German Basic Law is the most significant constitution, and no other law cannot conflict with it. The Basic Law in Germany consists of the most fundamental rights that comprehensively regulate German society's needs. The fundamental rights and freedoms are mentioned in Articles 1 to 19. They are human dignity as a human right, personal privilege including the right to self-determined death and the right to life, equality before the law, freedom of faith and conscience, freedom of assembly and association, freedom of movement, and property rights right of asylum and so on. The Basic Law enacted in West Germany has been applied to all German citizens since 1990. The human rights guaranteed in the Basic law are to make sure to defeat the atrocities of Nazi times.<sup>7</sup> Some of the fundamental rights are conferred to the German citizens and the foreigners who live in Germany.

These are the images of constitutional supremacy where a state practices a parliamentary system. The government cannot amend the Basic Law, and the Federal Constitutional Court is responsible for safeguarding the Basic Law. On the other hand, constitutional law is supremacy over the legislature's statutes. Therefore, the FCC can declare legislation contrary to the Basic Law null and void.<sup>8</sup>

The new constitutional rights are coming up nowadays because of the human rights seekers. Consequently, some controversial things, such as claiming a right to die that is the opposite of the right to life and are a critical social matter. There is no express international or regional provision that legally recognizes the right to die. Nevertheless, human dignity's determination is the main thing in reasoning cases before the German Federal Constitutional Court (FCC). The FCC's technical interpretation contributes to developing the fundamental human rights guaranteed under the Basic Law and constitutional justice as a community need. In this case, the concept of human dignity plays a very prominent role in German Constitutionalism.

Article 1 of the Basic Law states as follows:<sup>9</sup>

- (1) Human dignity shall not be violable. To protect and respect it shall be the duty of all state authorities.
- (2) Therefore, the Germans acknowledge inviolable and inalienable human rights as every community, peace, and justice's basics.

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<sup>7</sup> Handbook Germany, "German Basic Law," 2020, <https://handbookgermany.de/en/rights-laws/basic-law.html>.

<sup>8</sup> Section 78 the FCC Act of 1951; Anke Eilers, "The Binding Effect of Federal Constitutional Court Decision upon Political Institutions" (Karlsruhe, 2003), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU\(2003\)018-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU(2003)018-e).

<sup>9</sup> Article 1 Basic Law of 1949; Christoph Enders, "A Right to Have Rights: The German Constitutional Concept of Human Dignity," *NUJS Law Review* 3, no. 3 (2010): 253–64, <http://nujlawreview.org/2016/12/03/right-to-have-rights-the-german-constitutional-concept-of-human-dignity/>.

(3) The fundamental rights shall bind the three branches of the government as directly applicable law.

The concept of human dignity is rooted in the religious tradition, the ideas of the 18<sup>th</sup>-century European civilization, and contemporary secular theories of autonomy and self-determination.<sup>10</sup> The sixteen *Länder* of Germany also have their constitutions, and they establish a constitutional court individually. *Länder's* thirteen constitutional laws mention human dignity deal with Article 1 of the Basic Law for the Federation, 1949.<sup>11</sup>

Dignity is declared to be untouchable and sacrosanct. According to the authors, dignity is acceptable as the foundation for fundamental rights. If a conflict between dignity and other human rights emerges, human dignity is the priority. Therefore, the Basic Law's first article establishes that state authorities shall respect and protect human dignity.<sup>12</sup> The European Union (EU) Charter of Fundamental Rights 2000 prescribed that everyone has the right to be treated with dignity.<sup>13</sup>

Historically in the legal system based on Roman Law, human dignity was personal, and status and human dignity refer to the differentiation between human beings and animals. The animals know bodily satisfaction, and man has physical and mental feelings.<sup>14</sup> Human dignity was first used in the United Nations Charter (UN) to respect human rights and human dignity after the first and second world wars.<sup>15</sup> Universalism also grants that all human beings are born free and equal in dignity and rights in its first provision.<sup>16</sup> Later in Western Germany, constitutional texts include human dignity as the fundamental principle of protecting human rights.<sup>17</sup>

Human dignity's interest demands that the constitutional jurist extract how the inviolability's constitutional essence is appreciated correctly.<sup>18</sup>

<sup>10</sup> Rainer Ebert and Reginald M. J. Oduor, "The Concept of Human Dignity in German and Kenyan Constitutional Law," *Thought and Practice* 4, no. 1 (2012): 43–73, <https://www.ajol.info/index.php/tp/article/view/81222>.

<sup>11</sup> Ariel L. Bendor and Michael Sachs, "The Constitutional Status of Human Dignity in Germany and Israel," *Israel Law Review* 44, no. 1–2 (2011): 25–61, <https://doi.org/10.1017/S0021223700000959>.

<sup>12</sup> Dieter Grimm, Matthias Wendel, and Tobias Reinbacher, "European Constitutionalism and German Basic Law," in *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law*, ed. Anneli Albi and Samo Bardutzky (Hague: ASSER Press, 2019), 432.

<sup>13</sup> Article 1 The Charter of the Fundamental Rights of the European Union of 2000.

<sup>14</sup> Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights," *The European Journal of International Law* 19, no. 4 (2008): 655–724, <https://doi.org/10.1093/ejil/chn043>.

<sup>15</sup> The preamble of the UN Charter of 1945.

<sup>16</sup> Article 1 Universal Declaration of Human Rights of 1948.

<sup>17</sup> Bendor and Sachs, "The Constitutional Status of Human Dignity in Germany and Israel."

<sup>18</sup> Grimm, Wendel, and Reinbacher, "European Constitutionalism and German Basic Law."

German Federal Constitutional Court uses the interpretation approach in conformity with the community law.<sup>19</sup> In drafting legislation, the judgments of the FCC are taking place in a prominent role. The role of the FCC makes the German constitutional system significant and quizzing concurrently.<sup>20</sup> The integration clause allowing for the transfer of sovereign powers is crucial for the constitutional foundation of Germany's participation in the EU's multi-level Constitutionalism.<sup>21</sup>

In continental Europe and some developed countries, abortion is controversial regarding the right to life between pregnant women and embryos. Under section 1 of the German Civil Code, a human can enjoy other civil and political rights only by completing their birth. Nonetheless, the European Court of Human Rights (ECtHR) decided in two cases that the right to life does not concern the embryo since it is not a legal person.<sup>22</sup> Human dignity encompasses the right to equality, freedom of speech, the right to due process, the independence of demonstrating, etc.<sup>23</sup> The alternative form is that human dignity is a human right with dignity.<sup>24</sup> The FCC interprets Human Dignity as a general principle of law,<sup>25</sup> and defines it as a human right regarding human rights cases. Humans deserve dignity, not because of their lifelong achievements, but because they are already human beings.<sup>26</sup> Accordingly, human dignity is essential and complex in several instances, and it cannot be fixable exactly. But Human Dignity seems suitable, and it works as the functional foundation of all human rights in my perspective.<sup>27</sup>

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<sup>19</sup> Joachim Sanden, "Methods of Interpretation of the Constitution: Estonia Way's in an Increasingly Integrated Europe," *Juridica International*, no. 8 (2003): 128–39, [https://www.juridicainternational.eu/article\\_full.php?uri=2003\\_VIII\\_128\\_methods-of-interpreting-the-constitution-estonias-way-in-an-increasingly-integrated-europe](https://www.juridicainternational.eu/article_full.php?uri=2003_VIII_128_methods-of-interpreting-the-constitution-estonias-way-in-an-increasingly-integrated-europe).

<sup>20</sup> Palguna, "Constitutional Complaint and The Protection of Citizens The Constitutional Citizens."

<sup>21</sup> Grimm, Wendel, and Reinbacher, "European Constitutionalism and German Basic Law."

<sup>22</sup> Enders, "A Right to Have Rights: The German Constitutional Concept of Human Dignity"; *Vo v. France*, Grand Chamber Judgment (2004); *Evans v. the United Kingdom*, Grand Chamber Judgment (2006).

<sup>23</sup> Bendor and Sachs, "The Constitutional Status of Human Dignity in Germany and Israel."

<sup>24</sup> Conor O' Mahony, "There Is No Right to Dignity," *International Journal of Constitutional Law* 10, no. 2 (2012): 551–74, <https://doi.org/10.1093/icon/mos010>.

<sup>25</sup> *Omega Spielhallen and Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, Case C-36/02 (2004); McCrudden, "Human Dignity and Judicial Interpretation of Human Rights."

<sup>26</sup> Ruud ter Meulen, "Dignity, Posthumanism, and the Community of Values," *The American Journal of Bioethics* 10, no. 7 (2010): 69–70, <https://doi.org/10.1080/15265161003728852>.

<sup>27</sup> The Uni Tutor, "Why Human Dignity Is Important?," 2015, <https://www.theunitutor.com/essay-human-dignity-important/>.

## 2. Interpretation of the Basic law as a "Living Instrument."

The German interpretation is doctrinal; the judges first interpret the literal meaning, and later they favour systematic elucidation, objective reasoning, and the history of the rule. According to the FCC's decisions, "No single constitutional provision should be taken out of its context and interpreted by it, and it should be in such a way as to render it consistent with the fundamental principles of the Basic Law and the intentions of its framers."<sup>28</sup> The FCC has suggested the unity of the constitution as a logical-teleological entity.<sup>29</sup>

The extensions of the rights and duties of a supreme federal body or other parties vested by the Basic Law or by the rule of procedure of the highest federated body are dependent on the analysis of the provision of Basic Law by the FCC. Interpretation is one of the FCC jurisdictions, and it is the first and foremost task of the Court. The other competencies are abstract review, constitutional complaint, and concrete judicial review.<sup>30</sup> Generally, civil law countries prefer applying codification of laws to the discretionary power. Nonetheless, they are also the FCC's unique functions based on the interpretation of the Basic Law. It is also significant because of the FCC's pivotal role in Germany's performance, as the European Union nations practice civil law systems.

Nonetheless, constitutional concepts can be different in states' systems. It is because of the adaptation of human dignity as a general principle of law in Germany. Regarding the ECtHR concept, the living instrument requires the minimum standard of seriousness to get access in harmony with societal progress.<sup>31</sup> From a comparative point of view, according to Professor Kommers, the FCC generally draws on sources priority, including unwritten principles, the written constitutional text, the practice of German Constitutionalism, the history of the constitution, judicial precedents, academic writings, and comparative and international material than the intentions of the original framers. Professor Goldsworthy comments that the constitutional interpretation process is guided everywhere by similar considerations. They include the originalism or technical-legal meaning of words, evidence of their original intentions or purpose, underlying

<sup>28</sup> Geraldina Gonzalez de la Vega, "Two Different Approaches in Constitutional Interpretation with a Particular Focus on Religious Freedom: A Comparative Study between Germany and the United States," *Boletín Mexicano de Derecho Comparado* 41, no. 122 (2007): 795–833, [http://www.scielo.org.mx/scielo.php?script=sci\\_arttext&pid=S0041-86332008000200007](http://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S0041-86332008000200007).

<sup>29</sup> Donald P. Kommers, "German Constitutionalism: A Prolegomenon," *Emory Law Journal* 40 (1991): 837–73, [https://scholarship.law.nd.edu/law\\_faculty\\_scholarship/98](https://scholarship.law.nd.edu/law_faculty_scholarship/98).

<sup>30</sup> Article 93 and 100 Basic Law of 1949.

<sup>31</sup> Yutaka Arai-Yokoi, "Grading Scale of Degradation: Identifying The Threshold of Degrading Treatment or Punishment Under Article 3 ECHR," *Netherlands Quarterly of Human Rights* 21, no. 3 (2003): 385–421, <https://doi.org/10.1177/016934410302100303>.

principles, judicial precedents, scholarly writings, comparative international law, contemporary understandings of justice, and social needs.<sup>32</sup>

Nonetheless, the first case regarding human dignity before the ECtHR was *Tyrer v United Kingdom* (25 April 1978). The judges recalled the Convention as a living instrument that must be interpreted inconsistently with the present-day situations to be consistent with the requirements of the society.<sup>33</sup> In this case, the applicants claimed the violation of inhuman or degrading treatment or punishment before the Commission.<sup>34</sup>

### **a. Principle of Proportionality**

The principle of proportionality is to measure the legitimacy of all the state organs. It has become a constitutional principle of general importance because of the FCC.<sup>35</sup> Proportionality indicates a requirement of constitutional law that appeared in a state election law's constitutionality in 1954.<sup>36</sup>

Proportionality has two stages. The first is to establish that the governmental action has violated a right. Second, the government must show that it pursued a legitimate end and that the infringement was proportional. Proportionality requires (1) suitability, (2) necessity, and (3) proportionality in the strict sense.<sup>37</sup> Even a complainant can lodge a constitutional complaint with the FCC, and it can be admissible and inadmissible. It is because of the proportionality based on the facts of the cases. In this case, human dignity shall be protected and respectable, but it does not include getting priority over others. Human dignity is inviolable and thus not subject to proportionality.<sup>38</sup> Nobody should be discriminated against on their human dignity based on sex, race, colour, religion, even regarding the poor or the rich. Human beings have equality before the law,<sup>39</sup> and the right to hear before an independent and impartial tribunal.<sup>40</sup>

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<sup>32</sup> Vicki C. Jackson, "Constitution as 'Living Trees'? Comparative Constitutional Law and Interpretative Metaphors," *Fordham Law Review* 75, no. 2 (2006): 921–60, <https://ir.lawnet.fordham.edu/flr/vol75/iss2/21>.

<sup>33</sup> Para 31 *Tyrer v. The United Kingdom*, Court (Chamber) Judgement (1978).

<sup>34</sup> Article 3 European Convention of Human Rights of 1950.

<sup>35</sup> Yutaka Arai-Takahashi, "Proportionality-A German Approach," *Amicus Curiae*, no. 19 (1999): 11–13, <https://doi.org/10.14296/ac.v1999i19.1458>.

<sup>36</sup> Gertrude Lubbe-Wolff, "The Principle of Proportionality In the Case-Law of the German Federal Constitutional Court," *Human Rights Law Journal* 34, no. 6 (2014): 12–17.

<sup>37</sup> Moshe Cohen-Eliya and Iddo Porat, "American Balancing and German Proportionality: A Historical Origins," *International Journal of Constitutional Law* 8, no. 2 (2010): 263–86, <https://doi.org/10.1093/icon/moq004>.

<sup>38</sup> AC Steinmann, "The Core Meaning of Human Dignity," *Potchefstroom Electronic Law Journal* 19, no. 1 (2016): 1–32, <https://doi.org/10.17159/1727-3781/2016/v19i0a1244>.

<sup>39</sup> Article 20 EU Charter of Fundamental Rights of 2000.

<sup>40</sup> Articles 7 and 10 Universal Declaration of Human Rights of 1948.

In the Omega, a case referred to the Court of Justice by the Federal Administrative Court of Germany. Omega is a German company established in 1994 that gives services for installing laser sport in Bonn by the British company's technology and equipment supplies "Pulsar." Bonn's police authority ordered Omega to supply an exact illustration of the game's working intended in the laser drome. Its intention was possible to play at killing people in Omega. The police authority issued an order against Omega to pay a fine for each game played in breach of the order. The Federal Administrative Court decided that banning the game was compatible with the Basic Law because human dignity would be respectable according to Article 1(1).<sup>41</sup>

Omega claimed that a prohibition on it setting up a 'laser drome,' where people fire with the guns each other with fake laser guns, was an unlawful restriction on the free movement of services.<sup>42</sup> Nevertheless, the European Court of Justice (ECJ) declares that "Community law does not preclude economic activities consisting of the commercial exploitation of games if it can affront human dignity."<sup>43</sup>

The Basic Law is prominent by the critical explanation of the FCC to protect human rights. Moreover, the significant function is interpreting the political issues within the legal framework.<sup>44</sup> In this way, the concept of human dignity became crucial as a constitutional principle, a human right itself, and finally, human dignity is the right to have rights.<sup>45</sup> There is a ground that the FCC explores the new human rights for modern society's requirements. Therefore, it is not necessary to amend the Basic Law repeatedly. The case study approach is essential to research the technical clarification of the Basic Law by the FCC.

There was a case of respecting citizens' right to life against the state. It was an aircraft shooting case and conflict between the right to life and protecting community peace. The FCC focused on the second paragraph of personal freedom described the right to life in conjunction with human dignity. Hence, the FCC decided that Section 14 (3) of the Air Safety Act was incompatible with Articles 1 (1) and 2 (2) of the Basic Law insofar as it

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<sup>41</sup> Paras 3/4/5 Omega Spielhallen and Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, Case C-36/02, No. I-0960.

<sup>42</sup> Articles 46 EC and 49 EC.

<sup>43</sup> Para 42 Omega Spielhallen and Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, Case C-36/02, No. I-0960.

<sup>44</sup> Thomas Henne, "The History and Structure of German Basic Law-The Fundamental Structural Principles of the Federal Republic of German" (Faculty of Law, University of Debrecen, 2009).

<sup>45</sup> Christoph Enders, "The Right to Have Rights: The Concept of Human Dignity in German Basic Law," *Revista de Estudos Constitucionais, Hermenêutica e Teoria Do Direito (RECHTD)* 2, no. 1 (2010): 1–8, <https://doi.org/10.4013/rechtd.2010.21.01> Authors:

affected the innocent passengers and crew of an aircraft.<sup>46</sup> The Act intended to protect similar terrorists in response to the 9/11 attacks in New York. In Germany, the minister of defence is the commander in chief of armed forces due to the Act who can shoot down an aircraft hijacked.

The right to life is a universal and absolute right within the domestic and international legal framework. Therefore, some developed countries have abolished the death penalty, and some are not. Nonetheless, there are rarely sentences for the death penalty where it is allowed legally. It is the criminal point of view regarding the right to life implementation. It also has a conflict between the right to life and pregnancy relating to abortion. So, abortion is not permitted; criminal laws prohibit it worldwide. It is an unavoidable case for some women sometimes. Like an unwanted pregnancy because of a rape case, sexual assault, or child abuse.<sup>47</sup>

At the latest, the FCC allowed the self-determined death in February 2020. It is a judgment of interpreting the term "personal freedoms" in conjunction with human dignity.<sup>48</sup> From a critical point of view, personal freedom is also significant because self-determined death is the opposite of the right to life. It mentions that the right to life is in the second hierarchy in the first paragraph.<sup>49</sup> According to the FCC's judgment, the Court declared that the assisted suicide service's criminalization is inconsistent with the constitutional law. It can be an exception to the right to life contrary to the international and European protection of human rights.

## **b. A New Human Right within the Constitutional Interpretation of the FCC**

The FCC declared that the criminalization of assisted suicide services under section 217 of the Criminal Code was not constitutional the last February. The Criminal Code banned helping another person commit suicide, providing, procuring, or arranging a chance for that person to do so. They shall incur a penalty of imprisonment for a term not exceeding three years or a fine.<sup>50</sup> The Bundestag prescribed the law in 2015 to prohibit the purchase of deadly drugs.<sup>51</sup> The Court construed that the first paragraph of personal freedom is in line with human dignity and allowed assisted suicide

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<sup>46</sup> Bverfg, Headnotes to the judgment of the First Senate (2006).

<sup>47</sup> AOK, "Termination of Pregnancy," 2020, <https://en.zuwanderer.aok.de/home/my-insurance/medical-treatment/pregnancy>.

<sup>48</sup> Bverfg, Headnotes to the Judgment of the Second Senate (2020).

<sup>49</sup> Article 2 (1) Basic Law of 1949.

<sup>50</sup> Section 217 Criminal Code of 1971.

<sup>51</sup> DW, "Bundestag Votes against 'commercial' Assisted Suicides," 2015, [www.dw.com/en/Bundestag-votes-against-commercial-assisted-suicide/a-18831510](http://www.dw.com/en/Bundestag-votes-against-commercial-assisted-suicide/a-18831510).

services at the beginning of 2020.<sup>52</sup> As several Germans wanted to stop their lives, they went abroad like the Netherlands and Switzerland.<sup>53</sup> The FCC's permission to the assisted suicide to a third party and services can make the holocaust remembered. Germany became one of the few European countries that allowed a right to die according to self-determination. In Europe, a few states like Belgium, the Netherlands, Switzerland, and Luxembourg accepted a request to stop human life in two ways: euthanasia and assisted suicide. The Netherlands recognized both legally.<sup>54</sup> However, there are controversies within the religious, cultural, social, and public health sectors. Universalism protects the right to life as a fundamental right and unique to being human.<sup>55</sup> Euthanasia and assisted suicide services are allowable to patients who may have no hope to live with dignity in the future. Germany also recognized assisting suicide the German citizens who had cancer, coma, disability, and severe pains.<sup>56</sup> The legal framework of self-determination protects personal freedom. Self-determination is a human right in line with the International Covenants.<sup>57</sup> And it is a principle in the UN Charter.<sup>58</sup> According to the covenant, "All people have the right of self-determination. Consequently, they freely determine their political status and freely pursue their economic, social, and cultural development."<sup>59</sup> It is concerned with a state's self-determination to choose its political, economic, social, and cultural system independently.<sup>60</sup> Thus, self-determination is a right that belongs to people but not to minorities.<sup>61</sup> It became a guiding principle for the reestablishment of Europe after the First World War. The Atlantic Charter and Dumbarton Oaks proposal insert it, and they developed the United Nations Charter. It has two points of view; one is the political principle, and the other is a human right. In the opinion of Wolfgang Danspeckgruber, "No other concept

<sup>52</sup> Bundesverfassungsgericht, "Criminalisation of Assisted Suicide Services Unconstitutional: Press Release No. 12/2020," 2020.

<sup>53</sup> BBC News, "Germany Overturns Ban on Professionally Assisted Suicide," 2020, <https://www.bbc.com/news/world-europe-51643306>.

<sup>54</sup> Dpa.international, "Assisted Suicide in Europe," 2020, [www.dpa-international.com/topic/assisted-suicide-Europe](http://www.dpa-international.com/topic/assisted-suicide-Europe).

<sup>55</sup> Article 3 Universal Declaration of Human Rights of 1948.

<sup>56</sup> Kalaiivani Annadurai, Raja Danasekaran, and Geetha Mani, "Euthanasia: Right to Die with Dignity," *Journal of Family Medicine and Primary Care* 3, no. 4 (2014): 477–78, <https://doi.org/10.4103/2249-4863.148161>.

<sup>57</sup> Hurst Hannum, "The Right of Self-Determination in the Twenty-First Century," *Washington and Lee Law Review* 55, no. 3 (1998): 773–80, <https://scholarlycommons.law.wlu.edu/wlulr/vol55/iss3/8>.

<sup>58</sup> Article 1 United Nations Charter of 1945.

<sup>59</sup> Article 1 (1) of International Covenant on the Civil and Political Rights of 1966 and International Covenant on the Economic, Social, and Cultural Rights of 1966.

<sup>60</sup> Article 55 United Nations Charter of 1945.

<sup>61</sup> Articles 7 and 10 Universal Declaration of Human Rights of 1948.

is as powerful, visceral, emotional, unruly, and as steep in creating aspirations and hopes as self-determination." However, it depends on the concerned persons' situations, needs, interests, and conditions.<sup>62</sup>

The plaintiffs submitted constitutional complaints to the FCC to implement their self-determined death.<sup>63</sup> The FCC concluded that the state and society must respect individual points on the quality of life and meaningful existence when deciding to stop their lives. The right to a self-determined death involves the freedom to take one's own life. The freedom of one's life includes seeking and getting assistance provided by third parties. Accordingly, some medical practitioners also related to the right to self-determined death. Moreover, legal practitioners presented constitutional complaints on behalf of their clients and protected their fundamental rights violated by the Criminal Code. According to paragraph (4) of Article 20 or under Articles 33, 38, 101, 103, or 104, constitutional complaints are a constitutional remedy for German citizens when public authority violates their fundamental rights.<sup>64</sup> It can be submitted before the FCC directly by the damaged persons.<sup>65</sup>

The right to stop someone's life within the legal framework of self-determination and personal freedom at the domestic levels in Europe could not be successful, and the applicants brought their cases before the ECtHR. They proposed their right to respect private and family life under Articles 2 and 8 of the European Convention of Human Rights (ECHR).<sup>66</sup> The first case of the ECtHR regarding human dignity was *Pretty v. United Kingdom* (2002).

### **c. Germany: A Social Federal State**

The Federal Constitutional Court (FCC) protected asylum seekers' benefits by interpreting Article 20 of the Basic Law in conjunction with the first paragraph of Article 1. The first paragraph of Article 20 mentions that Germany is a democratic and social federal state. The FCC focused on the word "social" to protect the social benefit of asylum seekers. Then, the FCC declared that Article 3 of the Asylum Seekers' Benefits Act was incompatible with the Basic Law because it was so long not been amendable since 1993 in line with the current price for living. Article 1 (1) of the Basic Law defines human dignity as human rights, including a human being's

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<sup>62</sup> UNPO, "Self-Determination," Unrepresented Nations & Peoples Organization, 2017, <https://unpo.org/article/4957>.

<sup>63</sup> Article 93 (1/4a) Basic Law of 1949.

<sup>64</sup> Mahony, "There Is No Right to Dignity."

<sup>65</sup> Section 90 (1) FCC Act of 1951.

<sup>66</sup> Daria Sartori, "End-of-Life Issues and the European Court of Human Rights," *Question of International Law Journal* 52 (2018): 23–43, [http://www.qil-qdi.org/wp-content/uploads/2018/06/03\\_End-Life\\_SARTORI\\_FIN.pdf](http://www.qil-qdi.org/wp-content/uploads/2018/06/03_End-Life_SARTORI_FIN.pdf).

physical existence and a minimal degree of participation in social, cultural, and political life. German and foreign nationals who reside in the Federal Republic of Germany are entitled to the first to twenty Articles' fundamental rights.<sup>67</sup> A minimum dignified existence emerges as a fundamental right in the combined understanding of human dignity and the social welfare state's principle. And similar rights are in line with some provisions of the Basic Law 1949 by submitting constitutional complaints. The FCC determined that "the Basic Law does not oblige the legislature to reset benefits retroactively. Still, it is appropriate to retroactively apply the transitional rule by 1 January 2011 concerning the Asylum Seekers Benefits Act at the latest with the FCC's decision of 9 February 2010."<sup>68</sup>

German constitutional law protects the rights of German citizens and asylum seekers. The Basic Law allows political asylum seekers. The EU provides a Common European Asylum System to amalgamate minimum standards related to asylum, leaving EU Members States discretion to establish procedures for obtaining and withdrawing international protection.<sup>69</sup>

### 3. Right and Responsibility

There is a right and responsibility.<sup>70</sup> According to the German constitutional concept, human dignity is generally defined as a human right, as mentioned in the previous paragraphs.<sup>71</sup> A damaged person can lodge a constitutional complaint with the FCC to get a legal remedy.<sup>72</sup> The FCC also has a function to forfeit fundamental rights abused by a complainant.<sup>73</sup> Constitutional complaints can be admissible, and they can be inadmissible as well. It depends on the time, circumstances, political and social changes. Although Basic German Law permits the freedom of expression, arts, and sciences,<sup>74</sup> holocaust denial is not allowed expressly under Criminal law.<sup>75</sup> Anti-Nazi laws do not apply in every European country. Several European countries have enacted laws criminalizing both the rejection of the holocaust and the promotion of Nazi ideology. Germany and Austria practice these

<sup>67</sup> BVerfG, Judgment of the First Senate (2012).

<sup>68</sup> Article 93 (1/4a) Basic Law of 1949.

<sup>69</sup> European Commission, "Reforming the Common European Asylum System: Frequently Asked Questions," 2006, [www.ec.europa.eu/commission/presscorner/detail/en/MEMO\\_16\\_2436](http://www.ec.europa.eu/commission/presscorner/detail/en/MEMO_16_2436).

<sup>70</sup> John Deigh, "On Rights and Responsibilities," *Law and Philosophy* 7, no. 2 (1988): 147–78, <https://doi.org/10.2307/3504727>.

<sup>71</sup> Article 1 (1) Basic Law of 1949.

<sup>72</sup> Section 90 (1) FCC Act of 1951.

<sup>73</sup> Article 18 Basic Law of 1949.

<sup>74</sup> Article 5 Basic Law of 1949.

<sup>75</sup> Handbook Germany, "German Basic Law"; Section 130, German Criminal Code 1998.

laws very seriously and vigilantly prosecute both speech and behaviour, having any reference to Nazis and Nazism. Holocaust denial is also illegal in Israel.<sup>76</sup>

Germany's freedom of speech cannot extend to address that transgresses civility norms designed to secure personal honour, reputation, and dignity.<sup>77</sup> Moreover, this protection is not limited to individuals but extends to entire groups, such as persons serving in the armed forces or members of a particular racial or religious group. Therefore, the FCC has the competence to forfeit the freedom of expression, including the press, teaching, assembly, association, the privacy of correspondence, posts, and telecommunications, the rights of property, or the right of asylum to combat the free democratic order.<sup>78</sup> The ECHR also allows the freedom of expression with some limitations.<sup>79</sup> Where there is a conflict with human dignity, artistic freedom must always be subordinate to personality rights.<sup>80</sup> The cases' admissibility has relied on the facts of the issues and the ECtHR's reasoning. Professor McCrudden said that "I argue that the concept of 'human dignity' plays an essential role in the development of human rights adjudication, but it is in contributing to particular methods of human rights interpretation and adjudication."<sup>81</sup>

In the headscarf banning case, the FCC was reasoning the proportionality between the freedom of the individual faith and human dignity. Religious practice is acceptable if it is not an infringement of others' rights.<sup>82</sup> It was a constitutional complaint against the Order of the Higher Administered Court of the Land Hesse (23 May 2017), Section 45 of the Hesse Civil Service Act, and Ministerial Order of the Ministry of Justice (28 June 2007). The case summarized that the complainant was a legal trainee in the land of Hesse who practices Muslim, and she wears a headscarf in public. The Higher Regional Court instructed her that a legal trainee must conduct neutrally regarding religion. Therefore, she was prohibited from performing any task as a state representative. So, she lodged a constitutional complaint about the violations of her fundamental right under Articles 12 (1), 4 (1) / (2), Art 2 (1) in conjunction with Articles 1 (1), 3 (1), and (3) of the Basic Law.<sup>83</sup> The

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<sup>76</sup> Michael J. Bazylar, "Holocaust Denial Law and Other Legislation Criminalizing Promotion of Nazism," 2021, <https://www.yadvashem.org/holocaust/holocaust-antisemitism/holocaust-denial-laws.html>.

<sup>77</sup> Ronald J. Krotoszynski, "The Polysemy of Privacy," *Indiana Law Journal* 88, no. 3 (2013): 881–918, <https://www.repository.law.indiana.edu/ilj/vol88/iss3/2>.

<sup>78</sup> Article 18 Basic Law of 1949.

<sup>79</sup> Article 10 (2) ECHR of 1950.

<sup>80</sup> *Vereinigung Bildender Künstler v. Austria*, Judgement (2007).

<sup>81</sup> McCrudden, "Human Dignity and Judicial Interpretation of Human Rights."

<sup>82</sup> Article 4 (1) and (2) Basic Law of 1949.

<sup>83</sup> Para 22 BVerfG, Order of the Second Senate (2020).

FCC held that "the interference with freedom of religion is justified under constitutional law" and "the complainant's freedom of training under Article 12(1) is not violated."<sup>84</sup>

### C. Conclusion

According to the literature reviews, human dignity is supreme, but it does not mean absolute. Referring to the principle of personal freedoms, a person can have that right as they do not infringe others' rights or offend against the constitutional order or the moral law. Thus, human dignity represents a human right for all beings, not a priority for some specific person or group. So, an Article restricts the fundamental rights under the law. Such law must generally apply and not merely to a single case. The right to life is recognized as fundamental to getting further social and economic rights. Besides, it has some exceptions, such as capital punishment in some countries. Then there are abortion cases and the right to die, which are opposed to the right to life. Therefore, the fundamental law's human rights provided in the first chapter are within the FCC's broad interpretation.

In most cases, the FCC interprets the extent of those rights incorporation with the principle of human dignity. It is like a supporting principle to protect human rights in economic, social, and political matters by constitutional justice. From a different perspective, the two judges of the ECtHR defined dignity as a dangerous concept in their dissented opinion. The under structure of human rights cannot be anything other than the equal dignity of all human beings. Nevertheless, there is no uniform acceptance of human dignity but varieties of definitions by scholars. Notably, Germany and South Africa seriously respect human dignity, followed by Immanuel Kant's concept among outstanding experts. Finally, the term human dignity is comprehensive and related to several matters of human beings. The term is ambiguous, but it is the best weapon for protecting several infringements of human rights in Germany. And the anti-discrimination, equality before the law, civil and political rights, social rights, economic rights, human rights under the international rights, constitutional rights, and freedoms are encompassed in the meaning of human dignity. The primary responsibility to safeguard those rights is responsible to the FCC's competencies in Germany. The FCC's preeminent reasoning comes out from the technical interpretation of human dignity.

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<sup>84</sup> Bundesverfassungsgericht, "Banning a Headscarf for a Legal Trainee Is Constitutional: Press Release No 13/2020," 2020.

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