Comment on Atina Krajewska – Plural Concepts of Human Dignity and the Constitutional Treaty

By Felix Arndt[*]

A. Biotechnology as a Challenge to the Cohesion of European Constitutionalism

The interest in biotechnology is a global phenomenon. Consequently, its underlying issues transcend national borders and ultimately call for regulation in an international framework.[1] The ethical and legal questions of biomedicine touch upon fundamental issues of human life and our self-conception. The risks as well as the possibilities depicted in the debate are far-reaching. Moreover, the field is dynamic and new scientific developments can have significant implications for the political and legal situation.

In light of these circumstances, it is hardly surprising that little consensus has evolved on the limits of biomedical research, neither in the United Nations nor in the European Union (EU). And even in many Member States of the EU the discussion remains lively.[2]

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[1] Spiros Simitis, *A Convention on Cloning – Annotations to an almost Unsolvable Dilemma*, *in* HUMAN DIGNITY AND HUMAN CLONING 167, 169 (Vöneky & Wolfrum eds., 2004).

[2] For comparative studies see Deryck Beyleveld *et al.*, *The Regulation of Embryo Research in Europe*, *in* HUMAN EMBRYO RESEARCH IN PLURALISTIC EUROPE 111-155 (Solter *et al.* eds., 2003); Kristiane Weber-Hassemer, *Die ethisch-rechtliche Diskussion. Ein internationaler Vergleich*, *in* KLONEN IN BIOMEDIZINISCHER FORSCHUNG UND REPRODUKTION 361-366 (Honnefelder *et al.* eds., 2003); Hans-Georg Koch, *Embryonenschutz ohne Grenzen?*, *in* FESTSCHRIFT ESER 1091, 1106 (2004). For the German debate see National Ethics Council, Opinions on the Import of Human Embryonic Stem Cells (2001), on Genetic Diagnosis before and during Pregnancy (2003), and on Cloning (2004), *available at* http://www.nationalerethikrat.de. *See* also Christian Starck, Jörn Ipsen, Horst Dreier, and Wolfgang Graf Vitzthum, *in* HUMAN DIGNITY AND HUMAN CLONING, *supra* note 1, at 63, 69, 77 and 87. For a monographic discussion *see* JENS KERSTEN, DAS KLONEN VON MENSCHEN (2004). In Switzerland, a law permitting a limited creation of embryonic stem cells was adopted in a referendum on 28 November 2004.

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In such a situation, comparative law can serve the important function to clarify existing national positions and discussions and to foster common solutions. Two aspects are particularly important for comparing developments in a meaningful way. First, a comparative analysis of the legal framework for biomedicine in Europe should not be restricted to the level of ordinary legislation or the question whether a certain technology is legal or not but needs to include the constitutional framework and the cultural setting.[3] Only then it is possible to get a profound impression of an ongoing debate and not only a snapshot of a rather contingent situation at a certain moment. Secondly, it has to be underlined that – despite overarching issues – biomedicine encompasses various techniques and applications. Different forms of cloning, the creation of embryonic stem cells, the subsequent research, as well as preimplantation genetic diagnosis touch on these fundamental issues in a specific way and thus raise distinct questions.[4]

Tackling such a task would exceed the limits of a comment. Rather than analysing the fragmented situation from a comparative perspective, I will thus focus on the question how the European Union and its Constitutional Treaty deal with the divergent approaches its Member States have towards biotechnology. It has been argued that the incorporation of the Charter of Fundamental Rights entails a centralising tendency.[5] Prominent examples of the centralising effects of human rights include the US-American[6] and the German[7] experience. There are notable differences, however, between those examples and the situation in the European Union. In particular, the Constitutional Treaty does not contain a gateway for extending the scope of its fundamental rights that is comparable to the 14th Amendment of the US-Constitution. Quite on the contrary, Articles II-111 and II-112 CT hardly provide an argument for directly expanding the scope of European

[3] Erhard Denninger, *Embryo und Grundgesetz*, 86 KRITISCHE VIERTELJAHRESSCHRIFT 191, 191 (2003); Rainer Wahl, *Verfassungsvergleichung als Kulturvergleichung*, *in* VERFASSUNGSSTAAT, EUROPÄISIERUNG, INTERNATIONALISIERUNG 96-118 (*idem* ed. , 2003). On the function of comparative analysis in European Constitutional Law, *see* Philipp Dann, *Thoughts on a Methodology of European Constitutional Law*, in this volume.

[4] It is, for example, controversial, if the entities produced with cell-transfer cloning should be governed by the same rules as those produced by embryo-splitting. *See* Koch, *supra* note 2, at 1114; Jens Reich, *Empirische Totipotenz und metaphysische Gattungszugehörigkeit bei der Beurteilung des vorgeburtlichen menschlichen Lebens*, 50 ZEITSCHRIFT FÜR MEDIZINISCHE ETHIK 115, 129 (2004).

[5] Atina Krajewska, *Fundamental Rights Concerning Biomedicine in the Constitutional Treaty and Their Effect on the Diverse Legal Systems of Member States*, in this volume.

[6] Francis G. Jabobs & Kenneth L. Karst, *The "Federal" Legal Order: The USA and Europe Compared*, 1 INTEGRATION THROUGH LAW 169, 205 (Cappelletti, Seccombe & Weiler eds., 1986).

[7] KONRAD HESSE, *Der unitarische Bundesstaat*, *in* AUSGEWÄHLTE SCHRIFTEN 116, 130 (1984).

fundamental rights.[8] Indirect or decentralized mechanisms of harmonisation[9], however, remain possible.

Different concepts of human dignity are not only a challenge to finding unity in diversity, but also bring about the question whether the Constitutional Treaty itself is able to employ a unitary concept of human dignity or has to embrace differentiated concepts in different settings.[10] Arguably, at least with respect to human rights, different standards ought to be applied depending on the context.[11] On the other hand, differentiations between different standards of human dignity may conflict with its universal aspiration and its normative inviolability.

To shed some light on this question, this comment analyses three constellations in which the concept of human dignity is of significance in the context of European constitutional law. The first is the admissibility of domestic laws being obstacles to free movement in the name of safeguarding human dignity, the second concerns the suspension procedure according to Article 59 CT and the third constellation is the review of European legislation in light of Article 61 CT.

B. Human Dignity and Biotechnology – Three Constellations

I. Protection of Human Dignity as a Justification for Restrictions on Free Movement

Domestic laws regulating biotechnology will frequently result in obstacles to the free movement of goods or services in the European Union. Examples include the German import ban on embryonic stem cells lines obtained after 1 January 2002[12] or

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[8] Jürgen Kühling, *Grundrechte*, *in* EUROPÄISCHES VERFASSUNGSRECHT 581, 610 (von Bogdandy ed., 2003), (an English version in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW (v. Bogdandy & Bast eds., forthcoming)).

[9] *See e.g.,* the introduction of the freedom of information with reference to the Charter of Fundamental Rights by the Tribunal Constitucional, 30 November 2000 (No. STC-292, para. II-8), for an English translation see THE RELATIONSHIP BETWEEN EUROPEAN COMMUNITY LAW AND NATIONAL LAW: THE CASES VOLUME 2 (Oppenheimer ed., 2003).

[10] On these two dimensions of unity, *see* Jürgen Bast, *The Constitutional Treaty as a Reflexive Constitution,* in this volume.

[11] Armin von Bogdandy, *The European Union as a Human Rights Organization? – Human Rights and the Core of the European Union*, 37 COMMON MARKET LAW REVIEW 1307, 1318 (2000).

[12] Stammzellgesetz, 28 June 2002, Bundesgesetzblatt I 2277 (for a translation see the annex V 19 of HUMAN DIGNITY AND HUMAN CLONING, *supra* note 1).

the conceivable penalisation of parents or their doctors seeking preimplantation diagnosis in a more liberal Member State[13].

Such restrictions can arguably be justified by invoking the respect for human dignity as part of the *ordre public* justification. In the context of an exemption, the appropriate level of protection is generally determined by the individual Member State. In a recent judgment the European Court of Justice (ECJ) has clarified that the fact that a certain activity is permissible in some Member States does not preclude a Member State from relying on the respect for human dignity as a justification for a domestic ban of this activity.[14] The European legal order thus accepts plural concepts of human dignity. Notably, the ECJ does not have to decide itself on the scope of the respect for human dignity as a matter of European constitutional law in this context but only if the national interpretation is plausible and can thus justify an obstacle to the common market.[15]

II. Respect for Human Dignity as an Overarching Principle of the Union and its Member States

The European standard for the protection of human dignity is relevant for the interpretation of Article I-59 CT. It provides a procedure to enforce the fundamental values of Article I-2 CT, which include the respect for human dignity. Significantly, Article I-2 CT clarifies Article 6 EU which only referred to the respect of human rights and not specifically to human dignity. In case of a "serious and persistent breach" (Art. I-59(2) CT) of these fundamental values by a Member State, its voting rights may ultimately be suspended. This mechanism serves the mutual stabilisation and the structural compatibility of the Member States and the European Union, but not a sweeping enforcement of fundamental rights by the European Union.[16]

In contrast to other human rights issues, however, the two requirements limiting the application of Article I-59 CT will hardly provide a way to avoid a decision on

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[13] On the penalisation of accessories *see* ALBIN ESER & HANS-GEORG KOCH, FORSCHUNG MIT EMBRYONALEN STAMMZELLEN IM IN- UND AUSLAND 87 (2003).

[14] Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs GmbH* v. Oberbürgermeisterin der Bundesstadt Bonn, 2004 E.C.R. I-9609, paras. 37-38.

[15] For a different view *see* Jürgen Bröhmer, *Case note on Case C-36/02*, 15 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 755, 757 (2004). Bröhmer misinterprets the reach of the ECJ's finding that "measures which are incompatible with observance of the human rights thus recognised are not acceptable in the Community", Case C-112/00, *Schmidberger v. Republik Österreich*, 2003 E.C.R. I-5659, para. 73.

[16] ARMIN VON BOGDANDY, SUPRANATIONALER FÖDERALISMUS 15 (1999).

whether the respect for human dignity mandates certain limits on biotechnology in all Member States. Violations of human dignity would regularly amount to a *serious* breach, as a justification for any infringement is excluded[17] and consequently distinctions between different degrees of violations could hardly be reconciled with the inviolability of human dignity. And in case of an ongoing research policy, a *persistent* breach could also hardly be denied.

The meaning of respect for human dignity in the context of Article I-59 CT is closely linked to the procedure that governs its decision-making process. Such a realist perspective[18] is especially appropriate if a political decision-making process[19] is concerned rather than an independent judicial process. Consequently, one cannot ignore that the determination of the existence of a serious and persistent breach requires unanimity in the Council and the consent the European Parliament which has to act by a super-majority. As a result, Article I-59 CT refers only to a minimum standard of the fundamental principles.

Unless all Member States except one believe that a certain biotechnological procedure violates human dignity, such a determination will not be made. It is highly unlikely that such a broad agreement on biotechnological issues will emerge in the future. It has to be underlined that not only those Member States which actively support research cloning will prevent such a determination. Some Member States abstaining from this technology still do not grant the protection of human dignity to any totipotent cell outside the womb. As a result, Member States will not be compelled by Article 59 CT to harmonise their divergent understandings of the consequences of human dignity for biotechnology.

III. Human Dignity as a Limit to European Legislation

Article II-61 CT becomes relevant if European legislation touches upon issues of human dignity and biotechnology. In particular, two scenarios can be imagined.

First, some authors discuss the consequences of a hypothetical European law regulating the admissibility of research cloning in all Member States and warn of an

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[17]Martin Borowski, *Art. 1 CGREU*, KOMMENTAR ZUR CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION (Meyer ed. 2003), para. 40. For the German case *see* Horst Dreier, *Article 1(1) GG*, 1 GRUNDGESETZ-KOMMENTAR, (*idem* ed., 2nd ed. 2004), paras. 132-134.

[18] Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

[19] The ECJ can review the legality of acts under Article I-59 CT solely in respect of the procedural stipulations, *cf.* Article III-371 CT.

irreconcilable conflict.[20] The Constitutional Treaty does provide mechanisms, however, for avoiding a conflict on the scope of human dignity in that context.

With respect to research cloning in general, the European Union does not have the competence to regulate its admissibility. The appropriate legal basis for laws in the field of research in general would be Articles III-251/252 CT. These, however, do not provide for the harmonisation of legislation, but solely for the adoption and implementation of framework programmes. Article III-172 CT is only applicable insofar as a law or framework law serves the functioning of the internal market (*e.g.* the liberalisation of provisions banning the import of embryonic stem cells or the restricting free movement of researchers) not for a general policy on cloning.[21] Thus the potential conflict is already limited by the distribution of competences. Even if a limited measure was to be adopted, Article III-172(4) CT would allow the Member States to maintain their restrictive policies on cloning, as these are justified by major needs as shown above. This possibility thus can serve as an instrument to protect the national identity of a Member State. Likewise, the ECJ could take recourse to Article I-5 CT and protect differentiated concepts of human dignity instead of deciding itself which understanding is preferable.

The second constellation concerns the financing of research projects which some Member States consider to conflict with the respect for human dignity under the European framework programmes, *e.g.* projects involving the derivation of embryonic stem cells from embryos created for that purpose or projects involving research cloning. In principle, the state is only allowed to finance projects which are legal and do not conflict with its obligation to protect human dignity.[22] As the EU undoubtedly has a competence to finance research, it would be more difficult for the ECJ to evade the question of human dignity.

Respect for human dignity belongs to the general principles of Community law.[23] The classic sources of inspiration for the existence of a general principle, which will equally guide the interpretation of the Charter, appear to support a finding that respect for human dignity in Article II-61 CT does not exclude most

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[20] Yvonne Dorf, *Zur Interpretation der Grundrechtecharta*, 60 JURISTENZEITUNG 126, 132 (2005).

[21] Arguably, Articles III-251/252 are even *lex specialis* to Article III-172, see Martin Nettesheim, *Kompetenzen*, EUROPÄISCHES VERFASSUNGSRECHT 415, 474 (v. Bogdandy ed. 2003), an English version in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW (v. Bogdandy & Bast eds., forthcoming).

[22] BVerfGE 88, 203 (315) (F.R.G.) on the financing of abortion.

[23] Case C-377/98, *Kingdom of the Netherlands v. European Parliament and Council*, 2001 E.C.R. I-7079, paras. 70-77; Markus Rau & Frank Schorkopf, *Der EuGH und die Menschenwürde*, 55 NEUE JURISTISCHE WOCHENSCHRIFT 2448-2449 (2002).

biotechnological research. For one, it is the lack of a common legal tradition between the Member States which causes the conflict. Likewise, the prohibition only of "reproductive" (more precisely: birth) cloning in Article II-63 CT implies that a consensus on the prohibition of other forms of cloning did not exist and the decision was left to the legislatures.[24] Furthermore, the common international obligations of the Member States point in that direction. The majority of the ECtHR has recently refrained from finding that the unborn is encompassed by the right to life.[25]

Additionally, a significant tension between Article II-61 CT and Article I-2 CT seems to be the result if the ECJ wanted to employ more than a minimum standard for reviewing Union action. As shown above, a differentiation between the standards of Article I-2 CT in connection with Article I-59 CT and Article II-61 CT is highly problematic. Taken seriously, a ban on the financing of cloning research on the basis of Article II-61 CT would thus exert considerable pressure to invoke proceedings of suspension against the United Kingdom and other Member States. Depending on the perspective, either the authority of the ECJ or the legitimacy of the Union would be damaged, if the political process did not follow the ECJ's lead.

With an alternative line of reasoning, however, the ECJ would be able to avoid conflict while still ensuring a level of respect for human dignity above the minimum consensus. Depending on their share in the European budget, Member States that consider all forms of cloning to be contrary to human dignity indirectly have to finance such research. Arguably, the financing of such research by a European programme would thus raise a conflict between their fundamental constitutional value and membership in the EU and consequently touch upon their national identity.

C. Conclusion

The Constitutional Treaty provides ample mechanisms to cope with divergent concepts of human dignity in the European Union. The key element is Article I-5 CT, which calls for the respect for national identities. Accordingly, the Constitutional Treaty accepts plural concepts of human dignity and does not prescribe its Member States a fully homogeneous understanding, as we have seen with respect to the justifications of obstacles to free movement. It shares this characteristic with a liberal understanding of human dignity in a pluralistic

[24] Denninger, *supra* note 3, at 201; Kersten, *supra* note 2, at 115.

[25] *Vo v. France*, App. No. 53924/00 at para. 85 (Eur. Ct. H.R. 8 July 2004).

society.[26] If plural concepts of human dignity are thus understood as contributions to a discursive process rather than as irrevocable claims of truth, a Member State that refers to a restrictive understanding of human dignity in biotechnological issues does not at the same time deny the validity of the principle in a more liberal country.[27]

Moreover, the principle of respect of national identities relieves the Constitutional Treaty of a decision between different understandings of human dignity. As a result, the possible dilemma between constitutional conflict and incoherent meanings of human dignity within the Constitutional Treaty can be avoided.

[26] Denninger, *supra* note 3, at 196.

[27] But see Helmuth Schulze-Fielitz, *Verfassungsvergleichung als Einbahnstraße*?, VERFASSUNG IM DISKURS DER WELT 355-379, 372 (Blankenagel *et al.* eds., 2004); Dreier, *supra* note 17, at note 285, who use comparative law as an argument for a more liberal position.