

## A Probe into Torture for Rescue Purposes and Human Dignity

### -- Comments on German Criminal Law: From Tradition to Modernity

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#### Abstract

Since the Daschner case in Germany, discussions on torture have been controversial. This thesis believes that human dignity cannot be weighed, so even if the purpose of torture for rescue is legitimate, it still constitutes a violation of human dignity. Based on the shortcomings of the current theory of torture justification, it is possible to jointly solve related problems from the two factors of violating the law and the necessity of punishment for the purpose of prevention. In addition, the German Basic Law can become a reference for China. China should take a basis of its own national conditions and refine the theory of human dignity with Chinese characteristics with the consideration of absorption and reference.

#### Keywords

German Basic Law; prohibition of torture; rescue torture; human dignity; personal dignity.

#### 1. Introduction

*German Criminal Law: From Tradition to Modernity* is written by Eric Hilgendorf, a professor of criminal law at the University of Würzburg Law School in Germany, reflecting the latest theoretical status of German criminal law research. Professor Hilgendorf has a wide range of research fields, including criminal law doctrine, medical and biological criminal law, media criminal law, European Union criminal law and so on. *German Criminal Law: From Tradition to Modernity* systematically expresses the author's unique thoughts on the level of criminal law, and from the perspectives of tradition and modernity, it focuses on the history, current situation and future trends of German criminal law. The seventh chapter of this book focuses on the issue of torture for rescue purposes and human dignity. This thesis will first summarize the content of Chapter 7, then discuss human dignity in combination with three cases, and finally expand the relevant content.

#### 2. Content overview: the introduction of instrumental prohibition and the collective theory of human dignity

The seventh chapter of this book has ten parts. The author first puts forward the general situation of the instrumental terms that are usually used to define human dignity. Due to the many limitations of instrumental terms, the author finally proposes the collective theory of human dignity.

## 2.1. Putting forward "instrumentalized" terms

The first part of this chapter introduces the protection of human dignity by the Basic Law. It is stipulated in Article 1 of the German Basic Law that human dignity is inviolable, and it is the duty of all state agencies to respect and protect this dignity. Although human dignity is respected by the academic circles, the concept of human dignity has caused difficult problems in the application of specific cases. For example, can the suspect be tortured when the "bomb is about to explode"? For another example, can the aircraft be shot down when it is subject to a terrorist attack?

The second part of this chapter explains the meaning of "instrumentalized" terms, which is usually understood as "using it as a means against someone's own interests, will, or against the purpose of something. Subsequently, the author points out that the instrumentalized term is based on Durig's "object formula": "When a specific person is reduced to an object, a pure tool, or an alternative measure, it involves human dignity [1]." Here the thesis respects the original text, so uses the Durig-style "object formula" to express. The Federal Constitutional Court has always advocated that the object formula derived from Kant's philosophy defines the definition of human dignity. Therefore, the thesis believes that the "Durig-style object formula" is the object formula of Kant's philosophy. The instrumentalized meaning is the definition of human dignity, which means that when a specific individual is reduced to an object or a pure tool, his human dignity is violated.

## 2.2. Criticism of "instrumentalized" terms

The third part, fourth part, and fifth part of this chapter are the author's criticism of the "instrumental" term. In the third part of this chapter, the author quotes Birnbacher's point of view to introduce the "instrumentalized" term. According to Birnbacher, the dubious instrumentalization in the moral sense has the following characteristics: firstly, the use of others is based on strategic rationality; secondly, the person who is exploited will not agree to such use; thirdly, the purpose is not restricted, including to benefit oneself, benefit others, or moral purpose; fourthly, it is harmful to the object of the "instrumentalized" term [2].

The fourth part of this chapter is based on the third part and raises the question whether the concept of instrumentalization is too narrow. Because in some cases, the violation of human dignity cannot be summarized according to prevailing concepts. For example, B painfully endures living on a person's island, but no one knows about it, and no one might even know about it. In this case, there is no offender, that is, the person who caused B's pain, so whether there is a violation of human dignity in this case? In response to this question, the author believes that the violation of human dignity does not require the perpetrator and the initiator[3]. "Instrumentalization" takes the subject of instrumentalization as a prerequisite, and the violation of human dignity does not require this premise, so the term "instrumentalization" as a conceptual understanding of violation of human dignity appears too narrow. The fifth part of this chapter is based on the third part and raises the question whether the concept of instrumentalization is too broad. Because in some cases, instrumental prohibition can also be applied to cases that do not violate human dignity based on general understanding. For example, A gives B a bunch of flowers to please him. In this case, it can be considered that A uses B "purely as a tool" to achieve its further purpose, which is to please B. Although it lacks damage to B, damage is not an essential element according to the Durig - style "object formula" listed above. What is puzzling is that although A uses B "purely as a tool", B's dignity has not been violated.

The sixth and seventh parts of this chapter further demonstrate the irrationality of the concept of instrumentalization. The author believes that the term instrumentalization is no longer appropriate to describe the violation of human dignity, which cannot cover the violation of human dignity, nor can it clearly distinguish between violations and non-violation of human

dignity, but can be used as a basis for understanding situations that endanger human dignity in a specific way [4].

### **2.3. The collection theory of human dignity**

The eighth, ninth and tenth parts of this chapter are the focus of this chapter. In order to deal with the problems of instrumental terminology and its inability to define human dignity reasonably, the author puts forward his own opinion—the collective theory of human dignity as a substitute.

Firstly, the author introduces the superiority of the collective theory of human dignity. The author believes that an alternative may be to define human dignity from the sole value of human beings, and use it as a collection of basic subject rights. Infringement of human dignity is an infringement of one of the rights, which is only based on an objective observation point and has nothing to do with the subjective content of the offender [5]. Because human dignity is not subject to any restriction, infringements on human dignity in this sense cannot be justified under any circumstances, even if it is a legitimate reason that is generally explained, such as emergency avoidance and legitimate defense. Secondly, the author believes that the collection theory cannot solve all the problems within the framework of human dignity and its violation[6]. Finally, the author believes that the instrumentalized terminology is not reasonable because it cannot clearly define the violation of human dignity. Human dignity should be placed in the position of objective legal norms, because all situations that specifically endanger the ability of a person to act as an autonomous subject are against human dignity.

## **3. Content analysis: discussing human dignity from three cases**

### **3.1. Case introduction**

#### **3.1.1. Frankfurt Torture Case (also known as Daschner Incident)**

On September 27, 2002, the criminal suspect kidnapped the banker's son for ransom. The suspect was arrested while receiving the ransom, but during the interrogation process, he refused to reveal the location of the hostages. Considering that the lives of the hostages are in extreme danger, Officer Daschner ordered the intimidation and even torture of the suspects in order to obtain information about the hiding place[7]. In 2004, Officer Daschner was indicted for violating compulsory crimes. The Frankfurt District Court ruled in its judgment that Officer Daschner was guilty of the charges and pointed out in the judgment that no one may be regarded as an object by the state authority and become a target of violence, which shows that even if the police conduct torture for rescue purposes, it still violates the dignity clause of the basic legal person. However, in this case, the police in charge of handling the case faced a dilemma, either ordering and torturing the kidnapper, or letting the hostage die in pain. The behavior of the former will infringe the dignity of the kidnappers, and the inaction of the latter will infringe the dignity of the hostages, which raises the question, can the violation of human dignity be justified under certain circumstances? In other words, in order to save the victim's life and dignity, whether torture the criminal is in line with the Constitution, the essence of which is a conflict between the dignity of the criminal suspect and the dignity of the victim.

#### **3.1.2. Terrorist attack on aircraft**

After the September 11 incident, Germany promulgated the "Aviation Safety Act" in 2005, which stipulates that terrorist aircraft can be shot down after the Minister of Defense issues an order [8]. In 2006, the German Federal Constitutional Court ruled that this paragraph was unconstitutional on the grounds that this measure violated the human dignity of innocent passengers on the plane.

### 3.1.3. Time bomb

Terrorist installed time bombs in the city center. Although the police arrested him, the terrorist refused to say where the bombs were installed, and they were only a few hours away from detonation. Once the bomb is detonated, it will endanger the lives of thousands of people. The arrested terrorist is the only person who knows the location of the bomb. Can the terrorist be tortured at this time?

## 3.2. Case dispute

Professor Hilgendorf, the author of this book, believes that there are two options to consider: The first option is to justify torture without exception, which means that torture cannot be justified. But what raises the question is that when the dignity of the hostage conflicts with the dignity of the criminal, if the kidnapper is not subject to coercive measures, the kidnapper's dignity is violated by inaction, and the dignity of the kidnapper is violated if coercive measures are applied. The second option is to maintain the dignity of the hostages higher than the kidnappers, because the kidnappers deliberately create danger. If this scheme is used, the criminal's dignity evaluation will be greatly reduced, so the application of torture to the kidnapper is justified. The two solutions provided by Professor Hilgendorf correspond to the two opinions of German academic circles on the question of whether torture can be carried out, that is, the legal and ethical views against torture and the relativized view of prohibition of torture.

The legal and ethical viewpoint against torture: human dignity should be absolutely guaranteed, and rescue torture should be absolutely prohibited. This view is also a common argument in German academic circles, whose main argument is that Article 1 of the German Basic Law clearly states that human dignity should be in the first place and is in the first place of constitutional protection. This view takes the absolute value of human dignity as the starting point, and believes that the torture that infringes upon it, even if it is done with the intention of saving the lives of others, is not in line with the standards of the rule of law, and its justification a denial of the rule of law itself [9]. Therefore, at the constitutional level, rescue torture is absolutely prohibited. Even if torture is restricted to a very small number of extreme emergencies, its abuse cannot be ruled out, because torture is clearly incompatible with the basic principles of the rule of law.

The relativized view of the prohibition of torture: human dignity may break through under certain circumstances, and the protection of human dignity is more likely to be measured, so rescue torture should not be absolutely prohibited. Professor Brugger, who holds this view, believes that the protection of human dignity is not limited to the obligation of respect such as non-infringement. At the same time, the state must also fulfill the obligation to protect citizens from infringements by third parties. This view holds that in the time bomb case, not only the dignity of terrorists needs to be protected, but the dignity of innocent citizens who are put in danger also needs to be absolutely protected by the state. In this case, there is a conflict between the dignity of terrorists and the dignity of citizens. Based on this, the viewpoint of the prohibition of torture relativization attacks the common opinion of German academic circles, and believes that the absolute prohibition of torture also violates human dignity, that is, the human dignity of innocent people should also be protected by the state. And compared with the dignity of terrorists, the human dignity of innocent citizens is at a higher level, and priority should be given to protecting the human dignity of citizens. Therefore, the view of prohibiting torture relativization is a choice for weighing the dignity of different people. In other words, when the dignity of the suspect (terrorist, kidnapper) and the victim (the kidnapped, hostage) inevitably conflicts, priority should be given to protecting the latter.

### 3.3. This thesis's view

In the thesis, as far as the second plan provided by Professor Hilgendorf is concerned, this thesis does not believe that the dignity of the victim should be maintained higher than that of the criminal suspect. The general theory and jurisprudence of the German academic circles all advocate the incommensurability of human dignity. The principle of proportionality is not applied to human dignity, and the absolute protection it enjoys cannot be restricted by weighing against any interests. Any violation of human dignity cannot be legalized by measuring with other interests, which is precisely because human dignity cannot be weighed. Criminal suspects also have human dignity, and they should still receive the same protection as the victim. Therefore, we should not weigh the level of dignity between different people. Even if the purpose of torture is legitimate, it still constitutes an infringement of the dignity of the criminal suspect. Regarding the first option, although the thesis agrees with the conclusion that violations of human dignity cannot be justified, the author only throws out this conclusion and does not provide a real solution. When torture cannot be justified, in the Frankfurt torture case, are the police's actions illegal and responsible? From the perspective of illegality, objectively speaking, the police conduct torture of the kidnappers, and their behavior complies with the "compulsory" stipulated in Article 240 of the German Criminal Code; from the subjective aspect, the police knowing that their behavior is illegal and still implement it. Therefore, it meets the constitutional requirements of compulsory crime. Since the police's behavior constitutes a crime from the perspective of illegality and responsibility, there is still a question, that is, the police conduct torture of the suspect for the purpose of protecting the hostages. If the police are found guilty, does it go against the perception of ordinary people?

The thesis believes that we can learn from the plan proposed by Professor Roxin. In reality, the category of "criminal responsibility" (accountability) does not only come from guilt, but also from another necessity: that is, the necessity of punishment for the purpose of prevention. The category of "accountability" depends on two elements: guilt and the necessity of punishment for the purpose of prevention, which are equally important as far as he concerned.

If it needs to be applied to this case, it must be analyzed from the perspectives of liability for violations and prevention. From the point of view of responsibilities for violations of the law, the threat of torture belongs to the "compulsory" stipulated in Article 240 of the *German Criminal Code*, and the policeman has known about the relevant regulations. He has known that the behavior is illegal but still did so, therefore, the behavior of the police is culpable and conforms to the first element of "accountability". Next, we will discuss the second element of non-compliance with "accountability". From the perspective of the purpose of prevention, there is no need for punishment in this case. The reason is that the purpose of prevention is to prevent the offender from committing the crime again. However, in this case, as far as the police were concerned, he was tortured out of conscience to save the lives of the hostages, not out of criminal motives, so there was no need for punishment and no punishment was required. In addition, in case 2, when the plane was hijacked, from the perspective of culpability, if the Secretary of Defense ordered the plane to be shot down, the life of the innocent passengers on the plane would be deprived, which undoubtedly violated the dignity of the innocent passenger, so he was guilty. On the contrary, if the Secretary of Defense did not order the downing of the plane, his inaction would cause the hijacked plane to hit the building and cause more deaths, which also violates the dignity of the people in the building and is equally culpable. Therefore, only from the perspective of guilt, no matter what actions the Secretary of Defense takes, he will be deemed to bear criminal responsibility. Therefore, the way to solve this dilemma is to invoke the responsibility that exceeds the regulations to prevent the cause, or the evaluation of guilt invokes Professor Roxin's point of view, that is, it is necessary to judge whether there is a need for punishment from the perspective of prevention. In such cases, there is indeed no need

for punishment, and it does not meet the second element of "responsibility", so there is no need to use punishment.

In addition to adopting the viewpoint put forward by Professor Roxin to solve the problem, there is another way to solve this problem. That is, in the Daschner case or the time bomb case, although the thesis believes that human dignity cannot be measured by the principle of proportionality, when a criminal suspect decides to give up his dignity, he should protect the dignity of the person who has not given up or is more worthy of protection. The reason is that when a criminal suspect commits an act that harms the lives of others, his behavior will inevitably bring about two consequences, one is to bear criminal responsibility; the other is to bear the consequences of the defender using it as a defense tool. Therefore, when a criminal suspect commits an act of harming the lives of others, torture is not a choice after weighing the dignity of the criminal suspect and the victim, but the criminal suspect has given up his dignity in order to achieve a certain purpose. When the criminal suspect abandons his dignity, the dignity of the victim or the innocent is certainly more worthy of protection.

#### **4. Content expansion: Comparison of the dignity of the German basic legal person and the dignity of the Chinese constitution**

##### **4.1. Human Dignity in German Basic Law**

Article 1 of the German *Basic Law* stipulates that human dignity is inviolable, and respect and protection of human dignity are all national rights and obligations. Article 79, paragraph 3 of the *Basic Law* also states that the protection of human dignity can never be changed. The Basic Law is the result of absorbing the human dignity of the Enlightenment period and Kant's philosophy. Kant's theory holds that everyone is a subject that should be respected. Therefore, people are ends rather than tools, and people cannot be used as means, otherwise it will violate human dignity. Human dignity is innate to a person, and a person should have the right to respect and his personality not to be insulted or degraded [10].

From the perspective of the status of human dignity in the Basic Law, human dignity has the highest effect on the level of regulation and is the most important constitutional principle. Therefore, human dignity is higher than other rights, and human dignity must not be regarded as a pure object or means, and must not be weighed against or belittled by other rights.

##### **4.2. Personal Dignity in China's Constitution**

Article 38 of China's *Constitution* stipulates that the personal dignity of citizens is inviolable, and it is forbidden to insult, slander, and falsely accuse citizens in any way. The academic circles generally understand human dignity as an individual basic right, focusing on the protection of citizens' personality. Personal dignity includes inviolable rights such as reputation, name, portrait and so on, which are closely related to the body of a citizen. In this sense, personal dignity is not a fundamental principle of our Constitution. The personal dignity stipulated in the Constitution of our country must be embodied through the personality system and transformed into a civil right before it can be protected by law [11].

##### **4.3. Comparison of the dignity of the basic legal person in Germany and the dignity of the constitution of China**

The status of first and second are different. Human dignity stipulated by the German Basic Law is the basic principle and highest value of the Constitution, while the human dignity stipulated in the Constitution of China refers to the right to be respected by citizens as subjects with independent will [12]. Therefore, human dignity is only a basic right in the constitution of our country. Compared with absolute and unrestricted human dignity, the status of human dignity stipulated in the Constitution of our country is different from that of the German Basic Law.

Secondly, the constrained objects are different. Personal dignity is a concentrated summary of human rights in civil law, which is mainly limited to civil rights such as reputation rights and name rights, and is to adjust the legal relationship between equal civil subjects. Human dignity is embodied in the aspects of individual autonomy, free development and minimum survival guarantee, and its object of restraint is the state power. Thirdly, it is different whether it can be sued. At present, China has not established a constitutional litigation mechanism, and fundamental rights are not litigable. Therefore, judicial protection of fundamental rights cannot be initiated directly based on the constitutional personal dignity clause. Germany can file a lawsuit against violations of human dignity through the Federal Constitutional Court. In summary, because China's interpretation of the clauses on personal dignity only includes the protection of citizens' personal rights too narrowly, the human dignity stipulated by the German Basic Law is very different from that stipulated in the Chinese Constitution. In short, there is only human dignity in the constitution of our country, and there is no top constitutional principle on par with the human dignity stipulated in the German Basic Law[13].

In practice, the role of the human dignity clause is limited. The latter sentence of Article 38 of the *Constitution* can be combined with the German object formula to justify it as the basis of the theory of human dignity in China's constitution. In addition, in conjunction with the provisions of Article 33 of the *Constitution* on "the state respects and protects human rights", the respect and protection of human dignity is elevated to a state obligation.

## 5. Conclusion

There are few discussions about the use of torture for rescue purposes in the academic circles of China, but it is necessary to discuss such issues. In view of the shortcomings of the current theory of torture justification, it can be learned from the plan proposed by Professor Roxin, which can be solved by the two factors of violating the law and the necessity of punishment for the purpose of prevention. The German Basic Law has reference significance to China, so China should start from its own national conditions and refine the theory of human dignity with Chinese characteristics on the basis of absorption and reference.

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