

**“OBJEKTFORMEL” – EVENTUAL ACTS OF DAMAGE  
TO HUMAN DIGNITY  
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**Abstract**

*The Object formula („Objektformel”) has been designed and developed in the mid century XX by Günter Dürig, starting from the second formula of Kant's categorical imperative. The Federal Constitutional Court of Germany took the formula and applied it for the first time in the case of the telephone conversations of December 15, 1970. The Object formula („Objektformel”) was taken from the German constitutional law and applied in the jurisprudence of the European Court of Human Rights.*

***Keywords:** human dignity; the jurisprudence of the Federal Constitutional Court of Germany; the jurisprudence of the European Court of Human Rights.*

**Introduction**

The Object formula was designed and developed by Günter Dürig, is outlined based on a negative form, but gives some legal possibilities. The theory of the object starts from the second formula of Kantian categorical imperative: “act in your relationship with humanity, in relation to your own person and in relationship with others, as they would be for a purpose and not a simple way”.

According to Dürig, the guarantee of the dignity is rooted in the idea that man is distinct from impersonal nature because of his mind that allows him to become self-aware, to self-determination and to shape his own destiny. Therefore, to treat someone as an object is to deny his ability to self-determination and to shape the environment. According to Dürig, the human dignity is affected when a concrete human being is reduced to an object, to a simple way, to an amount that you can dispense. The violations of the human dignity involve the degradation of a person to a thing that can, entirely, be kept in short, to have him be registered, to be brainwashed, to be replaced, to be used and be expelled.

This expression comes from the historical context of post-World War II and is now extensively applied to the Federal Constitutional Court of Germany. The idea was taken up by several German authors, with some nuances. The renowned German professor Josef Wintrich, which started from Kant's formula, stated that a person must remain “an end in itself in society and in the legal system can never be denigrated as a simple means of community, as a simple instrument or simple object without rights in system”<sup>1</sup>.

**The application of the object theory in german constitutional law**

To reify means, according to Kant's philosophy, to use the person only as a means to another end. Treating a person as an object is a denial of the uniqueness of the individual. No

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matter if reification is done by the state or by another individual as undermining human dignity is retained in both cases, it matters that the person can no longer trace the route of his own life, being completely available to another people. Humiliation, stigmatization, persecution, exile, inhuman or degrading punishment were considered in law as affecting human dignity.

The Federal Constitutional Court of Germany took the theory of the object and explained for the first time the concept of „Objektformel” in the case of telephone tapping of December 15, 1970. In this case it was about a constitutional amendment aimed at restricting the exercise of the right to privacy of correspondence, mail and telecommunications. It was indicated on this occasion that „Often it happens that a man is reduced to being an object of relationships and social development, but also to the law, meaning that he must obey without his interests being taken into account. It is not enough to retain a violation of human dignity. For this, you need that the treatment put in question the quality of the subject, or where it is the case, a violation of dignity that is arbitrary. The human treatment by the law enforcement public authorities should be a treatment that is contemptuous”<sup>2</sup>.

The Federal Constitutional Court of Germany (Bundesverfassungsgericht) has frequently held that is contrary to human dignity when a person is considered as a mere object of state. The Court expressed doubt about the fact that a formula such as general as the formula of the object could determine whether there was a violation of dignity in a particular case, and this is one of the weaknesses of the formula. To be an infringement of human dignity, it was argued that in addition, the person must be subjected to a treatment that basically launches doubts about the quality of a subject or in a particular case proves arbitrary disregard for dignity. To violate human dignity, the individual treatment in the hands of the public authority must be the expression of contempt for the incumbent of every human being by virtue of being a person. The Federal Constitutional Court of Germany was concerned that if a person was not notified of the fact that his phones are tapped, the pressure imposed on the citizens by the state for the need to protect the society and the liberal democratic order, do not constitute the expression of contempt for the person whose privacy has been affected. It was also noted that the quality of compliance of the quality of a subject of the person, normally includes the right to apply to a court, but, the exclusion of the judicial routes in question was not motivated by contempt for the human person, as are offered other forms of judiciary control. Therefore, the Federal Constitutional Court of Germany has not removed from the “object” formula, but he attached a subjective conception: “Objekt - Subjekt – Formel” (the formula considering as object or as subject).

On the other hand, in the Microcensus case<sup>3</sup>, the Federal Constitutional Court of Germany established that to compel a person to record all aspects of his personality would treat it as an object. The dignity requires the state to treat the individual as being capable of self-determination, and should be left an internal space for a free and responsible development of his personality.

“Objektformel” involves determining the obligations of abstention and not the content of human dignity, such a formula addressing the concept of human dignity analyzed for restriction<sup>4</sup>. The content of human dignity can’t be defined in a general manner. The definition is a made in a negative way, the German Constitutional Court stating that human dignity must always appreciated by a particular case, and the appreciation from this perspective remains conjectural. Therefore, the general expressions like “the human being must not be reduced to an

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<sup>2</sup> D. P. Kommers, R. A. Miller, *The constitutional jurisprudence of the Federal Republic of Germany*, 3 edition, “Duke University Press, London” Publishing House, London, 2012, p. 365. For a detailed presentation of the German Constitutional Court's jurisprudence, see *Selecție de decizii ale Curții Constituționale Federale a Germaniei*, Fundația Konrad Adenauer, Programul Statul de Drept Europa de Sud Est, “C.H. Beck” Publishing House, Bucharest, 2013.

<sup>3</sup> The Microcensus Case, 27 BVerfGE 1, (1969), see D. P. Kommers, R. A. Miller, *work cited*, p. 356.

<sup>4</sup> K. Zakariás, K. Benke, Demnitatea umană în jurisprudența instanțelor constituționale din Germania, Ungaria și România, p. 46, [http://www.ccr.ro/uploads/zakarias\\_benke.pdf](http://www.ccr.ro/uploads/zakarias_benke.pdf).

object in the hands of state power” can only sketch and can be found within the violations of human dignity”<sup>5</sup>.

One of the most controversial cases in which the German Constitutional Court applies the theory of the object is the Case of the Aviation Security Act<sup>6</sup>. As a reaction to the terrorist attacks of 11 September 2001 on the World Trade Center and the Pentagon, in Germany was adopted the Law of aviation security, in 2005. The Section no. 14 of the law has aroused various reactions, as authorized by the Minister of Defence, with the consent of the Minister of Interior to use military force against a passenger of the aeronave if the plane intended to be used against human life, and when it was the only way to avoid an imminent danger.

Several lawyers and flight captains cited the non-compliance of the law with Art. 2 paragraph (2) which guarantee to all persons the right to life, together with Art. 1 paragraph (1) on the inviolability of human dignity in the German Basic Law. They reasoned the position adopted by showing that in doing so the State relativize the human life of the passengers on board, treating them as objects of state action and depriving them of their human value and honor.

The Federal Constitutional Court of Germany agreed with this position. In his view, to allow felling a passenger plane, the passengers and the crew would be deprived of the right to self-determination and thus would be mere objects of any rescue operation for the protection of others. Or, “human life is intrinsically connected with human dignity as the supreme principle of the Constitution and the highest constitutional value. Every human being is endowed with dignity as a person regardless of his physical or mental condition, (...), capacity or social status. No person may be deprived of his dignity. Any violation of this value would be unjust. The principle applies during the entire life of the person and includes the dignity even after death”<sup>7</sup>.

The Court held that if the right to life may be restricted by law, the principle of human dignity prohibits absolutely intentional killing of helpless people, passengers on a plane. In addition, the legal authorization of this kind would violate the “essence” of the fundamental right to life and the assumption that passengers when boarding would consent to breaking aircraft is nothing but a “non-realistic fiction”<sup>8</sup>. The court noted that people should not be treated as objects for the purpose of saving others and the killing of innocent passengers can not be used as a means to save the lives of potential victims on the ground, because human life can not be available unilateral to the state in this way, even if there is a statutory authority.

### **The application of the theory of the object in the jurisprudence of the European Court of Human Rights**

The European Court of Human Rights took the formula of the object and applied it in several of its decisions.

The first is the case Tyrer<sup>9</sup>, in which the plaintiff Anthony Tyrer was a British citizen, living in Castletown, Isle of Man. As with the other three teens, seriously injured a student in his school at the age of 15, he was sentenced by a local court for youth to corporal punishment consisting of three strokes of rods, for unprovoked assault causing bodily harm. Since his appeal to the High Court of Justice of the Isle of Man has been dismissed, the conviction was executed on April 28, 1972, to the police station in the presence of his father and a doctor. This type of punishment, although they were abolished in England, Wales and Scotland in 1948 and in Northern Ireland in 1968, was held for certain crimes, in the legislation of the Isle of Man. They apply only to males aged between 10 and 21 years, the number of shots being up to 6 for a person aged up to 13 years and 12 for those aged between 13 and 21 years. These penalties were

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<sup>5</sup> Beatrice Maurer, *Le principe de respect de la dignité humaine et la Convention européenne des droits de l'homme*, “La documentation française” Publishing House, Paris, 1999, p.125.

<sup>6</sup> Case on aviation security Act, 115 BVerfGE 118, 127 (2006), D. P. Kommers, R. A. Miller, *work cited*, p. 396.

<sup>7</sup> Case on aviation security Act, cited above, § 152.

<sup>8</sup> Case on aviation security Act, cited above, § 157.

<sup>9</sup> E.C.H.R., Case Tyrer vs. R.U., application no. 5856/72, 25 april 1978.

rarely applied, and in 1969 applied only to crimes of violence against persons. Before the Commission, the applicant complained under Article 3 of the European Convention on Human Rights. Having established that the question is not about torture or inhuman treatment, because the suffering caused by Antony Tyrer involved did not reach these concepts, examined whether the corporal punishment was a degrading treatment. For the purpose of the Court, is degrading the punishment if provoked humiliation and contempt that reach a particular level, which differs from the usual element of humiliation that contained normal and almost inevitable in any corporal punishment. The Court noted that the assessment in this regard is relative, being taken into account, in particular, the nature of the punishment, the context of the punishment and manner of execution. Compared to all the circumstances of the case, decided that the corporal punishment is degrading.

The reasons for the decision, is invoked the object theory. Judicial corporal punishment suppose, by their very nature as a human being to do the physical violence on his fellow man. He added as extra gravity that it was about institutionalized violence, and that those who applies penalty are complete strangers to the punished and to all involved formal punishment (anxiety of waiting for the violence to apply to them, and the shame of having to undress). It prohibited the use of punishment contrary to art. 3 of the Convention, whatever their deterrent effect. The European Court of Human Rights concluded that art. 3 of the Convention was violated because the penalty imposed on the applicant “consisting of being treated as an object of political power injured his dignity and physical integrity”<sup>10</sup>.

It is worth recalling the judgment of the European Court of Human Rights in P.E.T.A. Deutschland against Germany on November 8, 2012<sup>11</sup>. In March 2004, the applicant Association P.E.T.A. (“People for the ethical treatment of animals”) is planning to start an advertising campaign titled “Holocaust on your plate”. The campaign, developed in a similar way to the U.S.A., consisted of a number of posters, each with a photo of prisoners in concentration camps with an image of the animals kept in farms for mass production, accompanied by a brief text. One of the posters exposing a photo of emaciated camp inmates, naked, next to a photo of starving cattle under “walking skeleton”. Another poster showed a picture of the human bodies stacked on top of each other with the title „Ultimate humiliation” and rows of prisoners lying in bed crowded with flocks of birds in battery hens under the title “Concerning animals, everyone becomes Nazi”. Another poster featured a male prisoner starved and naked with starving cattle, titled „Holocaust on your plate” and the text “Between 1928 and 1945, 12 million human beings were killed in the Holocaust. So many animals are killed every day in Europe for human consumption”.

In March 2004, three individuals, P.S, C.K. and S.K., have submitted an application to the Regional Court of Berlin calling for the association to refrain from publishing or not to allow the publication of seven posters listed on the internet, in a public presentation or otherwise. The applicants were then chairman and two vice-chairmen of the German central Hebrew, Holocaust survivors when they were child, and C.K had lost his family in the Holocaust. They argued that the campaign was offensive and violate their human dignity and the personality rights of the deceased family members of C.K.

The Federal Constitutional Court of Germany dismissed the constitutional complaint, saying that the interpretation of images of the civil courts was one coherent. Federal Constitutional Court's reasoning is interesting in several aspects. First, the Court expressed doubts that such a campaign violate the human dignity of any of the persons described or applicants, because „not deny to the Holocaust victims described their value, putting them on par with animals, the scope of the campaign has not been to demean, but to suggest that the sufference of the people described was equal to the sufference applied to the animals”<sup>12</sup>. But consider that it is unnecessary to decide whether the campain violated the human dignity of

<sup>10</sup> E.C.H.R., Case Tyrer vs. R.U., cited above, §33.

<sup>11</sup> E.C.H.R., Case P.E.T.A. Deutschland vs. Germany, application no. 43481/09, 8 November 2012.

<sup>12</sup> E.C.H.R., Case P.E.T.A. Deutschland vs. Germany, cited above, §48.

applicants since the contested decision contained sufficient evidence to justify the ban on publication, without reference to the violation of the human dignity of applicants and considered acceptable that the domestic courts based their decisions taking into account the fact that the Basic Law makes a distinction between, on the one hand, human life and human dignity and on the other hand, the interests of animal welfare and that the campaign trivialized the fate of Holocaust victims. The German Federal Constitutional Court held that it was acceptable that the content of the campaign violated the personality rights of the plaintiffs. According to Court “was part of the self-image of Jews living in Germany about the fact that they belonged to a group that was marked by fate and that a special moral obligation was owed by all others, who formed some of their dignity”<sup>13</sup>.

On the decision of the Federal Constitutional Court of Germany have made several important clarifications. The principle of human dignity is central in the German legal system. According to art. 1 paragraph 1 of the German Basic Law, “Human dignity is inviolable. All public authorities have an obligation to respect and protect”. In German law, commitment to human dignity can be analyzed by the Federal Constitutional Court of Germany. On the other hand, this guarantee “was not open to any form of balancing test. It is the right which may “trump” over all other rights. (...) Being the first norm and unrevised, the human dignity was more than a norm and expressed the spirit of whole fundamental law in a nucleus”<sup>14</sup>. Human dignity acts as principle of interpretation, correcting any teleological interpretation of the German Basic Law which is not in the purpose of the respect of human dignity. In the relationship between freedom of expression and the right to honor, dignity is an impassable limit for the first. When it appears that expression of opinion violated the human dignity of the applicant, that decision does not depend on weighing competing interests. In the conflict between fundamental rights, the Federal Constitutional Court of Germany reviewed the observance of proportionality, particularly checking if Ordinary Courts have ignored the importance of freedom of expression as a fundamental right. Since it was found that freedom of expression was given due consideration by the Regional Court, the Federal Constitutional Court has not considered it necessary to refer the case to the lower courts for review because there were no indications that the latter would have reached to a different conclusion. In addition, the lower courts based their opinion on the fact that the campaign violated the applicants' human dignity as a violation of their personal honor was extremely serious.

We must insist also on the different position stood by the Austrian Supreme Court. In March 2004, the same posters were exhibited in Vienna and a number of Austrian citizens of Hebrew origin, other than the plaintiffs in this case and Holocaust survivors have filed an application with the Austrian courts in order to prohibit the publication of seven posters. The Austrian Supreme Court dismissed on October 12, 2006, saying that the posters are not depreciating the inmates of concentration camps described, and, moreover, the court held that the poster campaign, except that it addresses an important topic interest, had a positive effect to revive the memory of national-socialist genocide.

The European Court of Human Rights ruled that there was no violation of Art. 10 of the European Convention on Human Rights. So deciding, the court considered whether the interference was necessary in a democratic society.

First, it was stated that the association intended a campaign with posters about animal welfare and the environment, so in public interest, making that only strong reasons to justify the interference with freedom of expression of the association in this context. The Court held that domestic courts have held that the campaign did not pursue the purpose to humiliate inmates in concentration camps described as the images involved only that the suffering applied to human and animal was equal.

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<sup>13</sup> E.C.H.R., Case P.E.T.A. Deutschland vs. Germany, cited above, §18.

<sup>14</sup> C. Möllers, *Democracy and Human Dignity: Limits of a Moralized Conception of Rights in German Constitutional Law*, Israel Law Review no. 42/2009, p. 419.

The Object theory provides arguments to ascertain the applicants' personality rights violations. The "instrumentalization" of plaintiffs suffering was the one who infringe their personality rights as Hebrew who lived in Germany and the Holocaust survivors, the violation being compounded by the fact that the victims were shown in their most vulnerable state.

The problem becomes even more interesting by the fact that the court believes that this can not be detached from the historical and social context in which the expression of opinion occurs. Therefore, in the opinion of the Court, referring to the Holocaust should be seen in the specific context of the German past and the government's position that believe they have a special obligation to the Jews living in Germany, must be respected. Moreover, historical considerations, qualified as appropriate historical context, historical past, the particular historical circumstances, historical trend, historical experience, usually invoked by the respondent State to justify an interference with the exercise of the conventionality right guaranteed by the Convention are considered by the European Court regarding its control over the discretion of the state: they are one parameter among others to determine the extent of the discretion<sup>15</sup>.

On those facts, the European Court of Human Rights leaves Member States a wide margin of discretion, stating that "other jurisdictions could address similar issues in a different way"<sup>16</sup>. There are still considered two factors: that have not been applied a criminal penalty, but a civil prohibition preventing the association to publish seven posters specified and that it was not demonstrated that the association had no other means available to attract the attention of the protection of animals.

Judges Zupančič and Spielman rejects the arguments of the majority view of the fact that "the impact of an opinion (...) on someone else's personality rights can not be detached from historical and social context in which the statement was made and that a reference to the Holocaust must also be seen in the specific context of the German past"<sup>17</sup>. From such an argument, would clearly be inferred that the European Court would agree with the impunity behavior of the association concerned, if it comes to a jurisdiction where the historical and social context is different according to the statements. The central idea underlying the judgment in the separate opinion is the relativization of an unacceptable uses of freedom of expression. It was argued that one can imagine that the posters were made from the opposite point of view; situation where someone can reach to the contrary impression that prisoners who are shoulders barbed wire should be compared with pigs behind bars. The two judges sharply criticized the majority opinion, stating that: "If such is the kind of statement covered by freedom of expression, one then finds it difficult to understand, what is not covered by freedom of expression. (...)The above relativisation is deeply problematic from a seemingly "democratic" point of view, where everything goes because everything is relative and everything is, to put it metaphorically, for sale. People only have opinions, but they lack convictions, let alone the courage of their convictions. The difference between good and evil, between what is right and what is clearly wrong is thus a matter of opinion, as if reasonable men could reasonably differ on a particular subject matter. Here we may pause and ask, whether reasonable men could indeed or could not differ on the utterly distasteful and unacceptable comparison between pigs on the one hand and the inmates of Auschwitz or some other concentration camp, on the other hand. A few decades ago this kind of *Denkexperiment*, even in the American context, would only yield a result unfavourable to the applicants, because a few decades ago, reasonable persons could not possibly differ on the question we have before us in this case. (...) On the other hand, the unfortunate implication of our own position seems to be that the same kind of "freedom of expression" in the Austrian

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<sup>15</sup> J.F. Flauss, *L'histoire dans la jurisprudence de la Cour Européenne des Droits de l'Homme*, Revue Trimestrielle des Droits de l'Homme no. 65/2006, p.7.

<sup>16</sup> E.C.H.R., Case P.E.T.A. Deutschland vs. Germany, cited above, §49.

<sup>17</sup> E.C.H.R., Case P.E.T.A Deutschland vs. Germany, cited above, concurring opinion of Judges Zupančič și Spielman, §1.

cultural context would clearly be acceptable – let alone in other countries ranging from Azerbaijan in the east to Iceland in the west”<sup>18</sup>.

The dissenting opinion focuses on the theory of the object. Contrary to the view expressed by the majority, in the dissenting opinion, the principle of dignity is first invoked and then developed. The German constitutional concept of dignity coincides with the Kantian categorical imperative (“human being must be treated as an end in itself”). The unit - dignity of the person opposes to the instrumentalization of the person by split between its components<sup>19</sup>. The person should be seen as a whole, as completed, with whose body can’t be achieved through inhuman and degrading treatment that provoke a sense of humiliation, to mitigate the social value, of dissocialising. Applying the theory of the object, the Court held that it is about the human dignity, as a mark of distinction between man and the rest of the universe, who would be harmed when the human beings in their suffering and humiliation overall are compared to chickens and pigs to lower order to promote animal rights, for in this case “we are not in a position to argue that human beings viewed in the images are treated as an end in itself”<sup>20</sup>.

What are the arguments for recognizing the inherent dignity of each person? And why should not treat people merely as means? Worth to render this way, George Kateb explains our uniqueness among other species, human dignity source: “The human species is really something special in that it has a uniqueness or distinctiveness valuable, laudable, it is distinguished from all other species uniqueness. It has a higher dignity than all other species, or qualitatively different from that of other species. His superior dignity is theoretically based on partial upper discontinuity of humanity with nature. Humanity is not only natural, while all other species are only natural”<sup>21</sup>. George Kateb believes that human dignity derives from the unique ability of humans to reason.

The presence of human dignity in the decision reflects the emergence and maturing of the relationship between dignity and freedom of expression, the first limiting it to the latter. The decision brings new elements, drawing a negative definition of dignity by resorting to the theory of the object, taken from German law and applied in the conventional space.

## Conclusions

There is no complete agreement on the utility of the theory of the object. The main drawback of this theory is that it very much appeals to intuition. Part of the doctrine considers that the theory of the object is hopelessly vague, indefinite and fails to provide a principled basis for judgment in a case<sup>22</sup>. It would be several actions that the other is treated as an object, and when, however, does not violate dignity. In German legal literature, some authors call it “*Leerformel*” (formula without substance) as it is applied only on unambiguous restraints<sup>23</sup>. Others cite Schopenhauer’s criticism<sup>24</sup> and referring to the decision on wiretapping, believes that the Federal Constitutional Court of Germany deem it an empty formula. Two arguments can be made against the theory of the object. First, is the fact that it is often inconclusive and the second argument is that the contemptuous treatment sets the bar too high, in that it presupposes the existence of an intention to devalue the human person. However, the damages to dignity are not

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<sup>18</sup> E.C.H.R., Case P.E.T.A. Deutschland vs. Germany, cited above, concurring opinion of Judges Zupančič și Spielman, §3-9.

<sup>19</sup> X. Bioy, *Le concept de personne humaine en droit public. Recherche sur le sujet des droits fondamentaux*, “Daloz” Publishing House, Paris, 2003, p. 580.

<sup>20</sup> E.C.H.R., Case P.E.T.A. Deutschland vs. Germany, cited above, concurring opinion of Judges Zupančič și Spielman, §14.

<sup>21</sup> G. Kateb, *Human Dignity*, Belknap Press of Harvard University Press, Cambridge, 2011, p. 5.

<sup>22</sup> H. Botha, *Human dignity in comparative perspective*, Stellenbosch Law Review, vol. 20/2009, p. 4.

<sup>23</sup> K. Zakariás, K. Benke, *work cited*, p. 46.

<sup>24</sup> It is estimated that the Kantian formula “is very uncertain, undefined, and requirements that indirectly achieved its purpose, must, in each individual case, first be explained, defined and modified”.

just intentional, but also those resulting from action taken knowingly, with the best intentions and to achieve legitimate objectives.

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