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HUMAN DIGNITY AND THE LAW IN POST-WAR EUROPE

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LIST OF ABBREVIATIONS

BVerfG	Das Bundesverfassungsgericht (Karlsruhe) (German Federal Constitutional Court)
Basic Law	German Basic Law (Grundgesetz)
Convention	European Convention for the Protection of Human Rights and Fundamental Freedoms
Declaration	Universal Declaration of Human Rights
EC	European Communities
ECJ	Court of Justice of the European Union (Luxembourg)
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights (Strasbourg)
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union
European Convention	European Convention for the Protection of Human Rights and Fundamental Freedoms
GG	Grundgesetz (German Basic Law)
ICJ	International Court of Justice (The Hague)
ICTY	International Criminal Tribunal for the former Yugoslavia
ICC	International Criminal Court (The Hague)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labor Organization
Lisbon Treaty	Lisbon Reform Treaty, amending the Treaty on European Union (TEU) and introducing the EU Charter
NATO	North Atlantic Treaty Organization
NGO	Non governmental organization
OSCE	Organization for Security and Cooperation in Europe

Oviedo Convention	Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine
TEU	Treaty on European Union
TFEU	Treaty on the functioning of the European Union
UN	United Nations Organization
UN Charter	United Nations Charter
UNESCO	United Nations Educational, Scientific and Cultural Organization
Union	European Union
Universal Declaration	Universal Declaration of Human Rights
US	United States of America

INTRODUCTION

Understanding the legal principle of human dignity

1.1. Hypothesis

With the entering into force of the Lisbon Reform Treaty on December 1st, 2009, the Charter of Fundamental Rights of the European Union[1] (EU Charter) has become law. With it, the legal *principle* of human dignity is enshrined in EU law: article 1 of the EU Charter reads:

"Human dignity is inviolable. It must be respected and protected".

The term "human dignity" also appears in the preamble of the EU Charter, whilst articles 25 and 31 speak of the dignity of the elderly and the worker. Since however article 1 is the "master principle" of human dignity in the EU Charter, we will focus on this article. The *legal concept*, or *Rechtsbegriff*, of human dignity has served as the basis of the European human rights system only since the end of World War II. We make a distinction in this study between the *legal concept* and the *legal principle* of human dignity. A legal concept refers to a fundamental idea or philosophical notion that underlies a certain legal instrument. A legal principle refers to an operational legal term or an actual rule of law that is directly enforceable in a court of law, which could also be referred to as a *legal norm*. In its legal context, human dignity appears in both forms in Europe. The European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention) is based on the *legal concept* of human dignity, whereby the protection of human dignity is not referred to directly in the document itself, but only the rights deriving from it. The German Basic Law introduced the *legal principle* of human dignity protection as the highest duty of the state to protect, whereby the German Federal Constitutional Court (BVerfG) directly applies this principle in its rulings. There is,

[1] The Charter of Fundamental Rights of the European Union was proclaimed by the European Council, the European Parliament and the European Commission on December 7, 2000 and again on December 12, 2007 and incorporated in article 6 of the Treaty of European Union (TEU) through a revision implemented by the Lisbon Reform Treaty that itself entered into force on December 1st, 2009

however, no fundamental agreement on the definition of human dignity, neither as a philosophical notion, nor as a legal term. Article 1 of the EU Charter, the new European legal principle of human dignity, could therefore prove problematic because it leaves much uncertainty as to the exact scope of its application and it is open to broad interpretation.

In order to be able to protect human dignity under the EU Charter, it is necessary to achieve a better understanding of the roots and realities of this principle and its application in the EU. If this is not achieved, as a consequence the stated legal principle itself can become a threat to that which it is trying to protect. Developments over the past decades, especially where it involves dealing with issues pertaining to the beginning and end of human life and biomedicine, as well as religious freedom, are the clearest examples of this threat. All too often human dignity is invoked on both sides of an argument that deals with the protection of fundamental human rights such as the right to life and the right to freedom of religion. When it comes to understanding the legal concept or the legal principle of human dignity, modern-day relativism and legal positivism can collide with the post-War European revival of Christian and natural law thinking as well as the further development of the Kantian concept of human dignity in that same period. The Christian and Kantian schools of thought – as most authors would agree - provide the philosophical foundation for the notion of human dignity in its legal context as it developed in post-War Europe. These two traditions form the basis for such ground-breaking documents as the Universal Declaration of Human Rights (Declaration), the German Basic Law (Grundgesetz), the various other national constitutions in Europe, the Convention and the EU Charter itself. Equally relevant are the application of these documents by the German Federal Constitutional Court (BVerfG) in Karlsruhe, the European Court of Human Rights in Strasbourg (EctHR) and the Court of Justice of the European Union (ECJ) in Luxembourg. These philosophical and legal traditions and documents comprise the defining elements of the current European human rights system and form the basis for article 1 EU Charter.

1.2. Objective and scope of the research

Objective of the research

This research aims to provide an insight into the genesis, application and consequences of article 1 EU Charter and the legal concept of human dignity in general, by analyzing the main post-War schools of thought and related (legal-) historical developments that have shaped the notion of human dignity in Europe today. This research should contribute to a better understanding of the legal principle of human dignity now enshrined in EU law as well as the legal concept of human dignity in Europe in a broader sense.

Scope of the research

Our focus will be on the post-War period because, as is generally agreed in literature, it has been during this time that human dignity was decisively shaped in its legal context. Until the beginning of the Second World War, the use of the human dignity notion as a political or legal concept was mostly limited to counter the negative effects of Europe's rapid industrialization through which ordinary workers suffered inhumane conditions and were used as objects in the production process. Pope Leo XIII addressed the urgent need to take measures to protect the dignity of the worker as early as 1891 in his ground-breaking Encyclical *"Rerum Novarum"*, also called "the encyclical on the condition of the working classes".[2] In 1919, the International Labor Organization (ILO) was founded as an agency of the League of Nations with much the same purpose in mind and concluded various conventions to that extend. Pope Pius XI further expanded the Catholic Church's social doctrine on the inherent human dignity of the worker in his 1931 Encyclical *"Quadragesimo Anno"*.[3] However, human dignity as a broadly applicable political and legal concept or as a legal principle does not have a long history. It was in response to the horrors of Nazism and Communism ravaging the European continent and many parts of the world in the 20th century that various European political and legislative initiatives were introduced to avoid a repeat of this massive and organized

[2] Pope Leo XIII, Encyclical letter on Capital and Labor "Rerum Novarum", 15 May 1891. Published at www.vatican.va

[3] Pope Pius XI, Encyclical letter on Reconstruction of the Social Order "Quadragesimo Anno", 15 May 1931. Published at www.vatican.va

disregard of fundamental human rights. It was held to be self-evident, at least in the West, that these totalitarian systems and their actions violated human dignity. In the years immediately following the Second World War, Europe therefore saw the creation of various legal instruments recognizing and protecting human dignity as the basis for human rights. The United Nations Charter (1945), the Universal Declaration of Human Rights (1948), the European Convention on Human Rights and Fundamental Freedoms (1950), the Helsinki Final Act (1975) and various related UN human rights documents as well as the German Basic Law (1949) all addressed human dignity, albeit in different ways and forms. The German Basic Law enshrined human dignity in article 1.1. as the state's "highest duty to protect". The various UN fundamental rights' treaties, such as for example the International Covenant on Civil and Political Rights (ICCPR, 1966) and the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966), speak of human dignity and the need to protect it mostly in the preambles. The Council of Europe's European Convention refers to it indirectly only through referral to the Universal Declaration, but the later "Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine" (Oviedo Convention, 1997) makes repeated mention of the legal concept and the legal principle of human dignity. Today the legal concept of human dignity has thus become generally accepted as foundational for international human rights law, especially in Europe. The legal *principle* of human dignity only appears in a small number of legal instruments and in different forms, both as a general and as a specific norm. The most recent and prominent example is the EU Charter already quoted above, whereby both the concept and the principle are included in the document: it speaks of the inviolability of human dignity in the preamble and in article 1. But none of these documents actually define what human dignity is and how it should be applied in a legal context. At best, human dignity is an ambivalent notion that is applied inconsistently. At worst, it is a vague political slogan that can be used at will and with varying content for the most diverse purposes. When we look at laws passed and judgments rendered on cases involving beginning and end of human life questions, the ambivalence of the notion of human dignity becomes very clear, as is demonstrated in the fact that it is commonly used to both support and reject the same argument. McCrudden summarizes this problem well:

"In practice, very different outcomes are derived from the application of dignity arguments. This is startlingly apparent when we look at the differing role that dignity has played in different jurisdictions in several quite similar factual contexts: abortion, incitement to racial hatred, obscenity, and socio-economic rights. In each, the dignity argument is often to be found on both sides of the argument, and in different jurisdictions supporting opposite conclusions." [4]

So it is all the more relevant that the EU Charter has now entered into force introducing human dignity protection as an operational legal principle of EU law. Yet a clearer understanding of what human dignity entails is not automatically achieved with this. The EU Charter only once more highlights the need for clarification of this notion in general terms and within the framework of European law as such.

1.3. The roots of human dignity in its legal context

In order to better understand the legal concept and legal principle of human dignity as it is known today, especially in the EU Charter, we will first analyze their philosophical roots as they developed in post-War Europe. We will then look at the historical setting within which the notion of human dignity became relevant in a legal context. Finally, we will look at the legal-historical development and case law in post-War Europe that has shaped the human dignity legal concept and legal principle into how it is currently applied.

<u>The main philosophical roots</u>

The two main schools of thought having shaped the development of human dignity in its legal framework in post-War Europe are the Christian tradition with its revival of natural law thinking on the one hand, and enlightenment rationalism inspired by Kantian thought and its further development in post-War Europe on the other hand. We will analyze these traditions in Part I and focus on how these traditions developed during and after the

[4] Christopher McCrudden, Human Dignity and the Judicial Interpretation of Human Rights, in : The European Journal of International Law – EJIL 19, 2008, p. 698

Second World War. In the area of Christian thought we have selected a number of important Catholic writers predominantly (but not exclusively) from the German-speaking countries due to the fact that in post-War Europe these writers have had such an important impact on the development of the legal concept and the legal principle of human dignity. Apart from the post-War Kantian tradition – especially in Germany -, the Catholic tradition of that same period and the German post-War constitutional tradition are the largest resources available on the development of the human dignity notion. Two factors explain this: the 1949 Basic Law of Western Germany being the first post-War constitution in Europe to enshrine human dignity protection as a *constitutional principle*, and secondly the important developments that were made in Catholic thinking on human dignity after the War at a time when the Catholic Church was still very influential in Europe. It is also no coincidence that the president of the convention that drafted the EU Charter was Roman Herzog who during his career served both as president of the German Federal Constitutional Court and as federal president of Germany.

The historical setting

The two main historical developments that most contributed to the notion of human dignity becoming legally so broadly relevant in post-War Europe were the bloodletting of the totalitarian and unspeakably *inhuman* regimes of Adolf Hitler in Nazi Germany and Josef Stalin in the communist Soviet Union. In Part II we will study the actual violations of human dignity under Nazism and Communism and analyze the subsequent broad political movement leading to human dignity developing into a legal concept and a legal principle no longer limited to mostly worker's issues. Without a thorough historical understanding of the deep impact the Second World War and its aftermath had on the European soul and the fabric of society, it is impossible to understand the meaning of human dignity today. Historical awareness is therefore the key to effective human dignity protection. The German philosopher Heiner Bielefeldt summarizes this point well when he says that "*die apriorische Rechtsidee nur in der geschichtlichen Auseinandersetzung inhaltliche Bestimmtheit und positiv-rechtliche Wirklichkeit Erlangen kann.*"[5].

[5] Heiner Bielefeldt, Neuzeitliches Freiheitsrecht und politische Gerechtigkeit. Perspektiven der Gesellschaftsvertragstheorien, Würzburg 1990, p. 115

The legal-historical development

The milestones in the development towards article 1 EU Charter and the legal concept of human dignity in general are on the one hand the various national constitutional traditions in Europe and on the other hand the key post-War international documents (and related legal mechanisms) including the human dignity notion. These latter are the Charter of the United Nations (1945), the Universal Declaration of Human Rights (1948), the German Basic Law (1949), the European Convention on Human Rights and Fundamental Freedoms (1950) and the Charter of Fundamental Rights of the European Union (2000, 2007, 2009). These documents and their legal evolvement, as well as the resulting case law by German and European courts, will be discussed in Part II.

1.4. The uniqueness of article 1 EU Charter

Although the notion of human dignity is not new in the European legal landscape as such, article 1 EU Charter is the first time in the history of the European Union that human dignity becomes an operational legal term on the supranational level of EU law. According to article 51 of the EU charter, it will be exclusively applied for the time being in matters relating to the operations of the EU institutions as well as the implementation and application of EU law in and by member states. The Court of Justice of the European Union in Luxembourg (ECJ) will have the final word on the application of this article. The Court herewith assumes a new role with which it has so far only had limited experience, other than generally following the case law of the European Court of Human Rights in Strasbourg and translating it into its own rulings where appropriate.

To speak with the French jurist Béatrice Maurer, human dignity is a mystery, always incompletely understood by human beings themselves. It can only be better understood by "participating in it", by it becoming progressively more accessible by human experience itself – not by rigid legal definition[6]. This study hopes to contribute to this participation in human experience as a way to better understand human dignity.

[6] Béatrice Maurer, Le principe de respect de la dignité humaine et la Convention européenne des droits de l'homme, La documentation Française - Paris, 1999, pp. 7-8

PART I:

PHILOSOPHICAL ROOTS OF THE LEGAL PRINCIPLE OF HUMAN DIGNITY IN ARTICLE 1 CHARTER

Chapter 1: The revival of natural law thinking

1.1. Introduction

The inalienable dignity of the human being was mostly considered a philosophical and theological concept before it became a general legal concept[7]. Article 1 EU Charter is rooted in a long intellectual and spiritual tradition without which the legal concept of human dignity as we apply it today cannot be fully understood. It is the political development in Europe in the years after the Second World War combined with the strong influence of the émigré European intellectuals residing in the United States during the War that gave the broad acceptance of the human dignity notion its main forward thrust towards how it is regarded today. The protection of human dignity would not have become an article of EU law, were it not for the rapid and simultaneous strengthening of this concept in philosophical discourse, in national and international politics and in national law throughout Europe from the post-War period onwards. But what is often overlooked in the discussions about the thinking behind and the meaning of the legal concept and the legal principle of human dignity is what the authors of the original human dignity provisions and those that influenced them had in mind. Knowing this will help us understand their true meaning and envisaged consequences. We will therefore first discuss a number of influential thinkers of the post-War era that advanced a revival of natural law thinking in relation to human dignity and human rights. We will then discuss the relevant Catholic doctrine on human dignity, followed by modern Christian thought and finally the development of post-War Kantian thought on human dignity and the law.

[7] As we discussed in the introduction, the human dignity notion was a political and legal concept of only limited applicability until the beginning of the Second World War

In dealing with the total destruction of the Second World War, a return to natural law theories was in fact already prompted by a more or less practical reason: the absence of functioning legal systems. Jacques Maritain notes this pointedly:

"Be it finally noted that when it comes to the application of basic requirements of justice in cases where positive law's provisions are lacking to a certain extend, a recourse to the principles of Natural Law is unavoidable, thus creating a precedent and new judicial rules. That is what happened, in a remarkable manner, with the epoch-making Nazi war crimes trials in Nuremberg."[8]

Rémi Brague observes:

"Seit einigen Jahrzehnten, und schon gleich nach dem 2. Weltkrieg ist ein neues Bedürfnis nach Natürlichem und Objektivem in der Letztbegründung der Normen aufgetaucht. Der NS-Staat hatte sein eigenes Rechtssystem entwickelt. Die Henker und Kriegsverbrecher richteten sich nach den Normen dieses ursprünglich völlig legitim zur Macht gelangten und international anerkannten Staates. Wie konnte man sie etwa während der Nürnberger Prozesse anklagen? Sie seien nur pflichtgetreue Diener eines Staates gewesen. Dieses sehr konkrete, zeitgebundene Problem bildete den Hintergrund für eine Wiederentdeckung des Naturrechts gegen den einseitigen Rechstpositivismus, der zwischen den Kriegen das Feld behauptet hatte."[9]

But already during the rise of the Nazi regime and the first years of the war, and as more details started emerging about its massive crimes against humanity, important European intellectuals that had gone into exile started working on post-War models for a peaceful and just European society[10]. The natural law argument played a primary role in these deliberations. The idea of natural law as the foundation for the notion of human dignity

[8] Jacques Maritain, Man and the State, Washington D.C. 1998, p. 95 – footnote 12. First published in 1951.
[9] Rémi Brague, Naturrecht heute – Editorial, in: Internationale Katholische Zeitschrift Communio (IKaZ) 39 (2010), where he is summarizing Mey and Hillgruber, p. 114
[10] The list of influential European thinkers that fled Europe for the United States not only included Heinrich Rommen and Maritain, but also Yves R. Simon (France), Eric Voegelin (Austria) and Leo Strauss (Germany), to name but a few

and the human rights based on it became widespread, although not long-lived as Verdross notes[11]. The main 20th Century revival of natural law thinking took place mostly between 1930 and 1950, being driven for an important part by those philosophers, theologians and lawyers that fled to the United States after the rise to power of Hitler. Some of the main writers of this period who all suffered personally from the consequences of the Nazi persecutions will be discussed here.

1.2. Heinrich Rommen (1897-1967)

The German lawyer and professor Heinrich Rommen was a civil and canon law specialist who also studied philosophy and political science. Apart from his academic work, he also practiced law. Rommen had a keen interest in Catholic social action, both as an answer to the disintegration of the Weimar Republic, as well as in opposition to the rise of National Socialism. His outspoken views on the danger of the Nazi power system already landed Rommen in jail in 1933. He emigrated to the United States with his family in 1938. Rommen was quickly recognized there as a leading émigré thinker and almost immediately started teaching, lecturing and publishing. During the last 15 years of his life he amongst others held a "distinguished professorship" at Georgetown University in Washington, D.C. His most influential work *"The Natural Law"* was published in 1947, it being a revised edition of his 1936 work *"Die Ewige Wiederkehr des Naturrechts"*. Another important work was *"The State in Catholic Thought"*, published in 1945[12]. Until today Rommen is mostly neglected by scholarship, with the exception of the keen attention he got from some of his contemporaries and fellow refugees in the United States during and after the Second World War, like for example Leo Strauss. When discussing natural law thinking in post-War Europe, it is however important to discuss Rommen's thought as he was quite influential in his time and a proponents of returning to a legal system that builds upon natural law, especially in relation to the Catholic tradition in political and social philosophy. Throughout his career he was mostly engaged in studying the relation of the Catholic Church to the modern constitutional democracy and proposed that these two were perfectly compatible. Rommen was of the opinion that Catholic

[11] See for example on the revival of natural law after the wars: Alfred Verdross, Statisches und Dynamisches Naturrecht, Freiburg 1971, p. 9

[12] Heinrich Rommen, The State in Catholic Thought, St. Louis, 1945

thought was the best possible defense against totalitarianism[13]. This conviction was inspired by the fact that the Catholic tradition contains a strong natural law component which, as we will see when studying its various other proponents, very much influenced the human dignity movement after the War.

As Hittinger[14] puts it, every generation finds a new reason for the study of natural law. For Rommen and many of his contemporaries the reason was the rise of totalitarianism in the forms of both Nazism and Communism[15]. His book The Natural Law was clearly written as a response to what Rommen considered an acute political and legal crisis. Hitler was using – aided by organized intimidation and violence- the formal democratic process, not a revolution, to grasp power through the laws of the land. That he succeeded is in itself a clear indication that a merely positivistic legal system carries great dangers if it is not founded on strong pre-positive principles. Rommen saw this and therefore made the case for reapplying natural law. We need to understand the ultimate and highest principles of law, which means the essence or nature of law, Rommen says. Only then are we able to discern whether or not to apply the positive law. This process of discernment asks what are the sources of the law's obligatory character – what is the intrinsic difference between right and wrong, justice and injustice?[16] For Rommen it is very clear: the mere fact that a law has been democratically decided and then promulgated by the state does not automatically mean the citizen has to submit to this law. The law has to be tested for compliance with the "highest principles of law" and only this will lead to the right conclusion whether the law is just. An unjust law is not a law as Augustine says[17], and Rommen equally sees compliance with the unjust law as unfitting. Once again, Rommen was responding here to a political and legal crisis developing before his eyes in Germany and of which he himself had become a victim. But also today we would agree

[13] See William P. Haggerty, Heinrich Rommen on Aquinas and Augustine, Laval Théologique et Philosophique, 54, 1 (février 1998): pp. 163-174
[14] Russel Hittinger in the Introduction to the 1998 Liberty Fund reprint of Rommen's The Natural Law, p. xii
[15] Also: Ibid. Haggerty, Heinrich Rommen on Aquinas and Augustine, p. 164
[16] See. Ibid. Rommen, The State in Catholic Thought, pp. 109-111
[17] Saint Augustine, On Free Choice of Will, translated by Benjamin and Hackstaff, New York/London 1964, p. 11

with him that the Nürnberg Race Laws of 1935[18], which will have been a specific cause of concern to Rommen, were unjust laws that could not be obeyed. The natural law is for Rommen the source of these ultimate principles of law that show us whether a law is just or unjust. In the face of totalitarianism it can only be the natural law that counterbalances a morally corrupt system.

But legal positivism – one of the pillars of Nazi ideology - regards the natural law as a non-law in the proper sense of the word, because it is not the result of state intervention[19]. To put it differently, law can only be law if it is by statute and recognized by the state, more precisely the constitutional and legislative order. New legislation in this sense is inspired only by popular will and guided by those ideal norms that are generally accepted at that time, often summarized as "ethics". The difference with the understanding of the natural law lies in the fact that the latter is considered for ever unchangeable and the former is not, since it depends on the continuously changing social and cultural circumstances, or as Herdegen puts it, on "situational considerations" when he denies that there is a pre-positive order that underpins human dignity[20].

But Rommen is much more accepting of the obvious need for positive law than the legal positivist would ever be about the need for the natural law and he in no way sees them as opposed. For Rommen it is only logical that the natural law calls for the positive law. The positive law in a sense – ideally of course - writes down and actually enforces the natural law. Even where the natural law is the enduring foundation of the positive law, it should progressively recede "behind the curtain" of the positive law as the latter develops into greater perfection[21]. Inversely, this then also means that whenever the positive law becomes grossly unjust, like is the case with totalitarian regimes, the natural law reappears naturally – thus Rommen's original title for his work: "Die Ewige Wiederkehr

[18] The Nürnberg Race Laws were promulgated during a NSDAP party rally on 15 September 1935. They consisted of two parts: "Law for the Protection of German Blood and German Honor" and "Reich Citizenship Law"
[19] See Ibid. Rommen, The State in Catholic Thought, p. 219
[20] See the Böckenförde-Herdegen controversy on article 1 of the German Basic Law and the inviolability of human dignity and the foundations on which it is built: Ernst-Wolfgang Böckenförde, Bleibt die Menschenwürde Unantastbar?, Blätter für deutsche und internationale Politik 10/2004, pp. 1216-1227
[21] See Ibid. Rommen, The State in Catholic Thought, pp. 230-231

des Naturrechts". The reality of the history of humanity is that it always falls back into injustice. Rommen and many of his contemporaries responded to this reality they were living by calling for the re-application of natural law. This then also inspired the authors of such important documents as the Universal Declaration as we will discuss below.

Rommen goes on to explain[22] that natural law should be seen as a framework law that does not ordinarily set directly applicable and enforceable norms for the given society we live in. It doesn't say for example that democracy is the only correct form of government. The natural law only proposes that every political system should respect human dignity and the fundamental rights of the person and the family. This would then of course automatically exclude political systems like totalitarianism. The natural law is "unvarying" as Rommen puts it, and thus elevates it above "the changing historical positive law". This elevation makes it an ideal to pursue for the legislator and a critical principle to apply to the positive law, leading to the natural law being able to govern political power itself. The defense against the totalitarian system should be based on justice and the rule of reason confirming the natural dignity and rights of the human person. The rule of law, Rommen says, is the law that binds both the ruler and the ruled as it stems from the natural law. The natural law doctrine exists to show the connection between morality and law. In his concluding chapter Rommen summarizes the relevance of the natural law for the post-War world:

"The hope of a peaceful change of the legal status quo *within each nation as well as in the community of nations depends on the acceptance of such a higher law that measures both the legal rights of the* status quo *and the claims of those who alter it; and it measures them because it is based on natural reason, in which all men participate."*[23]

1.3. Jacques Maritain (1882-1973)

Jacques Maritain is best known for his important role in the drafting of the 1947 UNESCO human rights catalogue that for the most part found its way into the Universal

[22] See Ibid. Rommen, The State in Catholic Thought, pp. 234-236
[23] Ibid. Rommen, The State in Catholic Thought, p. 236

Declaration of 1948, the latter which he co-authored with amongst others Eleanor Roosevelt and the French jurist René Cassin. Maritain fulfilled this influential role during his tenure as French ambassador to the UNESCO. He also served as the French ambassador the Holy See from 1944-1948. Maritain was a devout Catholic, converted from Protestantism, which greatly impacted his writings. He married his Russian wife Raissa in 1904. She was Jewish and converted to Catholicism along with her husband in 1906. Maritain was amongst others a professor of Philosophy at the *Institut Catholique* in Paris before the Second World War and visiting professor at Princeton University and other renowned US universities like Yale and Harvard during and after the War. All these facts of Maritain's life are relevant for understanding his deep convictions as expressed in his writings. What makes Maritain such an interesting and in his time very influential philosopher is his ability to integrate classical philosophical principles with the historical and cultural realities of his time. Maritain was in no way disconnected from the events and its consequences during and before his lifetime and he had the remarkable capability to react to those developments with answers that were taken from the writings of great masters of Western thoughts such as St. Augustine, St. Thomas Aquinas and Hugo Grotius, whilst grounded in a profound historical awareness.

Before entering into Maritain's natural law approach, some explanatory comments have to be made[24]. When the philosopher speaks about natural law, the term "law" has to be understood in the Thomistic sense of being "an ordinance of reason for the common good, made by one who has care for the community and promulgated"[25]. Thus it is a "directive" on how one should act in the future. The term "law" is used here in its primary sense and not in the analogous sense as is the case when one speaks about "the laws of nature" in a scientific and physical context. The latter use does not tell us how we should act but rather how nature or human beings are likely to act based on experience and research. So this already implies the moral element of the primary sense of the word "law". The term "natural" as Maritain uses it has to be understood to have two

[24] See William Sweet, Introduction: Jacques Maritain: Life and Thought, in: Jacques Maritain, Natural Law – Reflections on Theory and Practice, pp. 8-9, South Bend 2001

[25] See Thomas Aquinas, Summa Theologica, question nr. 90, in: St. Thomas Aquinas, Treatise on Law (Summa Theologica, Questions 90-97), Gateway Editions - Washington D.C. 1991, pp. 1-11

components: the first is that of human nature, namely how we function as human beings and what is our end. The second component is the way in which it –the natural law- is known by us, for example through reason or observation. The processes of reason and observation are facts of human existence and in themselves independently functioning. Maritain thus describes two elements of the natural law: the ontological element that is the existence of human nature by which every human being is endowed with reason and is capable to pursue and end in complete freedom. This then, forms the basis for man's judgment. The second element Sweet calls the "gnoseological", which refers to the actual knowledge of the ontological element through the experience of life itself[26].

Maritain describes the idea of natural law as the heritage of Christian and classical thought and traces it back as far as the Greek writer Sophocles, one of the great tragedians of Antiquity[27]. He calls Antigone –title and main character of one of the great dramas written by Sophocles- the "eternal heroine of natural law" because she was aware of the fact that as humans we must always obey a higher law that can even mean disregarding a human law that contradicts it. Antigone knows not the source of this higher law, only its existence before her and the fact that it will continue to exist after she dies – eternally. The passage from the tragedy Antigone to which Maritain refers shows particularly clearly the understanding of the meaning of natural law already present in Antiquity[28]. It is the reply of Antigone to King Creol, whose edict not to give her dead brother Polyneicis the customary full burial rites Antigone has disobeyed repeatedly. She now stands accused before him and replies to Creol's question why she dared break those laws:

"Yes. Zeus did not announce those laws to me.
And Justice living with the gods below
sent no such laws for men. I did not think

[26] See. Ibid. Sweet, Introduction: Jacques Maritain, pp. 8-9
[27] Jacques Maritain, Natural Law – Reflections on Theory and Practice, South Bend 2001, p. 34
[28] This is not undisputed. See for example: Tony Burns, Sophocles' Antigone and the History of the Concept of Natural Law, in: Political Studies Volume 50, Issue 3, pp. 545-557, Blackwell Publishers 2002. He states that this interpretation is inconsistent with what is known about Sophocles and his attitude towards the functioning of democracy in Athens.

anything which you proclaimed strong enough
to let a mortal override the gods
and their unwritten and unchanging laws.
They're not just for today or yesterday,
but exist forever, and no one knows
where they first appeared. So I did not mean
to let a fear of any human will
lead to my punishment among the gods."[29]

Maritain refers to the Ancients calling the natural law the "unwritten law" and finds this indeed the most useful term. He then goes on to define natural law in his own words as there being by virtue of human nature "an order or a disposition which human reason can discover and according to which the human will must act in order to attune itself to the necessary ends of human being. The unwritten law, or natural law, is nothing more than that."[30] What the great philosophers of Antiquity and the later Christian thinkers have in common is that they know and accept that the natural order, including human nature, comes from God. This is the core of Maritain's understanding of natural law and which makes it so difficult to accept for secular European society. But Maritain was aware of this already during the War. He underlines that at the very least one could accept that there is an unwritten law if one believes in human nature itself and in the freedom of the human being, be it that the person who believes in God has a "firmer and more unshakable" understanding of the principle of an unwritten law. This is important to note here, since it is precisely from post-War Christian thinkers like Maritain that the revival of natural law thinking and the subsequent development of human rights law and the emphasis on the notion of human dignity has come. Throughout history it has been the Catholic Church that most strongly promoted natural law, in recent times expressed through the writings of Pope John Paul II and Pope Benedict XVI. Both pontiffs refer to natural law as the basis of a correct understanding of the human person, the meaning of

[29] Sophocles, Antigone, nrs. 450-460; translation by Ian Johnston, Malaspina University-College, Nanaimo, BC – Canada. Translation last revised in May 2005. Retrieved on 9-4-2010 from http://records.viu.ca/~johnstoi/sophocles/antigone.htm
[30] Ibid. Maritain, Natural Law, p. 35

human dignity and the universal human rights derived from it. More will be said about this later. Maritain was however keenly aware of the reality of limited and developing knowledge of natural law and says that it can be known to different human beings in different degrees with the unavoidable risk of error as well. He thus scales back to that which all men have in common naturally and infallibly, which is the practical knowledge that we must do good and avoid evil. Maritain refers to this as the "preamble and principle of natural law". The natural law itself is what one should do and not do following from this primary principle in a necessary way. The understanding of natural law, Maritain explains, because it is unwritten, has gone through a process in which man's knowledge of it has grown in small steps as man's conscience has developed. This process continues, throughout the existence of humanity and the development of each individual person. According to Maritain, full and perfect knowledge of natural law will only be achieved then when the Gospel "has penetrated to the very depth of human substance".[31]

Natural law is a moral law because there is always the free choice to obey it or disobey it. The natural law does not need to be obeyed necessarily, as is the case with the laws of nature, like for example gravity: if I let go of the stone in my hand, it must fall. If I choose to ignore the natural law, nature's physical realities will not stop me from doing so. Human behavior is thus ruled by an order that is not reducible to the general order of the cosmos[32].

From here the link to the rights of human beings can be easily made: if we believe that the preamble and principle of natural law is the common knowledge that we must do good and avoid evil, we can also recognize the rights that are inherent to the nature of the human being. The human being possesses these rights because of the fact that it is a human being with personhood – master over its own life and to be treated as such. Here we come to the notion of the dignity of the human being, which Maritain finds to mean nothing if it is not recognized that by virtue of natural law the "human person has the

[31] Ibid. Maritain, Natural Law, pp. 36-37
[32] Ibid. Maritain, Man and the State, p. 87

right to be respected, is subject of rights, possesses rights"[33]. But, as Jones puts it in his interpretation of Maritain on this point, the discussion of rights only makes sense if the participants involved hold to a proper anthropology, one that contemplates what man is in his nature and what his destiny is[34]. The human being has the right to fulfill its destiny and to do the things necessary for this purpose. The true philosophy of the rights of the human person, therefore, is based on the idea of natural law. As much as its duties are laid down in this law, so are its rights. This philosophy is opposite to that which bases the rights of the human being on the claim that it is subject to no other law than that of its own will and freedom. Rousseau proposed this in his paradigm that "man should only obey himself". What was said by Antigone to King Creol, namely that the human law is always superseded by "a higher law", the concept of Rousseau clearly rejects. It ignores the fact that such an understanding of rights, in which the unfolding of these rights would ultimately go at the expense of others, is in fact disconnected from the duties of the human being that are equally important and part of the natural law.

The human person is constituted first to be part of a family and then to participate in political society, Maritain goes on to say. It nevertheless transcends family and political society because it has a destiny that is superior to time, place and the social order. In other words: the human being has its end beyond human society, namely in God, because man and woman are created in the image and likeness of God. This is the constitutive element of the Christian understanding of human dignity and it is also the basis on which Maritain builds his thought on the subject. The so-called "imago Dei" concept finds it source in the following part of the Old Testament, Genesis I, verses 26-28:

"*26. Then God said, "Let Us make man in Our image, according to Our likeness; and let them rule over the fish of the sea and over the birds of the sky and over the cattle and over all the earth, and over every creeping thing that creeps on the earth."*
27. God created man in His own image, in the image of God He created him; male and female He created them.

[33] Ibid. Maritain, Man and the State, p. 37
[34] Brian Jones, Jacques Maritain and Dignitatis Humanae: Natural Law as the Common Language of Religious Freedom, Ignatius Insight December 2009. http://ignatiusinsight.com. (Retrieved on 26-3-2010)

28. God blessed them; and God said to them, "Be fruitful and multiply, and fill the earth, and subdue it; and rule over the fish of the sea and over the birds of the sky and over every living thing that moves on the earth."[35]

This transcendent quality of the dignity of the human being was and is most clearly made visible by religious thought, in Antiquity but even more strongly in the Christian message of the Book of Genesis and the Gospels. Maritain also quotes the example of the Apostles in the Sanhedrin defending their spreading the message of Jesus. The Apostles basically repeat what Antigone said long before them as they hold "We must obey God rather than man."[36] So where the preamble and principle of natural law is to do good and avoid evil, one could say that the source of natural law is God himself, who is our creator and the creator of the universe and thus the author of the natural law. Human dignity thus finds its basis and its explanation here. The concept of "imago Dei" has formed the basis for all further developments throughout the history of Christian thought on the notion of human dignity. The starting point of this philosophy is that the human dignity of each individual human being is to be respected at all times regardless of its stage of development or its perceived value for society. Since the human being is created for an end that lies beyond the society in which it lives, its intrinsic value can never be measured according to the standards of that same society which is temporary by its very nature.

Learning of the Nazi use of forced labor during the War but also the generally bad labor conditions throughout Europe since the Industrial Revolution, Maritain frames his discussion on the practical implications of human dignity within the rights of the working person. The working person, through its labor, directly affects the economic life and the temporal order. Because of this, it affects both the spiritual and the moral order as well. Here, Maritain says, the offended and humiliated human dignity has become the inspiration for emancipation towards liberty and the respect for the individual person on the work floor. The worker is no longer a tool –as the Nazi's practiced, but also much of the industry independent of the War- but a vital expression of the community of people closest to the material realities of human life and thus in need to be respected as such. As

[35] Source: New American Standard Bible
[36] Acts of the Apostles, Chapter 5, verse 29; New American Bible

Maritain puts it "In a word, this historic gain is the consciousness of the dignity of work and of the worker, of the dignity of the human person in the worker as such."[37] In saying this, he criticizes both the Nazi and Communist ideologies, where the former used "lesser race" persons to do forced labor under deplorable conditions, whilst the latter saw the need to –even violently- oppose the workers' class against all other classes. The dignity of the human being required however that the worker be enabled to educate and organize so that he or she can move forward in life and contribute to the common good. That is also why slavery violates human dignity, as it does not allow the individual to take responsibility for its own life and make the necessary choices to fulfill its destiny. Maritain forwards his personalist vision of human dignity that we will later on see with John Paul II as well, in contrast to the more common liberal-individualistic and communist perceptions of it that are prevalent today. In a personalistic type of society Maritain sees "the mark of human dignity first and foremost in the power to make these same goods of nature serve the common conquest of intrinsically human, moral and spiritual goods and of man's freedom of autonomy."[38]

Maritain makes a number of insightful distinctions that are useful today for the debate on natural law and its relevance for the understanding of human dignity. He quotes Laserson[39] who explains how theories of natural law should not be confused with natural law itself. Different kinds of theories of natural law – like any other theory – might present different arguments and conclusions to support or reject natural law. But disproving such theories does not mean that natural law itself is disproven. This distinction is especially important to make when looking at the philosophical roots of the notion of human dignity today: we cannot understand human dignity if we do not go beyond the many theories and doctrines of natural law to what can be clearly seen as the true idea, the reality, of natural law itself. Maritain is very aware of this and underlines the point by quoting Richter who ironically but quite rightly says that "every fair and

[37] Ibid. Maritain, Natural Law, p. 51
[38] Ibid. Maritain, Man and the State, p. 107
[39] Max M. Laserson, Positive and Natural Law and their Correlation, in Interpretations of Modern Legal Philosophies, New York 1947, quoted in footnote 2, p. 81, Ibid. Jacques Maritain, Man and the State

every war brings forth a new natural law"[40]. This was said in the 18th century! Maritain stresses, as we already discussed above, that natural law itself does not change or progress, but rather the human knowledge of it does. This is the root of the confusion between natural law theory and natural law itself. Put differently: the ontological basis of natural law should be distinguished from one's knowledge of the natural law. It means there can be a natural law with some people not knowing it and many only knowing it partly, depending on the development of moral principles in a given society, which in turn is influenced by historical and sociological developments[41]. It is precisely at this point where our current debate on human dignity often fails: the roots of the notion are not known and modern-day developments are exclusively applied as interpretative norms leading to new theories, whereas it is meant to include both aspects to come to a correct understanding of human dignity. When the foundation is not recognized, building on it becomes problematic. Maritain takes as an example the rights doctrines of Kant and Rousseau which in his opinion turned individual rights into too absolute and unlimited rights that could only lead to those rights clashing violently with the rights of other beings[42]. Understanding the foundation of these rights leads to the knowledge that rights also have certain limitations that are rooted in the reality of the human person necessarily being part of a larger community.

Maritain is a strong proponent of natural law as the foundation for the rights of man, or in today's terminology, (fundamental) human rights. In his 1951 work "Man and the State" he puts it unequivocally: "The Philosophical foundation of the Rights of Man is Natural Law. Sorry that we cannot find another word!"[43] Still he was realistic enough to know through his intensive work on drafting the Universal Declaration that this did not mean that all humankind agreed on the primacy of natural law, its role as foundation for human rights or on its correct interpretation. He explains how in drafting the Universal Declaration, the rational arguments for claiming these rights had to be left aside, and the

[40] Maritain quotes the German Romantic writer Jean Paul Richter on page 83; he took the original quote from Chapter 4 of Heinrich Rommen's The Natural Law: A Study in Legal and Social History and Philosophy (1947), now also available in a translation by Thomas R. Hanley. Indianapolis 1998
[41] Ibid. Sweet, Introduction: Jacques Maritain, p. 9
[42] Ibid. Maritain, Man and the State, p. 83
[43] Ibid. Maritain, Man and the State, p. 80

committee instead focused its efforts on coming to a "merely practical agreement regarding a list of human rights"[44]. This did not mean Maritain did not hold on to his outspoken opinion on the importance of natural law as its indisputable basis. He merely accepted that in a world with as diverse philosophical, cultural and religious traditions as the one he lived in – and we still do-, the next-best solution was to at least agree on the outcome that should be achieved in any case. This outcome therefore is ambiguous when it comes to more deeply understanding human dignity.

Maritain's concrete application of human rights also starts with human dignity: the essential characteristic of any civilization should be the respect for the dignity of the human person, he says.[45] He takes the notion of human dignity to the higher realm where it belongs by explaining that "in the flesh and bones of man there lives a soul which is a spirit and which has a greater value than the whole of the physical universe"[46]. This notion of human dignity sets a clear boundary to the human being: because of its great value the human being itself cannot limit, change or suspend neither one's own human dignity, nor that of another. In a 2010 speech before members of Parliament in London, Alveda King, niece of the late Martin Luther King and herself an active civil rights campaigner, put it like this: "that at no time does anyone's life become less human or more human"[47]. There is nothing greater than the human soul than God himself. This means that because of the intrinsic dignity of the human being, any society is in its existence subordinate to each human being[48]. The revival of natural law thinking during and after the Second World War started from this perspective.

1.4. Alfred Verdross (1890-1980)

Alfred Verdross was a contemporary of Jacques Maritain. An Austrian legal philosopher, university professor, diplomat and a judge on the European Court of Human Rights, he

[44] Ibid. Maritain, Man and the State, p.76
[45] Jacques Maritain, The Rights of Man and Natural Law, 2nd edition, London 1945, p. 5. Translation from the original French version first published in 1942.
[46] Ibid. Maritain, The Rights of Man and Natural Law, p. 6
[47] Alveda King: Civil Rights, Human Dignity and Faith, June 23, 2010 for the All-Party Parliamentary Group on Human Dignity, Houses of Parliament, London – available at: http://davidalton.net/2011/08/09/dr-alveda-king-and-her-uncles-legacy/ (retrieved 2-2-2012)
[48] Ibid. Maritain, The Rights of Man and Natural Law, p. 11

was especially influential in the area of the theory of international law[49]. Like Maritain, he was a Catholic and amongst others strongly rooted his writings in the works of Augustine, Thomas Aquinas and Hugo Grotius. He was also especially influenced by the 15th century Salamanca School which puts natural law in an international context and underlines its universality to all human beings. Verdross was a great admirer of and much influenced by the founder of the *"Wiener rechtshistorischen Schule"*, Hans Kelsen.

Verdross traces back the recognition of human dignity in natural law theory to the late Sophists and the Stoics. Still, he concedes it would take many centuries to anchor the human rights based upon it constitutionally and make them enforceable through the courts. It would furthermore take until the Second World War for a public affirmation of the need for a system of international recognition and protection of human dignity[50].

For Verdross there is no doubt that the philosophical roots of human dignity are the natural law and the fact that the human being is created in the image and likeness of God. In Verdross's writings on the subject, one quote stands out underlining his conviction that human dignity is a through and through Christian notion. The theory of human dignity, he says, is rooted in Christian patristic philosophy and its terminology was first presented by the Catholic Church[51]. The quote is a text from the Christmas prayer of the Latin rite Liturgy that introduces the term *"dignitas humana"* and summarizes in one sentence the entire Christian understanding of human dignity:

"Deus qui humanae substantiae dignitatem mirabiliter condidisti et mirabilius reformasti"[52]

[49] See for example Bruno Simma, The Contribution of Alfred Verdross to the Theory of International Law, European Journal of International Law (EJIL 6 -1995), p. 54. Simma was a close associate of Verdross and is now a judge at the International Court of Justice in The Hague
[50] See: Ibid. Alfred Verdross, Statisches und Dynamisches Naturrecht, pp. 111-112
[51] See Alfred Verdross: Die Würde des Menschen und Ihr Völkerrechtlicher Schutz; Schriftenreihe Niederösterreichische Juristische Gesellschaft, Heft 3, 1975, pp. 6-7 and: Alfred Verdross, Statisches und Dynamisches Naturrecht, pp. 85-91
[52] Translation: "God, you have so miraculously created and renewed Man's dignity"; The Mass of the Roman Rite : Its Origins and Development (Missarum Sollemnia II), Joseph A. Jungmann, 1949, p. 74

Here not only referral is made to the Old Testament *imago Dei* concept as discussed above, but also to the rebirth of the human being through Christ, who came to renew the face of the earth and return the human being to God its creator, from whom it was estranged. This reconciliation with God reinvigorated the understanding of the inviolable dignity of the human being, through its reconfirmed "Godly" basis. Any worldly power is thus limited by the fact that it does not share with the human being this divine dimension of its existence; as Psalm 8 says it:

"What are humans that you are mindful of them, mere mortals that you care for them?
Yet you have made them little less than a god, crowned them with glory and honor.
You have given them rule over the works of your hands, put all things at their feet (...)"[53]

Alfred Verdross gives a clear definition of natural law when he says that it is "*ein dem Wesen des Menschen entsprechendes Normengebilde"*[54]. But the human being has to be seen as a whole, not limited to only certain of its aspects. Therefore, it is important to see what these different elements are that constitute the whole of the human being[55]:

1. the biological being: already from the moment of conception the human being is unique and pre-programmed to be human, rather than for example the animal
2. the social being: for its whole development and survival, the human being needs to be part of a larger whole, a community of some sort. Life in its early stages is defenseless and unable to take care of itself.
3. the independent being: even when the human being needs its social environment for survival, it is created to think and act independently. It can for example choose at some point to be no longer part of the community it grew up in.
4. the historical being: humanity advances and learns, while the human being develops itself through history and comes to understand certain things better, whilst forgetting others. The evolving understanding of human dignity is an example of this development throughout history.

[53] Psalm 8, verses 5-7, New American Bible
[54] Ibid. Verdross, Statisches und Dynamisches Naturrecht, p. 73
[55] Ibid. Verdross, Statisches und Dynamisches Naturrecht pp. 73-85

5. the transcendental being: Man possesses the ability to transcend the elements of space and time of this world and inquire about its origins. This no animal can do. It is a key aspect of human dignity, although often misunderstood as to mean that as long as the human being cannot (yet) use this ability, its dignity can be called into question. The problem with this reasoning is that it overlooks the fact that whether or not a human capability is actually used or fully developed does not change its essence.
6. the cultural being: not only is the human being in need of a community to live in (the social being), it also needs structures and institutions for its development, like science and technology, but also laws and political and administrative institutions.

Human dignity then is what crowns and includes all these separate elements of the human being in its essence. What is interesting is that Verdross does not dwell in greater detail on reason as the human being's core aspect – the rational being - and the fact that linked to this it is also a religious being, a being that is in search of its creator. Verdross discusses this only briefly when outlining the transcendental being. But exactly because of the transcendental aspect of the human being, it is not only capable to ask after its origin, but also after the higher order bringing the world in which the human being lives into existence: here reason and faith come together because every human being always comes to a point where reason and science alone cannot explain certain things. But it is here only reason that can decide whether or not to accept faith as the answer. This is why we find one should add here the element of the religious being.

For Verdross natural law has the object to enable the harmonious living together of people with diverse backgrounds through their acceptance of the fact that they have all been given the same dignity as free and responsible people[56]. Reaching back into Greek Antiquity and quoting philosophers like Herakleitos, Plato, Aristoteles and Cicero, he explains how their ideas where further developed and brought onto a new level by the biblical imago Dei theory. Through grounding the dignity of the human being in the image and likeness of God, not only does the meaning of the notion itself deepen, at the

[56] Alfred Verdross, Abendländische Rechtsphilosophie, 2. Auflage Wien 1963, p. 257

same time the human being's relationship to earthly communities changes radically.[57] Verdross points out that this concept, in its origin Hebrew and extensively developed in Christianity brought with it a rethinking about the relation between the human being and the state. Now the state is no longer the ultimate goal of the human person, nor is it the highest human reality. The Church, as a universal body representing man's journey to God, points towards a heavenly or supernatural reality whilst not considering itself to be that reality. This lead to a radical change of political reality: in Antiquity the state was both a sacred and an earthly institution, whilst with the rise of Christianity these two became more and more separated and the state was limited to its earthly dimension. Through this, the human being is no longer only a citizen of the state, *"Er wird zugleich Glied des auf Erden pilgernden Gottesreiches"*[58].

Here we come to what is probably one of Verdross's most important contributions about natural law and its meaning for the notion of human dignity. When the human being is "on pilgrimage" to the Kingdom of God, or put differently, merely on earth to pass into another world, then he or she *already* possesses rights that cannot be taken away by that earthly community which only serves as a transit route. This is the root of the Christian understanding of the *inviolability* of human dignity and human rights stemming from it. Such inviolability and the rights rooted in it can only exist if they find their origin outside of the state, namely in what Verdross calls the *"überpositive Ordnung"*. This order limits the state because it existed before the state and will exist after it. This however means that, when the state *is* seen as the highest order, human dignity cannot be protected as inviolable. This idea of the limitation of the state was the core message of the 15th and 16th centuries' Salamanca School and especially the Spanish moral theologian Francisco de Vitoria and the writer Fernando Vasquez de Menchaca. Vasquez de Menchaca on the basis of this principle explicitly condemned slavery as an affront to natural law[59].

Verdross refers to the German philosopher Samuel Pufendorf (1632 – 1694) as another important advocate of human dignity, especially regarding the philosophy behind the

[57] See: Ibid. Verdross, Abendländische Rechtsphilosophie, p. 259
[58] Ibid. Verdross, Abendländische Rechtsphilosophie, p. 260
[59] Verdross here refers to Menchaca's 1564 revised work "Controversiae illustres"

American independence movement. Pufendorf links the inherent dignity of the human being to the duty to treat one another as equal ("*gleichberechtigt*"). This was of course a relatively new thought in a time where slavery and colonialism worked with the idea that men and women are not born equal. The 1776 American Declaration of Independence reflects Pufendorf where it states:"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights (...)". The authors of the Declaration of Independence believed that what is self-evident is in no need of definition. But this then also prolonged an imperfect understanding of human dignity, for example highlighted by the fact that slavery and racial discrimination remained widespread in the United States after its independence from colonial rule. It shows, as Verdross points out, that a clear distinction needs to be made between the catalogue of human rights that sprout from the inherent human dignity of the human being and the step-by-step process of actually recognizing these rights[60]. Maritain and Verdross seem to agree this is a slow process that coincides with the development of the human being's conscience throughout time. Historically speaking, this process intensifies in the face of totalitarian regimes and their aftermath as the vulnerability of human life is most apparent then. This was clearly the case in post-War Europe. Verdross gives the 1948 Universal Declaration as an example. Here one also finds his most convincing argument for the universality of natural law when he describes how the General Assembly of the United Nations - in representing the most diverse of cultures - was still able agree on the recognition of fundamental human rights:

"Diese Übereinstimmung zeigt uns, dass es sich dabei um Rechte handelt, die zur Führung eines menschenwürdigen Daseins notwendig sind. Das bedeutet aber nichts anderes, als dass sie einen naturrechtlichen Charakter aufweisen."[61]

Verdross is concerned that with the "codification" of human dignity and the cataloguing of human rights that started with the 1776 American Bill of Rights, followed by the Declaration of Independence, the French *Declaration des Droits de l'Homme* and other

[60] Ibid. Verdross, Abendländische Rechtsphilosophie, p. 265
[61] Ibid. Verdross, Abendländische Rechtsphilosophie, pp. 265-266

documents, human dignity was so much written into positive law that its pre-political origin was forgotten or at least diluted. In post-War Europe, the 1945 UN Charter and the 1948 Universal Declaration for the first time specifically refer to the pre-positive character of human dignity and rights – in Verdross's opinion this is the natural law. Here he follows the same line of reasoning as Maritain who also regards natural law as the foundation of human dignity and human rights. For Verdross human dignity is clearly predefined to positive law, even if the legal concept and the legal principle of human dignity are now included in legislation. This is why the distinction between the existence and the actual recognition of human dignity is so important. The fact that there are different theories of human dignity does not change the notion of human dignity itself, only its application. This is equally the case, as we discussed above, for the understanding of natural law –the foundation of human dignity, where Verdross like Maritain distinguishes between natural law theories and natural law itself[62]. Verdross is adamant that the understanding of human dignity and the spread of human rights throughout the world by the West is to be firmly rooted in the fundamental principles that are the natural law:

"Diese kann aber durch das Abendland, trotz seiner weltpolitischen Entmachtung, ja vielleicht gerade dank dieser Erscheinung, wesentlich gefördert werden, wenn die fundamentalen Werte, die allen Menschenrechten zugrunde liegen, klar herausgearbeitet und von ihren bloß zeitbedingten Anwendungen, die dem historischen Wandel unterliegen, unterschrieben werden."[63]

It is as if Verdross echoes his contemporary, the writer Romano Guardini (1885-1968) who in his 1962 speech accepting the "Erasmus Prize", asserted that Europe is entrusted with a primary duty in humanity to protect freedom because "it gave birth to the concept of freedom"[64]. It is a lofty goal, but one that fits in well with the post-War development

[62] Ibid. Verdross, Statisches und Dynamisches Naturrecht, pp. 14-15
[63] Ibid. Verdross, Abendländische Rechtsphilosophie, p. 267
[64] Romano Guardini, Europe – Reality or Mission. Acceptance speech upon being awarded the Erasmus Prize, Brussels 21 April 1962. Re-published in F.A.M. Alting von Geusau, European Unification in the 20th Century – A Treasury of Readings - 1998, pp. 5-11

of human dignity protection that finds its origin in a free Europe and its Christian understanding of the human being.

1.5. Johannes Messner (1891 – 1984)

The Austrian priest, theologian, jurist and economist Johannes Messner was influential in the post-War revival of natural law thinking, especially in the German speaking countries of Europe. He represented what is referred to as the "Viennese natural law school". Like so many of his contemporaries he had to flee Austria in 1938 because of his outspoken criticism of National Socialism. He settled in England where he amongst others authored one of his most important works "Social Ethics", in German known as *"Das Naturrecht"*[65]. It goes beyond the scope of this research to discuss his extensive natural law theory in detail. Instead, we will focus here on Messner's thought on human dignity in relation to natural law.

Messner first of all observes there is incontestable evidence that mankind as a whole has a moral consciousness of human dignity. This evidence can be found in the 1948 Universal Declaration, he says.[66] The document clearly surpasses national, cultural and religious differences and, Messner emphasizes, founds human rights on the pre-positive foundation ("*überpositivrechtlicher Grundlage*") of human dignity. It affirms attributes that are inherent to human beings, for example in article 1 it says: "They are endowed with reason and conscience (…)" What Messner points out here is very relevant: even a secular consensus document such as the Universal Declaration is rooted in the notion of universal principles of humanity. Some would call this natural law – like Messner himself does -, others would call it "universal values". But the point Messner makes here is that human dignity is a concept that exists independently of the state or the legislator and is valid for all. He goes further in this line of reasoning by clearly stating – something that we have not yet found so directly expressed with other Catholic writers – that the human dignity notion such as represented in the Universal Declaration can be directly attributed

[65] Johannes Messner, Das Naturrecht – Handbuch der Gesellschaftsethik, Staatsethik und Wirtschaftsethik, Tyrolia Verlag 3. Auflage 1958

[66] Johannes Messner (edited by Anton Rauscher and Rudolf Weiler), Menschenwürde und Menschenrecht – Ausgewählte Artikel, Oldenbourg Verlag 2004, pp. 208-209

to the Book of Genesis and the three verses in which the human being is presented as created in God's image and likeness (chapter 1 verse 26ff; chapter 5, verse 3 and chapter 9 verse 6). To counter the common argument that the Book of Genesis was only written for the Israelites and can therefore not have such universal significance, Messner remarks: *"Zu beachten ist, dass diese Mitteilung Gottes keineswegs nur an das Volk Israel gerichtet war, sondern and die ganze Menschheit; denn erst vom 12. Kapitel an redet die Genesis von Israel."*[67] Messner sees Genesis not as the only source of the human dignity notion, he just stresses that without it and the further development of Christian thought on the subject, human dignity cannot be understood correctly. Elsewhere Messner puts it even stronger:

"Nichts von dem, was die Wissenschaft über den Menschen gefunden hat und zu sagen vermochte, reicht an das heran, was ihm am Anfang seiner Geschichte durch Gottes eigene Mitteilung gesagt wurde: nämlich dass er nach dem Bild und Gleichnis Gottes geschaffen ist."[68]

One of the attributes of this unique aspect of human life is the potential ability of the human being to reason, through which it can be creative and subdue the earth. Subduing the earth is the assignment which the human being has received upon creation and in it lays the potential for self-realization[69]. It is in these three components: reason, creative power and self-realization that one finds the essence of human dignity in action. But also Messner cautions here, along with other authors we have discussed, that the mere potential – inherent to every human being - of these three capabilities constitutes human dignity, not its actual use or fulfillment. The complete fulfillment of human dignity as the consequence of the human being created in God's image and likeness is only to be found in Christ who is the perfect visible image of an invisible God[70]. The human being is born fragile and in need of care and protection to be able to grow towards living ever more fully the dignity it has been given. Messner furthermore stresses, unlike most other

[67] Ibid. Messner, Menschenwürde und Menschenrecht, p. 210
[68] Ibid. Messner, Menschenwürde und Menschenrecht, p. 245
[69] Ibid. Messner, Menschenwürde und Menschenrecht, p. 246
[70] See Ibid. Messner, Menschenwürde und Menschenrecht, p. 212.

authors on the subject, how much the family is of vital importance to this human development in dignity. It is in the family that the individual learns what it means to be human and what this implies for responsibility, justice, truth and many other principles of life bringing order to the lives of individual human beings[71]. It is in the family that the human being comes to more fully understand the meaning of human dignity and its implications in daily life. With this important point Messner shows how marriage and the family are a necessary surrounding for very human being and a school for human dignity itself.

In concluding our discussion of Messner we can summarize his thought in the four foundations of human dignity he proposes[72]. The first is the theological foundation that anchors human dignity in the human being's creation in God's image and likeness. The second is the metaphysical foundation that is the human being's freedom and self-realization rooted in the responsibility for its conscience. Thirdly, there is the ethical foundation that lies in the fulfillment of those duties that are necessitated by its being. Fourthly, there is the ontological foundation that lies in the human being's experience that derives from human nature and the human being recognizes as such.

1.6. Karl Rahner (1904 – 1984)

The renowned 20th century theologian and Jesuit priest Karl Rahner has written extensively and is often described as one of the giants of his age. He made an important contribution to the preparation of the Second Vatican Council. Rahner's primary approach to human dignity is that its most important attribute consists in man being capable of speaking to God at any occasion and in doing so not loosing any of its being. We may actually face God without in any way losing our unique identity. There is a lot to this approach as it describes from another angle the fact that the human being is created in the image and likeness of God. When a being is able to retain its own unique identity directly facing God himself, its Creator, there must be something "God-like" about this being. In the presence of its creator the human being is able to be and to speak and whilst

[71] Ibid. Messner, Menschenwürde und Menschenrecht, p. 253
[72] Ibid. Messner, Menschenwürde und Menschenrecht, pp. 252-253

not being equal to God, existing in his image allows for direct contact with him. This fact gives the human being a profound and exclusive dignity, something no other earthly being possesses since these beings, although created by God, have not been created in His image and likeness. What is the background of this far-reaching notion of human dignity described by Karl Rahner himself when he unfolds his theory of "Christianity and the new Man": *"Das Christentum versteht sich als die Religion der Zukunft, als die Religion des neuen und ewigen Menschen."*[73] Because the Christian is focused on eternity through the eternal dimension of life it has been given by God the creator through the human soul, the full meaning of human dignity can be better grasped[74]. Rahner is quite clear in his writings on human dignity that this notion can simply not be fully understood outside the framework of reason and Christian revelation. Only in the "knowing-believing-loving" dialogue of the human being with God, the former's dignity becomes truly visible and it can therefore never be the subject of purely objective considerations or, for that matter, of positive law[75]. As for most other writers on the subject, also for Rahner human dignity is a given for each human being, *"vorgegeben"* he calls it. To put it in other words of Rahner: *"Sie ist letzlich sachlich identisch mit dem Sein des Seienden, (..)"*[76]. The German philosopher Josef Bordat puts its like this: *"Er muss seine Würde nicht erwerben oder bestätigen, er kann sie gar nicht erwerben oder bestätigen, weil er sie nicht hat, sondern weil er sie in sich trägt und erst dadurch zum Menschen wird."*[77] The dignity of the human being is thus understood through the duality of the human being, in both its physical and spiritual dimensions. But decidedly the mere existence of the human being – *"Sein des Seienden"* – already establishes this human dignity indiscriminately. This means that, taking Rahner's argument to its practical application, regardless of the state in which the human being finds itself – whether unborn or born, handicapped, old, young

[73] Karl Rahner, Das Christemtum und der "Neue Mensch", in: Karl Rahner Sämtliche Werke – Band 15 Verantwortung der Theologie – Im Dialog mit Naturwissenschaften und Gesellschaftstheorie, Herder 2001, pp. 138-139

[74] See Ibid. Rahner Band 15, p. 147, in which he speaks of the consequences of the concept of eternity in human life

[75] See Karl Rahner, Würde und Freiheit des Menschen, in: Karl Rahner Sämtliche Werke – Band 10 Kirche in den Herausforderungen der Zeit – Studien zur Ekklesiologie und zur kirchlichen Existenz, Herder 2003, pp. 186-187

[76] Ibid. Rahner Band 10, pp. 184-185

[77] Josef Bordat, Menschenbild, Menschenwürde, Menschenrechte. Zur Bedeutung der christlichen Wurzeln Europas für die Grundwerte der Union. In: Heit, H., Die Werte Europas - Verfassungspatriotismus und Wertegemeinschaft in der EU? (= Region, Nation, Europa 31). Münster 2006, pp. 87-88

or brain-dead, to name but a few examples – its human dignity enjoys exactly the same worth and should therefore enjoy the same protection. Either human dignity is, or it isn't. There are no categories in human dignity. It is the same for all, from the very moment of conception to the person's last breath. Rahner would subscribe to this interpretation of his work when he writes:

"Dieser Schlüsselbegriff hat noch eine zweifache Eigentümlichkeit: er bezeichnet sowohl ein Vorgegebenes wie auch ein Aufgegebenes; weil der Mensch, gleichgültig, welche Anlagen, Funktionen er in einer Gesellschaft hat, gleichgültig, welche Rasse er angehört, wie viel er an materiellen Gütern hat, welche Macht er besitzt, er hat eine Würde, die immer schon gegeben und unabdingbar und unverlierbar ist; sie ist vorgegeben. Und gleichzeitig aber ist eine solche Würde seine Aufgabe: er soll sie in Freiheit annehmen, entfalten, verteidigen, er soll werden, was er ist: ein Mensch mit seiner Würde, die eine unendliche Aufgabe bedeutet."[78]

It is important to note that Rahner does not say here that this would mean that the actual human experience would not play any role in understanding or even determining human dignity. He goes on to explain that it is actually through the experience of life itself – Rahner fittingly calls this the *"unauslotbare Tiefdimension"* - that the individual human being comes to grasp more fully what this "given" dignity means and how the living experience is the basis for the free choice to also live in dignity. Rahner refers to this as the *"aufgegebene Würde"*. As examples for human experience Rahner gives culture and the sciences, but above all, he stresses, religion is the defining factor in both understanding the given dignity as well as the ability to freely choose to actually live this dignity. The message of Christianity is that the human being can experience its dignity in fullness because it is rooted in God who is the origin and purpose of the whole of creation. For this very reason human dignity is not dependant on or changeable by external and ideological circumstances and considerations[79]. This also means that when the human being accepts and embraces its dignity in all its dimensions, it will eventually

[78] Karl Rahner, Über die Würde des Menschen, in: Karl Rahner Sämtliche Werke – Band 28 Christentum in Gesellschaft – Schriften zur Pastoral, zur Jugend und zur christlichen Weltgestaltung, Herder 2010, p. 12
[79] See Ibid. Rahner Band 28, p. 12-14

encounter God himself. It is what Rahner calls the Christian message of the *"radikale Unbedingtheit seiner Würde"*. But this can only be achieved when "er die Würde des Nächsten ebenso unbedingt bejaht, wenn er ihn liebt wie sich selbst, wenn er immer aufs neue der schrecklichen Versuchung widersteht, den Andern zum Mittel für die eigenen Zwecke zu machen und so eben seine Würde zu erniedrigen."[80] Human dignity is a notion that cannot be understood or applied correctly when it is limited to the opinion of individual person *only*, or interpreted as such that each person decides for itself what his or her human dignity means. The fact that human beings live in community with each other leads to a situation in which human dignity can only be fully understood and radically lived when each individual human being also respects the inviolability of the dignity of every other. Any different approach, as we have seen very clearly in modern history, will always lead to gross violations of human dignity. When some human beings decide that other human beings are not entitled to the same respect for human dignity as they themselves feel entitled to, the notion of human dignity becomes rapidly eroded. History and modern society offer numerous horrendous examples of what this can lead to. Rahner would answer this observation with an appeal to embrace the Christian understanding of the human being, because when the human experience of any individual or society does not include clear examples of this radical embrace of human dignity Christianity proposes, how else would people come to know the full potential of their inherent dignity?[81] Probably without intending to do so, Rahner has laid bare here the fundamental weakness of the post-War European human dignity discourse in politics and in law: it let itself mainly be inspired by the purely negative experience of the horrors of the Second World War and the massive violations of human dignity that were perpetrated. When it comes to the Universal Declaration it is understandable that this was the only politically attainable solution due to the wide range of religions and philosophies represented at the United Nations. In Europe however, at the time still a fundamentally Christian continent, one wonders whether the process of including human dignity in law and politics could not have been more strongly rooted in this radical Christian understanding of human dignity. Many European leaders in post-War Europe, like Robert

[80] Ibid. Rahner Band 28, p. 14
[81] See Ibid. Rahner Band 38, pp 14-15

Schumann, Konrad Audenauer and Alcide DeGaspari, certainly had this in mind but probably felt that they could not too explicitly mention these Christian principles for wont of alienating Europe's non-Christian leaders whose support they needed to bring about the post-War rebuilding of a peaceful Europe.

1.7. Eric Voegelin (1901 – 1985)

The German political philosopher Eric Voegelin – born Eric Vögelin in Cologne – was yet another of the intellectuals and opponents of Nazi ideology that needed to flee the regime. At the time of the *Anschluss* in Austria, when Voegelin was teaching at the University of Vienna, he was already known to be an outspoken critic of Nazism, especially through four works he published between 1933 and 1938[82]. He narrowly escaped arrest by the Gestapo when he left Austria in 1938 and went to the United States.

Voegelin is relevant for the discussion on the development of the notion of human dignity in post-War Europe because he proposed the thesis, discussed extensively in his numerous writings covering the philosophy of history[83], that there is a "true order of being" originating in God and expressed through the order and development of human history. Previously discussed thinkers would call this the natural law. Although this true order of being can never be perfectly known or mastered by human beings, history is the "revelation of God's way with man". This means - here Voegelin echoes Maritain and Verdross - humankind goes through a process in history where step by step it better understands this order of existence, however in the process being increasingly confronted with the gap that lies between the truth of the human being's transcendence and its immanent existence here on earth. The human being can grasp that its life is directed towards what is beyond this world, yet sees itself confronted by the realities and limits of earthly existence[84]. This process of coming to know the truth about the human being is,

[82] See Eric Voegelin, Hitler and the Germans, translated, edited, and with an introduction by Detlev Clemens and Brendan Purcell, 2003. This is a collection of lectures Voegelin gave in 1964 in which he analyzed the reasons for and consequences of Hitler's rise to power.
[83] For example: Eric Voegelin, The New Science of Politics, An Introduction; University of Chicago Press 1987. This is considered one of his most influential works and was an introduction to his most important work "Order and History".
[84] See John A. Hallowell, Eric Voegelin (1901-1985), The Intercollegiate Review – Spring/Summer 1985, pp. 3-4

according to Voegelin, conducted through common sense and reason, whereby reason is necessarily allied with the love of the Good. It is precisely reason that unites the human being and God, because it is common to them. In turn it is this uniting aspect of reason – connecting the human and the divine – which is fundamental to understanding the Christian notion of human dignity. The essence of being human, Voegelin often says, is human-divine participation. It is both reason itself and the fact it unites the human being with God that matter. "The truth of man and the truth of God are inseparably one."[85] The central role the concept of imago Dei plays in the Christian tradition finds its origin in this reality. Glenn Hughes paraphrases Voegelin to explain this notion further: "Thus it is only the Christian vision of imago Dei that establishes the absolute spiritual equality, and thus the equal spiritual dignity, of all human beings – a recognition that underlies all later political affirmations of universal human dignity and universal human rights."[86] It is therefore understandable that this notion of equal spiritual dignity is only acceptable to those, as Hughes rightly points out, that are personally open to "the experience of one's own participation in divine transcendence". Because when the soul is truly open to the transcendent reality, it finds a source of order that pre-dates that of the established order of society created by man, and that is also superior to it[87]. The fact that every human being is capable to arrive at this conclusion allows it to "share" in this superiority which is the characteristic element of human dignity itself. In our discussion of the social doctrine of the Catholic Church this aspect will be further studied. In discussing Voegelin's emphasis on the transcendent element of human existence and the need for humans to be open to it, we see that a correct understanding of human dignity depends on it. Hughes pointedly summarizes Voegelin in explaining what the consequences are of denying the human-divine relationship:

"The closure of consciousness to its own transcendent divine ground is the rejection by a person of his or her own personhood. (…) Closed existence is personal deformation, resulting from the frightened, or despairing, or rebellious, or lazy refusal on the part of consciousness to orient itself on the basis of its innate awareness of its own divine ground

[85] Ibid. Voegelin, The New Science of Politics, p. 69
[86] Glenn Hughes, Eric Voegelin and Christianity, The Intercollegiate Review – Fall/Winter 2004, p. 31
[87] See Ibid. Voegelin, The New Science of Politics, p. 156

and through the cultural legacy that explores the meaning of human-divine relationship.(…) And from such acts of existential closure there emerge into public discourse deformed images of what a human being is—images that, when accepted and internalized, undermine human dignity by eclipsing its basis in transcendence, by distorting the search for meaning, and by disrupting the sense of human solidarity. Images of the human that publicly replace the participatory imago Dei with images of a completely world-immanent self, the good citizen of a totalitarian or communist state, or the "absolute self" of atheist existentialism or philosophical materialism, are not harmless, because from them flow ambitions, decisions, actions, habits, and policies. Dehumanized self-interpretation issues into dehumanizing behavior."[88]

[88] Ibid. Hughes, Eric Voegelin and Christianity, p. 32

Chapter 2: **Catholic doctrine and social teaching**

2.1. Introduction

The notion of human dignity has had primary attention in the development of Catholic thought[89] throughout the centuries but it has enjoyed renewed and more central attention only since the Second World War[90]. The first official papal document after the War that deals extensively with human dignity is Pope John XXIII's encyclical *"Pacem in Terris"*[91] which set the stage for even deeper reflection on this topic by the Second Vatican Council that had commenced its proceedings in 1962. This encyclical further developed the Church's doctrine on the inherent dignity of every human being which started gaining prominence with the encyclicals *"Rerum Novarum"* of Pope Leo XIII in 1891 and *"Quadragesimo Anno"* of Pope Pius XI in 1931. The influence Catholic thought had and still has on the development of the notion of human dignity in its legal context is however mostly underestimated or ignored. This is unfortunate, because the Catholic understanding of the human person and its view of human dignity is one of absolutes that does not leave room for doubt or negotiation about the profoundness and consequences of human dignity, seeking to protect the dignity of every human being from conception onwards, regardless of any human valuation. This strict view of the notion of human dignity can only benefit human kind as a whole – Christian or not – as it does not exclude anybody. Aguas[92] summarizes well the relevance of Catholic thought in modern times when he points out that the dignity of a human being is not bestowed on it by somebody else, it is "incommunicable, inviolable and absolute" leading to a radical freedom. It is the human being's complex constitution of material and spiritual aspects that makes it so uniquely different from all other species[93]. It is also the Christian

[89] When we speak of "Catholic thought" in this chapter, it also refers to official documents published by the Catholic Church, mostly by its popes. Unless otherwise specified, all quoted Church documents have been retrieved on line from: www.vatican.va

[90] See for example Pope John Paul II who specifically confirms this: "After the Second World War, she [the Catholic Church] put the dignity of the person at the centre of her social messages (..)": John Paul II, Encyclical Letter Centesimus Annus, published 1 May 1991, §61

[91] Pope John XXIII, Encyclical letter "Pacem in Terris" on Establishing Universal Peace in Truth, Justice, Charity and Liberty, April 11, 1963

[92] Jove Jim S. Aguas, The Notions of the Human Person and Human Dignity in Aquinas and Wojtyla; Kritike, Volume 3, nr.1, June 2009, p. 54

[93] See Ibid. Aguas, The Notions of the Human Person and Human Dignity in Aquinas and Wojtyla, p. 51

tradition, following in the footsteps of Judaism, which made human dignity a notion of universal application, even when this happened late in history[94]. This broad concept was for example not shared by the ancient Greeks or Romans, as they reserved dignity for certain classes of people, not including slaves and other groups of "lesser" human beings. Full dignity in these latter traditions was attributed only to free men and women. So when trying to understand human dignity, it is vital to include a thorough analysis of Catholic thought on the subject.

Four sets of modern-era Catholic Church documents can be identified as especially relevant in contributing to the legal-philosophical understanding of human dignity in post-War Europe: the 1965 Pastoral Constitution *"Gaudium et Spes"*; the 1968 *"Declaration on Religious Freedom "Dignitatis Humanae""* by Pope Paul VI and the (social) encyclicals written by Pope John Paul II (Karol Wojtyla), whom as a Pole personally experienced both Nazi and Communist totalitarian regimes and thus knew all too well what happens to a society that disregards human dignity. As already noted, human dignity was one of the main themes of his 27-year pontificate. Finally the writings of Pope Benedict XVI (Joseph Ratzinger) are also relevant for our human dignity understanding as they pay special attention to the relationship between reason and modernity.

2.2. The Pastoral Consitution Gaudium et Spes

This document was one of the outcomes of the Second Vatican Ecumenical Council, the most important gathering of senior representatives from the Catholic Church worldwide in the 20th century. The Council lasted from 1962 to 1965 and was amongst others aimed at taking stock of the rapid social, cultural, political and technological developments of the time and see how the Church should respond. *Gaudium et Spes*, published in 1965, deals with the question of what is the relation of the Catholic Church to the changing modern world. This question was especially relevant with regard to technological advances and political developments that profoundly impacted both the adherence to the

[94] See Michael Novak, The Judeo-Christian Foundation of Human Dignity, Personal Liberty, and the Concept of the Person; Journal of Markets and Morality 1, no. 2 October 1998, p. 109

moral teachings of the Church, as well as its influence on world affairs. The moral guidelines of the Church for its members were now, and continue to be, increasingly rejected or questioned as to their validity in modern times. A strong downwards trend in the number of practicing Catholics in Europe that started in the 1960's also had a profound impact on the influence Catholics and through them the Catholic Church could have on society. The authors of *Gaudium et Spes* were well aware of these changes as the following excerpt shows:

"Today, the human race is involved in a new stage of history. Profound and rapid changes are spreading by degrees around the whole world. Triggered by the intelligence and creative energies of man, these changes recoil upon him, upon his decisions and desires, both individual and collective, and upon his manner of thinking and acting with respect to things and to people. Hence we can already speak of a true cultural and social transformation, one which has repercussions on man's religious life as well."[95]

The first chapter of the document is titled "The Dignity of the Human Person" and forms the introduction to a thorough discussion of the Church's understanding of human dignity and its implications for the human being and society. The dignity of the human being is clearly seen by the authors as the basis of the teachings of the Catholic Church as outlined in this document[96]. The fundamental element of the human being's dignity, the document says, is the ability to listen to its conscience and to be able to choose to do good and avoid evil. Obeying conscience is "the very dignity of man". The human being also rebels against death because it is created with a soul that has been made to live eternally and thus cannot be limited to its earthly dimension. Therefore, no matter the great technological advances and the ability to prolong human life in its biologic sense, it does not take away the longing of the human being for the "higher life". This longing is such an important element in understanding human dignity because it makes very clear that the human being is never limited by this world, and can thus also never be fully

[95] Pastoral Constitution on the Church in the Modern World Gaudium et Spes, promulgated by His Holiness Pope Paul VI on December 7, 1965; §. 4; published in: The Documents of Vatican II, Vatican Translation, St. Pauls 2009, p. 125

[96] See: Charles E. Curran, Catholic Social Teaching, 1891-present – A historical theological and ethical analysis, Washington D.C. 2002, p. 75

under the control of the earthly institutions. This is why human dignity is inviolable. The root reason for its human dignity, says *Gaudium et Spes*, "lies in man's call to communion with God".[97] The authors point out that when a divine dimension is missing from human life, when there is no hope for a hereafter, the human being sinks into despair and despondency. This leads to a loss of human dignity through actions that reflect a lack of understanding of the human being's eternal dimension, like for example "whatever is opposed to life itself, such as any type of murder, genocide, abortion, euthanasia or willful self-destruction"[98]. The Council leaves no doubt as to how it regards human dignity in its full force and meaning, especially in what we today call the social dimension:

"Coming down to practical and particularly urgent consequences, this council lays stress on reverence for man; everyone must consider his every neighbor without exception as another self, taking into account first of all his life and the means necessary to living it with dignity (..)"[99]

Human dignity also means that a person that errs, or for example adheres to another religion, does not loose any of its dignity. One has to distinguish here between the error and the person that makes the error. One can reject the former but not the latter, says *Gaudium et Spes*. This counts especially for the freedom of expression and the freedom of religion. The authors state that the Gospel and the role given in it to the Church are the best guarantors of human dignity. When the divine law is rejected - the higher order to which the human being is on pilgrimage as Verdross also puts it - human dignity is in danger of being annihilated because it will then become a matter of debate and interpretation rather than based on an untouchable truth. Therefore, especially Christians should participate in social, political and cultural activities that bring human life and society "in conformity with the dignity of the human person without any discrimination of race, sex, nation, religion or social condition"[100]. This should of course also be

[97] Ibid. Gaudium et Spes § 19
[98] Ibid. Gaudium et Spes § 27
[99] Ibid. Gaudium et Spes § 27
[100] Ibid. Gaudium et Spes § 60

reflected in the reform of legal and political rights that enable the human being to live in full dignity. *Gaudium et Spes* refers here to the various initiatives that had already been taken or were under way at the time to include human dignity and human rights in laws and international treaties.

2.3. The Declaration on Religious Freedom "Dignitatis Humanae"

As was already noted, the Second Vatican Council was primarily aimed at helping the Catholic Church find its place in a rapidly changing world, a world in which the traditional influence of the Church, religiously and politically, was undergoing major changes. Whereas the Pastoral Constitution *Gaudium et Spes* can be seen as the Church's key document in outlining its tradition and further development of human dignity theory, the declaration on religious freedom *Dignitatis Humanae*[101] by Pope Paul VI would best be described as a practical application of the Church's human dignity theory in the modern world. It should also be noted that *Dignitatis Humanae* drew much of its inspiration from another important document from the time of the Second Vatican Council, Pope John XXIII's abovementioned 1963 encyclical *"Pacem in Terris"*[102]. As Grasso[103] points out, the importance of *Dignitatis Humanae* – mostly ignored today – is vast, although at the time of its promulgation it was quite controversial[104]. Pope Paul VI, addressing the world's leaders at the conclusion of the Second Vatican Council on 8 December 1965 called *Dignitatis Humanae* one of the Council's "major texts", whilst also calling it "one of its greatest documents" in an address to representatives from various nations and international organizations a day earlier. In his message to rulers he says:

[101] Declaration on Religious Freedom Dignitatis Humanae; On the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious: Promulgated by Pope Paul VI on December 7, 1965, published in: The Documents of Vatican II, Vatican Translation St. Paul's 2009, p. 391ff

[102] Ibid. Pope John XXIII: Encyclical Pacem in Terris

[103] Kenneth L. Grasso, An Unfinished Argument: Dignitatis Humanae, John Courtney Murray and the Catholic Theory of the State, in: Kenneth L. Grasso and Robert P. Hunt (ed.), Catholicism and Religious Freedom: contemporary reflections on Vatican II's Declaration on religious liberty, Rowan & Littlefield Publishers 2006, pp. 161-162

[104] It was especially controversial within the Catholic Church which had had until then not fully embraced the concept of religious freedom. We will discuss this in more detail later on

"What does the Church ask of you today? She tells you in one of the major documents of this council. She asks of you only liberty, the liberty to believe and to preach her faith (...). "[105]

Religious freedom was then and is now much proclaimed in constitutions and international treaties, but still a fundamental right violated on a large scale today. Not only the Second World War, but even more the communist dictatorships behind the Iron Curtain and in Asia were and - in the case of Asia (including the Middle East) and parts of Africa – still are prime examples of such violations. It is especially the communist dictatorships that Pope Paul VI was referring to in both *Gaudium et Spes* and *Dignitatis Humanae* when lamenting the lack of religious freedom in the world. But more importantly, and this was the real controversy, with *Dignitatis Humanae* the Church made a big step in its doctrinal development. She publicly broke with an ambivalent and increasingly unsustainable notion of religious liberty that had in the past been used by some to be harshly intolerant of other religions[106]. This departure is starkly underlined when Paul VI writes that "there has at times appeared a way of acting that was hardly in accord with the spirit of the Gospel or even opposed to it."[107]

According to the declaration, the right to religious liberty finds its foundation in the dignity of the human being. This dignity, it states, can be known through the revealed Word of God and through reason. Human dignity consists of human beings being gifted with both reason and a free will. This then enables them to take personal responsibility for their lives and for what they do. The importance of *Dignitatis Humanae* lies therein, that it clearly sees religious liberty as one of the defining aspects of human dignity itself. More than a consequence, it is a vital component of human dignity[108]. Pope John Paul II notes with regard to religious liberty and its relation to human dignity that it is ultimately the personal convictions of the human person that lead it to recognize and follow a religious or metaphysical concept that involves the whole of the human life and thus all

[105] Pope Paul VI , Address to the Rulers, 8 December 1965; published on www.vatican.va
[106] See. Ibid. Kenneth L. Grasso, An Unfinished Argument: Dignitatis Humanae, John Courtney Murray and the Catholic Theory of the State (p. 166), for example, states that as late as Pius XII, who was Pope until 1958, Catholic social teaching did not accept a natural human right to religious liberty
[107] Ibid. Dignitatis Humanae, § 12
[108] See. Ibid. Dignitatis Humanae, § 2

the fundamental decisions that are a result of adhering to this concept. But this process can only take place when the individual conscience is fully respected and its searching is not hampered by the judgment or interference of others[109].

The American theologian Neuhaus summarizes this concept of *Dignitatis Humanae* as "the dignity of the human person, and of the person in community, requires religious freedom."[110] Without it, Paul VI seems to say, it is hardly possible to uphold human dignity at all. This argument is supported when one takes a close look at the following passages from *Dignitatis Humanae* discussing the human being's search for truth - a defining aspect of human life:

"Truth, however, is to be sought after in a manner proper to the dignity of the human person and his social nature. The inquiry is to be free, carried on with the aid of teaching or instruction, communication and dialogue, in the course of which men explain to one another the truth they have discovered, or think they have discovered, in order thus to assist one another in the quest for truth. Moreover, as the truth is discovered, it is by a personal assent that men are to adhere to it".

and further on:
"Injury therefore is done to the human person and to the very order established by God for human life, if the free exercise of religion is denied in society, provided just public order is observed."[111]

Put differently, human dignity cannot be upheld if civil society does not uphold the freedom to exercise a religion, since religion – in the Catholic view at least – is a matter of faith *and* reason and thus only possible as a completely free and deliberated choice, either to accept it or to reject it. Denying the freedom of religion would take away the essence from the notion of human dignity that is the gift and use of reason that can lead to

[109] John Paul II, The Freedom of Conscience and Religion, St. Paul Editions 1980, pp. 5-6
[110] Richard Neuhaus, Vatican II, 40 Years later: "Dignitatis Humanae"; a November 20, 2003 interview with "Zenit" on the Declaration on Religious Freedom, p. 1, www.zenit.org/article-8747?I=english (retrieved 30-4-2011)
[111] Ibid. Dignitatis Humanae, § 3

faith. No government should therefore interfere with the religion its citizens chose to practice or they chose to turn their backs on. No one can be forced to embrace any given faith, including the Christian faith, because by its nature the act of faith is a free act. Man serving God means that it acts by personal conscience, not under compulsion. That is the dignity of the human person as given by God[112]. *Dignitatis Humanae* emphasizes that the recognition of this primary aspect of human dignity in society – the freedom from any coercion in matters religious – is the fruit of a process of human development over the course of time[113].

Essential to reading this document is the understanding Paul VI promotes of the limits of government: his core message is a vision of political life that is one of limited government. Since human dignity comes from the pre-political order, it is the human being that should watch over the state, not the state watching over the human being. Liberty and a right to immunity from coercion are, as John Murray puts it '"resident in the person as such" and thus cannot be granted, regulated or taken away by the state[114]. Religious freedom can thus not be seen as a form of tolerance, because it isn't. This liberty is God-given and grounded in the dignity of the human person, as well as in natural law[115]. Here we are reminded of what both Maritain and Verdross had to say about natural law and human dignity, whereby the former is the unchangeable source and basis of the latter over which the state cannot have control, as it is a pre-positive order enjoying universal application.

Now that nations and men of different religions and cultures grow ever closer together, the declaration concludes, it is even more important that this fundamental element of human dignity – in which every man and woman has personal responsibility - be constitutionally anchored and adhered to in order that peace be established[116]. Without

[112] Ibid. Dignitatis Humanae, § 10-11
[113] Ibid. Dignitatis Humanae, § 12
[114] See. Ibid. Kenneth L. Grasso, An Unfinished Argument: Dignitatis Humanae, John Courtney Murray and the Catholic Theory of the State, pp. 167ff, where John Courtney Murray is extensively quoted. Murray was an American Jesuit priest and a theologian (1904-1967) who played a major role in the drafting of Dignitatis Humanae and was known trying to reconcile Catholic doctrine with religious plurality. He was also instrumental in convincing the Council fathers to adopt the Declaration.
[115] See Ibid. Neuhaus, Vatican II, 40 Years later, p. 4
[116] Ibid. Dignitatis Humanae, § 15

freedom, one can conclude from this principle, there can be no peace. The Christian understanding of religious freedom – unfortunately historically not always practiced as such - can thus best be summarized as was done in *Dignitatis Humanae*:

"For He bore witness to the truth, but He refused to impose the truth by force on those who spoke against it. Not by force of blows does His rule assert its claims."[117]

2.4. The encyclicals of Pope John Paul II

Pope John Paul II, already known for his numerous writings as Karol Wojtyla before he became Head of the Catholic Church, repeatedly stated that human dignity is the "pivot on which the entirety of Catholic social doctrine rests."[118] This conviction is also apparent from what is referred to as his 'social encyclicals' and the various other documents discussing human dignity and human rights. Karol Wojtyla was a philosophy and ethics professor at the Catholic university of Lublin in Poland before he became bishop, archbishop and then pope and put the themes of human freedom and human dignity at the center of his writings. As a young man he had personally experienced the trampling of human dignity by the Nazi occupiers of his country, followed by the installation of a communist dictatorship that was equally disrespectful of the dignity of the human person. Wojtyla's main concern was the rising prominence of various new visions of the human person in post-War Europe. All these visions had in common that in one way or the other – again – they denied what is the essence of being human, namely to be able to exercise free will[119]. Marxists claimed that human beings are merely the product of their class and only driven by economic interests, and thus not free to exercise their will. Or in other words: determinism. This view was of course strongly present in Wojtyla's direct environment. But his concern also went to other forms of determinism that were – apart from Marxism – popular in Europe, both East and West, such as the Freudian understanding of the human person's sexual determination. Also important to mention here is the Nietzschean notion embraced by the Nazis. They claimed that human

[117] Ibid. Dignitatis Humanae, § 11, citing from John 18: 36, 37 and Matthew 26: 51-53
[118] See Ibid. Neuhaus, Vatican II, 40 Years later, p. 1
[119] See: Tracey Rowland, John Paul II and Human Dignity, June 2005 Public Lecture held at the John Paul II Institute for Studies on Marriage and the Family (Melbourne, Australia), p. 1 (online version, retrieved 2-2-2012: www.jp2institute.org

dignity in the Christian understanding had severed the link between dignity and power and instead –other than for example Plato, Aristotle and Cicero did – bestowed full dignity on every single human being, regardless of age, race, public status, sex or religion. It is in response to those ideologies that Wojtyla set out to develop a philosophical anthropology that focused on the capacity of the human person to rise above the determinism described by amongst others Marxism, Freudian thought and Nietzsche's ideas, by focusing on the mere aspect of *being* and the exercise of a free will. Wojtyla linked human dignity to the (developing) capacity of the human being to transcend itself, to overcome cultural conditioning and to choose to do the good. This can however not take place effectively without including the component of the human being's relations to others, the social dimension[120]. These elements can be seen as the foundation for Wojtyla's later writings on human dignity, which found their first expression in his 1969 phenomenological work *"The Acting Person"*[121]. The key to this work was that every action has an internal effect and an external effect – and that the person's dignity is in fact best expressed though the exercise of a free will and as a consequence also the free gift of oneself to others. Human dignity in the thought of Pope John Paul II therefore also has a strong social component. This underlines the Christian understanding of dignity being exclusively reserved for the human being, and not for example for animals, because it is only the human being that has the capacity of self-giving. Dignity in this sense can only be human.

Now we come to the encyclicals of John Paul II in which the notion of human dignity was further developed. Due to the innumerable writings of Karol Wojtyla after he became Pope John Paul II, we will focus on these encyclicals specifically discussing human dignity as well as related natural law theories, most important of which are *Veritatis Splendor, Evangelium Vitae* and *Fides et Ratio,* as well as two of the social encyclicals *Laborem Exercens* and *Centesimus Annus*. Since John Paul's intellectual and pastoral endeavors were centered on the protection of human dignity, many of his other writings

[120] See Ibid. Rowland, John Paul II and Human Dignity, pp. 2-3
[121] Original Polish title: Osoba y Czyn, English translation published 1979 by Springer Netherlands

also allude to the theme[122]. The social encyclicals deal more with the practical implications of human dignity relating to the development of the human being in society and the role of work. The former three encyclicals are focused on providing the theory or otherwise present the moral and natural law argument for the protection of human dignity. These writings should be seen in the light of dramatic new developments in science and medicine that led to the need for the Catholic Church to more thoroughly explain and reaffirm its teaching on matters involving the dignity of the human being.

In his first encyclical as leader of the Catholic Church, *Redemptor Hominis*[123], Pope John Paul II sets out the agenda for his pontificate. The document already outlines his views on human dignity in clear terms. Referring to Christ becoming man, John Paul II explains the enormity of human dignity: "Human nature, by the very fact that it was assumed, not absorbed, in him, has been raised in us also to a dignity beyond compare."[124] With this statement John Paul establishes a framework of a human dignity understanding that essentially knows no limits as to how much it should be respected – because of its divine dimension. This comprises the most generous understanding of the basis of fundamental human rights existent in today's human dignity discourse, a fact that has been mostly overlooked. Dignity belongs to humanity and is inseparable from it, whereby freedom is its precondition and basis[125]. It is worth noting that the Pope highlights two key areas in this encyclical in which the protection of human dignity is of special concern to him. It is religious freedom, where he refers to the declaration *Dignitatis Humanae* discussed above, and the rights of workers. These are recurring themes in the writings of this Pope: The need for the human being to be able to freely express a religion and the freedom to work under conditions that are human. With this he provides the constitutive elements for the notion of human dignity, namely that it includes freedom itself and the possibility to express that freedom by choosing to believe or not and being able to provide for one's life in a dignified way.

[122] During his papacy, John Paul II amongst others published 14 Encyclicals and 3288 speeches. Source: Vatican Press Office – www.vatican.va (retrieved 2-5-2011)
[123] John Paul II, Encyclical Letter "Redemptor Homnis", 3 April 1979. Published by Pauline Books & Media 1979
[124] Ibid. Redemptor Homnis §8
[125] Ibid. Redemptor Homnis §12

To simply classify the post-War encyclical letters of John Paul II and other Church documents discussing natural law as part of the 20th century movement of a revival of natural law thinking would not be accurate. The Catholic Church has a long and well-documented tradition in natural law discourse and it has played a decisive role in its development throughout history. It would hardly be possible to identify any pope that did not pay close attention to the subject in at least part of his writings. Still, one could say that all the post-War popes, and especially John Paul II and Benedict XVI - both of whom were personally affected by the Second World War and its impact on Europe - felt an especially urgent need to reaffirm and where necessary reintroduce natural law thinking. It is within this perspective that we discuss John Paul II's thought on human dignity.

Encyclical Letter Veritatis Splendor (1993)

In writing "The Splendor of Truth"[126] John Paul II wanted to challenge the pervasive trend of moral relativism both within and outside of the Catholic Church that continues until today. The Pope warns how the rupture between truth and freedom promoted by many in modern society is in fact undermining society itself. The document is a solid treatise on the Catholic tradition in the field of morality and in the first part outlines in detail the foundational importance of the natural (moral) law. The second part also deals extensively with the relationship between human dignity and natural law.

In his introductory chapter John Paul notes the fact that the teachings of the Catholic Church are no longer simply questioned by occasional dissent, but called into question in an "overall and systematic" way. Along the way the natural law, its universality and the permanent validity of its precepts is rejected. This rejection is mostly based on anthropological and ethical considerations that have disconnected human freedom from "its essential and constitutive relationship to truth".[127] The core of many of today's problems lies here, he notes, since those human issues involving moral reflection that are

[126] John Paul II, Encyclical Letter "The Splendor of Truth (Veritatis Splendor)", 6 August 1993. Vatican Translation, Pauline Books 1995
[127] Ibid. Veritatis Splendor, §4

most frequently debated are in fact related to human freedom in one way or the other[128]. As was discussed above, there is an unbreakable link between human freedom and human dignity. As *Dignitatis Humanae* highlighted it, "the dignity of the human person is a concern of which people of our time are becoming increasingly aware"[129]. John Paul in quoting this points out and applauds the heightened sense of human dignity he sees in modern society, where one also sees an increasing awareness of the uniqueness of the human being and respect for its conscience. But at the same time, there is the problem of an over-exaltation of freedom that makes it an absolute end and itself therefore becoming the sole source of values. Truth is consequently considered a creation of freedom and becomes an issue of pure individual choice and not accountable to any other reality. This radically changes the understanding of conscience, since a universal truth about the good that is knowable to human reason is no longer accepted; this is what we call moral relativism[130]. This then leads to an individualistic ethic that disconnects human nature from its universal truth that is applicable to all. It is precisely at this point where the weakness in the current human dignity and human rights discourse lies: where there is no universal understanding of human nature, how can there be sufficient protection of human dignity that is the core of being a human? If we all exclusively abide by our own truths, inspired by our purely individualistic conscience about what it means to be human, how can we expect others to know what our human dignity consists of and where and when it would be violated by them? This question can be read clearly in *Veritatis Splendor,* where the Pope pleads for reestablishing the link between truth and freedom. The need for this link can best be seen in the relationship between freedom and the law: if law is only that which the human being in an exclusively autonomous way lays down for itself, having its source only in human reason, then arbitrariness and abuse of power are likely consequences. Here John Paul refers to the need to subject the human law to the natural moral law, the latter not established by the human being but by God himself and which the human person can come to know by the use of reason. The natural law is nothing else than the understanding we have received from our Creator allowing us to see what must be done and what must be avoided. However, this "autonomy of reason" does

[128] Ibid. Veritatis Splendor, §31
[129] Ibid. Dignitatis Humanae,§1, referring to Pope John XXIII 1963 Encyclical Letter Pacem in Terris
[130] See Ibid. Veritatis Splendor, §32, 35

not mean that this same reason with which we can understand the natural law can itself create values and moral norms[131]. Our reason is to be applied in a process of thought and deliberation that brings us to see and understand these norms having always existed. Here we see that the Thomistic doctrine of natural law has played an important role in the Church's teaching on morality and John Paul II continues this tradition. Thomas Aquinas points out that reason and human law need to be subordinated to the Wisdom of God and his law, the divine law. It is here that natural law finds its origin[132]. Coming from this understanding, John Paul II points to what he considers the true meaning of natural law:

"it refers to man's proper and primordial nature, the 'nature of the human person', which is the person himself in the unity of soul and body, in the unity of his spiritual and biological inclinations and of all the other specific characteristics necessary for the pursuit of this end. 'The natural moral law expresses and lays down the purposes, rights and duties which are based upon the bodily and spiritual nature of the human person."[133]

This law is not simply a set of norms on the biological level, John Paul II explains, but rather a rational order in which the Creator calls the human person to direct and regulate its life and actions whilst making use of its own body and mind. He explains the meaning of this with a concrete example: absolute respect for human life finds its origin not merely in the natural inclination to preserve one's own life – as determinism would have it -, but in the dignity proper to the person. The human being must be affirmed for its own sake. So yes, there are objective norms of morality. The natural law is universal and immutable, and human dignity finds its foundation therein. This law obliges all men and women never to offend in anyone the personal dignity common to all – at all cost. This dignity, John Paul II reiterates, is asserted when the human person lives in accordance with "the profound truth of his being"[134]. It is beyond doubt that there is a need to find the most fitting formulation for these norms because of the different cultural contexts our world is comprised of, but this does not diminish their content or historical relevance.

[131] See Ibid, Veritatis Splendor, §36, 40
[132] See Ibid. Veritatis Splendor, §44
[133] Ibid. Veritatis Splendor, §50
[134] See Ibid. Veritatis Splendor, §§52, 53

The Catholic Church, as John Paul underlines, is in no way the author or the arbiter of these norms, she only sees herself in obedience to the "truth which is Christ, whose image is reflected in the nature and dignity of the human person" to explain and propose the fullness of these norms[135]. The categorical defense of the personal dignity of each human being and the essential moral demands that come with it are the condition for freedom to exist at all. Thus, moral norms, especially the negative ones, are meant to protect the inviolable dignity of the human being and to help preserve the social fabric in which we live and develop. Neither civil authorities, nor fellow human beings, have the right to at any time or for any reason violate these fundamental and inalienable rights of the human being. This, John Paul asserts, is only sustainable when there is a morality which acknowledges "certain norms as valid always and for everyone, with no exception"[136]. This also means he goes on to say, that no nation or state and even not the majority of any social body or ruler may (decide to) disregard or violate these norms that are the natural law. To put it once again in the words of Antigone quoted earlier: "They are not just for today or yesterday, but exist forever, and no one knows where they first appeared."[137]

In explaining the meaning of *Veritatis Splendor*, Gerard Bradley[138] underlines the notion of "no exceptions granted" that is the core of these fundamental norms explained by John Paul II. In the Encyclical *Pacem in Terris* Pope John XXIII already wrote "The same law of nature that governs the life and conduct of individuals must also regulate the relations of political communities with one another (...) Political leaders are still bound by the natural law (...) and have no authority to depart from its slightest precepts."[139] Bradley sees a reaffirmation and strengthening of this essential aspect in the application of moral norms by Pope John Paul's statement in *Veritatis Splendor*: "When it is a matter of the moral norms prohibiting intrinsic evil, there are no privileges or exceptions for anyone"[140]. These precepts, Bradley goes on to explain, are by no means meant for Christians only, they are specifically addressed to all humankind since they express

[135] See. Ibid. Veritatis Splendor, §95
[136] See. Ibid. Veritatis Splendor, §§97, 99
[137] See footnote 29
[138] Gerard V. Bradley, Natural Law and Constitutional Law, The Catholic Social Science Review, Volume 1, 1996 – pp. 36-42.
[139] Ibid. Pacem in Terris §§ 80-81
[140] Ibid. Veritatis Splendor §96

universal moral truths. For John Paul II these norms are the only true foundation and guarantee of a just and lastingly peaceful society and the necessary roots of a genuine democracy where inalienable human dignity and the basic rights that flow from it can be protected. Janet Smith echoes this in her commentary on the encyclical by saying:

"[The] natural law and natural rights are linked by their shared grounding in the dignity and nature of the human person (...). Natural law, rooted in human nature shared by all mankind, is a guide to morality accessible to the Christian and the non-Christian alike. It is the great natural unifier of mankind; it allows men from different cultures and traditions to arrive at some consensus on morality."[141]

When John Paul speaks about the moral relativism that is so strongly present in modern society and its rejection of any form of universal truth, he critiques the fact that objective reality is no longer acknowledged, because that is what these universal moral norms are. This objective reality which we can all see and understand through reason is replaced by the human person subjecting the world according to its egocentric personal choices on the one hand and the dictate of the majority opinion on the other hand. In concluding his discussion of natural law and human dignity, John Paul II makes a stark analysis of the future of democracy and the rule of law - both necessary to uphold the protection human dignity – in a society that goes down the path of moral relativism:

"This is the risk of an alliance between democracy and ethical relativism, which would remove any sure moral reference point from political and social life, and on a deeper level make the acknowledgement of truth impossible. Indeed, 'if there is no ultimate truth to guide and direct political activity, then ideas and convictions can easily be manipulated for reasons of power. As history demonstrates, a democracy without values easily turns into open or thinly disguised totalitarianism'"[142].

[141] Janet E. Smith, Natural Law in Veritatis Splendor, Osservatore Romano, January 5, 1994
[142] Ibid. Veritatis Splendor, §101 where he also quotes his 1991 Encyclical Letter Centesimus Annus

Encyclical Letter Evangelium Vitae (1995)

This encyclical was published within two years of *Veritatis Splendor* and as a text builds upon the philosophical and theological foundations that were outlined in the 1993 document. The "Gospel of Life" sets out what should be the place of human dignity in political, legal and social matters. It furthermore focuses on the practical implications of the development of actual human dignity and human rights 'practice' against the backdrop of increasing moral relativism and secularization. The document singles out the inviolable right to life for all – from the unborn to the dying - as the primary consequence of a true understanding of human dignity. The active practice of abortion and euthanasia are proof for John Paul II that a correct interpretation of the notion of human dignity is in need to be reaffirmed, especially where it concerns the alarming developments through which formerly forbidden practices are now increasingly claimed as a 'right'. As John Paul II sets out to introduce his topic, the notion of human dignity is put at the center of his thesis. He affirms that every person can come to recognize

" (..) the sacred value of human life from its very beginning until its end, and can affirm the right of every human being to have this primary good respected to the highest degree. Upon the recognition of this right, every human community and the political community itself are founded"[143]

In various passages in the encyclical John Paul II speaks in even stronger terms of human dignity by referring to "the almost divine dignity of the human person". The incomparable dignity of the human being is considered by the Pope as such an essential element of the fabric of society that any threat to human dignity itself is necessarily a central concern of the Church[144]. This is even more so in modern times where there is a vast increase in what John Paul II considers "new forms of attacks on the dignity of the human being", especially the weak and defenseless added to the list of long-existing victims of poverty, hunger, disease, coercion and war. But these new threats are so much more dangerous to society because they involve incomparably larger numbers of human

[143] John Paul II , Encyclical Letter "The Gospel of Life (Evangelium Vitae)", Pauline Media 1995, §2
[144] See Ibid. Veritatis Splendor, §3

beings that are being killed or otherwise affected, whilst broad sectors of public opinion and legislation justify these actions as the mere result of the right to individual autonomy and freedom. Increasingly these claims to individual freedom as the justification for killing human life go as far as actually calling it a fundamental human right to do so. What was once universally held as criminal – the practices of embryo experiments and destruction, abortion, euthanasia and certain cases of infanticide-, has now become socially acceptable in many countries. The basic value of human life is no longer considered sacred and therefore inviolable. The introduction concludes with stating the specific object of this document, which is to be a "precise and vigorous reaffirmation of the value of human life and its inviolability"[145].

Evangelium Vitae is meant to bring attention to what John Paul calls a massive increase in the violation of human dignity, often framed in scientific, medical or social arguments that claim to alleviate suffering or improve living conditions. The Pope, when addressing millions of youth in Denver in 1993, remarks:

"(..) with time the threats against life have not grown weaker. They are taking on vast proportions. They are not only threats coming from the outside, from the forces of nature or the 'Cains' who kill the 'Abels'; no, they are scientifically and systematically programmed threats. The twentieth century will have been an era of massive attacks on life, an endless series of wars and a continual taking of innocent human life."[146]

A clear example of this development of crumbling respect for inherent human dignity is those situations when life is only accepted under the condition that it is free of certain limiting conditions such as handicap or illness. This phenomenon is increasingly present in so-called 'therapeutic interventions' that abort the unborn child with such 'deficiencies'[147] or in assisted suicide procedures. It is a generally known fact that in the past decade the number of children born with Down-Syndrome has become a fraction of the number it used to be due to the large majority of parents aborting the child because of

[145] Ibid. Veritatis Splendor, §5
[146] Address for the World Youth Day vigil, 14 August 1993, Denver. Published on www.vatican.va
[147] See: Ibid. Evangelium Vitae, §14.

its specific condition[148]. Perversely, the argument of the 'impossibility' of a 'dignified life' is most often used to justify such killing.

John Paul II in *Evangelium Vitae* notes a remarkable contradiction in modern thinking between on the one hand a society that puts ever greater emphasis on the protection of human rights and its grounding in human dignity, whilst at the same time rejecting the respect for dignity and the right to life of massive numbers of the most defenseless of human beings: the unborn, the handicapped and the dying. John Paul II famously described this as a "culture of death". The increasing importance of international human rights treaties is the pride of Western society. Yet, at the same time, the people, countries and institutions that proclaim these 'inviolable' rights are also the active promoters many life-ending procedures clearly violating human dignity and the right to life. Why this contradiction in the understanding and implementation of human dignity protection? John Paul II gives the following analysis of the understanding of the human being that is prevalent in today's thinking:

"(..) and recognizes as a subject of rights only the person who enjoys full or at least incipient autonomy and who emerges from a state of total dependence on others. But how can we reconcile this approach with the exaltation of man as a being who is "not to be used"? The theory of human rights is based precisely on the affirmation that the human person, unlike animals and things, cannot be subjected to domination by others. We must also mention the mentality which tends to equate personal dignity with the capacity for verbal and explicit, or at least perceptible, communication. It is clear that on the basis of these presuppositions there is no place in the world for anyone who, like the unborn or the dying, is a weak element in the social structure, or for anyone who appears completely at the mercy of others and radically dependent on them, (..)"[149]

John Paul II here directly touches upon Kant's human dignity theory as developed in post-War Europe and on which we will dwell later in greater detail. At this point it is

[148] Later on we will discuss this large scale abortion of children with Down Syndrome, currently about 92% of all cases
[149] Ibid. Evangelium Vitae, §19

important to note that John Paul clearly warns for an erroneous use of Kant's human dignity theory in which autonomy as the basis of human dignity is decoupled from the moral imperative that one human being cannot be used for the end of another human being. Yet this is precisely what seems to be happening.

John Paul then goes on to explain how this understanding of the human person is connected to a distorted sense of the meaning of human freedom. If freedom only means to be able to do whatever one wants without regard for others, it becomes a form of slavery to the mere desires or whims of the self and leaves no room for charity and community. "This view of freedom leads to a serious distortion of life in society. If the promotion of the self is understood in terms of absolute autonomy, people inevitably reach the point of rejecting one another. Everyone else is considered an enemy from whom one has to defend oneself."[150] John Paul II observes. Equally, human dignity cannot be understood as something that stands purely on itself and has no regard for others. Human dignity finds part of its definition in the regard for the dignity of every other human being – meaning that in the defense of my own dignity the dignity of the other is as important to protect lest it become an arbitrary notion. How else can I successfully defend the right to the respect of my own human dignity if at the same time I disregard the dignity of my neighbor who is entitled to equal rights? This Christian notion of strict equality in dignity is generally not accepted due to the currently prevailing anthropological understanding of the human being that is dualistic in nature: modern culture tends to make a (scientifically questionable) distinction between the actual living human body and the conscious and experiencing autonomous person[151]. Bodily life is in this context seen in mechanical terms, as inspired by Descartes' thought on the subject, whereby the concept of the rational soul being an integral part of bodily life is rejected. The teleological understanding of human life however "affirms that the human body is the locus of a unified life such that the whole of that life is shaped and informed by a developmental dynamic directed to human fulfilment"[152] whereby the unifying principle

[150] Ibid. Evangelium Vitae, §20

[151] See: William E. May, Philosophical Anthropology and Evangelium Vitae, 24 September 2002, p. 2; published on http://www.christendom-awake.org (retrieved 10-4-2010)

[152] See: Luke Gormally, Human dignity: the Christian view and the secularist view, in: J. Vial Correa and Elio Sgreccia (ed.) The Culture of Life: Foundations and Dimensions; Vatican City - Libreria Editrice Vaticana 2002, pp. 52-66

of this dynamic is the rational soul. Dualism denies this and this denial is what ultimately serves as the justification for the discriminatory application of human dignity protection between for example the unborn child diagnosed with Down-Syndrome and its mother (the right to life as 'opposed' to the right to privacy and freedom). In this approach, the unborn life is not yet 'conscious' and autonomous, and according to some will never be, and is therefore not naturally entitled to the same protection as is the autonomous and fully conscious mother. The right to life can therefore not have precedence over the mother's freedom to choose what to do with the child in her womb, even when in other circumstances a right to life could prevail. Taking this way of looking at human dignity even further was Joseph Fletcher who stated "Death control, like birth control, is a matter of human dignity. Without it persons are like puppets."[153] This is yet another illustration of what was already observed in the introduction, namely that the notion of human dignity is used in the same argument but for opposing positions both to defend and reject equal dignity and the inviolable right to life.

In his encyclical, John Paul II makes the case for a human dignity understanding that takes into consideration all human beings, without limitation and exception and excluding any form of intentional killing of innocent human life or 'death control' as Fletcher calls it. The personal dignity of every human being lies therein that it always is, like its parents, irreplaceable and non-substitutable[154]. *Evangelium Vitae* presents as an alternative to the prevailing dualistic anthropology an integral anthropology that sees the dignity of the human being originate in its wholeness: body and soul, heart and mind. Each human being is a bodily person of incomparable worth and the bearer of rights that must be respected and protected by society. Or, as Robert Spaemann interprets the core message of *Evangelium Vitae* in simple terms, "(..) the being of a person does not consist in consciousness but in life. (..) persons are living beings and living beings are persons[155] and "the preciousness of human life is not primarily a function of some 'quality of life'

[153] Joseph Fletcher, Moral Responsibility: Situation Ethics at Work, Philadelphia - Lippincott, 1967, p. 151
[154] See: Ibid. May, Philosophical Anthropology and Evangelium Vitae, p. 10
[155] Robert Spaemann, On the Anthropology of the Encyclical Evangelium Vitae, in: Five Years of Confrontation with the Society, Proceedings of the 6th Assembly of the Pontifical Academy for Life – Vatican City 2000, Libreria Editrice Vaticane, edited by Juan de Dios Vial Correa and Elio Sgreccia, §§11, 12 (published on www.academiavita.org). Spaemann also points out here that this integral view of human life, whilst rejected by modern liberal thinking, is confirmed by biological anthropology.

but first and foremost the preciousness of life itself"[156]. A clearer understanding of the scope of human dignity can hardly be given. The age-old Christian view of human life and its inherent dignity is that human beings are an end in and of themselves and therefore can never be the subject of the ends of other human beings. The respect for the dignity of human life is thus a pre-condition for lasting human freedom and is therefore not at the disposition of this freedom itself[157]. John Paul underlines that a human being – in whichever state of development it is, would never be made or become human if it were not human already. Any argument in favor of abandoning the equal respect for human dignity for all human beings undermines human dignity itself[158]. Once again Spaemann offers an excellent grasp of the essential teaching of *Evangelium Vitae*:

"The correlation of personhood and life is the crux *of this encyclical. Human beings are not living beings in one half and persons in the other, so that being a person could be considered just one of many possible states of these living beings, but it is as persons that they are living beings; and* as *living beings, they are persons. Life is neither pure subjectivity, nor is it pure objectivity. It is an inseparable unity of inside and outside, of interiority and exteriority; it is an inseparable unity of being-for-itself and being-for-others. As a living being, the human being is part of the community of all that is living, including animals and plants as well. As person the human being is the peak and the end of the entire evolution of life."*[159]

As also the official summary issued by the Holy See along with the encyclical asserts, the primary goal of this document is to assert the value and dignity of each human life. In this effort, two main guiding principles can be seen. The first is John Paul II's clear rejection of any concept of thought that does not see human life as one integral whole; the body and the soul form an inseparable unity in their earthly dimension. The second is the argument that human dignity is a hollow notion if it does not find it's first and foremost application in the inviolable right to life for every human being, from conception to

[156] Ibid. Spaemann, On the Anthropology of the Encyclical Evangelium Vitae, §5
[157] Ibid. Spaemann, On the Anthropology of the Encyclical Evangelium Vitae, §6
[158] Ibid. Evangelium Vitae, §60
[159] Ibid. Spaemann, On the Anthropology of the Encyclical Evangelium Vitae, §7

natural death. Without it, the defense of human rights will always be based on arbitrary power only, namely the might of the strong against the right of the weak. Human dignity can only be an effective legal concept or legal principle if the inalienable right to life is not the subject of opinion or parliamentary vote, even if it represents the majority. If the right to life is not an absolute, neither can be the respect for human dignity[160]. Instead, John Paul calls for a new style of human life in which the dignity of every individual, especially the weakest, is respected and protected. Without an uncompromising regard for the dignity of the human being, the fabric of society itself is in danger. Pope John Paul II therefore concludes his encyclical pointing out there can be no true democracy without this radical stance on human life:

"A society lacks solid foundations when, on the one hand, it asserts values such as the dignity of the person, justice and peace, but then, on the other hand, radically acts to the contrary by allowing or tolerating a variety of ways in which human life is devalued and violated, especially where it is weak or marginalized. Only respect for life can be the foundation and guarantee of the most precious and essential goods of society, such as democracy and peace." [161]

Encyclical Letter Fides et Ratio (1998)
"Fides et Ratio seeks to restore to humanity the courage to seek the truth, that is, to encourage reason once again in the adventure of searching for truth."

In this way Joseph Ratzinger[162] summarizes the essence of the encyclical "Faith and Reason". It is also the vital component for beginning to understand the meaning of human dignity. An understanding of the truth about the human being is indispensable for

[160] See Ibid. Evangelium Vitae, §57, where the Pope leaves no doubt on this issue as he states "the direct and voluntary taking of all innocent human life" as "always gravely immoral". Or in §90: "I repeat once more that a law which violates an innocent person's natural right to life is unjust and, as such, is not valid as a law."
[161] See Ibid. Evangelium Vitae, §101
[162] Joseph Ratzinger, Culture and Truth: Some Reflections on the Encyclical Letter, Fides et Ratio, lecture, 13-2-1999 at St. Patrick's Seminary, published in: The Patrician – Winter 1999 St. Patrick's Seminary Patrician Magazine, February 1999; also published as: Joseph Ratzinger, Culture and Truth: Reflections on the Encyclical, Origins 28, no. 36 (25 February 1999)

applying the notion of human dignity as it is meant: inviolable and equal for all. This document deals specifically with the need to accept the vital role in human affairs of faith and reason together, not as opposing forces but as "two wings on which the human spirit rises to the contemplation of truth"[163]. John Paul looks at truth not exclusively from a Christian perspective, but rather from a universal perspective. In speaking about criteria for enriching Christian tradition with certain aspects of other traditions that are compatible, he says: "The first of these is the universality of the human spirit, whose basic needs are the same in the most disparate cultures."[164], and: "When they are deeply rooted in experience, cultures show forth the human being's characteristic openness to the universal and the transcendent."[165] What *Fides et Ratio* is trying to say – using as a starting point the example of the people of Israel as described in the Old Testament - is that culture needs to be and can be continually transcended "in order to open itself and enter into the expansiveness of a truth common to all"[166]. All people are invited to join in this process of transcending culture and subjective experience. When doing so they are enabled to direct themselves to God, who has "broken into the world" through his son Jesus Christ. In this context Ratzinger, echoing John Paul II, goes on to deliver a strong critique of modern philosophers' tendency to abandon both metaphysics and faith and revert to appearance or experience only. There is a need for the mere empirical and factual to be transcended to arrive at something absolute, which is foundational in the search for truth. The human being is capable of attaining knowledge of this transcendent reality and truth, even if this knowledge is imperfect and analogical[167]. But without this transcendent knowledge, Ratzinger stresses, the human person is cut off from its innermost self and by the reduction to experience only traps it in the subjective[168].

Especially relevant in relation to the theme of human dignity, *Fides et Ratio* provides John Paul's ultimate argument for the understanding of human life in its fullness– and thus of human dignity: the human being's search for truth and meaning and its capability

[163] John Paul II, Encyclical Letter "Fides et Ratio" on the relationship between faith and reason, 14 September 1998; Pauline Books & Media 1998, p. 7
[164] Ibid. Fides et Ratio, §72
[165] Ibid. Fides et Ratio, §70
[166] Ibid. Ratzinger, Culture and Truth
[167] See. Ibid. Fides et Ratio, §83
[168] See. Ibid. Ratzinger, Culture and Truth

to do so, unlike all other species. Both faith and reason are needed to conduct this search in a meaningful way. But without first accepting the mere existence of an objective truth as opposed to relativistic, subjective truths, it will not be possible to come to a full understanding of the concept of human dignity. Yet this process of searching for the objective truth about the human being can never be successful without applying both faith and reason. The reformed-protestant philosopher Wolterstorff here sees the encyclical as a "vigorous and visionary call to boldness"[169]. The boldness lies in the explicit call for both the use of reason and the exercise of faith, he continues. Not "either/or" – as John Paul notes that many modern philosophers propose, but "both/and". The relevance of this specific thesis cannot be underestimated for the development of human dignity thinking. Looking at the application of human dignity arguments today, one often sees a strong tendency to focus exclusively on circumstantial evidence and arguments - thus subjective – only, that are taken from the specific and often individual experience of one's personal dignity. For example: when a terminally ill person who suffers unbearably requests for euthanasia to be able to die 'with dignity' rather than continue suffering (which in this line of reasoning is seen as opposing that dignity), this is obviously very much based on personal experience and opinion. Other people in the same situation would say the opposite: they find there is dignity in accepting and carrying that suffering and reject prematurely ending life because it would be in violation of that same dignity. But as the Pope writes: "We cannot stop short at experience alone; even if experience does reveal the human being's interiority and spirituality, speculative thinking must penetrate to the spiritual core and the ground from which it rises."[170] In applying a philosophical concept such as human dignity it therefore follows that it needs to be grounded both in faith and reason so that it surpasses and rises above the mere subjective. Without these two the core of the concept will not be found. It is this core and this foundation that are necessary to understand human dignity as inviolable. Human dignity

[169] Nicholas Wolterstorff: Philosophers respond to Pope John Paul II's encyclical letter, Fides et Ratio; published on www.christianitytoday.com (retrieved 7-10-2010), p. 2
[170] Ibid. Fides et Ratio, §83

depends on thinking rightly about God and the human being – this seems to be the main argument of *Fides et Ratio*[171].

Encyclical letters Laborem Exercens (1981) and Centesimus Annus (1991)

Pope John Paul II devoted a considerable amount of his writings to the further development of what is commonly referred to as the "Social Doctrine of the Catholic Church", a doctrine that was formally introduced by the papal encyclical *Rerum Novarum* in 1891. John Paul continued a tradition started by his predecessors to mark the anniversary of *Rerum Novarum* in the area of social thought with a new encyclical on the topic discussing further developments which have taken place in the field. This has led to a well-developed Catholic tradition on a wide range of social issues, such as for example work, health and political activity. The core element of the Church's social doctrine is the Christian understanding of the human person, whereby the notion of human dignity plays a central role and is further developed. In John Paul's social encyclicals, human dignity features prominently. The *Compendium of the Social Doctrine of the Church* says it as follows "The whole of the Church's social doctrine, in fact, develops from the principle that affirms the inviolable dignity of the human person"[172]

The first of Pope John Paul II's social encyclicals, *Laborem Exercens*[173], was published in 1981 at the occasion of the 90th anniversary of Pope Leo XIII's monumental encyclical *"Rerum Novarum"*. The latter document was the Church's response to the great social injustices that accompanied the Industrial Revolution at the end of the 19th century. It sought to defend the dignity of the individual worker. *Laborem Exercens* takes stock of the improvements for workers since and analyses the current and future challenges facing workers. As is to be expected from this pope considering the "battle cry" of his papacy, a reaffirmation of the inviolable dignity of every human being stands at the center of John Paul's argument in this encyclical. He develops the notion of dignity and work from the

[171] The theologian James Schall analogically says this in relation to civilization itself in his commentary on Pope Benedict's 2006 Regensburg lecture, which he describes as "in the direct line of John Paul II's *Fides et Ratio*"; James V. Schall: The Regensburg Lecture: Thinking Rightly about God and Man, Ignatius Insight 15-9-2006, p. 3; published at www.ignatiusinsight.com (retrieved 9-10-2010)

[172] Compendium of the Social Doctrine of the Church, p. 55, §107; 2nd edition Libreria Editrice Vaticana 2009. The text is a quote from Pope John XXIII: encyclical Mater et Magistra

[173] John Paul II, Encyclical Letter "Laborem exercens" - on Human Work, on the ninetieth anniversary of Rerum Novarum, 14 September 1981

perspective of two passages in the Book of Genesis: the creation of the human being in God's image and the specific assignment to subdue and dominate the earth. In *Laborem Exercens* the notion of the human being's dignity in work is developed– not as something that stands by itself, but as a logical consequence of the understanding of the human person in Christian thought: that only human beings have been created in the image and likeness of God himself and therefore they have a dignity no other creature on earth possesses. The Pope goes even further by saying that "man's life is built up every day from work, from work it derives its specific dignity"[174], thus making work another constitutive element of human dignity itself, provided of course the worker is not subjected to inhumane conditions through this work. The encyclical reiterates the foundation of human dignity according to Christian tradition and what role the Church has to play in pointing out that dignity: "Relating herself to man, she seeks to express the eternal designs and transcendent destiny which the living God, the Creator and Redeemer, has linked with him."[175] "Eternal" and "transcendental" are descriptions distinguishing the human being from every other creature on earth. Created in the image and likeness of God, the human being has received a soul that is made for eternity and a life enabling it to contemplate God its creator and to be open to the world around. It is the human person's ability to contemplate that which is beyond itself which gives it its unique transcendent quality. Then God, telling the human to go forth and multiply, subdue and dominate the earth[176], passes on an authority and power that previously only the Creator himself possessed. This gives further meaning to the human being's God-given dignity:

"Man is the image of God partly through the mandate received from his Creator to subdue, to dominate, the earth. In carrying out this mandate, man, every human being, reflects the very action of the Creator of the universe."[177]

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[174] Ibid. Laborem Exercens, §1, where he goes on to say: "But the Church considers it her task always to call attention to the dignity and rights of those who work, to condemn situations in which that dignity and those rights are violated, and to help to guide the above-mentioned changes so as to ensure authentic progress by man and society".
[175] Ibid. Laborem Exercens, §4
[176] See: Book of Genesis, 1:28, New American Bible
[177] Ibid. Laborem Exercens, §4

In fact, the human being continues and perfects the work started by God, along the way learning more about how to apply the gifts of the earth through human development. So work being the "fundamental dimension of man's existence on earth" and "something that corresponds to man's dignity, that expresses this dignity and increases it"[178] as John Paul II puts it, helps us understand the practical implication of human dignity. The dominion of the human being over the earth is an essential notion, since it distinguishes the human being from other creatures that do not have the capability to develop the earth and its resources in the active and reasoned way in which only humans are able to do it. An illustration of how central this element of human dignity is to the Catholic tradition is the fact that the most important of all Christian prayers, the Eucharistic Prayer, mentions it specifically: "Father, we acknowledge your greatness: all your actions show your wisdom and love. You formed man in your own likeness and set him over the whole world to serve you, his creator, and to rule over all creatures."[179] Each individual human being has been created to participate in this process of subduing and dominating the earth, which can be achieved only through work – any work. In other words: there is no distinction of rank in the sort of work humans do: in God's plan, the encyclical says, each worker and every type of honest work has its unique place in continuing the work of the Creator. This latter notion that has been developed throughout Christian tradition is a clear departure from the ancient understanding of dignity and work where certain types of work were reserved for certain classes. For example: the Romans would find manual labor below their dignity and it would be passed on to the slaves, who were considered to be lower humans. The Christian concept of dignity and work is – even when it has not always been adhered to by Christians themselves - that each human being has the same dignity simply because of being human, regardless of the nature of its work. This is the "dignity of the human person, the indestructible image of God the Creator, which is identical in each one of us."[180] Therefore, what is primarily relevant is whether the dignity of the person doing the work is not violated by it, like for example the numerous victims of forced or inhumane labor in European history. John Paul II makes an

[178] Ibid. Laborem Exercens, §4, §9
[179] Eucharistic Prayer IV, English translation of The Roman Missal 1973
[180] John Paul II, Encyclical Letter "Sollicitudo Rei Socialis", for the twentieth anniversary of the encyclical "Populorum Progressio", 30 December 1987, §47

important point by stressing the need to focus on the *subjective* aspect of work and dignity, not the objective. The human person is at the center, not the object for which the work and the human being performing it can be used. The human being is someone, not just something. John Paul II explains it as follows in relation to the challenges of the relationship between technology, work and dignity:

"The very process of "subduing the earth", that is to say work, is marked in the course of history, and especially in recent centuries, by an immense development of technological means. This is an advantageous and positive phenomenon, on condition that the objective dimension of work does not gain the upper hand over the subjective dimension, depriving man of his dignity and inalienable rights or reducing them."[181]

What the Pope says here put in the broader context of human dignity is this: when looking at human dignity, the primary consideration is this: the human being's dignity is inviolable because it is a fact of creation – non-negotiable and non-changeable- that is an inherent element of each individual human life itself which cannot be given nor be taken away. Human dignity *is* because the human being *is*. The commentators of *Laborem Exercens* at the time generally agreed that with this notion of human dignity the encyclical introduced a much deeper perception of human life and human nature that lifted Catholic social teaching to a new height[182]. Labor in this document is presented and further developed as the axis of human self-making[183] and comprises another core element for understanding the fuller meaning of human dignity itself.

John Paul II's encyclical letter *Centesimus Annus* of 1991[184] is a commemoration of Pope Leo XIII's encyclical *Rerum Novarum*, the latter a document that started the tradition of social encyclicals. In it, Leo XIII makes a strong appeal to the industrializing world of the late 19th Century to respect the rights and improve the conditions of workers by actively

[181] Ibid. Laborem Exercens, §10
[182] See: Gerald J. Schnepp in his book review on "The Priority of Labor: A Commentary on Laborem Exercens by Gregory Baum", in Sociology of Religion 44(2), 1983, pp. 170-171
[183] See: Alexander J. Matejko in his book review on "The Priority of Labor: A Commentary on Laborem Exercens by Gregory Baum", Relations Industrielles / Industrial Relations, vol. 37, nr. 4, 1982, p. 964
[184] John Paul II, Encyclical Letter "Centesimus annus", on the hundredth anniversary of the encyclical "Rerum Novarum", 1 May 1991

acknowledging that "no man may with impunity violate that human dignity which God himself treats with great reverence"[185]. *Centesimus Annus* analyses the effect of *Rerum Novarum* over the preceding hundred years and discusses new challenges to the dignity of the human being in general and that of the worker specifically. It is important to note here that although the encyclical seems to be focused on economic issues, for a large part it discusses economics and related issues exclusively to place this aspect of human life within the framework of the Christian understanding of the human person. This is the thrust of the Pope's document and it is relevant for other areas – such as politics and law – as well[186]: "It is a point of view that treats each individual as uniquely valuable in himself, yet takes account of our social nature, which finds its expression in the complex networks of groups and associations – familial, juridical, economic, social, political – that compose society"[187]. John Paul makes these observations against the background of the fall of the iron curtain in 1989 and specifically addresses the failure of socialism and communism and how these systems fundamentally ignore the uniqueness, individual freedom and dignity of every human being. John Paul II having personally suffered under the dictatorship of the Nazis and of communist Poland has some poignant observations about these systems: it leads to his conclusion that there still exist serious threats to human dignity through new ideologies and new forms of totalitarianism, albeit in different and more elusive forms. This elusive totalitarianism and these new ideologies are equally - if not more - threatening to human dignity because they deny the transcendence of the human being and the need for a certain moral order:

"Thus, the root of modern totalitarianism is to be found in the denial of the transcendent dignity of the human person who, as the visible image of the invisible God, is therefore by his very nature the subject of rights which no one may violate — no individual, group, class, nation or State. Not even the majority of a social body may violate these rights, by

[185] Ibid. Pope Leo XIII, Encyclical Letter Rerum Novarum, §40
[186] See: Mary Ann Glendon, A Challenge to the Human Sciences, in: A New World Order: John Paul II and Human Freedom, edited by George Weigel, Washington 1992, pp. 79-80
[187] Ibid. Glendon, A Challenge to the Human Sciences, p. 80

going against the minority, by isolating, oppressing, or exploiting it, or by attempting to annihilate it."[188]

To this strongly worded observation one might add this also means – something John Paul II has repeatedly stated throughout his papacy – that even democratic majorities, be it parliamentary or by referendum, cannot in any way limit or redefine what it means to be human or what is human dignity. Human dignity is not granted by human beings. It is an inherent component of life itself, manifested in the being of each human life. The right to the protection of human dignity and life, according to the social doctrine of the Catholic Church, is not dependant on anything other than the mere fact of *being* a human[189]. This, John Paul II notes, is also where the fundamental flaw of socialism lies: it regards the human being not as a free and independent individual with personal dignity, but rather as a mere element of a social organism in which that person is fully subordinated to the socio-economic structure and where it does not need to make a choice between good and evil, which is delegated to the state. This in turn leads to a denial of the importance of private initiative and private property and as a consequence a forced dependence on the state[190]. Here lies a fascinating indirect criticism of the modern welfare state by John Paul II that is of vital importance to the meaning of human dignity. He observes: "A person who is deprived of something he can call "his own", and of the possibility of earning a living through his own initiative, comes to depend on the social machine and on those who control it. This makes it much more difficult for him to recognize his dignity as a person, and hinders progress towards the building up of an authentic human community."[191] This means that an over-bearing state, or a state where the human being is not sufficiently enabled or motivated to earn its own living without too much interference, actually violates human dignity. Without the freedom to work, to take the initiative and to develop one's capacities and ideas, authentic human life is not possible. This sheds an interesting light on what the unlimited social welfare state or the

[188] Ibid. Centesimus Annus, §44
[189] See: Ibid. Centesimus Annus, §11
[190] See: Ibid. Centesimus Annus, §13
[191] Ibid. Centesimus Annus, §13

over-regulated society does to its citizens: it hinders authentic human development[192]. This stands in contrast with the Christian understanding, which acknowledges that human fulfillment cannot be found entirely in the state, but is achieved through the various realities in which the human person is engaged, starting with the family and followed by the participation in social, economical, political and cultural groups, each of them in their own way aiming at the common good which should be their unifying purpose. The role of the state is much more to facilitate or at least not hinder the exercise of this freedom of human development. But then, John Paul II argues extensively in his encyclical, as long as a society rejects God it will never be able to fully grasp the limitless concept of human dignity, because it is not able to see its transcendence. When the human person and the realities it lives in are only looked at in a mechanistic or consumerist way, as for example materialism proposes, then also the true capacities of the human being are overlooked, namely those of going "beyond itself", the capacity to surpass the limits of every social order in search of that which is greater than us humans. Only when understanding this transcendence by answering to the God that has given this dignity and who is above and beyond all earthly structures and notions, can one fully grasp the inviolability and indivisibility of the dignity of every human being from the moment of conception onwards. Taking this a step further towards the functioning of society as a whole, only a democracy rooted in a rule of law based on a correct understanding of the human person and its inherent dignity can function properly[193]. The human being itself alone can respond to the personal vocation in life that each person has, John Paul explains as the

[192] It is important to note here that John Paul II in this encyclical makes a clear distinction between what one might call the limited and the unlimited state. The latter model is where his criticism is directed towards. The former model, which would include pension and unemployment benefits supported by the state, is in fact strongly promoted in the social encyclicals of the Catholic Church. The Pope states this distinction clearly in §11 of Centesimus Annus: "(..) the State has the duty of watching over the common good and of ensuring that every sector of social life, not excluding the economic one, contributes to achieving that good, while respecting the rightful autonomy of each sector. This should not however lead us to think that Pope Leo expected the State to solve every social problem. On the contrary, he frequently insists on necessary limits to the State's intervention and on its instrumental character, inasmuch as the individual, the family and society are prior to the State, and inasmuch as the State exists in order to protect their rights and not stifle them." See in this respect also Thomas Storck in: Catholic Social Teaching: John Paul II, Centesimus Annus, I, The Catholic Faith, vol. 4, no. 4 (July/August 1998), pp. 22-23 and Catholic Social Teaching: John Paul II, Centesimus Annus, II, The Catholic Faith, vol. 4, no. 5 (September/October 1998), pp. 40-41

[193] See: Ibid. Centesimus Annus, §46

element that enhances every individual's dignity[194]. The basic role of the state in defending human dignity starts from this premise: that the state does not create obstacles for integral human development. This brings us back to what *Dignitatis Humanae* said: religious liberty and the freedom of conscience are the cornerstones of human dignity and integral human development: "No authentic progress is possible without respect for the natural and fundamental right to know the truth and live according to that truth."[195] Concretely, this means integral human development includes the full right to believe or not to believe, regardless of the religion and how it is perceived by others. In brief: "the source and synthesis of these rights is religious freedom, understood as the right to live in the truth of one's faith and in conformity with one's conscience and transcendent dignity as a person"[196]. Dulles summarizes the principle message of *Centesimus Annus* that there is a need for a renewal of culture – a culture that accepts the transcendence of the human being. A restoration of the order of culture is called for that is directed towards the pursuit of truth, beauty and goodness[197]. A culture oriented at pursuing this in earnest necessarily includes religion and moral principles necessary to understand human dignity.

2.5. The encyclicals of Pope Benedict XVI

The tradition of papal encyclicals on social issues and including a discussion on human dignity has continued with Pope Benedict, who as Cardinal Josef Ratzinger served as one of Pope John Paul II's closest advisors in the function of prefect of the Vatican Congregation for the Doctrine of the Faith. In this position Ratzinger was closely involved with many of John Paul II's writings. Still, it is interesting to see that the popes have a distinctly different style of writing, but even more importantly, different academic backgrounds. Where Karol Wojtyla was a philosopher in the personalist tradition, Joseph Ratzinger is a theologian in the Augustinian tradition. Although this does not lead to fundamentally different views on the notion of human dignity, the methodology they apply to come to broadly the same conclusions on human dignity is different. Both authors however repeatedly stress in their writings the vital importance of natural law and

[194] See Ibid. Centesimus Annus, §29
[195] Ibid. Centesimus Annus, §29
[196] Ibid. Centesimus Annus, §47
[197] See: Avery Dulles, S.J., Centesimus Annus and the Renewal of Culture, Journal of markets and Morality 2. no. 1 (Spring 1999), p. 4

its relevance for understanding the inviolable dignity of the human being: "The Church's social teaching argues on the basis of reason and natural law, namely, on the basis of what is in accord with the nature of every human being."[198] There is also an important historical fact that unites the two: both popes as young men lived through the period of Nazism, in Poland and Germany, and both saw the results of communist totalitarianism. They share the same concern for the constant threat to human dignity, the effects of which they experienced personally. It is therefore a theme, although not as often as with John Paul II, returning regularly in Benedict's writings.

Encyclical Letter Deus Caritas Est (2005)

This is the first encyclical of Pope Benedict XVI and it presents the foundation on which he wants to build his teaching as the head of the Catholic Church: God is love and this love is expressed through the ability God has given human beings to "partake in this love"[199]. We will see this concept is a further element needed to understand the full meaning of the notion of human dignity as developed in the Christian tradition, especially in Catholic Social Teaching. Because God is love and human beings are therefore created out of love, the human dimension itself gets a much deeper meaning owing to this new aspect: the desire to be one with God. Benedict illustrates this as follows in his discussion of the Old Testament Book of the Song of Songs and its mystical allusions to love:

"(…) that man can indeed enter into union with God—his primordial aspiration. But this union is no mere fusion, a sinking in the nameless ocean of the Divine; it is a unity which creates love, a unity in which both God and man remain themselves and yet become fully one. As Saint Paul says: "He who is united to the Lord becomes one spirit with him" (1 Cor 6:17)."[200]

[198] Benedict XVI, Encyclical Letter "Deus Caritas Est", 25 December 2005, Libreria Editrice Vaticana, 2nd English edition 2006, §28

[199] Extensive literature on the Pope's first encyclical agrees on this. See for example the Fall 2006 issue of Communio – International Catholic Review, Vol. 33, no. 3, that devotes the entire edition to a discussion of Deus Caritas Est

[200] Ibid. Deus Caritas Est, §10

Building upon the thought of John Paul II on human dignity, Benedict provides a further deepening of the understanding of the contours of human dignity. Not only are we created in the image and likeness of God, not only have human beings been given dominion over the earth and the capability to continue the work of creation itself, union with *God himself* is contemplated here. Not a union out of mere necessity because of the role of "co-creators", but a union out of love, thus in freedom to choose or to reject. When this dimension is appreciated and accepted, it is not difficult to understand why the Christian notion of human dignity as developed and explained through Catholic tradition is so wide-ranging and, in fact, radical. A human being incorporating the image of God, the creative power of God and the love of God himself, is indeed entitled to possess such profound dignity. Because even if the human being is not, and can never be, God himself or fully equal to him, it has been given the attributes that bring it closer to God than any other creature. It underlines the profound "otherness" of the human being compared with all other living creatures. Yet, it is understandable that a society which does not recognize this God and the Christian understanding of God has great difficulty with fully appreciating and accepting human dignity in all its elements. When one doesn't believe in God, in a God having created humans out of love and having bestowed them with his most precious divine gifts, how could one grasp the extend of the dignity given to the human being itself? This is the core message of the encyclical.

Encyclical Letter Caritas in Veritate (2009)

This third encyclical of Pope Benedict XVI[201] - his second encyclical *"Spe Salvi"* will not be discussed here – is a continuation and more concrete development of the concept of Christian charity and the way this should be operational and visible in society. It however misses the clarity of argument that could be found in the two previous encyclicals and shows the result of various authors having worked on the document. This makes it more difficult to distill the central line of reasoning from the encyclical.
The encyclical discusses that "charity in truth" or truthful charity requires us to see and act upon what are the real needs for an authentic and integral human development in today's interdependent world. Due to an ever more globalized world it is necessary to

[201] Benedict XVI, Encyclical Letter "Caritas in Veritate", 29 June 2009, Libreria Editrice Vaticana, 2009

revaluate what is needed to come to such an integral development of the human being, whether rich or poor. The encyclical develops this theme from the foundation that was established in the Pope's first encyclical: "Love is God's greatest gift to humanity; it is his promise and our hope."[202] In order for true integral human development to be able to take place in the now global dimension of human life, it is necessary that the interdependence of people is accompanied by interdependence of consciences and minds and from the perspective of love that leads to charity. This starts with a fidelity to the universal truth of human life, the prerequisite of human freedom, without which no authentic human development can take place[203]. Therefore a thorough understanding of human dignity is required to come to see the universal truth of human life. As was discussed before is now repeated from the angle of integral human development: human dignity has two constitutive elements, without which it cannot be protected, these elements being the inviolability of human life and religious liberty.
In chapter two of the encyclical Benedict sets out to explain what the truth about the human being means for human development. He starts with asserting that our societies have to recognize that the primary capital in need to be safeguarded is the human person in his or her full integrity[204]. This means that one can only work towards a true development of the human person if life itself is respected and protected under all circumstances and in all forms. The acceptance of life itself is necessary to pursue the development of peoples. Benedict says:

"Openness to life is at the centre of true development. When a society moves towards the denial or suppression of life, it ends up no longer finding the necessary motivation and energy to strive for man's true good. If personal and social sensitivity towards the acceptance of a new life is lost, then other forms of acceptance that are valuable for society also wither away. The acceptance of life strengthens moral fibre and makes people capable of mutual help."[205]

[202] Ibid. Caritas in Veritate, §2
[203] See: Ibid. Caritas in Veritate, §9
[204] See: Ibid. Caritas in Veritate, §25
[205] Ibid. Caritas in Veritate, §28

Referral is amongst others made to the strong anti-conceptive culture prevalent in both developed and developing countries today and which includes state-sponsored practices of forced abortions and sterilizations in countries like China and India, but also the imposition of anti-conception measures by Western donor governments. How is an indiscriminate approach to the development of peoples worldwide possible, when there is no fundamental right to life for every people and every individual? True development of peoples can only take place when every single life, no matter in what state it is, is deemed worthy of support. Integral development for the human being can not be successful if it does not take place in an environment in which one absolute truth reigns: life is sacred in all its stages and every life therefore deserves equal respect and protection under the law. If not, discrimination is unavoidable, something history has clearly shown in the form of slavery, ethnic cleansing and religious persecution. Benedict clearly sees respect for life in tandem with the need for religious freedom. Also the latter is essential in the quest for authentic human development. Both the express lack of religious freedom itself, as well as the deliberate promotion of practical atheism and religious indifference, constitutes a major obstacle in the development of peoples. Because blocking this dimension of human life means denying it its transcendent dignity, leading humans to aim for what is beyond itself. God has not created men and women randomly, but endowed them with a soul destined for union with him[206]. If this element of life is blocked or denied, the human being is not capable of authentic development, since its authenticity is given by the development of the soul that is always in search of its creator and an integral part of human life. Or, as Benedict puts it: "When the State promotes, teaches, or actually imposes forms of practical atheism, it deprives its citizens of the moral and spiritual strength that is indispensable for attaining integral human development (…)".[207] The integral good of the human being has various dimensions and these cannot be individually suppressed without losing the integrity of human dignity. This encyclical underlines once again, now in the perspective of a globalized world and human development, that life and liberty are indispensible for human dignity to be respected.

[206] See: Ibid. Caritas in Veritate,§29
[207] Ibid. Caritas in Veritate, §29

Here we come to the core challenge facing the application of the notion of human dignity today: our globalized society displays an equally global collection of interpretations of what human dignity consists of. What unites the majority of these interpretations is that they all – paradoxically – limit the scope of human dignity by excluding certain human beings or limiting certain rights. In Europe the common interpretation is much influenced by a secular – and indeed as Benedict describes, often atheistic - mindset that prefers to keep God and religious truth out of matters pertaining to the ordering of society. Human dignity tends to be seen as a basic regulating value that changes along with human development, rather than representing an absolute truth about human life that is unchangeable and forms the basis for it. In *Caritas in Veritate* Benedict XVI points out that a treatment of human development not based on an integral view of human dignity is doomed to fail, since it lacks a unifying principle. Without a unifying principle, or put differently: a common understanding of what it is to be human, the application of the notion of human dignity falls prey to the public opinion or pressure groups of the day and thus automatically becomes discriminatory against those human beings of whom it is held at that particular time that they fall outside the scope of application: "Otherwise, if the only basis of human rights is to be found in the deliberations of an assembly of citizens, those rights can be changed at any time, and so the duty to respect and pursue them fades from the common consciousness."[208] The inviolability of human dignity would be lost in the process.

Caritas in Veritate describes what could be this unifying principle needed for a universal application of human dignity protection and the subsequent authentic development of the human being. It is the truth about human life that can be understood through reason: "(…) truth is not something that we produce; it is always found, or better, received."[209] In discussing extensively the implications of this approach to human development in the areas of economics and finance and the environment, Benedict XVI points out to his readers that a mere technological or material approach which excludes the wholeness of the human being is not enough, since body and soul are a unity impossible to separate. Therefore, the well-being of the human person needs to include both its spiritual and

[208] Ibid. Caritas in Veritate, §43
[209] Ibid. Caritas in Veritate, §34

moral dimensions.[210] Only from this approach is an understanding of human dignity attainable.

2.6. Documents of the International Theological Commission

By way of concluding the discussion of post-War Catholic doctrine and social teaching on human dignity, it is worthwhile to briefly discuss two documents that were published in 2004 and 2009 by the *International Theological Commission* (ITC), the Catholic Church's influential "think tank" on matters pertaining to its doctrine. The documents are relevant because they go back to the source and system of human dignity: the human being is created in the image and likeness of God and is gifted with freedom and reason. In *"Communion and Stewardship: Human Persons Created in the Image of God"*[211] the ITC sets out to discuss the development of the concept of "imago Dei" and how it has enjoyed renewed prominence in both theological discourse and magisterial documents, especially since the Second Vatican Council. The Vatican II document *Gaudium et Spes*, as we have seen, brought the imago Dei doctrine back to the forefront of Catholic (social) thought. *Communion and Stewardship* paraphrases in clear terms what is the essence of the Christian understanding of the human being. The truth that lies at the heart of the Christian tradition is that the human being is created in the image and likeness of God and therefore "the theme is seen as the key to the biblical understanding of human nature and to all the affirmations of biblical anthropology in both the Old and New Testaments. For the Bible, the imago Dei constitutes almost a definition of the human being: the mystery of man cannot be grasped apart from the mystery of God."[212] This conclusion highlights what is the source of the confusion that exists around the notion of human dignity today, especially in law: when God is left out of the equation, only part of the meaning of human life and of its inherent dignity can be understood. A society that understands the human being exclusively as a self-constituting autonomous subject free from any relationship with God can obviously not fully grasp the dignity of the human being exactly derived from this relationship with God. Because: "(…) the imago

[210] Ibid. Caritas in Veritate, §76
[211] International Theological Commission, Communion and Stewardship: Human Persons Created in the Image of God, La Civiltà Cattolica 2004/IV, pp. 254-286
[212] Ibid. Communion and Stewardship, §7

Dei consists in man's fundamental orientation to God, which is the basis of human dignity and of the inalienable rights of the human person."[213] The imago Dei theology underlines the uniquely personal and relational conception of the human being. This is clearly linked to the "system" of natural law that is not a rigid fatalistic understanding of the human being as subjected to nature, but rather in the Christian tradition a natural *moral* law. It is a set of life coordinates given to human beings and valid for all peoples, regardless of religion, sex or race. The ITC document *"Nouveau Regard sur la Loi Naturelle"*[214] gives an in-depth analysis of the historical development and relevance of the concept of natural moral law today and proposes a "universal ethic" that it sees is possible because all major religions and philosophies have in common at least a limited understanding of this universal "moral framework" or philosophy[215]. This further strengthens the argument made earlier, whereby the Christian tradition sees the confirmation and application of the "pre-political" or "pre-positive" natural moral law as indispensable to understand the notion of human dignity: *"Les droits naturels sont des mesures des rapports humains antérieurs à la volonté du législateur. Ils sont donnés dès que les hommes vivent en société. Le droit naturel est ce qui est naturellement juste avant toute formulation légale"*[216]. Human dignity, the document underlines, can never be understood in a merely legal positivistic way: *"Mais le positivisme juridique est notoirement insuffisant, car le législateur ne peut agir légitimement qu'à l'intérieur de certaines limites qui découlent de la dignité de la personne humaine et au service du développement de ce qui est authentiquement humain."*[217] What is authentically human cannot be regulated or changed; it can only be understood or not understood. The natural moral law is the system, the tool, enabling the human being to come to that understanding, regardless of religion or culture.

[213] Ibid. Communion and Stewardship, §22
[214] Commission Théologique Internationale, A la Recherche d'une Ethique Universelle : Nouveau Regard sur la Loi Naturelle, published in French and Italian only and exclusively on www.vatican.va – June 2009 (retrieved 20-11-2011)
[215] See: Ibid. Nouveau Regard sur la Loi Naturelle, §11, §114
[216] Ibid. Nouveau Regard sur la Loi Naturelle, §92
[217] Ibid. Nouveau Regard sur la Loi Naturelle, §7

Chapter 3: Modern Christian thought

3.1. Introduction

We now begin the discussion of some influential Christian writers that, although having lived through the Second World War, were either very young or not yet in the determining phase of their academic development when war broke out. Their writings therefore mainly reflect the post-War European development of human dignity thinking whilst at the same time displaying an acute awareness of what misery and destruction the totalitarian regimes of their age had brought about.

3.2. Franz Böckle (1921-1991)

Franz Böckle was a Swiss Catholic priest who is especially known for his writings on moral theology. He co-authored some works with Karl Rahner and Ernst-Wolfgang Böckenförde, both whose writings on human dignity are included in this research.
As to the premise that human dignity is a given which cannot be taken away, Böckle seems to represent the same school of thought as Rahner and Böckenförde, although this is not entirely clear. In an important text he authored that includes a discussion on human dignity, Böckle says *"(..) dass jeden einzelnen Menschen ein personaler Wert eigen sei, der ihm unabhängig von seiner Mitgliedschaft in irgendeinen denkbaren Sozialsystem zukommt und darum von keinem Sozialsystem abgesprochen werden darf."*[218] It is interesting to note the use of words by Böckle; the last word of this quote is *"darf"*, a conjugated verb meaning in this context "not allowed". Would he have been willing or did he intend to use the verb *"kann"* instead, meaning that "it cannot be done". Because essentially this is what the application of the pre-positive - as amongst others Maritain calls it – notion of human dignity ultimately should lead to: it *cannot* be limited or taken away from any human being, even if laws designed to do so are passed and applied,

[218] Franz Böckle, Fundamentalmoral, 6. Auflage 1994 (1977), p. 299. Sociologists at the time spoke in this context of "transcendental human dignity" as opposed to "imminent human dignity", the latter which is conditioned by the social system in which people actually live. In other words, a purely positivistic approach to human dignity that renders it changeable according to the specific circumstances. See Böckle's footnotes 16-18 as well as Spindelböck's criticism of this approach in: Josef Spindelböck, Die Katholische Kirche und die Heiligkeit des Menschenlebens, in: Forum Katholische Theologie 27 (2011), pp. 114-128

meaning that such laws should be considered null and void. An unjust law is not a law, as Augustine tells us. Spindelböck formulates the answer one would have expected from Böckle: *"Der darin liegende Anspruch der Achtung lässt sich zwar verletzen, und zwar durch den betreffenden Menschen selber, aber auch durch andere. Dieser mit dem Menschsein als solchen verbundene Anspruch auf Anerkennung eben dieser Würde wird dadurch jedoch nicht aufgehoben."*[219] Did Böckle mean to say this or was his choice of the verb deliberate? From the discussion on the subject of human rights in general, as we will see below, it seems that Böckle interprets human dignity as not "being allowed" to be changed or taken away rather than it *not being possible* to do so. This is relevant for analyzing his human dignity theory, as it implies that it lacks the radical approach to the inviolability of human dignity other writers discussed in this research espouse. We will return to this theme later when discussing Robert Spaemann.

Franz Böckle equally sees Christian revelation as essential to understanding the full notion of human dignity and analyses it from this perspective. The Christian message begins and ends – and here he paraphrases Hans-Urs von Balthasar - with the revelation that the eternal God eternally loves each individual human being, which is proven in the most dramatic way by his death on the cross. Recognizing and accepting this act of ultimate love by God leads the human person to fully appreciate its worth in the eyes of the creator and as a consequence conclude its true dignity. A dignity however, which can only be accepted in freedom by acknowledging that it originates outside of the self[220]. Or, as Böckle puts it pointedly: *"Weil der Christ an diese Liebe glaubt, glaubt er an den Menschen, erkennt er seine Not und seine Würde."*[221] It is from this perspective we can understand the radical nature of human dignity in the Christian understanding as amongst others discussed above in relation to Karl Rahner's work. However, Böckle stresses that this does not mean human dignity can only be understood through Christian revelation. He points out it is a notion that can and should be understood by human reason as such. Human dignity is not the exclusive reserve of Christians, even when Christian revelation reveals its full depth and meaning like no other tradition does. What Böckle wants to say

[219] Ibid. Josef Spindelböck, Die Katholische Kirche und die Heiligkeit des Menschenlebens, p. 121
[220] See Franz Böckle in: Kirche im Umbruch der Gesellschaft, edited by H. Stirnimann, Paulusverlag 1970, p. 95. He refers to Von Balthasar's work "Gott begegnen in der Heutigen Welt"
[221] Ibid. Böckle, Kirche im Umbruch der Gesellschaft, p. 103

is that the Christian message, also where it concerns human dignity, is meant for all peoples, – as repeatedly stated by Jesus himself in the Gospel - which thus includes all non-Christians as well. Even more, Böckle explains, the morality of revelation is the true morality of reason[222]: *"Die theologische Tradition besagt vielmehr, dass die Moral der Offenbarung die wahre Vernunftmoral sei, die gerade auf diese Weise ihre Bestätigung erfahre".*[223] The content of Christian morality is first of all humanistic ("*menschlich*") in the sense of being graspable by all human persons through reason[224]. It has very meaningful things to say about human life: *"Offensichtlich kann die Theologie hier ihren Beitrag leisten, da sie glaubt, dass sich von der Gottesfrage her Entscheidendes über die Menschen sagen lässt."*[225] The human person's search for God the creator of life logically reveals essential information about human life itself. But Böckle insists that human dignity cannot be understood, or only in a very limited and general way, without a transcendental analysis of what it means to be human. The exclusive focus on the self, which is a specific tendency of modern society, does not suffice to understand human nature comprehensively[226]. Nor is it sufficient to only observe the natural world because the natural and supernatural or transcendental dimension of human life are a unity and cannot be separated, as we discussed above in the context of the human being's dual nature. The true nature of human life, and thus its inherent and inviolable dignity, can only be grasped when it is considered not as isolated but as part of an Absolute that is outside of it: *"Die menschliche Natur ist so durch die Kommunikation mit dem Absoluten bestimmt."*[227] From this communication with the Absolute originates the human being's search for truth which, as Böckle explains elsewhere when talking about a practical application of morality, is the sole object of human reason. This search for truth enables the human being to differentiate between good and evil, true and untrue and this is the ultimate expression of human dignity, even if this is a life-long process needing much

[222] See: Ibid. Böckle, Fundamentalmoral, pp. 226, 291-292
[223] Ibid. Böckle, Fundamentalmoral, p. 292
[224] See: Ibid. Böckle, Fundamentalmoral, pp. 297-298, where he amongst others explains his argument by quoting J. Fuchs in footnote 13: Die christliche Moral ist "in ihrer kategorialen Bestimmtheit und Materialität grundsätzlich substantiell ein Humanum, also eine Moral echten Menschseins".
[225] Ibid. Böckle, Kirche im Umbruch der Gesellschaft, p. 93, also see p. 101
[226] See: Ibid. Böckle, Fundamentalmoral, pp. 241-242
[227] Ibid. Böckle, Fundamentalmoral, p. 238

learning and many corrections[228]. Böckle then adds his historical-philosophical observation that the wars of the 19th and 20th centuries[229] have shown that the modern state cannot decide for its people upon religion or worldview, let alone morality. Therefore, the modern democratic state as it has developed until today is founded on the principle that human rights are a given to each human being and the state is called to protect the human dignity on which these rights are based. At the same time the state acknowledges that it cannot itself provide the one and only answer to what is the ultimate reason for this inherent dignity, whilst also accepting that various answers can and will be given[230]. This, of course is once again, but through a different approach, a warning many philosophers and theologians on the subject of human dignity give. The modern state stands or falls with recognizing this vital aspect: *"Der freiheitliche Rechtsstaat steht und fällt also als dieses äußere Prinzip der Einheit einer pluralistischen zukunftsoffenen Gesellschaft mit der von ihm selbst her nicht begründbaren Überzeugung, dass die Würde des Menschen, die Würde der Person unantastbar ist."*[231] In light of the discussion above about Christian revelation, the question remains of course whether a truly Christian-democratic state (not in the political sense of the term, but in its theological sense) would not be an exception to Böckle's rule of the pluralistic democratic society. Because if one follows the argument that Christian revelation points to the full depth and meaning of human dignity and its implications, which we believe it does, could not the truly Christian-inspired society ordered by the appropriate democratic institutions offer the ultimate guarantee for the human being's inviolable dignity? Böckle does not answer this question but at least explains how theology and Christian faith can contribute to a better understanding of this concept, whereby the concrete experiences of history also play an important role. He stresses how the philosophical and historical development of the modern state and its democratic framework is inseparable from Christianity and its proper development. This is equally the case for the development of

[228] See: Franz Böckle, Ja zum Menschen – Bausteine einer Konkreten Moral, edited by Gerhard Höver, Kösel Verlag 1995, p. 84
[229] Böckle speaks here of "konfessionelle Kriege", religious wars, and it is not clear whether this is his labeling for all or most of the wars fought in the 19th and 20th centuries. Historically speaking this qualification is at least debatable: for example, one can hardly call the First World War a religiously motivated war. And even when the Nazis persecuted the Jews, this was not religiously motivated.
[230] See: Ibid. Böckle, Ja zum Menschen, p. 89
[231] Ibid. Böckle, Ja zum Menschen, p. 90

the notion of human dignity, which has been part of this same process. Böckle by way of example quotes the German Basic Law (Grundgesetz) that places human dignity and human rights at its center: this is not only a direct consequence of the bitter experiences of the Nazi regime, but also the open adherence to a – basically Christian- system of values that identifies as its core principle a human community in which every human being can freely develop its unique personality and thus affirm its true dignity[232]. Yet, the series of human rights proclamations that started mostly during the 18th century and that continue until today, as Franz Böckle rightly points out, shows that the development of human rights thinking on a broader scale, even if there would be more clarity on human dignity as its foundation, shows that human rights systems are still very much in development and these systems cannot therefore be considered as unchangeable[233]. One should add here that these proclamations, laws and international treaties are obviously a direct consequence of certain historical events, especially where it concerns a distinct lack of justice and freedom. Or as Böckle defines human rights: *"Menschenrechte sind als Freiheitsrechte Ausdruck elementarer Erfahrungen von Unfreiheit."*[234] This is, as we discussed already, a limited concept of human rights which for example Rahner would disagree with as he would find this definition lacking the necessary positive experience of human rights. But Böckle's final analysis ends up being close to what his contemporaries say: where on the one hand he clearly emphasizes the changeable nature of the process of defining human rights, as well as the fact that the underlying notion of human dignity can be understood outside of Christian revelation though reason, he does conclude that ultimately only a *consistently lived* Christian faith can guarantee that the integrity of the individual human being and its dignity does not fall victim to changing ideologies and consequently its violation[235]. The bloody modern history of Europe alone gives us countless examples of the truth of this argument.

[232] See: Ibid. Böckle, Ja zum Menschen, p. 103
[233] See: Ibid. Böckle, Ja zum Menschen, p. 104
[234] Franz Böckle/Gerhard Höver, Menschenrechte/Menschenwürde, in: Neues Handbuch Theologischer Grundbegriffe, edited by Peter Eicher, Volume 3, Kösel Verlag 1985, p. 95
[235] See: Ibid. Böckle, Kirche im Umbruch der Gesellschaft, p. 103

3.3. Robert Spaemann (1927-)

The German philosopher and Roman Catholic Robert Spaemann is well known for his many contributions in the field of ethics and he has also written substantively on both the relevance of natural law in modern society and on human dignity. He is an academic trusted and regularly quoted by Pope Benedict XVI, also when the latter was still a cardinal. It is a fact that Spaemann has influenced the writings of Benedict and therefore he can be considered as an important contributor to the development of Catholic thought on natural law and the Christian understanding of human dignity.

We have already discussed how the revival of natural law thinking in post-War Europe had a distinct impact on the development of the human rights doctrine, including the writing into law of the respect for and protection of human dignity throughout Europe. It is therefore useful to begin this discussion of Robert Spaemann on human dignity with a brief review of his position on natural law and its relevance today.

Noting the continued debate on the relevance of natural law, Spaemann writes that, regardless of this debate or its outcome, it has not been able to change the simple fact that the principle on which the natural law is founded is that *"Menschen unterscheiden gerechte und ungerechte Handlungen."*[236] This, he points out, is not merely one human being judging another human being or situation from the perspective of self-interest. There are enough instances where we judge a person or a situation in the absence of any self-interest or personal involvement. We are also able to accept situations as in accord with just standards when we are denied something in the interest of another person. But still, the discussion almost always remains centered on what are the exact parameters of what is just and what is unjust. Spaemann acknowledges that this is often the basis for the argument against the relevance of natural law, claiming that because of this eternal debate one cannot effectively speak of "natural rights" since they are not naturally accessible or acceptable to all. He counters this line of reasoning by showing how in fact this argument has the opposite effect as its confirms the existence of a natural law: *"Gäbe es kein von Natur Rechtes, so könnte man über Fragen der Gerechtigkeit gar nicht sinnvoll streiten."*[237] and *"Das von Natur Gerechte bezieht sich vielmehr primär gerade auf die*

[236] Robert Spaemann, Zur Kritik der politischen Utopie, Ernst Klett Verlag 1977, p. 183
[237] Ibid. Spaemann, Zur Kritik der politischen Utopie, p. 183

Verfahrensvorschriften für diejenige Fälle, wo über Werte eine Einigung nicht erzielt werden kann.“[238] Spaemann illustrates this point with the following example: when we would qualify the classical legal principle *“Nulla poena sine lege”* as merely positivistic and we would subsequently repeal this principle invoking the “higher” natural law, this would precisely be a violation of what is objectively just. The positivistic nature of this principle is itself a fundamental aspect of natural law. Natural law in fact consists of two parts: on the one hand it is the existence of personal liberty and the need for human beings to mutually recognize this, on the other hand it is the natural law *“in senso stricto”* which is the human condition that presupposes all forms of human activity and which can only be violated at the cost of its own destruction[239]. An example of this destructive violation is the widespread denial of the inalienable right to life for every human being: it is a right, a condition every human being pre-possesses from conception onwards. Even in medical science it is no longer disputed that human life starts with the biological event of conception. In violating this right through abortion and other forms of embryo destruction and selection, the natural right to life – enshrined in all major human rights documents - loses ever more meaning and runs the risk of disappearing completely. A forewarning of this danger we see in the development of euthanasia practices in countries like The Netherlands and Belgium, where even doctors “legally” performing euthanasia complain that the pressure of family members “to bring death about” often diametrically opposes the wishes of the patient itself. Where life is not valued at its beginning, it is a small step towards also disregarding it at its end.

But Spaemann takes his argument in favor of the modern-day need for natural law a step further with a keen eye for the development of modern society and the globalized world. Where in the old days the world mostly comprised of a collection of very different legal traditions within closed societies strictly separated from each other, there did not exist so much this urge to find common ground to build on. This radically changed in a world in which boundaries and borders became ever less relevant. Societies have become rapidly interlinked through new forms of communication and mobility, against the background of great changes in the entire social fabric of human life. Suddenly the centuries-old

[238] Ibid. Spaemann, Zur Kritik der politischen Utopie, p. 186
[239] See: Ibid. Spaemann, Zur Kritik der politischen Utopie, p. 196

localized systems of custom and tradition were no longer able to deal with the challenges of the time. This is how the battle for the moral framework itself begun and a wide variety of worldviews are now involved. This battle highlighting so many different opinions, Spaemann argues, is however not a valid argument against the existence or relevance of natural law. The fact that one accepts there is a natural law does not mean its content is clear for everybody at all times. It only means that the direction to which the natural law points can provide useful answers[240]. What we refer to as "natural law" can no longer be seen, Spaemann rightly points out, as a catalogue of norms or a meta-constitution. It is rather a fundamentally important way of thinking and of analyzing human activity grounded in the understanding that the exercise of human liberty that disregards the reality of nature is an illusion because it is self-destructive[241]. It is this last argument of Spaemann that is so important in understanding his thought on human dignity. The natural law is not a philosophical or legal framework in full view of its beholders, it is rather a foundational understanding of justice and the good that, especially where it concerns human dignity, at least provides a minimal standard unchangeable by human intervention and therefore "a given".

Spaemann proposes a definition of human dignity that on first observation sounds very different from the other authors we discussed. However, once more closely studied it is not so much different after all but rather a more profoundly expressed view of what human dignity really is:

"Würde ist keine empirisch gegebene Eigenschaft. Die eigene Würde geachtet zu sehen, ist auch kein Menschenrecht. Es ist vielmehr der transzendentale Grund dafür, dass Menschen Rechte und Pflichten haben."[242]

This definition of human dignity, saying the respect for human dignity is not a human right, seems to go against article 1 of the Charter of Fundamental Rights of the European

[240] See: Ibid. Spaemann, Zur Kritik der politischen Utopie, pp. 183-184
[241] See: Ibid. Spaemann, Zur Kritik der politischen Utopie, pp. 198
[242] Robert Spaemann, Menschenwürde und Menschliche Natur, in: Internationale Katholische Zeitschrift Communio (IKaZ) 39 (2010), 134-139; p. 134

Union, the subject of this research, and one could say the whole of the post-War human rights movement. In these documents the respect for and protection of human dignity is seen as the perennial human right that presupposes all other human rights. But is this really what Spaemann means to say? The answer is quite clearly negative because with this definition he only wants to underline the importance of understanding the notion of human dignity being something much more fundamental and pre-dating of what we today call human rights than literature on the subject suggests[243]. Or, to put it differently: Spaemann wants human dignity to be understood for what it really is: not a mere "right" that can thus be acknowledged or rejected by law, but as an intrinsically human condition existing in each and every human being upon conception and irrevocable. We shall delve in to this deeper to understand what Spaemann points at here. First of all, the term human dignity is itself a transcendental notion, like that of freedom and liberty. Human dignity obviously existed long before human rights became important. It is the reason why we even have human rights at all. Human dignity also does not have the same operational potential as human rights themselves have[244]. For example: it is much more straightforward to prosecute a case that deals with the violation of the right to the freedom of religion than it is to deal with a case about human dignity violation as such. The former is a specific right that is defined; the latter lacks both the specificity and the definition. But what Spaemann argues is that one cannot compare these two and that one should also not want to treat them in the same way because they are fundamentally different. This is the reason why he states that the respect for human dignity cannot be a human right itself. That which is the foundation of something cannot at the same time be the structure built on it. Citing article 1.1. of the German Basic Law (Grundgesetz), Spaemann points out that not acknowledging this fundamental distinction can lead to incorrectly understanding what *"Die Würde des Menschen ist unantastbar"* really implies. The question we raised when discussing Franz Böckle is also taken up by Spaemann: does this provision mean that human dignity *cannot* be violated or that it *may not* be violated? For Spaemann the ambiguity of this constitutional formulation is an

[243] See: Robert Spaemann, Über den Begriff der Menschenwürde, in: Robert Spaemann, Grenzen – Zur ethischen Dimension des Handelns, Klett-Cotta Verlag 2001, p. 109. In the original German text is says: "Was mit ihm benannt wird, ist ursprünglicher als das, was durch 'Menschenrechte' bezeichnet wird."
[244] See: Ibid. Spaemann, Über den Begriff der Menschenwürde, p. 109

indication that *"der Begriff der Menschenwürde in einem Bereich angesiedelt ist, der dem Dualismus von Sein und Sollen vorausliegt."*[245] This is an essential formulation of human dignity which indicates that we should look for an answer to the above question not in the context of what our human rights systems today tell us about the respect for human dignity or what the word dignity implies etymologically, but rather in the origin of the notion of human dignity in both an ontological and anthropological sense. Ontologically speaking, Spaemann points out, what makes human dignity something that is graspable for us in the first place, is the fact that the human being is worthy in and of itself, thus not dependant in this sense on other human beings. This ontological dimension makes human life something sacred. This then explains why, anthropologically, the notion of human dignity derives entirely from the Judeo-Christian understanding of the human being created in the image and likeness of God the creator. We discussed this above at length. The notion of human dignity is therefore fundamentally religious-metaphysical[246]. The sole reason why the human being is attributed that which we call "human dignity" is that in its moral dimension the human being is a representative of the Absolute[247], of that which is beyond and greater than itself. Human dignity for this reason is inviolable: it cannot be taken away by other human beings because it is exclusively dependent on the Absolute. It can only be violated insofar as it is not respected. 'A', who does not respect and violates the human dignity of 'B', therefore does not take away B's dignity; 'A' only violates its own dignity by violating that of 'B'. Spaemann explains this argument by referring to the death on the cross of Jesus. Even though the cross was in Roman times the ultimate symbol of disgrace through which the crucified died a painful and slow death in full public view, Christian theology and art throughout the centuries have been able to turn it into and object of adoration. By consistently directing this public gaze on the innermost meaning of Christ's death on the cross, namely his self-sacrifice for all humankind and his voluntary relinquishment of any power, the cross – at least for Christians – has become the symbol of ultimate dignity, which is the exact opposite from what the Romans had intended. Spaemann says:

[245] Ibid. Spaemann, Über den Begriff der Menschenwürde, p. 109
[246] See: Ibid. Spaemann, Über den Begriff der Menschenwürde, p. 113
[247] See: Ibid. Spaemann, Über den Begriff der Menschenwürde, p. 115

"*Das Kreuz ist der Schritt zur radikalen Verinnerlichung des Würdebegriffs, zur Besinnung auf das, was sich im Phänomen des Würdevollen zugleich zeigt und verbirgt.*"[248]

What we mean with human dignity can become most visible through the deepest humiliation that we experience[249]. But we should add that this 'presentation' of human dignity is only possible when the humiliation is accepted and embraced as Jesus did on the cross. The dignity of at least one of the criminals, crucified next to Jesus and who angrily requested Jesus to use his divine power to get down from the cross, is not in view. It is this which is the vital distinction that needs to be made to understand this radical concept of acceptance. The free choice of self-sacrifice for the other and in spite of oneself is what makes the person enter the realm of the Absolute, the transcendental, because it has acquired a moral nature. Maximilian Kolbe, Spaemann explains, was an impressive example of how the heroism of saintliness is the highest dignity any human being can achieve[250]. The priest Kolbe not only gave his life for the father of a family, he also embraced his own slow and painful death with dignity and thus showed the full meaning of human dignity as Jesus did on the cross. This basic human dignity is inextinguishable because it is rooted in moral freedom, which is the freedom that each and every human being has to do good in all circumstances of life. Accepting this freedom is what constitutes the fundamental act of respect for human dignity.
For Spaemann there is a clear distinction to be made between the transcendental-pragmatic and the metaphysical theories of human dignity. The former theory, which he espouses, only accepts the biological affiliation as a "homo sapiens" species as the reason for a being's human dignity. The latter theory grounds human dignity in the unique soul of every human being[251]. The reason for Spaemann's preference is that the biological question as to when the life of a human being starts is scientifically answered and undisputed whilst – at least for non-Christians – the question as to when the soul enters

[248] Ibid. Spaemann, Über den Begriff der Menschenwürde, p. 111
[249] See: Ibid. Spaemann, Menschenwürde und Menschliche Natur, p. 135
[250] See: Ibid. Spaemann, Über den Begriff der Menschenwürde, p. 115
[251] See: Ibid. Spaemann, Über den Begriff der Menschenwürde, pp. 116-117

the human body is still much debated. The biological affiliation argument provides for a clearer and more easily applicable notion of human dignity.
Where it comes to the application and inclusion into law of the human dignity notion, Spaemann warns against what he considers a dangerous political conception, a legal utopia that is found in literature and political discourse on the subject. One should not consider human dignity at the same time as something that already is and that still needs to come. Allowing this consideration to enter the legal and political process – which we see happening on a large scale today - would lead to the protection of human dignity being replaced by a never-ending series of optimizations that seek to include ever more diverse situations. This, Spaemann rightly points out, would inadvertently lead to the boundaries that a constitutional protection of human dignity has set being eroded. One should add here that this is so because in that case human dignity becomes a mere operational term that stands at the free disposition of its users, whereas what distinguishes human dignity from human rights is that it is a basic condition that is unchangeable rather than a specific principle that is codified. Speamann summarizes this argument in paraphrasing Kant – whom we will discuss later - as follows:

"*Die Forderung unbedingter Achtung der Menschenwürde ist inkompatibel mit der Forderung ihrer maximalen aktiven Beförderung. Niemand hat das klarer gesehen als Kant. Aus dem Selbstzweckcharacter des Menschen folgert er nie, dieser `Zweck` müsse auf irgendeine Weise befördert oder 'verwirklicht' werden. Er bezeichnet vielmehr die einschränkende Bedingung unter der alle unsere Zwecktätigkeiten stehen müssen. Die Würde des Menschen kann so wenig wie die Gottes 'verwirklicht', sie kann nur als immer schon wirklich geachtet werden.*"[252]

It is interesting to note that in the end Spaemann comes to the conclusion that there is an urgent need to codify human dignity in the context of being the representation of the Absolute that is the human being. This is all the more necessary, he argues, because in the increasingly scientific – and one should add: atheistic - society in which we live and where everything, even human beings, are now the object of the almost limitless power of

[252] Ibid. Spaemann, Über den Begriff der Menschenwürde, p. 118

science, there is the need for a clear Absolute even science needs to respect. This Absolute is the human being[253]. "Absolute" also means that human dignity cannot be subjected to compromises: the dignity of one human being can never oppose the dignity of another since it is always rooted in the human freedom to do good and act justly[254]. It would be interesting to know, in view of what we have discussed on Spaemann's human dignity theory, how he would codify this concept. This we have not found in his writings on the subject.

3.4. Ernst-Wolfgang Böckenförde (1930-)

The German legal philosophers Alexander Hollerbach and Ernst-Wolfgang Böckenförde have many converging views in relation to natural law and human dignity and had an important influence on each other's writings. They will be discussed here in sequence. Böckenförde taught at the universities of Bielefeld, Heidelberg and Freiburg and is a former member of the German Federal Constitutional Court (BVerfG). Böckenförde's most well-known dictum is that *"der freiheitliche, säkularisierte Staat lebt von Voraussetzungen, die er selbst nicht garantieren kann."*[255] This is the premise from which Böckenförde's thought on human dignity must be seen: human dignity is a "given" that the liberal-democratic state is built upon, which it however cannot itself guarantee. Once again, as at the beginning of our discussion on Robert Spaemann, it seems that this statement contradicts the philosophy on which the human rights movement is based. Human dignity being one of the key prerequisites for the liberal democracy, post-War political and legal efforts have in this regard very much focused on doing exactly that which Böckenförde seems to deny is even possible. Both the German Basic Law (Grundgesetz), as well as the more recent EU Charter, include human dignity as the highest priority of the state to protect. But as we will see further on, what Böckenförde wants to say with this is different: the state cannot guarantee human dignity in the sense that it is a pre-state integrated characteristic of the human being that can neither be given or taken away, nor changed by the state or any being or institution. The state can however

[253] See: Ibid. Spaemann, Über den Begriff der Menschenwürde, p. 122
[254] See: Ibid. Spaemann, Menschenwürde und Menschliche Natur, p. 139
[255] Ernst-Wolfgang Böckenförde, Staat, Gesellschaft, Freiheit - Studien zur Staatstheorie und zum Verfassungsrecht, Suhrkamp 1976, p. 60.

put into place laws and measures that help protect human dignity against violation by third parties, including the state itself. The state can also condone or itself undertake actions that violate it. The difference lies therein that the state can only protect or deny protection of human dignity as a given human condition the actual existence of which it cannot control in any way.

Böckenförde discusses human dignity amongst others within the context of religious freedom, one of the defining aspects of human dignity itself. He notes that the understanding of religious freedom as anchored in human dignity was for the Catholic Church herself a difficult thing to come to accept and it took until the end of the Second Vatican Council and the declaration *"Dignitatis Humanae"* for her to do so[256]. The fundamental issue that was at stake here and which is crucial for the development of the human dignity understanding is the relationship between truth and human dignity. The classical understanding of the Catholic tradition had been that nothing – no rights and no duties - can be founded other than in truth. As Böckenförde puts it : *"Nicht mehr der Mensch hat Recht, aus seiner Natur und Kraft seiner Würde, sondern die Wahrheit."*[257] Therefore, those that did not adhere to the true faith could not be granted the actual right to reject this faith because this would mean granting them the right to reject the truth. Non-believers should therefore be tolerated only because the Christian duty of charity and the realities of living together with non-believers required this. Since it is however dependant on human judgment to discern and express what this absolute truth is, it can easily become an arbitrary concept that undermines the natural law itself because it does not recognize that some characteristics of the human being are a given through its nature. Böckenförde here delivers a sharp critique of the theory that sets truth above dignity and concludes that in the end it was a matter of power only who got to decide what is truth and what is not. Human dignity however, as also the Catholic Church understands and proclaims today, does not depend on power since it is a given of the human being from the moment of its creation onwards. He brings together the argument that religious freedom is exclusively rooted in the dignity and liberty of the human being as follows in

[256] See: Ernst-Wolfgang Böckenförde, Religionsfreiheit – Die Kirche in der modernen Welt, in: Schriften zu Staat, Gesellschaft, Kirche, Band 3, Herder 1990, p. 15
[257] Ibid. Böckenförde, Religionsfreiheit, p. 23

the theological proposition that *"der Glaube als Akt der Freiheit um seiner selbst willen auch die Freiheit, nicht zu glauben, voraussetz."*[258] Archbishop Denis Hurley remarked during the discussions on this issue at the occasion of the Second Vatican Council that religious freedom does not exist as a means against the truth but rather as a means to come to that truth[259].

Böckenförde's most notable discussion on the understanding of human dignity and the law can be found in a series of publications[260] he authored in 2003-2004 as a reaction to the new and influential commentary on article 1 paragraph I of the German Basic Law (Grundgesetz) by Matthias Herdegen[261] in which the latter departed from the fundamental post-War notion of German constitutional law that human dignity is an unchangeable pre-positive legal concept. Böckenförde notes that, although Herdegen stretches the principle of human dignity as written in article 1.1. to be applicable as broadly as possible, the entire principle is undermined by Herdegen's shift towards opening up the human dignity provision to varying degrees of actual protection according to the current developments and needs in society. Herdegen presents a new view of human dignity that no longer accepts what the 1948 parliamentary assembly drafting the Grundgestez intended, namely "*als Übernahme eines grundlegenden, in der europäischen Geistesgeschichte hervorgetretenen 'sittlichen Werts', in das positive Verfassungsrecht, das damit bewusst und gewollt ein Fundament vor-positiver Art in sich aufnahm."*[262] Instead, Herdegen turns human dignity protection into a legal principle of merely positive law that no longer enjoys the special foundational and pre-positive status intended by the fathers of the constitution. For Dürig, as Böckenförde explains, the German human dignity provision in article 1.1. represented the highest constitutional principle of all law, not only constitutional law. It was therefore also not to be considered as a fundamental right itself because this would necessarily include limits and the balancing of different interests. The human dignity provision however, as its place in the Grundgesetz also makes clear, was

[258] Ibid. Böckenförde, Religionsfreiheit, p. 27
[259] Ibid. Böckenförde, Religionsfreiheit, p. 31; see Böckenförde's footnote 35
[260] See amongst others: Ernst-Wolfgang Böckenförde, Die Würde des Menschen war unantastbar, in: Feuilleton der Frankfurter Allgemeine Zeitung 03-09-2003, nr. 204, p. 33 and: Ibid. Böckenförde, Bleibt die Menschenwürde unantastbar?, pp. 1216-1227
[261] Matthias Herdegen, in: Maunz/Dürig, Grundgesetz. Kommentar, art. 1 I, 2003
[262] Ibid. Bockenförde, Bleibt die Menschenwürde unantastbar?, pp. 1216-1217

formulated deliberately not as a fundamental right but as a universal and inviolable overarching principle. Article 79, paragraph 3 of the Grundgesetz underlines this by explicitly excluding the possibility for changing article 1.1. through constitutional reform. Yet what Herdegen does is to turn the human dignity guarantee into a flexible and changeable principle of purely positive law by specifically rejecting the foundational relevance today of its pre-positive and philosophical-ethical nature incorporated into the positive law[263]. Herdegen says:

"Die im Parlamentarischen Rat herrschende Vorstellung, das Grundgesetz übernehme mit der Menschenwürdeklausel 'deklaratorisch' einen Staat und Verfassung vorgeordneten Anspruch ins positive Recht hat noch beachtliche Suggestionskraft. (...) Für die staatsrechtliche Betrachtung sind jedoch allein die (unantastbare) Verankerung im Verfassungstext und die Exegese der Menschenwürde als Begriff des positiven Rechts maßgebend."[264]

Human dignity herewith becomes a mere positivistic legal principle amongst many others, whilst no longer anchored in what is *independent of the legislator* and which finds its origin in the history of European thought, especially Christianity and the natural law tradition[265]. The Herdegen *Grundgsetz* commentary represents a fundamental break with German legal tradition on human dignity, yet it comes as no surprise. Herdegen's commentary and clear departure from this tradition are only an effort to catch up with the ever more prevailing moral relativism of European society. Secularization plays an equally important role in this development: a system that insists religion is a purely private affair which cannot be of relevance for governing a democratic society is not capable of accepting a concept rooted in the transcendental nature of the human being. The secular state is unable to accept that the source of human dignity lies beyond the grasp of the state, since its proponents cannot accept the human being has a destiny beyond itself and this life. Since the German constitutional law tradition on human dignity was one of the main sources of inspiration for article 1 of the EU Charter, we see

[263] See: Ibid. Bockenförde, Bleibt die Menschenwürde unantastbar?, pp. 1217-1218
[264] Ibid. Herdegen, Grundgesetz. Kommentar, nr. 17
[265] See Amongst others: Ibid. Böckenförde, Die Würde des Menschen war unantastbar, p. 33

this development is also having its effect within the European context. Our later discussion of recent case law will illustrate this. Herdegen, as Böckenförde comments, basically turns the application of the human dignity provision into a procedural deliberation that in its outcome depends on the relevant current developments and possibilities within the context in which human dignity protection is requested at the time. Concretely this means that not so much the question whether human dignity should be protected in a certain case is relevant, but rather if and how it can be done. This ultimately also includes a balancing of interests. This approach, Böckenförde warns, can only lead to undermining and destroying the inviolability of human dignity itself: when the application of the principle is increasingly open to relativity, ultimately the principle itself becomes empty and no longer enforceable. The problem is exacerbated by the fact that its philosophical and pre-legislative foundation is no longer recognized as an integral part of the positive principle itself. Human dignity then becomes merely a legal concept based on an ever-changing mutual consent and eventually emptied of any substantial meaning. As we know from our discussion above, this is a fundamentally different understanding of human dignity than the one grounded in the Catholic natural law tradition. It is also an approach Böckenförde firmly rejects as contrary to the intention of the men and women who drafted the German Basic Law on the ruins of World War II:

"Was den Parlamentarischen Rat bewegte, war die Übernahme eines geistig-philosophisch geprägten Begriffs, der seine Konturen aus seinen Wurzeln in der christlichen Tradition und im Gedankengut der Aufklärung, insbesondere Immanuel Kants, gewonnen hatte, als Rechtsbegriff in das Verfassungsrecht, um ihn so als grundlegendes normatives Prinzip staatlichen Handelns verbindlich zu machen. Damit wurde etwas vor-positiv Vorhandenes in das positive Recht hineingenommen. Das lassen die Beratungen im Parlamentarischen Rat wie auch das Zeitumfeld deutlich erkennen."[266]

[266] Ibid. Bockenförde, Bleibt die Menschenwürde unantastbar?, p. 1223. See also his extensive listing of sources that confirm this theory in his footnote 28

The parliamentary assembly that drafted the text, Böckenförde rightly points out, deliberately did not want to make the human dignity provision an empty principle that could be filled-in according to the specific considerations of any given period of time in which it was applied. Rather, it wanted to provide for an inalterable foundation of human dignity protection that would rule the application of the principle at any given time. For Böckenförde there is no doubt human dignity is a profoundly metaphysical-religious concept and in this form the only sustainable basis of human rights[267].

Böckenförde in his discussion on human dignity finally makes the interesting observation that in fact he sees there is no real disagreement as to the fundamental guarantee the legal principle of human dignity offers. Its core justification lies in the human being's *"Zweck an sich selbst"* as the Kantian doctrine has it. The disagreement on the scope of human dignity protection starts with the question whether apart from born human beings it should also be extended to the unborn life[268]. Böckenförde argues there is no reason why this should not be the case. If we accept the dignity of the human being in its 'completed' dimension after birth, one cannot separate this from its history that led to this stage and which started at conception when – and this is scientifically no longer disputed – the irreversible essence of that human being was created, the unique chromosomes' structure which gives each human being its distinct and unchangeable nature. Any dividing line one would try to create here would per definition be arbitrary, since biologically speaking there is only one identifiable starting point of life and one identifiable ending point of life. This is then also why, as we already discussed above, human dignity protection in Böckenförde's view would best be linked to the biological and scientifically proven start and end of life. Only this approach would guarantee human dignity protection for every human being under all circumstances.

3.5. Alexander Hollerbach (1931-)

Hollerbach was a law professor at the universities of Mannheim and Freiburg im Breisgau with amongst others a focus on legal philosophy. Hollerbach's writings focus

[267] Ernst-Wolfgang Böckenförde and Robert Spaemann (Ed.), Menschenrechte und Menschenwürde, Klett-Cotta 1987, p. 9

[268] See: Ibid. Bockenförde, Bleibt die Menschenwürde unantastbar?, pp. 1225-1226

less on human dignity as such but more on the crucial post-War revival of natural law theory that formed the basis for the human rights movement and the legal concept of human dignity, especially in Germany. He calls "natural law" the flag under which society looked for a foundation on which to rebuild itself after the bitter experiences of the perversion of law and the state under Nazi rule[269]. National Socialism was a system that led to the application of arbitrary and criminal legislation because it espoused an interpretation of legal positivism demanding blind obedience because "the law is the law". Hollerbach points out that after such an extreme form of positivism (he calls it "Gesetzpositivismus") it is understandable refuge was sought in its opposite, an unwritten common denominator referred to as "the natural law". What Hollerbach understands as "natural law" in this context is *"im idealtypischen Sinne ein Recht, das unabhängig von autoritativer Setzung, gewohnheitsmäßiger Übung oder vertraglicher Vereinbarung gilt."*[270] Something that is valid independently of authority, practice or agreement. We deliberately used the term "common denominator" above as Hollerbach describes how the post-War enthusiasm for natural law found its inspiration in the broad context of the history of the natural law tradition: from Aristotle, Cicero and the Stoics to Christian scholasticism with Thomas Aquinas and its neo-scholastic and neo-thomistic interpretations. But also the Enlightenment rationalism and especially the concept of universal human rights and Kant's understanding of the inviolability of human dignity all influenced this post-War movement. It is for this reason that Hollerbach holds the opinion that one cannot speak of one clearly defined concept of natural law. Yet he concludes that the neo-scholastical tradition of natural law as propagated by the Catholic Church and Catholic thinkers was certainly the main driving force behind the post-War revival of natural law as a relevant legal-philosophical framework for ordering society. He paraphrases Kaufmann[271] in highlighting five main components of natural law: the ontological aspect of natural law, the convergence of divine and human reason, the unchangeable nature and universal validity of the natural law, its direct applicability and

[269] See: Alexander Hollerbach, Katholizismus und Jurisprudenz – Beiträge zur Katholizismusforschung und zur neueren Wissenschaftsgeschichte, Schöningh 2004, p. 279: Was ist aus der deutschen Naturrechtsdiskussion geworden?
[270] Ibid. Alexander Hollerbach, Katholizismus und Jurisprudenz, p. 299: Naturrecht
[271] Franz-Xaver Kaufmann, Wissenssoziologische Überlegungen zu Renaissance und Niedergang des katholischen Naturrechtdenkens im 19. und 20. Jahrhundert, in: Naturrecht in der Kritik, edited by Franz Böckle and Ernst-Wolfgang Böckenförde, Grünewald 1973, p. 135

the Catholic Church's prerogative of its authentic interpretation[272]. The 1947 constitution[273] of the German state of Rheinland-Pfalz comes closest to this understanding of natural law and for the purpose of the subject of our research it is useful to quote the entire preamble and first article here, as it is indeed, as Hollerbach points out, a very far-reaching application of natural law thinking into positive law and the protection of human dignity (highlighting: CAvG):

*"**Vorspruch***
*Im Bewusstsein der Verantwortung vor **Gott, dem Urgrund des Rechts** und Schöpfer aller menschlichen Gemeinschaft,*
*von dem Willen beseelt, die **Freiheit und Würde des Menschen** zu sichern*
(...)
Artikel 1
*(1) Der Mensch ist frei. **Er hat ein natürliches Recht auf** die Entwicklung seiner körperlichen und geistigen Anlagen und auf die freie Entfaltung seiner Persönlichkeit **innerhalb der durch das natürliche Sittengesetz gegebenen Schranken**.*
(2) Der Staat hat die Aufgabe, die persönliche Freiheit und Selbständigkeit des Menschen zu schützen sowie das Wohlergehen des Einzelnen und der innerstaatlichen Gemeinschaften durch die Verwirklichung des Gemeinwohls zu fördern.
*(3) **Die Rechte und Pflichten der öffentlichen Gewalt werden durch die naturrechtlich bestimmten Erfordernisse des Gemeinwohls begründet und begrenzt**.*
(4) Die Organe der Gesetzgebung, Rechtsprechung und Verwaltung sind zur Wahrung dieser Grundsätze verpflichtet."

It is hard to imagine that in our modern secular and pluralistic Europe there still exists today a constitution so visibly drafted in the neo-scholastic natural law tradition. Even Hollerbach, himself no enemy of the Catholic natural law tradition, rightly questions the usefulness of this constitutional codification of natural law theory. As we will discuss later, this development was obviously linked to the historical framework of the time: a

[272] See: Ibid. Alexander Hollerbach, Katholizismus und Jurisprudenz, p. 280
[273] Verfassung für Rheinland-Pfalz vom 18. Mai 1947, VOBl. 1947, p. 209

German nation completely ruined and utterly desolate as the direct consequence of a barbaric regime that – according to Hollerbach – was motivated by an extreme form of *"Gesetzpositivismus"*. The state and its laws had developed into a murderous machinery which existed for its own purposes only and thus completely disregarded the human being in its unique dignity and freedom. As the constitutional assembly that drafted the new German Basic Law in 1948 put it to cement Germany's break with this troubled period of its history: *"Der Staat ist um des Menschen willen da, nicht der Mensch um des Staates willen."*[274] The law promulgated and enforced by the state is only just when it is there for the sake of the human being, not for the sake of the state itself.

Although the post-War revival of natural law was in no way an undisputed forward march of the neo-scholastic or any other specifically identifiable tradition, it can be said that the Catholic natural law tradition was leading it in its first stages. Only by 1960 had the field – including neo-scholasticism itself – developed to a point where the legal-philosophical landscape showed a much wider spectrum of natural law concepts as well as case law[275]. It is in this period also that the Catholic Church itself made an historically crucial step by specifically recognizing as a matter of Church doctrine the freedom of religion for all peoples, whether Catholic or not, in the declaration "Dignitatis Humanae", as essential to human dignity as such. We already discussed this document in detail above. It is however Hollerbach's and Böckenförde's explanation of this important shift in Church doctrine that deserves further attention[276]. Through quoting scripture and the natural law tradition, the document argues religious freedom is a fundamental aspect of human dignity. Yet the fundamental shift is to be found in the Church moving form the overarching concept of its prerogative of truth to the overarching concept of the prerogative of the human person and its dignity. This needs further explanation. Until at least the Second Vatican Council, Church doctrine generally held that since the Church – and she alone - represents the only true faith, Catholicism should be accepted as the state religion. For the sake of the common good of a peaceful society, however, other religions needed to be tolerated and be given freedom of religion. On the other hand, due to the

[274] Report of the constitutional convention of Herrenchiemsee 10-23 August 1948, in: Auf dem Weg zum Grundgesetz, Hefte zur Bayerischen Geschichte und Kultur, Haus der Bayerischen Geschichte 1998, p. 52
[275] See: Ibid. Alexander Hollerbach, Katholizismus und Jurisprudenz, pp. 283-285, see also p. 106
[276] See: Ibid. Alexander Hollerbach, Katholizismus und Jurisprudenz, pp. 285-286. See also: Ernst-Wolfgang Böckenförde, Schriften zu Staat – Gesellschaft – Kirche, Vol. III, Herder 1990, pp. 15-72

often diverse political, legal and cultural realities in which the Church found herself and therefore her inability to claim a preferred position, the Church needed to demand equal status with other religions on the basis of the same principle of religious freedom. This doctrine of the Church was also reflected in the legal sphere: the objective truth had the right of preference above all else, including the freedom to be wrong on issues of religion. Although the Catholic Church did not depart from the principle of representing the true faith, she did come to accept and teach that the individual freedom of religion is a fundamental right of every human being and one of the pillars of the correct relationship between church and state. Faith in Christ can only be an act of the free will to which nobody can be forced, as the Church has held since its foundation, so it is only logical to conclude that as a consequence the choice not to believe cannot be excluded either because without it there would not be the true freedom to choose for Christ. This religious liberty that the Church now embraced explicitly also meant the active freedom for the Catholic Church and any religion not to only freely practice its faith, but also to go out and spread it amongst others that are not its followers.

Hollerbach brings together the post-War revival of natural law and the development of human rights and human dignity theory by pointing out their interdependence: The natural law debate is most of all a human rights debate. The guarantee of liberty is the essence of human rights. Human rights in turn set the framework within which positive law finds its justification and limitation[277]. When we speak about fundamental rights or human rights we essentially speak about questions of natural law, being that which the legislator encounters as a given, like for example the existence of human life itself and its unique individual characteristic of inherent dignity. The core element of this dignity, Hollerbach continues elsewhere[278], is the human being's autonomy. As Kant already argued, the autonomy of the rational being is the foundation of its human dignity[279]. This is then also one of the important premises from which developed the modern concept of the rule of law. It has within it the fundamental elements of human dignity: the human

[277] See: Ibid. Alexander Hollerbach, Katholizismus und Jurisprudenz, pp. 287-289
[278] See: Alexander Hollerbach, Selbstbestimmung im Recht, Universitätsverlag C. Winter 1996, pp. 18-21
[279] See: Immanuel Kant, Foundations of the Metaphysics of Morals, Macmillan - second edition 1990/translated by Lewis White Beck, pp. 57-63

capability for autonomy and its inherent freedom[280]. Without these a democracy cannot exist and human dignity and human rights cannot be protected. Yet this notion of Kant Hollerbach builds on and that continues to play a defining role in modern day human dignity thinking, also has serious limitations, for example in that it seems to suggest that without such autonomy human dignity cannot exist or only in a limited way. This contradicts the classical Christian understanding discussed above that the human dignity of the human being exists independent of what it can or cannot be or do, or in the words of Böckenförde: *"nicht die jeweilige Verwirklichung im konkreten Menschen, sondern die 'gleiche abstrakte Möglichkeit', das heisst die potentzielle Fähigkeit zur Verwirklichung ist entscheidend"*[281]. This approach differs fundamentally from a common interpretation of the Kantian autonomy principle: in the latter understanding of autonomy, one does not necessarily see the unborn or severely mentally handicapped human being as possessing full human dignity, since the full autonomy is not visibly in place. Böckenförde however speaks of the *potential* of autonomy, which is present in the human being from the moment of conception through the unique defining composition op human nature taking place at that very moment. We will discuss the post-War Kantian autonomy understanding later in greater detail.

3.6. Christian Starck (1937-)

In concluding this chapter on the revival of the natural law tradition and the development of Christian human dignity discourse in post-War Europe, we will have a closer look at a specifically Catholic approach to human dignity and the law. In some vital aspects it is fundamentally different from Herdegen and it thus illustrates well how much the legal principle of human dignity in German law, from which article 1 EU Charter derives much of its inspiration, is in need of further clarification. In his own commentary on the German Grundgesetz[282], Christian Starck represents an interpretation of article 1.1. of the Grundgesetz and of human dignity in general that openly embraces the decisive influence of the Christian understanding of the human being. Starck however warns against

[280] See: Ibid. Alexander Hollerbach, Selbstbestimmung im Recht, p. 30
[281] Ernst-Wolfgang Böckenförde, Bleibt die Menschenwürde unantastbar?, in: Blätter für deutsche und internationale Politik, 10/2004, p. 1217
[282] Christian Starck (ed.), Kommentar zum Grundgesetz Mangoldt-Klein – Band 1, Verlag Franz Vahlen 2005, pp. 1-82

generalizations such as the one claiming article 1.1. Grundgesetz being founded on "the philosophers" or "the natural law". The sources of human dignity protection should be specified and called by their name, Starck says[283]. For Starck this also means that when applying this human dignity provision today, one has to not only take into consideration but also accept the Christian roots of this dignity understanding in amongst others the Old Testament and the New Testament, such as for example the relevant passages from the Book of Genesis (Gen. 1, 27). This does not mean other European schools of thought that have developed along with Christianity are not relevant or that it alone has exclusive validity. The humanistic tradition as well as the Enlightenment (the latter of which often strongly opposed the Catholic Church) and especially Kant's concept of human dignity, Starck notes, also had an important impact and need to be taken into consideration. But the Christian tradition is by all means the major source of inspiration and understanding for this legal principle of human dignity. The question is not so much, Starck points out, whether or not the human dignity provision is grounded in a secularized version of Christian principles or one that is more the product of humanism and the Enlightenment. Rather, our notion of human dignity finds its origin and inspiration in both currents of thought. Yet the core of human dignity lies in the Christian idea of the human person ("*Menschenbild*") that has in turn developed through a process of secularization leading to the legal status of human dignity today[284]. Starck in this regard explicitly positions himself critically towards Herdegen's above discussed view in the *Maunz/Dürig* Grundgesetz commentary which holds that human dignity can only be seen as a concept, a term of positive constitutional law with its pre-positive roots only given very limited importance[285]. Contradicting Herdegen, he stresses that the constitutional assembly of Herrenchiemsee did take this core aspect of human dignity into consideration as a foundational element of the human dignity principle at various times during the deliberations. We therefore cannot simply "do away" with this fundamental basis on which our human dignity principle rests, Starck rightly points out. Acknowledging the Christian roots of our modern human dignity understanding by no means forces anybody to accept the Christian faith. By recognizing this basis, however, we merely give human

[283] See: Ibid. Starck, Kommentar zum Grundgesetz, pp. 28-29
[284] See: Ibid. Starck, Kommentar zum Grundgesetz, p. 30
[285] See: Ibid. Starck, Kommentar zum Grundgesetz, p. 28

dignity the metaphysical foundation that is the ultimate and necessary guarantee for the human being against the complete control of the state over humans[286]. Accepting the human being as being created in the image and likeness of God does not require somebody or the state that protects this fundamental aspect of human life to actually be a Christian. All the human being and the state need to accept is that the human being has been created by a power that is beyond and above itself and the purely human and limited structures humans create. In doing so, we accept that our lives do not depend on the state (or other human structures) and therefore it has to respect the inherent dignity and autonomy of the human being that it cannot control. Starck says that *"Eine metaphysische Grundlage der Menschenwürde bedeutet in ihrem rechtlichen Kern eine letzte Sicherung des Menschen vor einer totalen Verfügung durch Staatliche oder gesellschaftliche Mächte."*[287] Even an atheist should be able to accept that he or she and the earth itself have ultimately been created by a "creative power" surpassing history and the state. Today's structures as they have been created by humans have to accept that consequently the free disposition over each individual human life lies somewhere else, beyond our reach. This gives a quality of independence and freedom to the individual human being that the state could never guarantee: the created cannot be the protector of the creator. This is the core of the Christian understanding of human dignity: a given of each individual human being that the state or other structures created by those same human beings can never alter or take away. All the state can do is to implement measures that aim to limit the violation of this dignity. Human dignity legislation is, apart from its Christian, Enlightenment and humanistic roots, also deeply rooted in the history of the first half of the 20th century that saw such a massive violation of human dignity by the state and in the name of "law". A clear example of why measures to protect human dignity are so important. We will discuss this in detail in Part II.

A fundamental issue Starck also stresses and which is the understanding of human dignity ever more being eroded, is that human dignity exists independently of the human being's actual self-consciousness or the ability to experience its dignity, to live its

[286] See: Ibid. Starck, Kommentar zum Grundgesetz, p. 31

[287] Christian Starck, Der demokratische Verfassungsstaat: Gestalt, Grundlagen, Gefährdungen, Mohr 1995, p. 190

autonomy or to use its reason[288]. We already quoted Böckenförde's similar statement on this point above. Human dignity exists whenever a human life exists: *"Denn die verfassungsrechtliche Würdegarantie umfasst auch das menschliche Leben, das vitale Basis der Menschenwürde ist."*[289] In quoting the German Federal Constitutional Court (BVerfG) Starck adds: *"Wo menschliches Leben existiert, kommt ihm Menschenwürde zu."*[290] In the words of Tiedemann: *"Sie ist untrennbar mit der menschlichen Existenz gegeben."*[291] Qualifications as to what the human being can and cannot do or experience, are irrelevant here. For Starck it is clear that the constitutional human dignity provision therefore also fully and indiscriminately applies to all human life, born or unborn, including the embryo in whichever state of development or medical use. The BVerfG has confirmed this in various rulings[292] and strictly speaking abortion and embryo research and destruction are still unconstitutional in Germany, even though legislation is now in force that provides for a way to bypass the unconstitutionality. These facts illustrate clearly how difficult it is to sustain a system of constitutional human dignity protection when the protection of human life itself is ever more limited. Here the fundamental flaw of the increasing trend in European human dignity discourse is laid bare: when a society and its legal system, like in the case of both the European Union and most of its member states, no longer accepts the inviolability of human life from the moment of conception until natural death, it takes away the only foundation on which human dignity can itself remain inviolable or even exist at all. When life itself is not fully respected in all its stages and qualities and instead made subject to the individual qualifications and the claimed superior rights of others, like in the case of abortion and embryonic stem cell research, how is it possible to maintain the inviolability of human dignity that only makes sense when each such human life actually receives equal protection? As Böckenförde rightly pointed out, there is not so much disagreement as to the inviolability of human dignity for born human beings, the problem lies in the fundamental disagreement in European society on whether that inviolability also extends indiscriminately to human

[288] See: Ibid. Starck, Kommentar zum Grundgesetz, pp. 37-38
[289] Ibid. Starck, Kommentar zum Grundgesetz, p. 61
[290] BVerfGE 88, 203, 252
[291] Paul Tiedemann, Menschenwürde als Rechtsbegriff. Eine philosophische Klärung, Berliner Wissenschafts Verlag 2007, p. 115
[292] See Starck's discussion of relevant case law: Ibid. Starck, Kommentar zum Grundgesetz, pp. 66-67

life before birth. Both Böckenförde and Starck would answer here in line with the Christian understanding of human dignity as discussed in detail in this chapter: every human being from the moment of conception and regardless of its physical or mental state per definition enjoys the same inherent dignity at all times of life and independent of other human beings or the state. The most fundamental elements of this human dignity are life itself and liberty; Starck paraphrases the BVerfG when he summarizes this in a clear definition of the legal principle of human dignity:

"Mit der Menschenwürde ist zu allererst – als Basis – das nackte menschliche Leben gemeint; darüber hinaus sind damit die Voraussetzungen für freie und selbstverantwortliche Entscheidungen garantiert."[293]

[293] Christian Starck, Vom Grund des Grundgesetzes, Edition Interfrom 1979, p. 43. Starck quotes two rulings that are relevant in this regard: BVerfGE 39, 1 (41) and BVerfGE 27, 1 (6 f.)

Chapter 4: Kant's dignity understanding developed

4.1. Introduction

Discussing the post-War development of the Kantian notion of human dignity deserves discussion in a separate chapter. But, to speak with McCrudden, it would be rash to purport to be able to fully get to grips with Kant's understanding of human dignity which is "notoriously contested territory."[294] Still, there is general agreement in literature that the writings of Immanuel Kant have had a decisive impact – and continue to do so - on the way we think about human dignity in its European legal context today. Gerhard Luf underlines this when he writes: *"Die zeitgenössischen Diskussionen um die Würde des Menschen bewegen sich im Wesentlichen innerhalb des 'vernunftrechtlichen Paradigmas der Kantischen Tradition.'"*[295] Elsewhere he says: *"(…) denn es steht wohl außer Streit, dass die Philosophie Kants einen wesentlichen, ja für viele den überzeugendsten Beitrag zur Bestimmung des Begriffs der Menschenwürde geleistet hat, dem auch heute noch Maßgeblichkeit zukommt."*[296] Gerd Brudermüller and Kurt Seelmann equally underline the overarching importance of Kant for modern human dignity discourse: *"(…) Kant, auf den man sich für das moderne Würdeverständnis zumeist stützt (…)"*[297] As a more practical example, the German constitutional development on human dignity since 1945 cannot be understood – and thus also the development of European human rights law that has been very much influenced by it - without acknowledging the lasting impact of Kantian thought[298]. The fact that, as discussed extensively above, the revival of natural law thinking along with the Christian philosophical and Catholic magisterial tradition has driven human dignity thinking for an important part, does therefore not exclude the equal relevance of Kantian thought. It should furthermore be remarked here, as Jacques Maritain stresses, that Kant was profoundly influenced by his pietist upbringing and that

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[294] See: Ibid. Christopher McCrudden, Human Dignity and Judicial Interpretation of Human Rights, p. 659
[295] Gerhard Luf, Menschenwürde in der Philosophie des Deutschen Idealismus, in: Gerhard Luf, Freiheit als Rechtsprinzip – Rechtsphilosophische Aufsätze, Elisabeth Holtleithner and Alexnader Somek (ed.), Facultas.wuv 2008, p. 29; Luf partly quotes Axel Honneth here, see his footnote 1.
[296] Gerhard Luf, Menschenwürde als Rechtsbegriff – Überlegungen zum Kant-Verständnis in der neueren deutschen Grundrechtstheorie, in: Ibid. Gerhard Luf, Freiheit als Rechtsprinzip, p. 266
[297] See: Vorwort, in: Menschenwürde – Begründung, Konturen, Geschichte by Gerd Brudermüller and Kurt Seelmann (ed.), Königshausen & Neumann 2008, p. 7
[298] Cf. for example Birnbacher and Luf in: Ibid. Menschenwürde – Begründung, Konturen, Geschichte, p. 9 and p. 44

his doctrine was "dependent on fundamental religious ideas and a religious inspiration he received in advance." [299] To understand Kant's ethical theory, Maritain argues, all the reference points to traditional Christian thought should also be taken into consideration. The influential Catholic philosopher Karol Wojtyla – later Pope John Paul II - was well versed in the writings of Kant and clearly influenced by it, although he had some profound disagreements with Kantian thought. Closer study of Wojtyla's writings, both before and after his election to the papacy, reveals this[300]. It is therefore important to underline at the beginning of this chapter that the Kantian school of thought on human dignity and its post-War development should not be seen - as is often done - necessarily *always* opposing the specifically Christian tradition and the post-War natural law revival relating to human dignity[301]. It should rather be seen as a major further development of the notion of human dignity – yet at the same time not as a mere continuation or replacement of the Christian or Catholic tradition. Luf summarizes this as follows when he observes that the Kantian understanding of human dignity *"(...) zwar an bestehende Traditionen anknüpft, aber den Begriff doch entscheidend geprägt hat."*[302] Kant's human dignity theory therefore gives a mixed picture of on the one hand imitating, confirming and further developing the Christian tradition on the subject, whilst on other points clearly contradicting it. The core of the conflict between the Christian and Kantian traditions on human dignity seems to be the focus in Kantian thought (or the interpretation thereof) on the degree of the absoluteness of the autonomy of the human person and the suggested premise that without it no – or at least a lesser - human dignity exists. Kant's theory of absolute autonomy leads to the human person being considered the final end of the cosmos and an end in itself, whereas the Christian tradition clearly sees God as the final end (and beginning) of all that is. The theologian Michael Waldstein describes this problem well in comparing the personalistic thought of Kant – which can

[299] Jacques Maritain, Moral Philosphy, Charles Scribner's Sons 1964, p. 96
[300] See for a discussion on Kant and Wojtyla (John Paul II): Michael Waldstein, Three Kinds of Personalism: Kant, Scheler and John Paul II, in: Forum Teologiczne X, 2009, pp. 1-21
[301] Heiner Bielefeldt is a strong proponent of this interpretation. See: Heiner Bielefeldt, Philosophie der Menschenrechte: Grundlagen eines weltweiten Freiheitsethos, Primus Verlag 1998, pp. 46-47
[302] Gerhard Luf, Der Grund für den Schutz der Menschenwürde – konsequentialistisch oder deontologisch, in: Menschenwürde – Begründung, Konturen, Geschichte by Gerd Brudermüller and Kurt Seelmann (ed.), Königshausen & Neumann 2008, p. 44

be seen as one of the defining pillars of his human dignity theory - with that of Karol John Paul II:

"Wojtyla's understanding of the personalistic norm is indeed rather different from Kant's. Being *an end differs from* having *an end,* being *the highest good differs from being* the beneficiary of *the highest good,* being *God differs from* having *God as one's end."*[303]

Waldstein criticizes the "quasi divine value" that Kantian thought attributes to the human person. He speaks here of an "absolutizing of the autonomous dignity of the person as the highest end" leading to a personalism – and thus a human dignity understanding - in which the final end is already found in the human person and therefore necessarily excludes God[304]. Since it is the final end that determines every aspect of human life, there is a fundamental difference between a human dignity coming from that final end being God or the final end being the human person[305]. This contradiction seems to be the key element of many modern Kant interpretations. A rationalism that exclusively holds the human being as the highest good, the final end of the universe, can do no other than to consider the human person as fully equal to God – thus God himself. This is something fundamentally different from the Christian understanding of human dignity stemming from the fact of every human life being equally created in the image and likeness of God and thus not itself being God.

If one would merely reduce – as some authors do - the two main sources of post-War European human dignity discourse – Christian and Kantian thought - to effectively being only the difference between a *heteronomous* and an *autonomous*[306] understanding of human dignity, there is much disagreement in literature as to whether these two concepts are reconcilable at all. Tiedemann[307], for example expresses the clear conviction that the heteronomous and autonomous concepts of human dignity are diametrically opposed and

[303] Ibid. Waldstein, Three Kinds of Personalism, p. 13
[304] This corresponds with Maritain's critique of Kant, See: Ibid. Jacques Maritain, Moral Philosphy, p. 103
[305] See: Ibid. Waldstein, Three Kinds of Personalism, pp. 13, 18, 19
[306] See: Ibid. Kant, Foundations of the Metaphysics of Morals, §433
[307] See: Ibid. Tiedemann, Menschenwürde als Rechtsbegriff, pp. 171-172

cannot both and at the same time be the foundation of a single human dignity understanding. Heiner Bielefeldt, on the other hand, holds that from a Kantian perspective it can be argued there is "no inherent conflict between moral autonomy and theocentrism"[308], the latter in this context being the heteronomous understanding of human dignity. Theo Kobusch is another defender of the latter approach where he stresses that the Christian idea of the human being as created in God's image and as expressed in the early modern natural law tradition, "furnishes the background for Kant's concept of the dignity of the person" and "although explicitly stated in the *Groundwork of the Metaphysics of Morals*, this idea is an often overlooked recourse by Kant to the metaphysics of morals being preceding his own philosophy"[309]. Kobusch sees Kant's understanding of human dignity not as a new notion developed in modern history, but rather as the high point of a tradition started in the Middle Ages. This *"Lehre vom moralischen Sein"* is of great relevance today, he argues[310].

4.2. Immanuel Kant on human dignity

Before entering into a further discussion of the post-War development of Kantian thought on human dignity, we will briefly look at the notion of human dignity as Kant himself saw it, especially as described in the *Foundations of the Metaphysics of Morals*[311], which is generally considered as Kant's most important work outlining his human dignity theory. In total however, Kant discussed 'dignity' or 'human dignity' in its various contexts in 18 of his published writings, of which the *Foundations of the Metaphysics of Morals and the Metaphysics of Morals* are the most important[312]. It goes beyond the scope of this research to discuss all Kant's writings that include the word 'dignity' in detail, but we will include some passages from the *Metaphysics of Morals* as well. We

[308] Heiner Bielefeldt, Towards a Cosmopolitan Framework of Freedom: The Contribution of Kantian Universalism to Cross-Cultural Debates on Human Rights, in: Annual Review of Law and Ethics – 200th Anniversary of Kant's Metaphysics of Morals, Drucker und Humblot 1998 Volume 5 (1997), p. 359 Bielefeldt also quotes Franz Böckle representing this thought. See p. 360 of the article.
[309] Theo Kobusch, Nachdenken über die Menschenwürde, in: Allgemeine Zeitschrift für Philosophie, 31.3 – 2006, p. 207
[310] Ibid. Kobusch, Nachdenken über die Menschenwürde, p. 224
[311] We have used the second edition of Lewis White Beck's English translation: Kant, Foundations of the Metaphysics of Morals, Macmillan/Library of Liberal Arts, 1990
[312] See for a detailed analysis of the use of the word "dignity" and its different meanings in Kant's writings: Oliver Sensen, Kant's Conception of Human Dignity, in: Kant-Studien Volume 100, Walter de Gruyter 2009, pp. 309-331

will then concentrate on how Kant's theory was developed by some post-War Kantian scholars.

Human dignity for Kant means that the human being, he also speaks of the 'person' - 'man' or the 'rational being' - has an absolute inner worth. Kant understands the human person as an intrinsically free being (*'Wesen der Freiheit'*) that is an end in itself. The human being is "endowed with inner freedom"[313]. This inner freedom, Kant goes on to say, constitutes the "innate dignity of a human being"[314] and is the "only original right belonging to every man by virtue of his humanity"[315] The human being by virtue of this freedom possesses autonomy[316]. Kant's most often quoted categorical imperative, his paradigm on the absolute inner value of human dignity, is "act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only."[317] The dignity of the human person, Kant then says, finds its basis in its autonomy, since "as an end in himself, he is destined to be a lawgiver in the realm of ends, free from all laws of nature and obedient only to those laws which he himself gives."[318] The human being has an absolute worth in and of itself "that has no price."[319] The absoluteness is rooted in human freedom, which finds its expression in the absolute autonomy of the human person. We can therefore legitimately lay claim, Kant says, to respect from every other human being – and the state, one should add - as the recognition of the dignity of each human being that lies in this absolute inner worth. He calls this "the dignity of humanity in every other human being" that raises human beings above all things[320]. It is a duty that this respect be shown to every other human being, Kant stresses. Kobusch and Braun[321] point out that this absolute worth of the human being in Kant's understanding

[313] Immanuel Kant, The Metaphysics of Morals, Part II – Metaphysical first principles of the doctrine of virtue, translated and edited by Mary Gregor, Cambridge University Press 13th edition 2009, 6:418, p. 174
[314] Ibid. Kant, The Metaphysics of Morals, Part II, [6:419], p. 175
[315] Ibid. Kant, The Metaphysics of Morals, Part I - Metaphysical first principles of the doctrine of right, [6:237], p. 30
[316] Ibid. Kant, Foundations of the Metaphysics of Morals, §§448, 453
[317] Ibid. Kant, Foundations of the Metaphysics of Morals, §429
[318] Ibid. Kant, Foundations of the Metaphysics of Morals, §435
[319] Ibid. Kant, The Metaphysics of Morals, Part II, [6:462], p. 209, §37
[320] Ibid. Kant, The Metaphysics of Morals, Part II, [6:462], p. 209, §38
[321] Ibid. Kobusch, Nachdenken über die Menschenwürde, pp. 224-225; he also quotes: Kathrin Braun, Die besten Gründe für eine kategorische Auffassung der Menschenwürde, in: M. Kettner (ed.), Biomedizin und Menschenwürde, Frankfurt a.M. 2004, p. 87

can only be grasped when it is fully respected, or held in esteem, ("*Achtung*") through abiding by Kant's own – once again: absolute – "prohibition" of instrumentalising the human being ("*Totalinstrumentalisierungsverbot*"[322]). The absoluteness itself of this worth is best understood when we realize that it cannot be compared with anything. Kant says:

"In the realm of ends everything has either a price or a dignity. Whatever has a price *can be replaced by something else as its equivalent; on the other hand, whatever is above all price and therefore admits to no equivalent, has* dignity*."*[323]

and later on:
"This esteem lets the worth of such a turn of mind be recognized as dignity and puts it infinitely beyond any price; with things of price it cannot in the least be brought into any competition or comparison without, as it were, violating its holiness."[324]

This concept of absoluteness that Kant develops can be seen as the reason why Kant's human dignity theory seems to fit in with the classical Christian understanding of the incomparable worth of the human being, and thus its inherent dignity and the need to hold it in the highest possible esteem. Kobusch[325] makes an important contribution to this discussion of Kant where he concludes that it was Hegel who – as the generally accepted "successor" [326] of Kant in the metaphysics of morals – took Kant's concept of the esteem, the reverence, of the absoluteness of human dignity deeper by showing that ultimately it is the divine love ("*die göttliche Liebe*") for the human being that constitutes human dignity[327]. This ultimate form of love, one could say, God has reserved exclusively for

[322] See for an interesting discussion on the "Instrumentalisierungsverbot": Dieter Birnbacher, Annäherungen an das Instrumentalisierungsverbot, in: Ibid. Menschenwürde – Begründung, Konturen, Geschichte, pp. 9-23
[323] Ibid. Kant, Foundations of the Metaphysics of Morals, §434
[324] Ibid. Kant, Foundations of the Metaphysics of Morals, §435
[325] See: Ibid. Kobusch, Nachdenken über die Menschenwürde, pp. 226-227
[326] See for example Gerhard Luf who speaks of Hegel (and also Fichte) as the 'Vollender' of Kant's philosophy, in: Ibid. Gerhard Luf, Menschenwürde in der Philosophie des Deutschen Idealismus, p. 249
[327] Here we are reminded of Robert Spaemann's argument (discussed in chapter 3) that ultimately, human dignity is expressed through Jesus dying on the cross for mankind

the human being. For Kobusch[328], Kant's categorical imperative "act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only" is itself the largely ignored proof that Kant indeed based his *Foundations of the Metaphysics of Morals* on the Judeo-Christian metaphysical concept of the human person that stands in direct relation to the Absolute by it being an end it itself. One could add here Kant's own commitment to the Absolute where in his conclusion to the *Foundations of the Metaphysics of Morals* in relation to the use of reason to understand (human) nature he speaks of the "supreme cause of the world", which is absolute[329]. Yet, in light of what we discussed earlier it is not entirely clear who or what this "absolute" is in Kant's understanding. Is it God himself or is it the autonomous dignity of the human person which in itself is considered the final end of the cosmos? Could it be that Kant referred here to the Absolute merely as the initial provider of this autonomy herewith relinquishing its role as final end?

Kobusch' line of reasoning would seem to bring Kant's human dignity theory right back to the essence of the Christian understanding of the human being created in God's image and likeness, since the act of the creation of human life is itself an act of divine love. Yet although this reasoning indeed might be the underlying concept of Kant's dignity theory, it still does not take away the question of an interpretation of Kant's definition of autonomy that can be – and is frequently - derived from this passage that we quoted earlier: "For, as an end in himself, he is destined to be a lawgiver in the realm of ends, free from all laws of nature and obedient only to those laws which he himself gives."[330] This definition of autonomy can be interpreted as to deny that with all its dignity, the human being can still never be God himself who alone is free from all laws of nature. Furthermore, in the Judeo-Christian understanding there cannot exist any law that God himself has not either made or tolerated. The reason why we make this observation is because it points to a fundamental misunderstanding in human dignity discourse today. When human dignity is seen as ultimately being the human being's absolute autonomy as a final end in itself and without any limit, including a disregard for the laws of nature and

[328] See: Ibid. Kobusch, Nachdenken über die Menschenwürde, pp. 220-222, where he a.o. says: „Der Begriff der Person ist aber ganz ohne Zweifel ein metaphysischer begriff für Kant."
[329] See: Ibid. Kant, Foundations of the Metaphysics of Morals, §463
[330] Ibid. Kant, Foundations of the Metaphysics of Morals, §435

the existence of the Absolute, we enter into the realm of the arbitrary that is only led by individual preference and desire. When absolute autonomy becomes the sole focal point of human dignity theory, the foundation of human dignity is taken away. This foundation is the acknowledgement that every human being is created in the image and likeness of God, which necessarily means the full equality of each human being towards every other human being in the sense it is not itself God[331]. The human being in an absolute understanding of autonomy no longer accepts that it is "merely" created in the image and likeness of God, because it now itself wants to be God. This in turn leads to the individual human person – now considering itself almighty – becoming ever more self-centered and no longer recognizing that all other human beings are equal in dignity to itself. Boundaries in what can and cannot be done in order that all life is actually treated equal are as a result disregarded. History is littered with examples of this that show the tragic consequences of a distorted understanding of individual autonomy that denies the equal worth of every human life. For example, modern day human dignity arguments often point to the right to privacy and integrity of the person as the "right to do with my body and my life whatever I choose". This right is interpreted as deriving from the absolute autonomy a person has over all aspects of life, also when this involves the lives of others (the unborn human being, the embryo) when individual circumstances or desires so dictate and one's own death (euthanasia and assisted suicide). In this approach life is no longer seen as an equal gift to all human beings that is subject to the laws of nature, but rather as a "product" that can be obtained or disposed with according to individual preferences and circumstances. Kant himself would simply call this instrumentialization, which he vehemently opposes. This widespread view of human life can be seen as a consequence of an understanding of the notion of human dignity that is entirely focused on the unlimited autonomy of the individual human being as the rightful expression of its inherent human dignity combined with a moral framework that is almost entirely based on empirical principles and not on categorical moral imperatives. In this context Kant

[331] It is important to note here that when we speak about the human being created in the image and likeness of God, it is not meant only as an approach that specifically considers the Judeo-Christian tradition as its basis. As we argued above, many other traditions would be able to recognize that the human being has been created by a "rational being" or a "supreme being" that goes beyond human life and this world. We call this being "the absolute" and also Kant accepts this. An unbreakable link exists between this absolute and the human being, which comprises the latter its transcendence

also warns against basing moral concepts on purely empirical principles as the latter makes it impossible for my maxim to be a universal law[332]. There is no reason to believe that Kant intended this development of his dignity theory (he could have hardly foreseen it), yet uncritically following his absolute autonomy theory inevitably leads to this outcome. This we will be able to see when analyzing the case law of the German Federal Constitutional Court in Part II of this research. It is thus not enough to point to Kant adamantly stressing that every human being is an end in itself and therefore any form of instrumentalising the human being or using it arbitrarily should be rejected because part of the problem lies in the interpretation of the phrasing "end in itself"[333]. We are for example clearly speaking of instrumentalization in the case of embryonic stem cell research and cloning.

Kant then explains the contradiction of reasoned duty with the human person's – in itself plausible - needs and inclinations:

"Man feels in himself a powerful counterpoise against all commands of duty which reason presents to him as so deserving of respect. This counterpoise is his needs and inclinations, the complete satisfaction of which he sums up under the name of happiness. (…) From this natural dialectic arises, i.e., a propensity to argue against the stern laws of duty and their validity, or at least to place their purity and strictness in doubt and, where possible, to make them more accordant with our wishes and inclinations. This is equivalent to corrupting them in their very foundations and destroying their dignity – a thing which even ordinary practical reason cannot finally call good."[334]

It is a "principle of humanity" that the human being is an end in itself and can therefore never be used for the end(s) of other creatures, Kant repeatedly says, whilst this is then

[332] See: Ibid. Kant, Foundations of the Metaphysics of Morals, §442: "Empirical principles are not at all suited to serve as the basis of moral laws. For if the basis of the universality by which they should be valid for all rational beings without distinction (…) is derived from a particular tendency of human nature or the accidental circumstance in which it is found, that universality is lost."
[333] For example: Ibid. Kant, Foundations of the Metaphysics of Morals, §428: "(…) and not merely as a means to be arbitrarily used by this or that will."
[334] Ibid. Kant, Foundations of the Metaphysics of Morals, §405

also the "supreme limiting condition on the freedom of action of each man."[335] This means to be the ultimate limit arising from reason that is set to any subjective end we might pursue. The counterpoise Kant describes therefore needs to be dealt with by consistently and laboriously applying this principle of humanity. This is where the core of Kant's human dignity theory lies: autonomy is rooted in the human being as an end in itself, yet that autonomy is strictly limited by the autonomy of the other human being that can never be used as an end. This means, my autonomy does not have a higher worth as the autonomy of the other, and the latter thus needs to be respected. That is my moral duty. Then, when Kant says that man is only subject to the laws that "he himself gives", should this be understood in the context of the "golden rule" of the Gospel which says "do not do to others what you do not want to be done to you"? In the words of Kant: "That is, I ought never to act in such a way that I could not also will that my maxim should be a universal law."[336] Still the question remains whether the purely rationalistic approach that Kant favors in this regard can in effect lead the human being to acknowledge and act upon this categorical imperative, or otherwise put[337]: this unconditional moral obligation that binds us in any and all circumstances? What Kant seems to leave out of his considerations[338] is the traditional Christian understanding of faith illuminating reason, thus the faith helping the human being through grace to actually act consistently according to that which reason commands even in the face of the powerful counterpoise. It is the dynamic relationship of the human being to its creator as the beginning and end of all that is missing in Kant's absolute autonomy concept. This relationship is defined by grace and obviously has no place in the rationalistic approach Kant proposes. It is this point that could be seen as the most important divide between the Kantian and the Christian understanding of the human person and human dignity.

We will now focus on how these and other attributes of human dignity that have been developed by some authors in the last decades and that are relevant for the understanding

[335] Ibid. Kant, Foundations of the Metaphysics of Morals, §431
[336] Ibid. Kant, Foundations of the Metaphysics of Morals, §402
[337] See for excellent definitions of Kantian concepts the online Oxford Dictionary: http://english.oxforddictionaries.com (retrieved 14-3-2011)
[338] See for example Kant's discussion of the theological concept as a rational principle of morality: Ibid. Kant, Foundations of the Metaphysics of Morals, §443

of human dignity in the European legal context today. Luf presents an effective formula for judging the usefulness of Kantian interpretations in that they look at the key relationship between autonomy and freedom. He finds more convincing those interpretations *"die versuchen Kants Autonomieprinzip so zu interpretieren, dass in der Frage nach dem Begriff der Autonomie der Bezug zu den geschichtlichen Realisierungsbedingungen rechtlicher Freiheit und damit die Spannung von Idee und Geschichte wachgehalten wird."*[339] It is true, without the bloodshed of the two world wars of the 20th century it is hard to imagine how the legal concept of human dignity as we take it for granted in contemporary Europe could have developed from the basis of being a mostly philosophical concept. Yet we should also not loose sight of the fact that ultimately, human dignity is a fundamental notion of human life where the empirical analysis should therefore be subject to the principle.

4.3. Kantian thought in post-War Europe: various authors

For Mario Cattaneo it is a foundational concept of Kant's human dignity understanding that it is rooted in the divine creative act and the human being's direct unbreakable link with God, the absolute[340]. He therefore also sees it as Kant's most important contribution to the development of the notion of human dignity that he called upon the state *("die Inhaber der öffentlichen Gewalt"*) to see it as its duty to always respect human dignity, the absolute notion that it is[341]. The way in which the state should do this, Cattaneo explains Kant, is by creating a republican division of powers in which the executive and legislative powers are separated[342]. Only this system would ensure the freedom of each human being, their equality as citizens and a state where all – including the executive and legislative power- are subject to common laws, or put differently: the rule of law. Cattaneo notes that for Kant the state has the duty to consider the rights of the human being sacred: *"die wahre Politik ist also der Moral und dem Recht der Menschen*

[339] Gerhard Luf, Kant und die Menscherechte – Überlegungen zur aktuellen Diskussion über die Begründung von Menschenrechten, in: Ibid. Gerhard Luf, Freiheit als Rechtsprinzip, p. 298
[340] See: Mario A. Cattaneo, Menschewürde bei Kant, in: Menschenwürde als Rechtsbegriff, Reihen Rechts- und Sozialphilosophie - Kurt Seelmann (ed.), Franz Steiner Verlag 2005, p. 25
[341] See: Ibid. Cattaneo, Menschewürde bei Kant, p. 32
[342] See: Ibid. Cattaneo, Menschewürde bei Kant, p. 30. Cattaneo here discusses Kant's 1795 work "Zum Ewigen Frieden"

unterworfen. "[343] Yet with this high moral conception of human dignity Kant's theory presents us with, there is also, as Cattaneo points out, a very disturbing contradiction with regard to its application in Kant's later work the *Metaphysics of Morals*[344]. In Kant's criminal law theory therein described, the categorical imperative of not treating the human being other than an end in itself is disregarded where such things as the death penalty and certain forms of harsh corporal punishment are proposed in cases of serious crimes. As Cattaneo points out, this contradicts the Christian and humanistic principle that the human dignity of every person, also the condemned, should be respected under all circumstances. Another example he gives is Kant's theory that the child born out of wedlock does not deserve the protection of the law because it was born "outside of the law", which is marriage. We specifically note these examples here - provided by Kant and rightfully criticized by Cattaneo – because it highlights a problem of Kant's human dignity theory we already discussed above and that we also see in modern Kantian human dignity discourse. Due to the fact that Kant – although not directly denying the transcendental quality of the human being – founds his categorical imperative on practical reason alone, it can become a completely inflexible concept that disregards the fundamental contradiction that exists in each human life between good and evil. This contradiction is a human weakness (Christian doctrine would call it original sin) which cannot be merely dealt with by a reasoned approach, even when Kant's theory of the "powerful counterpoise" comes close. Gaylin calls this "The capacity to do evil, while at risk of freedom, is a component in defining the good."[345] But the purely rationalistic application to which Kant's theory invites cannot otherwise than lead to the contradiction Cattaneo points out. Human weakness will always lead to situations where a reasoned approach alone leads to conflict with itself, for example as discussed above in the case where harsh corporal punishment is justified to make good for a criminal deed. Both the criminal deed and the excessive corporal punishment that follows it violate human dignity. Yet Kant would still propose the latter and thus disregard his own categorical imperative. This is so, because Kant's human dignity theory and especially his

[343] Ibid. Cattaneo, Menschewürde bei Kant, p. 31
[344] See: Ibid. Cattaneo, Menschewürde bei Kant, pp. 27-29
[345] Willard Gaylin, In Defense of the Dignity of Being Human, The Hastings Center Report, Vol. 14, No. 4 (August 1984), p. 22

understanding of autonomy based on reason alone lacks compassion, which would be one of the aspects provided by what we referred to above as the "illumination" of reason by faith and its corresponding virtues. This is then also one of the problems we see with modern Kantian human dignity notions as they can be observed today. An exclusively rationalistic understanding of autonomy as the foundation of human dignity can actually lead to undermining the universality of human dignity itself because it fails to include all aspects of human life. Catherine Dupré in her commentary on Kant's dignity theory within its legal context says this "autonomy based understanding of human dignity provides a very simplistic and partial legal picture of the complex reality of human lives and experiences."[346] Willard Gaylin[347] has an interesting additional proposition to answer to this danger by proposing to move beyond the exclusive use of the concept of Kantian autonomy in human dignity discourse and to look at what other typical attributes of the human being give it its worth, even when its autonomy would be questioned. He points out that the human species is the "glory of creation" possessing so many more attributes than autonomy alone, like for example the range of our emotions and the freedom from instinctual fixation[348]. The point being made here is this: where the Kantian autonomy theory is seen by literature as at least a leading notion of human dignity in European human rights theory, it alone is not enough to come to the right application of human dignity provisions in laws, for example the EU Charter. As Gaylin stressed already almost 30 years ago, we need to move beyond autonomy alone and see the human being and its dignity in a much broader context[349]. This context not only includes for example Gaylin's attributes or consideration of Cattaneo's critique, but also the whole sphere beyond mere human reason, such as the human being's transcendence and the relationship to its creator.

Oliver Sensen presents an interesting critique of the commonly held view in Kantian literature – as also expressed above – which holds that Kant understood human dignity as an absolute inner value of each human being which also constitutes the reason why one

[346] Catherine Dupré, Unlocking Human Dignity: towards a theory for the 21st Century, in: European Human Rights Law Review 2009-2, p. 193
[347] Ibid. Gaylin, In Defense of the Dignity of Being Human, pp. 18-22
[348] See: Ibid. Gaylin, In Defense of the Dignity of Being Human, p. 21
[349] This is also the main thesis Dupré presents in her 2009 article: Ibid. Catherine Dupré, Unlocking Human Dignity: towards a theory for the 21st Century, pp. 190-205

should respect other human beings[350]. In his paper Sensen argues that contrary to what is generally accepted among Kantian scholars, Kant did in fact not see dignity as an inner value at all. Sensen presents the thesis that Kant rather viewed dignity as a sublimity, an elevation of the human being above all else. This is something different than the common view on Kant's dignity theory that speaks of its value in terms of 'absolute', 'inner' and 'unconditional'[351]. There is an important distinction to be made, Sensen argues, between the value-understanding and the elevation-understanding of human dignity. Sensen distinguishes three "paradigms of dignity" that explain this distinction: first, the *contemporary* paradigm seeing human dignity as a "non-relational value property human beings possess that generates normative requirements to respect them." Second, the *archaic* paradigm seeing dignity not as a value of the human being but as an elevation the human being can earn or loose. Thirdly, there is the *traditional* paradigm that holds that human beings have an exclusively elevated position in nature because of possessing attributes like freedom and especially reason, whereby the duty exists to make good use of the latter[352]. Sensen claims that it is not the *contemporary* paradigm of human dignity that Kant represents, but the *traditional* one. He supports his argument with a detailed analysis of all the instances Kant speaks about dignity in his published works and he comes to the conclusion that in each case Kant was actually meaning the *traditional* human dignity notion of elevation and duty. In Sensen's analysis, the *traditional* paradigm has two stages of elevation that are both referred to as 'dignity'. It concerns the stage of the initial dignity that every human being has by virtue of reason and freedom, and subsequently the duty (read: the categorical imperative) to make proper use of these attributes in order to fully realize one's "initial dignity"[353]. As we see, these dignity notions focus on the holder of the dignity, not, as is the case with the *contemporary* paradigm, on the dignity of others. This theory of Sensen offers an interesting addition to what Kobusch and Bielefeldt say where they argue that there is no real contradiction between Catholic and Kantian human dignity theories. Sensen in this regard specifically refers to Christian and Renaissance thought where he sees the basic structure of the

[350] Ibid. Sensen, Kant's Conception of Human Dignity, pp. 309-310
[351] See: Ibid. Sensen, Kant's Conception of Human Dignity, p. 311
[352] See: Ibid. Sensen, Kant's Conception of Human Dignity, pp. 312-313
[353] See: Ibid. Sensen, Kant's Conception of Human Dignity, p. 314 + 331

traditional paradigm clearly represented[354]. But one has to add here that this basic structure is not enough to make Kantian human dignity theory the same as the specifically Christian tradition that is represented by Catholic writers and in documents of the Catholic Church. For example, Sensen holds that in Kant's writings "The absolute worth of human beings is secondary to and depends upon a morally good will."[355] As we discussed above, the Christian tradition does speak of the duty to act morally and holds that this has an influence on one's dignity, yet it always holds high that every human being has an inalienable human dignity that is a given and which is independent of its actions and can never be taken away, not even by oneself. Although one could see a parallel here with the two-leveled dignity that Sensen describes as the *traditional* paradigm, it must be clear that it is essentially different from the Christian notion whereby the human being's basic dignity does have an absolute character through its divine link. At the same time however, Sensen's analysis does give an explanation to the discrepancy Cattaneo observed between Kant's categorical imperative and his views on the death penalty and corporal punishment that we discussed earlier. When Kant indeed makes the dignity of the human being dependent on its morally good will, then it should be no surprise Kant proposes harsh and undignified treatment for those refusing to act with a morally good will. In this perspective such people would not even be entitled to treatment that would respect their human dignity, since they do not adhere to Kant's own categorical imperative.

4.4. Gerhard Luf

Gerhard Luf in his analysis of Kant's contribution to human dignity theory first observes – like Heinefeldt and Kobusch – that the notion of human dignity was obviously not invented by Kant but is a further development of the Stoic, Christian, humanistic and Enlightenment philosophical traditions. What Kant specifically contributed to human dignity theory, Luf says, is *"(...) dass er in aller Radikalität den unbedingten Wert der Person, eben ihre Würde, in der Freiheit des Menschen zu verantwortlicher Selbstbestimmung fundiert und solcherart ins Zentrum moralphilosophischer Reflexion*

[354] See: Ibid. Sensen, Kant's Conception of Human Dignity, p. 313
[355] See: Ibid. Sensen, Kant's Conception of Human Dignity, p. 327

gedruckt hat."[356] Note the central role Luf gives to "*Freiheit*". In Luf's explanation of Kant's human dignity understanding human freedom is the foundation of it all, a fact we already discussed in the introduction to this chapter. Where Kant uses the terms 'dignity', 'autonomy' and *'Selbstzweckhaftigkeit'*, Luf explains, they are systematically speaking interchangeable terms that all express an adequate understanding of the concept of human freedom[357]. This notion of human dignity founded in freedom then needs to be adapted for its use in the legal tradition, since Kant formulated his human dignity principles mostly in a moral-philosophical context that cannot be applied one-on-one as legal norms. Here Luf makes a crucial point that is often overlooked in modern human dignity discourse. Luf points out that merely transferring concepts of moral autonomy to the law could lead to loosing the categorical distinction between morality and legality[358]. Moral autonomy as an expression of self-determination should never be enforced by the law, Luf warns, since that would mean instrumentalising the freedom-threatening force of law to do good. What constitutes the bridge between Kant's autonomy as the basis of human dignity and the application of human dignity principles in the law is *"die Anerkennung und den Schutz der vitalen Voraussetzungen sittlichen Subjektsseinkönnens, also jener Bedingungen, die für die Garantie der körperlichen bzw. Seelischen Integrität von Menschen maßgeblich und notwendig sind."*[359] So it is indeed possible, Luf concludes, to apply Kant's principles in a legal context as long as the law guarantees the integrity of the whole human being necessary for it to be able to make free moral choices. Not doing so would mean that the law itself violates the human dignity it is meant to uphold because it takes away the freedom to act in a self-determining way. Not allowing this freedom of self-determination to all human beings would mean that certain human beings end up completely at the mercy of the interests of other human beings or the specific objectives of a given society. This would mean the instrumentalisation of human beings and their individuality as a means, which denies their personhood[360]. Luf cites an impressive piece of case law by the BVerfG to highlight his point that in the end, Kant's formula of self-purpose can be applied as a criterion to evaluate laws and legal procedures:

[356] Ibid. Gerhard Luf, Menschenwürde als Rechtsbegriff, p. 266
[357] See: Ibid. Gerhard Luf, Menschenwürde als Rechtsbegriff, p. 267
[358] See: Ibid. Gerhard Luf, Menschenwürde als Rechtsbegriff, p. 275
[359] Ibid. Gerhard Luf, Menschenwürde als Rechtsbegriff, p. 277
[360] See: Ibid. Gerhard Luf, Menschenwürde als Rechtsbegriff, p. 277

"Der Satz 'der Mensch muss immer Zweck an sich selbst bleiben' gilt uneingeschränkt für alle Rechtsgebiete; denn die unverlierbare Würde des Menschen als Person besteht gerade darin, dass er als selbstverantwortliche Persönlichkeit anerkannt bleibt."[361]

Luf herewith presents convincing evidence of what we noted earlier, namely that the German post-War legal tradition cannot be understood without acknowledging the influence of Kant and his notion of human dignity.

An up-to-date and better informed Kant-interpretation, Luf says, should be able to bring forth a clearer framework in which these complex questions can be answered. Part of this framework Luf already provides himself. First, he cautions against using human dignity either as only a very restricted principle to deal with the most barbarous of crimes and thus severely limiting its scope, or to degrade the principle into an *'Allerweltsformel'* that can be used for whichever interest one would like to forward[362]. Second, Luf echoes Christian Starck and others in underlining the vital importance of avoiding the tendency – that is also widely present amongst modern adherents to Kant's theory – to do away with the metaphysical dimension of human dignity for the sake of finding a basic common denominator of ethical principles. One could add here that the metaphysical dimension of human dignity was certainly not disputed by Kant. When rejecting the metaphysical dimension, Luf rightly points out, we merely end up with wholly unreflected 'new' metaphysical premises[363]. Kant himself would surely agree where he for example puts it quite strongly in his *Metaphysics of Morals*: "But his *thought* must always go back to the elements of metaphysics, without which no certitude or purity can be expected in the doctrine of virtue, nor indeed any moving force."[364] Kant underlines how any moral principle can only be rooted in this metaphysical dimension "that is inherent in every human being because of his rational predisposition (…)"[365] A moral principle can never be based upon any feeling, he says. This latter assertion by Kant highlights a tendency

[361] BVerfGE 45, 187, in: Neue Juristische Wochenschrift 1977, 1526. See also footnote 41, p. 277 in: Ibid. Gerhard Luf, Menschenwürde als Rechtsbegriff
[362] See: Ibid. Gerhard Luf, Menschenwürde als Rechtsbegriff, pp. 279-280
[363] See: Ibid. Gerhard Luf, Menschenwürde als Rechtsbegriff, p. 280
[364] Ibid. Kant, The Metaphysics of Morals, Part II, [6:376], p. 142
[365] Ibid. Kant, The Metaphysics of Morals, Part II, [6:376], p. 142

that can also be clearly seen in the current debate on human dignity and its implementation. The application of human dignity as the *"Allerweltsformel"* Luf speaks of is often inspired by presumed moral principles that lack a reasoned basis because they are almost exclusively rooted in feelings, opinions and preferences. One of many examples relevant here is the main argument used to justify euthanasia: the suffering of the person concerned has become "undignified" and his or her right to the protection of human dignity justifies death on demand[366]. No matter how horrendous the suffering of a person in such a situation can be, this argument completely lacks the metaphysical dimension of human life and is merely based on how this person *feels* about its suffering and what he or she *prefers* to do about it. Suffering is an unavoidable reality of human life, yet this reality cannot be understood when the metaphysical dimension is excluded. Euthanasia is of course subject of much debate and controversy, which goes beyond the scope of this research to discuss. Yet it is interesting to conclude the discussion of this example by once again letting Kant himself speak on the matter. On "willfully killing oneself" he says it is a violation of "one's duty to other people (…), as one's abandoning the post assigned him in the world without having been called away from it."[367] Once again, this quote of Kant highlights his adherence to the metaphysical dimension of the human being, which clearly lacks proper attention in the current euthanasia debate, as well as in most other debates on questions of life and death in (bio) medicine and science.

4.5. Kurt Seelmann and Joachim Hruschka

Kurt Seelman[368] gives a further useful analysis of the development of the post-War Kantian human dignity understanding. He outlines how in his view there is a – possibly deliberate - misunderstanding in Kantian literature as to the basis of Kant's human dignity notion. Seelmann argues that where literature on the subject is mostly in

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[366] The Swiss euthanasia association "Dignitas" puts it like this: "Der Verein „DIGNITAS – Menschenwürdig leben – Menschenwürdig sterben" (…) hat (…) insgesamt 1'067 Menschen geholfen, ihr Leben sanft, sicher, ohne Risiko und zumeist in Anwesenheit von Familienmitgliedern und/oder Freunden zu beenden.", in: So funktioniert DIGNITAS - Auf welcher philosophischen Grundlage beruht die Tätigkeit dieser Organisation?, Dignitas, second edition Juni, 2010, p. 2. Published on www.dignitas.ch (retrieved 25-3-2011)

[367] Ibid. Kant, The Metaphysics of Morals, Part II, [6:422], pp. 176-177

[368] See: Kurt Seelmann, Menschenwürde und die zweite und dritte Formel des Kategorischen Imperativs – Kantischer Befund und aktuelle Funktion, in: Menschenwürde – Begründung, Konturen, Geschichte by Gerd Brudermüller and Kurt Seelmann (ed.), Königshausen & Neumann 2008, pp. 67-77

agreement that the second paradigm of Kant's categorical imperative, namely that the human being is an end in itself, forms the basis for human dignity, a close reading of the relevant texts shows it is in fact the thrid paradigm, namely that the human being is capable of self-legislation, that forms the basis. This observation is relevant because deciding what the basis is of Kant's human dignity understanding sets the stage for the actual scope of protection either human dignity notion in a legal context gives. The second paradigm-based concept considers human dignity as a *given* of every human being regardless of its mental or physical state or stage of development and thus has the widest possible application. The third paradigm-based concept, in Seelmann's opinion, would require the actual capability to self-legislate, which would automatically exclude certain groups of human beings[369]. Although Seelmann tries to develop an argument that would enable the broad application of human dignity that stems from the second paradigm to also apply to the third paradigm, he finally comes to the conclusion himself that this is not possible. This leads Seelmann to concede that it is therefore preferable that either the "misunderstanding" remains in place for practical considerations, or that we deliberately limit the Kantian human dignity notion to its basis in the second paradigm of the categorical imperative[370]. Seelmann's observation points to a problem we observed earlier with an interpretation of Kantian thought or other schools of thought where it comes to an often applied notion of human autonomy that gives prime importance to the mental and physical capability to 'live' its autonomy and human dignity. This limits human dignity to those that can use reason expressively and therefore denies the inherent quality of human dignity in every other human being because it applies this autonomy as an argument to deny the equal dignity of somebody unable to express it. In its extreme, such a line of thought leads to the radical utilitarian observations the well-know philosopher Peter Singer makes on the value of human life, where even young children are denied equal dignity and the right to life because they are dependent. Once again we quote Luf where he underlines that the actual capability to use reason is not relevant in Kant's human dignity understanding but only the fact of belonging to the human species:

[369] See: Ibid. Seelmann, Menschenwürde und die zweite und dritte Formel des Kategorischen Imperativs, pp. 74-75
[370] See: Ibid. Seelmann, Menschenwürde und die zweite und dritte Formel des Kategorischen Imperativs, p. 77

"Denn der Begriff der Würde ist wie jener der Freiheit ein praktischer Vernunftbegriff, der alle empirischen Entwicklungsstadien des Menschen überschreitet und in seiner apriorischen Dignität daher nicht vom tatsächlichen Vorhandensein oder Nicht-Vorhandensein spezifischer Fähigkeiten abhängig gemacht werden darf."[371]

In this perspective Kant's theory presents us with, Luf goes on to say, dignity belongs by principle to the each and every human being. Joachim Hruschka puts it even stronger where he says that full human dignity according to Kant belongs to every human being from conception onwards. He writes "every human being is a person and thus an end in itself" and "'the conceived' is also 'a person'"[372] Hruschka therefore rightly sees human embryos and fetuses as fully equal to born human beings, and he supports his argument with Kant's own words that it is "in practical respects a completely correct and also necessary idea to see the act of conception as an act through which we have placed a person…in the world."[373] Hruschka goes on to warn that the death of the notion of human dignity is immanent where this fundamental principle is not respected and where the human being sees itself only as a rational natural being (what Kant calls the *Homo Phaenomenon*) rather than also an intellectual being (*Homo Noumenon*). Such merely rational natural being therefore has – in Kantian terms - a price because it has relative value only. The human being becomes a good, a thing and thus it is substitutable. Consequentialism and utilitarianism are the result, Hruschka argues, of which the theories of Peter Singer are the most extreme example[374]. Hruschka then makes an important point that underlines the importance that we have discussed already of the radical approach to human dignity being equally applicable to each and every human being from conception onwards. If we do not apply this as the minimal guarantee – that even Kant seems to propose – we quickly drift towards a human dignity system in which the application of this notion depends on qualifications to human life where one human being decides over

[371] Ibid. Gerhard Luf, Der Grund für den Schutz der Menschenwürde, p. 48
[372] Joachim Hruschka, Kant and Human Dignity, in: Kant and Law, edited by B. Sharon Byrd and Joachim Hruschka, Ashgate 2005, pp. 81-82 (originally published 2002 in German in: Archiv für Rechts- und Sozialphilosophie 88, pp. 463-480
[373] Ibid. Hruschka, Kant and Human Dignity, see his footnote 91 on page 82
[374] See: Ibid. Hruschka, Kant and Human Dignity, pp. 82-83

another. Since this can only be an empirically-based exercise, it is per definition prone to arbitrariness and therefore inevitably leads to the undermining and eventual death – as Hruschka warns – of the notion of human dignity itself. The current mainstream understanding of human dignity in Europe is in fact already very much advancing towards this arbitrariness. We will discuss this in greater detail in the following chapters. Neither Kant's human dignity theory nor the Christian understanding of human dignity justifies this unfortunate development.

4.6. Heiner Bielefeldt

We already discussed Heiner Bielefeldt briefly above, but his various contributions to post-War Kantian literature and human dignity discourse deserve further discussion.
In his analysis of the notion of human dignity within the Kantian tradition Bielefeldt gives a frank analysis of what human rights in reality are. Human rights, he says, are the expression of the "ambivalence of modernity"[375]. On the one hand they are an answer to the experience of gross injustices in modern history, whilst on the other hand they reflect the relatively recent (post-War) development of an ethos of universal freedom into political discourse and operational legal norms. This has amongst others led to new interpretations of the notion of human dignity and Bielefeldt sees Kant as the best orientation-help to come to a universal understanding of this idea. Human dignity, Bielefeldt also reiterates, is a "given" of human life which cannot be ignored, even if one would want to[376]. It finds its origin in the human being as capable of and destined to morality[377]. This is what Kant calls autonomy. According to Bielefeldt the "revolutionary" consequence of this theory is that Kant does away with any form of materializing or categorizing human dignity and makes it an absolute which does not recognize any degrees of application[378]: *"Die Unverrechenbarkeit der Würde impliziert die strikte Gliechheit der Menschenwürde – wie immer auch gesellschaftliches Ansehen und Stellung der Menschen differieren mögen."* Kant clearly sees dignity and honor as

[375] See: Ibid. Bielefeldt, Philosophie der Menschenrechte, p. 45.
[376] See: Heiner Bielefeldt, Kants Symbolik: ein Schlüssel zur kritischen Freiheitsphilosophie, in: Alber-Reihe praktische Philosophie volume 69, Alber Verlag 2001, pp. 69-70
[377] See: Ibid. Bielefeldt, Philosophie der Menschenrechte, p. 64
[378] See: Ibid. Bielefeldt, Philosophie der Menschenrechte, p. 64

completely different concepts[379]. For Kant, it is understandable through reason *"dass die Menschenwürde etwas völlig anderes sein muss als ein materialer Wert neben anderen Werten. Die Würde des Menschen kann nicht durch das Gesamt einer objektiven 'Wertordnung' mediatisiert werden, sondern findet ihren Grund in der sittlichen Autonomie des Menschen als der Bedingung der Möglichkeit materialer Werte überhaupt."*[380] What Bielefeldt says here is quite essential to giving human dignity the right place in the ordering of society. According to this Kantian principle, human dignity is not a mere value that can be compared, let alone ranked, with other values. It is a foundational "stand-alone" principle necessary to even be able to speak about the values of a society. This also means that this principle cannot be changed without undermining the value-system as a whole based on it. But in order for this understanding not to remain an abstract notion difficult to implement, it needs to find a form in the legal system able to specify the principle as an operative norm[381]. For Kant, the two basic and equal premises in such a legal system would need to be liberty (freedom) and equality. They are intrinsically connected, Bielefeldt underscores, and also a given of the human being[382]. Liberty and equality constitute the basis for the one and same dignity of every human being as well as for the legal system that protects it[383]. Kant's theory of moral autonomy and the modern equality movement inspired by it, Bielefeldt argues, is not – as some argue - an effort to level the social structure of society, but rather brings to fruition the true greatness of the human being, its moral autonomy and therefore its dignity: *"Sie ist denkbar nur als die eine und gleiche Würde eines jeden: als eine Würde jenseits aller gesellschaftlichen 'Würdigkeiten'"*[384]. Human dignity is inseparably both the normative limit as well as the foundational principle of the rule of law, which is why the state has the duty to protect it. Limit and foundation belong together, Bielefeldt says, because the protection of human dignity by law is only possible when the rule of law limits itself to that which regulates the external aspects of human interaction, whilst not interfering with

[379] See: Ibid. Bielefeldt, Philosophie der Menschenrechte, p. 65
[380] Ibid. Bielefeldt, Philosophie der Menschenrechte, p. 63
[381] See: Ibid. Bielefeldt, Philosophie der Menschenrechte, p. 67 as well as: Ibid. Bielefeldt, Kants Symbolik, p. 117
[382] See: Ibid. Bielefeldt, Philosophie der Menschenrechte, pp. 70-71
[383] See: Ibid. Bielefeldt, Philosophie der Menschenrechte, p. 70
[384] Ibid. Bielefeldt, Kants Symbolik, p. 75

the equal freedom of the human being in choosing its individual relations[385]. This is what Bielefeldt calls the necessary differentiation between law and moral when dealing with human dignity, whereby moral autonomy is inalienable:

"Nur die Indirektheit, *in der das Freiheitsrecht auf die Würde des Menschen als sittlich autonomes Subjekt verweist, verleiht der Rechtsordnung ihre symbolische Qualität als institutionelle Verkörperung des Respekts der Menschen voreinander, dessen letzter Geltungsgrund, die sittliche Autonomie, jeden direkten Zugriff entzogen blieben muss."*[386]

Bielefeldt clearly rejects religious principles as decisive for the interpretation and application of human dignity in modern pluralistic society, pointing out that even the drafters of the German Basic Law voted to describe human dignity in strictly secular terms[387]. This point of departure, Bielefeldt argues, should also be leading for international legal instruments including human dignity provisions, such as the EU Charter. He forwards – in line with the Kantian tradition – a model of human dignity discourse that is founded on rational arguments and practical ethics such as human beings recognizing and assuming responsibility ('*Verantwortung*')[388]. Bielefeldt here proposes to understand the notion of human dignity as a purely "secular concept"[389]. He however cautions that the qualification as a secular concept does not mean that religious thought is not relevant for human dignity at all, only that the latter's existence is independent from it[390]. In this regard Bielefeldt seems to contradict what various other writers discussed in this research, such as for example Spaemann, have argued about the notion of human dignity in which the Christian understanding of the human person is considered as decisive for its application. Here we see highlighted what Maritain and John Paul II already pointed out as the fundamental difference between Kantian and traditional

[385] See: Ibid. Bielefeldt, Kants Symbolik, p. 111
[386] See: Ibid. Bielefeldt, Kants Symbolik, pp. 111-112
[387] Heiner Bielefeldt, Auslaufmodell Menschenwürde? Warum sie in Frage steht und warum wir sie verteidigen müssen, Herder-Verlag 2011, p. 145
[388] See: Ibid. Heiner Bielefeldt, Auslaufmodell Menschenwürde?, pp. 31-36
[389] Ibid. Heiner Bielefeldt, Auslaufmodell Menschenwürde?, pp. 156-157
[390] See: Ibid. Heiner Bielefeldt, Auslaufmodell Menschenwürde?, p. 158, where he refers to Jürgen Habermas making this same point of the "independence of the human dignity notion"

Christian thought on the human person, namely the nature of its finality[391]. The latter tradition has the autonomous self as its finality, while the former tradition considers this to be God. Bielefeldt is right though in underlining that the *existence* of the attribute of human dignity *itself* is independent from any given religion, religious interpretation or understanding of the order of finality. Human dignity is a given of human life and in spite of various understandings as to its origins and purpose it will always remain the same. The challenge for mankind is to continue unlocking the mystery of its deepest meaning.

[391] Ibid. Jacques Maritain, Moral Philosphy, pp. 101-103

Chapter 5: The Christian and the Kantian basis

5.1. The "Four Accounts Approach" of Lebech

In concluding and summarizing this part of our research on the philosophical roots of the legal concept and the legal principle of human dignity in post-War Europe, Mette Lebech provides for a useful ordering of the different human dignity theories that influence the current understanding of the notion[392]. In her "Four Accounts Approach" Lebech distinguishes between the *cosmo-centric*, the *Christo-centric*, the *logo-centric* and the *polis-centered* approach to human dignity. Human dignity as we know it today, Lebech argues, cannot be properly understood without taking all these four approaches into consideration[393]. The basis for Lebech's approach is furthermore that a distinction needs to be made between the *principle* of human dignity and the *idea* of human dignity (not to be confused with the distinction we make between the legal principle and the legal concept of human dignity):

"The principle of human dignity, as a universal affirmation that human beings have the highest value, does not itself have a history, because a universal statement is meant to have limits neither in space nor in time. But the idea of human dignity does have a history in so far as it has been thought to rely on various things and consequently been accounted for in various ways."[394]

Lebech goes on to say she distinguishes four stages in the development of the *idea* of human dignity, whereby each stage developed in its own historical context and can be seen as a source of the idea of human dignity as it is ultimately expressed in the *Universal Declaration of Human Rights*. These four accounts coexist in the current discourse on human dignity: at times they overlap and at other times they conflict with

[392] Mette Lebech, What is Human Dignity?, in: Maynooth Philosophical Papers - edited by M. Lebech, National University of Ireland Maynooth 2004, pp. 59-69. Available on the University's website: http://eprints.nuim.ie/392/ (retrieved 18-4-2011). See also: Mette Lebech, Towards a Definition of Human Dignity, in: La cultura della vita: Fondamenti e dimensioni, Supplemento al volume degli Atti della VII Assembla Generale 1-4 marzo 2001, Città del Vaticano: Libreria Editrice Vaticana 2002, pp. 87-101
[393] See: Ibid. Lebech, What is Human Dignity?, p. 12
[394] Ibid. Lebech, What is Human Dignity?, p. 2

each other, yet neither one suffices alone to understand human dignity in today's context[395].

The cosmo-centric framework[396], to which Aristotle and Cicero are the main contributors, sees human beings as having a fundamental value because they have *dominion*, both moral and physical. Their human nature allows them to dominate their passions and other people and the animal kingdom. The Christo-centric framework, based on the Bible and to which Thomas Aquinas and the Scholastics contributed importantly, sees human beings as having fundamental value because they are made in the image and likeness of God – *imago Dei* – and therefore are a reflection of God the creator who is the originator of all being and value. The resulting relationship with God is of equal importance for this fundamental value of the human being. The logo-centric framework, mostly inspired by Kant, sees human beings to have dignity because of *reason* and *autonomy* and their capability to understand the consequences of their actions. The polis-centric framework, according to Lebech much inspired by Mary Wollstonecraft, sees human dignity as based on *experience and recognition within society* and therefore a forgeable concept that includes no absolute value and thus easily leads to utilitarian approaches to human dignity. It is therefore the trickiest of the four frameworks, as it is easily applied as a tool of political influence rather than a principled idea. This Lebech recognizes indirectly when she explains the polis-centric framework as a result of the social development of the common people that only started during the Enlightenment: "The idea of human dignity was the linguistic tool by which they themselves gained self-esteem and political influence (…)"[397]. It is this framework we find to present the biggest challenge to human dignity understanding in the current European legal setting, as it is – unlike the other three approaches – not grounded in a clearly identifiable attribute of the human being but rather based on the current opinion of society and mostly empirically oriented. This can hardly be a sustainable basis for a viable notion of human dignity.

Lebech concludes: "Human dignity as the fundamental value of human beings is common to the frameworks treated, yet each understands it to rely upon, or to be conditioned by,

[395] See: Ibid. Lebech, What is Human Dignity?, pp. 8, 11
[396] See for a detailed discussion of the four approaches: Ibid. Lebech, What is Human Dignity?, pp. 3-10
[397] Ibid. Lebech, What is Human Dignity?, p. 8

different features of human reality."[398] Adherents to each of the four theories would agree that human dignity pertains to the individual human being as a whole, and not only merely to one of its different attributes as here described. Yet there is clear disagreement about the source of the universality of this principle. Already Jacques Maritain, whom we discussed at length above, saw this problem when co-drafting the Universal Declaration and therefore settled for a "practical assertion"[399] of a list of human rights based on a notion of human dignity that was held to be universal without there being an agreement on its philosophical or theological origins. As the jurist Frans Alting von Geusau rightly points out, following the Second Word War, such practical agreement on these universal norms was only possible because of the specific historical context within which the Western world found itself at that time[400]. The Universal Declaration could be passed firstly because of the awareness of the gross violation of these fundamental rights by Nazi-Germany and Stalin's regime, and secondly due to the common understanding in the West at the time that the protection of dignity and rights against state-sponsored violation called for international supervision. This historical experience and its political and legal consequences therefore beg the question whether Lebech's four approaches should not be extended to include what we would call a conscience-centred approach. As we will discuss in greater detail in Part II, it was the *revolt of conscience* following Hitler's and Stalin's atrocities that led to the inclusion of the notion of human dignity into a system of international human rights law and especially European law. The polis-centred approach covers this partly through its inclusion of experience but insufficiently addresses the reality of conscience as a defining element of the notion of human dignity. Where the polis-centred approach puts too much emphasis on opinion and power, a conscience-centric approach would add the element of the voice of the human soul; throughout history it has always spoken out in the face of extreme suffering and persecution.

[398] Ibid. Lebech, What is Human Dignity?, p. 10
[399] Ibid. Maritain, Man and the State, p. 79
[400] Frans A.M. Alting von Geusau, Woher die Verwirrung?, in: Europa der Grundrechte? – Beiträge zur Grundrechtencharta der Europäischen Union, Gudrun V. Lang and Michael F. Strohmer (ed.), Edition Pro Mundis 9, Verlag für Kultur und Wissenschaft 2002, pp. 142-158

In her final analysis, Lebech concludes with one thought that is central to understanding human dignity, yet at the same time mostly very difficult to appreciate outside of the Christian context[401]. She says:

"We call the pure appreciation of the individuality of the other self, love. Love sees potential everywhere, even where great effort is needed to bring it to fulfillment. It also bears disappointment and understands, where only rudiments of meaning seem to exist. It advocates the rights of the weak, the young and the old, and it protects them against abuses by stronger parties and interests. Against this background it is not so strange that it is only in love that we adequately identify the other, and therefore not so strange either that we should have to rely on it in practice in order to give content to the idea of human dignity. What we say when we claim that the principle of human dignity is the basis of the international world order, is that this world order should be a civilisation of respect and love."[402]

What makes the Lebech approach so useful for understanding today's human dignity principle and its application in the legal sphere is that it recognizes that the legal concept or legal principle of human dignity can only be applied when the notion (idea) of human dignity is recognized as containing various components that are to be regarded jointly. Where human dignity is inalienable and thus unchangeable, understanding it, as history shows, is a process of humanity that goes through various stages of development. This process is ongoing.

5.2. Summary: Overlapping and contradicting positions

We have analyzed in detail what are the most important post-War philosophical sources of the legal concept of human dignity in general and the legal principle of human dignity as it is now codified into EU law through the EU Charter. The two main schools of thought on human dignity have been discussed: the Christian, mostly Catholic, tradition

[401] Interestingly Jürgen Habermas seems to share this approach where he in this context speaks of 'solidarity' instead of 'love' or 'charity'. See. Jürgen Habermas and Joseph Ratzinger, The Dialectics of Secularization – On Reason and Religion, Ignatius Press 2006, pp. 22, 29-34

[402] Ibid. Lebech, What is Human Dignity?, pp. 11-12

which revolves around the imago Dei concept and the intrinsic, absolute and equal value of every human life from the moment of conception, and the Kantian tradition and its further European development with its specific emphasis on the absolute autonomy of the human being and it being an end in itself. From a jurist's point of view, McCrudden puts the two main elements of Kantian human dignity theory as follows: individuals should be treated as ends in themselves and not means to an end, and dignity is defined by treating individuals as autonomous beings able to choose their own destiny.[403] Following Lebech's approach where she distinguishes the four frameworks within which the notion of human dignity developed, the Christian and Kantian traditions would fall within the Christo-centric and logo-centric approaches. Although we agree with Lebech that it is necessary to take all these approaches to human dignity into consideration for better understanding, the Christian and Kantian concepts are certainly the most important for understanding human dignity in its European legal context, along with the historical dimension to be discussed in the next chapters[404]. By way of concluding our philosophical discussion on the notion of human dignity we will now briefly outline the overlapping and contradicting positions in the Christian and Kantian approaches.

The most important difference between the Christian and Kantian human dignity understanding is how its ultimate source is perceived. In the Christian tradition this source has consistently been the *imago Dei* principle, found in the Book of Genesis, telling us that the human being is created in the "image and likeness of God". The extensive literature on the Christian notion of human dignity cannot be understood without starting from this fundamental Biblical premise. The Kantian tradition, on the other hand, whilst not specifically denying the *imago Dei*, tells us that human dignity finds its true origin in the fact that the human being is a free being with the capacity to reason and therefore possesses absolute autonomy. As the philosopher Jürgen Habermas rightly points out, Kant does not really define human dignity as such, but rather integrates

[403] See. Ibid. Christopher McCrudden, Human Dignity and Judicial Interpretation of Human Rights, pp. 659-660

[404] As we will see later the historical dimension of human dignity is closely linked with the conscience-centred approach we advocate, as well – to a lesser extend – with the polis-centred framework. The cosmo-centric approach, although still relevant by itself, mostly is of historical-philosophical relevance: the classical Greek understanding of human dignity rooted in status and power is not applied in Europe today.

it into his key concept of autonomy. Habermas says: *"Interessanterweise erhält bei Kant die menschliche Würde keinen systematischen Stellenwert; die ganze Begründungslast trägt die moralphilosophische Erklärung der Autonomie."*[405] The consequence of these two different fundamental approaches to human dignity is that one – the Christian concept – is clearly transcendental whilst the other – the Kantian concept – is not, at least not visibly so. In the Kantian tradition the relationship between the creator and the created does not enjoy the same primary importance as it does in the Christian tradition. Where the human being's relationship with God the creator cannot be omitted to understand the Christian human dignity tradition, following the Kantian school this would be possible, some would argue even necessary, as we can conclude by the fact that the Kantian human dignity theory is so widely accepted, by Christians and non-Christians alike. Where in the Christian tradition the creator is at the forefront of human dignity, Kant has given it a background position. It is this aspect that is also much prevalent in modern human dignity thinking in Europe: autonomy is clearly recognized as the fundamental if not the only relevant aspect of human dignity, yet the relationship of a human being to God is mostly left in the sphere of "the private religious opinion" and is therefore not seen as necessarily relevant within the framework of the public affirmation of human dignity. In other words, it is the difference between human dignity as a purely rational principle of human life and human dignity as a broad principle of what it means to be human, including its physical, social, intellectual and spiritual dimensions. Where the Christian tradition focuses on the oneness of the person in all its facets and a finality that exists beyond itself, the Kantian position is mostly concerned with its absolute autonomy, leaving transcendence in the background and seeing the human being as a fully independent end it itself. Maritain, in his earlier quoted critique on Kant, expresses it as follows: "But it is not only in the name of pure disinterestedness of ethical motivation, it is also and above all in the name of the autonomy of the will that for Kant the absolute ultimate end must be eliminated from the constitutive structure of ethics and

[405] Jürgen Habermas, Das utopische Gefälle. Das Konzept der Menschenwürde und die realistische Utopie der Menschenrechte, in: Blätter für deutsche und internationale Politik, 8/2010, p. 50. Also available in English: Jürgen Habermas, the Utopian Gap. The Concept of Human Dignity and the Realistic Utopia of Human Rights, in: Metaphilosophy, Volume 41, Issue 4, July 2010, pp. 464-480

from the proper domain of the moral life. God plays no role in this domain. (..)"[406] Maritain therefore concludes that the dignity of the person in Kant's ethical theory can "only obey itself" because the only legislator is the *Practical Reason.*[407]

Where the two schools of thought overlap on the notion of human dignity is that the Kantian school took the Christian tradition and so to say selected the gift of reason – the latter which, as we have discussed extensively, is obviously much recognized and discussed throughout the Christian tradition - as that attribute of the human being to be given the highest place and to be further developed. Out of this development then grew the theory of the primacy of autonomy. The two traditions overlap where they see that reason is one of the key attributes that distinguishes the human being from all other living creatures and therefore makes it so unique within the order of nature. Yet the two traditions diverge again when it comes to the consequences this has for formulating the dignity of the human being: where reason resulting in autonomy is considered as *one* of the defining aspects of human life in the Christian tradition, it is not seen as standing on its own and disconnected from God. It is part of being an image of God to possess reason, yet it can therefore also not be seen as separate from him. The human being's relationship to God is seen as all-defining for human dignity. Most of the post-War Kantian school however develops in a direction that raises reason and autonomy to a level of independence increasingly – and at times completely - leaving out the transcendental dimension which in Christian thought is the essence of human dignity itself. As Karl Rahner said, it is the personal relationship of God and Man that is the defining aspect of human dignity. In the Kantian tradition the defining aspect is understood to be the lived autonomy of the human being ruled, in the words of Maritain, by the law of Pure Practical reason.

Further positions that overlap are the equal dignity of all human beings defended by both traditions as well as moral consciousness being the necessary compass in guiding human action to be in accordance with human dignity. Equally important is the overlapping

[406] Ibid. Jacques Maritain, Moral Philosophy, pp. 101-102
[407] Ibid. Jacques Maritain, Moral Philosophy, p. 103

position on the pre-positive nature of human dignity: it is not something the human being created for itself or is able to dispense with, both traditions agree, but it is a defining and natural given element of human life. Jürgen Habermas describes this in other words where he says that *""Menschenwürde" [ist] keine Attrappe (ist), hinter der sich eine Vielfalt verschiedener Phänomene verbirgt, sondern die moralische "Quelle", aus der sich die Gehalte beliebiger Grundrechte speisen."*[408]

In his extensively researched study on human dignity and human rights law, McCrudden is able to identify a consensus on the existence of three core elements of human dignity amongst those who use the notion of human dignity within its historical and legal context. The first is the recognition of the intrinsic worth of every human being. The logical second element is that this intrinsic worth should be accepted and respected by others, whilst the third element is the requirement for the state, in recognizing this intrinsic worth, to exist for the sake of the individual human being, and not the other way around. McCrudden calls these the ontological, the relational and the limited-state claims together constituting the "minimum core"[409]. This minimum core, however, is merely a common notion of human dignity, without there being a philosophical or political consensus on its implications[410]. The notion of human dignity goes through continued and renewed stages of philosophical and historical development. The understanding of human dignity as we know it in Europe today is thus far from perfect and still incomplete.

We will now turn to a (legal) historical discussion of the notion of human dignity to gain a better understanding of its implications through the individual experiences of men and women. Once again Jürgen Habermas, makes this point forcefully:

"*Menschenrechte sind immer erst aus dem Widerstand gegen Willkür, Unterdrückung und Erniedrigung entstanden. Heute kann niemand einen dieser ehrwürdigen Artikel –*

[408] Ibid. Jürgen Habermas, Das utopische Gefälle. Das Konzept der Menschenwürde und die realistische Utopie der Menschenrechte, pp. 44-45
[409] See: Ibid. Christopher McCrudden, Human Dignity and Judicial Interpretation of Human Rights, p. 679
[410] Cf. Ibid. Christopher McCrudden, Human Dignity and Judicial Interpretation of Human Rights, pp. 679-680

beispielsweise den Satz "Niemand darf der Folter oder grausamer Strafe unterworfen werden" – in den Mund nehmen, ohne das Echo zu hören, das darin nachhallt: den Aufschrei unzähliger gepeinigter und hingemordeter menschlicher Kreaturen."[411]

[411] Ibid. Jürgen Habermas, Das utopische Gefälle. Das Konzept der Menschenwürde und die realistische Utopie der Menschenrechte, p. 44

PART II:

HISTORICAL ROOTS OF THE LEGAL PRINCIPLE OF HUMAN DIGNITY IN ARTICLE 1 EU CHARTER: VIOLATION, CODIFICATION AND CASE LAW

Chapter 1: Historical context - the revolt of conscience

1.1. Introduction: the revolt of conscience

The relevance of history for current law is well summarized by the Dutch legal scholar Hirsch Ballin who says: "Europe's legal history has been written not just in the ink of the pens of great scholars, but also in blood and tears."[412] Human dignity as a legal principle in the EU Charter today cannot be understood without specifically taking into consideration the rise and fall of three excessively violent regimes. These regimes were responsible for the biggest bloodshed in human history which had far-reaching consequences for countless individual men and women and for Europe as a whole. The historian Norman Davies chillingly summarizes how deep Europe actually sank:

"There are shades of barbarism in twentieth-century Europe which would once have amazed the most barbarous of barbarians. At a time when the instruments of constructive change had outstripped anything previously known, Europeans acquiesced in a string of conflicts which destroyed more human beings than all convulsions put together. The two World Wars of 1914-18 and 1939-45, in particular, were destructive beyond measure, and they spread right across the globe. (...) Future historians therefore must surely look back on the three decades between August 1914 and May 1945 as the era when Europe took leave of its senses. The totalitarian horrors of communism and fascism, when added to the horrors of total war, created an unequalled sum of death, misery and degradation. When choosing the symbols which might best represent the human experience of those years, one can hardly choose anything other than the agents of twentieth-century death:

[412] Ernst Hirsch Ballin, Law, Justice, and the Individual, Brill 2011, p. 8

the tank, the bomber and the gas canister: the trenches, the tombs of unknown soldiers, the death camps and the mass graves."[413]

Communism, Nazism and ethnic Nationalism were all three ideologies born on the European continent sharing an unprecedented *organized* disregard for human dignity. The bitter irony is that Nazism and Communism saw each other as arch-enemies and often justified their horrendous deeds by pointing to the danger posed by the other. Hitler already in his early days proclaimed the Jews and "their Marxist helpers" the cause of all evil and urged the need for their removal from German and European society, whilst even in post-War Eastern Europe most of the Soviet-led propaganda was still geared towards convincing the population that communist totalitarian rule was only defending Europe from fascism (in this case Nazism was actually meant) and was therefore necessary[414]. Yet it was almost as if Nazism, Communism and Nationalism competed for the doubtful distinction of most barbaric regime. The three regimes became experts in the large-scale and well-organized killing of innocent civilians by the state, all under the guise of a better future for their own "great nation" or "the workers". Statistical data illustrates this point well: the Nazi organized Holocaust alone, also called The Shoa, led to the death of up to 6 million Jews from 15 different European countries, the total number of *civilians* killed during World War II however being estimated at over 27 million; victims of the Soviet Gulag number 22 million between 1914 and 1945. The 1939-1940 deportation of civilians from Eastern Poland, the Baltic States and Romania led to an estimated 2 million deaths. The list goes on.[415] Timothy Snyder, in his much acclaimed work on the combined destruction caused by Hitler and Stalin between 1933 and 1945, points out that Nazism and Stalinism (the latter as an extreme form of Communism) had much in common, not only in ideology[416] but even more in what he calls the "Bloodlands"[417].

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[413] Norman Davies, Europe, a History - TENEBRAE, Europe in Eclipse, 1914-1945 Oxford - New York 1996, p. 897

[414] As we will discuss later, this Soviet propaganda, already started in the 1930'ties, has led to widespread confusion until today about the terms *Fascism* and *Nazism*, two distinctly different ideologies that are often confused.

[415] See: Ibid. Norman Davies, Europe – A History, pp. 1328-1329. Not all figures are based on recorded deaths but rather on post-War demographic shortfalls.

[416] See: Timothy Snyder, Bloodlands, Basic Books 2010, pp. 389-401, where he discusses these similarities in great detail.

[417] Ibid. Timothy Snyder, Bloodlands, pp. 379-380

"Bloodlands" refers to the geographical area in the middle of Europe extending from central Poland to western Russia through Ukraine, Belarus and the Baltic States. Here the Nazi and Soviet regimes between 1933 and 1945 committed most of their atrocities killing fourteen million people: "mass violence of a sort never before seen in history was visited upon this region."[418] Snyder calls the killing that took place in the *Bloodlands* the central event of European history.[419] These staggering facts are therefore the key to understanding the post-War European unification process and the rapid introduction of human rights legislation and human dignity language. Even though the number of deaths pertaining to the Balkan wars of the 1992-1999 period is much smaller, the utter cruelty and disdain for human dignity applied by the people involved bears close resemblance to the Nazi and Stalinist regimes. If the actors in the Balkan wars would have had the chance to continue, it is likely the number of deaths would have been much higher. Therefore an analysis of this more recent conflict is equally important to the understanding of human dignity discourse in Europe today.

Closer analysis of what brought these regimes to perform their murderous acts reveals a pattern of consistent disregard for the equal dignity of every human being as the root of their ideologies, whereby certain "races", "nationalities" or "class enemies" were suddenly degraded to virtual statelessness and therefore rightlessness. They were *dehumanized*. Regimes centrally decided upon the life and death of groups and individuals often using fear and age-old prejudices as a justification. Where Hitler decided the Jews or the handicapped were in need of extinction because of their "danger" or "burden" to society, Stalin equally sent millions of innocent people to their deaths because they were regarded as being "dangerous bourgeois elements" or "counter-revolutionary". Indeed, the historian Norman Davies puts it well when he says that the first half of the 20th century is "*the era when Europe took leave of its senses."*[420] Yet, in spite of this and many other like-minded observations and the grandly proclaimed treaties and laws that followed after 1945 enshrining human dignity and protecting human rights, Europe once more fell into the abyss of genocide when all thought the respect for human

[418] Ibid. Timothy Snyder, Bloodlands, pp. vii-viii
[419] Ibid. Timothy Snyder, Bloodlands, p. 380
[420] Ibid. Norman Davies, Europe, a History, p. 897

dignity had been firmly established on the European continent. In full view of the international media and armed UN peacekeepers, the likes of Milosevic and Mladic simply repeated the methods of Hitler and Stalin, only selecting different scapegoats to dehumanize. The Balkan wars at the end of the 20th century therefore painfully show us the fragility of the notion of human dignity as a guiding principle of governance and civil society.

The Jewish political theorist Hannah Arendt, in her influential work on *"The Origins of Totalitarianism"*, investigates this problem of the grandly proclaimed respect for human dignity and human rights failing to have any effect at all exactly at those events in modern history when it was most needed. She traces back the problem to the end of the 18th century when – as a result of the Enlightenment - Man himself became the only source of the inalienable dignity and rights of Man, thus also requiring a human structure such as the political community to be able to effectively guarantee these rights. Since however many Europeans in the 1918-1939 inter-war period as well as during and after the First and Second World Wars became minorities, stateless, refugees or were proclaimed undesired, they found themselves deprived of anybody caring about their 'inalienable rights'. No law protected them.[421] Helis paraphrases Arendt's point well where he says: "The political empowered simply cannot relate to the disempowered as equal members of humanity."[422] By way of illustrating the problem Arendt observes that these people would only be recognized by the law when they would commit a criminal offense. Only by becoming an offender of the law will the stateless or the refugee be noticed by it and gain protection from it like everybody else.[423] Hitler first deprived the Jews of all their rights and legal status in Germany and waited for no other country to "claim" them before he sent them to the extermination camps[424]. This was a carefully planned process of which Arendt concludes: "The point is that a condition of complete

[421] Cf. Hannah Arendt, The Origins of Totalitarianism, Meridian books – The World Publishing Company, 7th edition 1962, pp. 291-292, 294-295
[422] John Helis, Hannah Arendt and Human Dignity: Theoretical Foundations and Constitutional Protection of Human Rights, in: Journal of Politics and Law, Vol. 1, No. 3, September 2008, p. 73
[423] Cf. Ibid. Hannah Arendt, The Origins of Totalitarianism, p. 286
[424] Cf. Ibid. Hannah Arendt, The Origins of Totalitarianism, pp. 295-296

rightlessness was created before the right to live was challenged."[425] Following Hannah Arendt's reasoning, it was not so much the loss of specific human rights themselves that led to the mass murder of innocent civilians in 20th century Europe, but rather "the loss of a community willing and able to guarantee any rights whatsoever (..). Man, it turns out, can lose all so-called Rights of Man without losing his essential quality as man, his human dignity. Only the loss of polity itself expels him from humanity."[426] Indeed, as we will see with our analysis of Nazism, Communism and ethnic Nationalism, each of these regimes first deprived people of their "belonging to" and then went on to exterminate them when they were left literally 'homeless', with nobody caring about them. The Jews under Hitler, the Tatars under Stalin and the Bosnians under Karadzic all suffered this fate. The Srebrenica massacre of up to 8000 Muslim boys and men is the most recent illustration of this point.

Of course historical explanations for the notion of human dignity reach much further back into history, yet it was the combined human destruction in Europe caused by Communism (1917-1989, especially in the extreme form of Stalinism until 1953) and Nazism (1933-1945) that led to a *revolt of conscience*, which can be considered as the main thrust leading to the inclusion of the human dignity notion into the European legal framework. The 1992-1999 ethnic Nationalism that led to the Balkan wars was a stark reminder that the ghosts of mass killings on European soil had not been cast away by any of the international human rights treaties of the post-World War II era. It is therefore important to include an analysis of the methods of these three ideologies and their consequences in order to better understand the fragile notion of human dignity in the history of Europe and what is the deeper meaning of this widely used but little understood concept. In our brief historical discussion we will, through the use of concrete examples as reported by historical scholars, focus on analyzing the attitude primarily responsible for all human dignity violations throughout history: the deliberate dehumanization of individual human beings. Tim Snyder underlines the importance of not letting the sheer numbers of Europe's bloodletting lead to anonymity of the victims.

[425] Cf. Ibid. Hannah Arendt, The Origins of Totalitarianism, p. 296
[426] Ibid. Hannah Arendt, The Origins of Totalitarianism, p. 297

Every human being is irreducible, he reminds us again and again in "Bloodlands" through the personal stories of individual victims: "Each record of death suggests, but cannot supply, a unique life. We must be able not only to reckon the number of deaths but to reckon with each victim as an individual."[427] Human dignity cannot be understood otherwise.

1.2. Nazism

First of all a distinction needs to be made between *Nazism* and *Fascism*. The Nazi ideology was a German invention and originated with Hitler's National-Socialist Democratic Party (NSDAP) which came into existence in the same year that the First World War ended. The Fascist ideology is rooted in Italy and has Mussolini as its main author. Fascism had adherents and like-minded political movements in various European countries, whilst Nazism was mainly concentrated in Germany and Austria and later forcibly exported to some of the German-occupied countries. An important example of the difference between these two ideologies is the aspect of racism. Mussolini, although an ally of Hitler, did not adhere to the Nazi theory of the superiority of the Aryan race and related racist theories about the Jews. The confusion between these two terms finds its origin in Soviet propaganda which was introduced under Stalin in the 1930-ties and continued until 1989, whereby anything that was anti-communist (which was obviously not only Nazism) was labeled as fascist. In this research we will not discuss Fascism but focus on Nazism and the persecution of the Jews and other minority groups. Nazism was by far the more destructive of the two ideologies and studying it gives a deep insight into the motivations for human dignity violations in general.

The historian Martin Gilbert starts his analysis of the Nazi-perpetrated Holocaust with a pointed summary of how this organized disregard of human dignity worked in practice: "the strong helping the strong to attack the weak; this was to become a hallmark of Nazi action"[428]. He describes another attitude that was equally a hallmark of Nazi effectiveness, as described by a survivor who says the Holocaust "depended most of all

[427] Ibid. Timothy Snyder, Bloodlands, p. 407
[428] Martin Gilbert, The Holocaust – The Jewish Tragedy, Fontana Press 1987, p. 30

(…) upon the indifference of bystanders in every land"[429]. Indifference and right defined by might are thus the key elements contributing to the organized extinction of up to six million Jews and millions of other civilians between 1933 and 1945. Where the Jews were the largest persecuted group under Nazi rule, they were certainly not the only victims. Political opponents, the handicapped and infirm, Gypsies and Slavs also ended up in the gas chambers, the execution sites and the forced-labor camps, to name but some of the persecuted groups. Analyzing human dignity violations past and present, like for example slavery, the Rwandan genocide and the mass murder of Muslim men and boys in Srebrenica, shows that indeed the root of the problem lies in widespread indifference and unchecked political power leading to the dehumanization of "the other", mostly a minority or a weaker group. Human dignity, history teaches us, cannot therefore be a principle depending on the state. It has to be a principle that protects us from the state. As National Socialism has shown, the state or the political entity throughout history has often been either unwilling or incapable to protect human dignity. Human dignity has to be a notion universally recognized as finding its meaning in human nature itself, independent of the structures it is part of. The decisive – be it far too late - response of post-War Europe, the United States and Canada to the Nazi atrocities showed that indeed the human being is capable to understand vividly where human dignity is violated, without there being a need or even the possibility for the state to define it. Jacques Maritain noted this, as already quoted above, immediately after the War:

"Be it finally noted that when it comes to the application of basic requirements of justice in cases where positive law's provisions are lacking to a certain extend, a recourse to the principles of Natural Law is unavoidable, thus creating a precedent and new judicial rules. That is what happened, in a remarkable manner, with the epoch-making Nazi war crimes trials in Nuremberg."[430]

So it was the clearly visible violation of human dignity that enabled post-War Europe to prosecute the perpetrators, without there being the need of a functioning justice system at

[429] Ibid. Martin Gilbert, The Holocaust, p. 18
[430] Ibid. Jacques Maritain, Man and the State, p. 95 – footnote 12.

the time to base the Nuremberg convictions on. Conscience revolted at the sight of the abuse, and it has done so repeatedly in history, albeit mostly after a long period of ignoring the evil. In this chapter we will analyze through a number of concrete historical examples how the "dehumanization of the other" unfolded in the thinking and acting of those violating human dignity on such a massive scale, or turning a blind eye.

It should be noted first of all, and we should be constantly reminded of this in our often uncritical democracy-loving Western world, that the successful rise of Nazism in Germany is a convincing example of the fact that democracy is not always a guarantee for the rule of law and for the protection of human dignity. On 30 January 1933, Hitler came to power by democratic means, namely through the popular vote and subsequent political negotiations which led to German president Von Hindenburg inviting Hitler to become Chancellor, following existing constitutional procedures[431]. Once Hitler had taken possession of his new powers he then rapidly established a totalitarian regime through intimidation and the silent consent or indifference of the majority of Germans, including the elected parliament. One of Hitler's first legislative acts was to abolish the fundamental rights catalogue of the German constitution on 28 February 1933. He did this with an emergency decree entitled *"Zum Schutz von Volk und Staat."* and enacted by German president Von Hindenburg himself.[432] Hitler was not a new face in German politics appearing out of the blue. His anti-Jewish and publicly known race theories could be dated as far back as the end of the First World War. Hitler's NSDAP party (National Socialist German Workers Party), founded in 1919, already on 25 February 1920 proclaimed its distinctly anti-Semitic and racist intentions in its party manifesto, the *"Grundsätzliches Program"*[433]. The manifesto held: "None but members of the Nation may be citizens of the State. None but those of German blood, whatever their creed, may be members of the Nation. No Jew, therefore, may be a member of the Nation."[434] The anti-Jewish rhetoric was also to be found explained in detail in Hitler's published work

[431] See, amongst many others, Martin Gilbert: History of the Twentieth Century, Harper Collins Publishers, 2001, p. 215
[432] See: Fragen an die deutsche Geschichte – Ideen, Kräfte, Entscheidungen Von 1800 bis zur Gegenwart, Deutscher Bundestag Bonn 1986, p. 296
[433] Grundsätzliches Programm der nationalsozialistischen Deutschen Arbeiter-Partei, München 24 Februar 1930, in: Ibid. Fragen an die deutsche Geschichte, p. 292
[434] Ibid. Martin Gilbert, The Holocaust, p. 23

"Mein Kampf", in which he lamented the fact that up to 15.000 Jews had not been killed by poison gas at the beginning of the First World War[435]. The rhetoric of Hitler was soon backed up by the creation of the *"Sturmabteilung"*, better known as the Brownshirts or *SA*, supposedly to guard party meetings but mostly used to rough up and intimidate political opponents and Jews. The first Jewish victims of the Nazis were eight people killed by the SA in Berlin on January 1st, 1930[436], three full years before Hitler came to power. His rise to power followed a period in which the NSDAP and its paramilitary arm (SA) had already repeatedly attacked and boycotted Jews throughout Germany. The following event, one of many that took place in the months directly after Hitler's rise to power, is a cruel example of how Nazi ideology from the beginning of its rule deliberately dehumanized those it persecuted. It speaks of the arbitrary arrests taking place in March 1933:

"One of these Jews was a baker's apprentice, Siegbert Kindermann. Before Hitler's coming to power, Kindermann, a member of the Bar Kochba Jewish Sports Society, had been attacked by Nazi thugs. His attackers had been brought to court, and convicted. Now the thugs took their revenge. On March 18 Kindermann was taken to a Stormtroop [SA] barracks in Berlin and beaten to death. His body was then thrown out of a window into the street. Those who found his body discovered that a large swastika had been cut into his chest."[437]

Jews were quickly and openly degraded in all areas of civic life and excluded from all layers of civil responsibility, whether in government, law, healthcare, education or commerce. German society was presented with the image of the Jew as being the cause of all evil and the urgent need to ban anything Jewish from German soil, including the Jews themselves. In the developing rhetoric they were reduced from being a person to being a category for government-sponsored discrimination and eventually liquidation. On March 23, 1933 Hitler presented his Enabling Law ("*Gleichschaltungsgesetz*") in the Reichstag (parliament), a draconian piece of legislation that basically gave the government

[435] See: Adolf Hitler, Mein Kampf, London 1939, transl. by James Murphy, p. 553
[436] See: Ibid. Martin Gilbert, The Holocaust, pp. 29-30
[437] Ibid. Martin Gilbert, The Holocaust, p. 33, where he quotes from the Nuremberg trial's transcripts

unlimited power to pass any 'law' it wanted and which abolished all remaining constitutional limitations to Hitler's power[438]. Once again, this law was passed with a sufficient parliamentary majority[439]. It was to be the last of parliamentary democracy in Germany until after the war: Hitler used the Enabling Law to firmly establish his dictatorship and quiet any political opposition, whilst centralizing all power in his own person. He used the *Gleichschaltungsgesetz* to forthwith formally exclude Jews from society and to do away with all political opponents, referred to as *"Staatsfeinde"* (enemies of the state) and meticulously defined by the *Sicherheitspolizei* (secret police) as follows:

"Kommunismus, Marxismus, Judentum, politisierende Kirchen, Freimaurerei, politisch Unzufriedene (Meckerer), Nationale Opposition, Reaktion, Schwarze Front, Wirtschaftssaboteure, Gewohnheitsverbrecher, auch Abtreiber und Homosexuelle, Hoch- und Landesverräter."[440]

By arbitrarily singling out a large group of Germans to be excluded from the protection of the law, in as far as the rule of law still existed, the Nazi regime openly dehumanized these people and left them to the whims of the Nazi apparatus. The result was bloody: fierce persecution of these groups ensued, leading to organized murder and large-scale detention in the newly erected concentration camps and later also extermination camps. Any semblance of a democratic state with equal rights for all its citizens had herewith officially come to an end.

It is a bitter irony that parliamentary democracy in Germany was abolished by parliament itself, another example of how democracy does not guarantee the rule of law. This observation is vital to understanding and assessing the legal landscape in Germany after March 1933. The question many scholars have debated since, and which goes beyond the scope of this research to discuss in detail, is whether any of the "laws" or decrees passed

[438] See: Ibid. Fragen an die deutsche Geschichte, pp. 296-303 with copies of the original texts of the Notverordnung (emergency decree) and the Gleichschaltungsgesetz (Enabling Law).
[439] See: Ibid. Martin Gilbert, History of the Twentieth Century, p. 216
[440] See: Ibid. Fragen an die deutsche Geschichte, p. 303; from the original files of the Sicherheitspolizei

by the Nazi regime between 1933 and 1945 can be considered as valid laws at all? When we follow Augustine's rule that "un unjust law is not a law", it is not difficult to conclude the status of most Nazi legislation. Yet many, if not most, of those having played active military or civil roles in the Third Reich defend(ed) their actions by referring to the law of the land at the time and their required obedience to it. For our discussion of the historical development of the notion of human dignity in Europe, this ambiguous position is relevant to note. It is an example, as we discussed above, of what Martin Gilbert calls "the strong helping the strong to attack the weak" and the "indifference of bystanders in every land"[441]. Even if "the strong" were often well-meaning people, their indifference or fear allowed injustices and human dignity violation to become the order of the day. The rejection of the dignity of every human being in Nazi-Germany was initially brought about by democratic means, be it at times accompanied by intimidation. Its ensuing policies were subsequently enacted or silently tolerated by the majority of ordinary people.

The Nuremberg "laws" of 15 September 1935 then formalized what the Nazis had been openly propagating since 1920. The Nuremberg Laws "elevated random discrimination into a system" as Gilbert puts it, and were signed by Hitler personally[442]. Jews were now officially defined as not being of German blood and forbidden from marriage and sexual relations with Germans. They were reduced to "lesser humans", or denied the status of human being entirely. The world reacted with disgust as articles appeared in important newspapers such as the New York' Herald Tribune (today the New York Times) and the London' Times[443], yet nothing substantial was undertaken to stop Hitler, both inside and outside of Germany. But the gravity of the situation in Germany was apparently well known by the major powers at the time. Once again Gilbert quotes a chilling report by a witness of the time. A senior British government employee writes down his experiences after his return from Berlin where he met with German officials:

[441] See: footnotes 428 and 429
[442] Ibid. Martin Gilbert, The Holocaust, p. 47
[443] See: Ibid. Martin Gilbert, The Holocaust, p. 48 with quotes from these papers

"I knew that the Jewish situation was bad, I had not realized as I now do that the fate of German Jews is a tragedy, for which cold, intelligent planning by those in authority takes rank with that of those who are out of sympathy with the Bolshevik regime, in Russia; or with the elimination of Armenians from the Turkish Empire. The Jew is to be eliminated and the state has no regard for the manner of his elimination."[444]

Note the explicit comparison made here with the Russian Gulag and the Armenian genocide of 1915-1917, the latter of which led to the organized killing of around 1 million Armenians at the hands of the Ottoman Empire. It is a clear proof that the massive violation of human dignity by the Nazis was already a fact widely known outside of Germany as early as 1935. Already at that time the common pattern of rejecting the humanity of certain groups of society as a prelude to their destruction, now taken up enthusiastically by the Nazis, was noted by what would later be the Allied Powers. Their detailed knowledge of the atrocities kept growing. A January 6, 1942 official note of the Soviet Foreign Minister Vyacheslav Molotov (himself not being unacquainted with the atrocities of his own regime) describes in harrowing detail what happened to the Jews in German-occupied Kiev in the period June-December 1941, as reported by eyewitnesses:

"A large number of Jews, including women and children of all ages, was gathered in the Jewish cemetery of Kiev. Before they were shot, all were stripped naked and beaten. The first persons selected for shooting were forced to lie face down at the bottom of a ditch and were shot with automatic rifles. Then the Germans threw a little earth over them. The next group of people awaiting execution was forced to lie on top of them, and shot, and so on."[445]

Yet little was done in practical terms to stop Hitler until the Allied forces achieved militarily superiority over the Germans. As Anthony Eeden, the British Foreign Secretary noted in the summer of 1944, "the speedy victory of the Allied nations" was the only

[444] Ibid. Martin Gilbert, The Holocaust, pp. 48-49. Gilbert cites from a letter by the Commissioner for Migration and Statistics in Palestine, Eric Mills, who visited Berlin to speak with the German authorities about the financial aspects of emigration of Jewish Germans to Palestine, at that time under British control.
[445] Martin Gilbert, Auschwitz and the Allies, Pimlico Edition 2001, p. 18

hope to stop the mass killings[446]. The same British man who as an immigration officer at the British consulate in Berlin had already reported - mostly ignored by his superiors - on Nazi atrocities in 1938-1939, now saw the full reality of the massacres when British troops entered concentration camps in April 1945. He writes: "Now the people here really and finally believe that the stories of 1938-9 were not exaggerated."[447]

Nazi ideology rejecting the idea of the equal dignity of every human being was not only disseminated through the propaganda of Goebbels, it also entered mainstream education and the academic world in an effort to give it broader support. Gilbert reports the successful 1936 doctoral thesis defense of a student in the German state of Saxony who held that the worth of an individual to the community "is measured by his or her racial personality. Only a racially valuable person has a right to exist in the community. A racially inferior or harmful individual must be eliminated."[448] Forced sterilization and castration, as well as euthanasia of certain groups of "racially inferior" (Jews), "racially harmful" (sexual offenders) or "unproductive" (invalids) people was openly promoted and increasingly performed by the Nazi regime and its helpers, culminating in the state-ordered euthanasia of large groups of people. It therefore did not remain a mere academic theory. The "academic" thesis promoted was more a theory following the already existing and growing practice. One of the most well-known Germans openly rejecting this abhorrent practice of euthanasia in Nazi Germany was Bishop Clemens August von Galen. He repeatedly and publicly complained to the German authorities and dedicated a number of sermons preached in the various churches of his Münster Diocese to these atrocities. He was one of the few examples of public figures voicing the revolt of their consciences against the state-sponsored rejection of the equal worth of every human being. In one of his famous sermons Von Galen, also called "the Lion of Münster", said:

[446] See: Ibid. Martin Gilbert, Auschwitz and the Allies, p. viii
[447] Ibid. Martin Gilbert, The Holocaust, p. 797
[448] Ibid. Martin Gilbert, The Holocaust, p. 50: Gilbert quotes (in translation) from a student named Hans Puvogel, in the seventies Minister of Justice in the German state of Lower Saxony until he resigned in 1978 after this dissertation published in 1937 had become public and he refused to distance himself from its controversial content. Original title: "Die leitenden Grundgedanken bei der Entmannung gefährlicher Sittlichkeitsverbrecher."

"Wenn man den Grundsatz aufstellt und anwendet, dass man den ‚unproduktiven' Mitmenschen töten darf, dann wehe uns allen, wenn wir alt und altersschwach werden! Wenn man die unproduktiven Mitmenschen töten darf, dann wehe den Invaliden, die im Produktionsprozess ihre Kraft, ihre gesunden Knochen eingesetzt, geopfert und eingebüßt haben! Wenn man die unproduktiven Mitmenschen gewaltsam beseitigen darf, dann wehe unseren braven Soldaten, die als schwer Kriegsverletzte, als Krüppel, als Invaliden in die Heimat zurückkehren! Wenn einmal zugegeben wird, dass Menschen das Recht haben, ‚unproduktive' Mitmenschen zu töten – (…). Dann ist keiner von uns seines Lebens mehr sicher. Irgendeine Kommission kann ihn auf die Liste der ‚Unproduktiven' setzen, die nach ihrem Urteil ‚lebensunwert' geworden sind."[449]

State-condoned anti-Jewish activity started also rapidly spreading throughout other parts of Europe after 1933, especially in Poland, Hungary, Romania, Slovakia and Ukraine where – partly inspired by Nazi pressure and propaganda – age-old sentiments of anti-Semitism were reawakened with zeal and with death and destruction as a result. A familiar pattern repeated itself: Jews were portrayed as lesser human beings, or as resembling animals, and the perpetrators used this as their justification for ignoring their intrinsic dignity. But probably nowhere else outside Germany were the Jews so suddenly and systematically persecuted and excluded from civil life as in Austria after the *"Anschluss"* of 1938. When Austria became an official part of the Third Reich in March 1938, Jews, communists and other political opponents immediately became targets of fierce persecution by Nazis and parts of the population. Martin Gilbert reports in detail how from one day to the other, Austrian Jews were completely excluded from public life and mistreated on a massive scale:

"Overnight, the Jews of Vienna, one sixth of the city's population, were deprived of all civil rights: the right to own property, large or small, the right to be employed or to give employment, the right to exercise their profession, any profession, the right to enter

[449] Clemens August von Galen, Sermon delivered as Bishop on 3 August 1941, published in: Heinrich Portmann, Kardinal von Galen – Ein Gottesmann seiner Zeit, Münster Aschendorff 1957

restaurants or cáfes, public baths or public parks. Instead they experienced physical assault: the looting of shops, the breaking of heads, the tormenting of passers-by."[450]

In the meantime, whilst all this was unfolding before the world in full view, a much more sinister and over the years carefully planned and hidden campaign was gaining momentum. The *"Endlösung"*[451] as the Nazis called it, the "Final Solution", was aimed at for good eliminating all estimated 11 million Jews in Europe. The official policy was decided on 20 January 1942 in the German town of Wannsee near Berlin, for the most part prepared by Adolf Eichmann, head of the 'Jewish Section' of the *SS*[452]. During the meeting, attended by a carefully selected group of senior military, security and civil representatives of Hitler's government, the Jews were not talked about as human beings but as *"Untermenschen"* and in the most businesslike of terms condemned to total extinction. Here we see that the Nuremberg Laws of 1935 were not only the formal continuation of an already existing policy of anti-Jewish aggression, but also the formal establishment of the ideological basis of what was already under way and still to come: the firing squads at mass graves, the extermination camps with their gas chambers, the torture prisons and the euthanasia centers. Once again, what was considered a "law", constituted the starting point of unspeakable atrocities against humanity. By the time the *Wannsee-Konferenz* convened to decide on its meticulously planned campaign to deport and exterminate the Jews from all over Europe, more than 40.000 Jews and Gypsies had already been gassed by way of experiment in the Chelmno extermination camp in the preceding 44 days[453]. The full operation of the death camps Auschwitz-Birkenau, Belzek, Chelmno, Majdanek, Sobibor and Treblinka was the direct result of the Wannsee meeting. Its *stated* goal was to indeed eliminate all 11 million Jews from Europe[454], yet the organized mass killing had already been under way for quite some time. Together with the many concentration camps throughout Europe, the countless executions, the

[450] Ibid. Martin Gilbert, The Holocaust, p. 59
[451] The "Endlösung" was formally decided by the Nazi regime in January 1942 at the "Wannsee-Konferenz", which outlined in meticulous detail how Europe would be "combed out" from East to West, making sure no Jews remained alive. See Ibid. Fragen an die deutsche Geschichte, p. 317
[452] See: Ibid. Martin Gilbert, Auschwitz and the Allies, p. 18
[453] Ibid. Martin Gilbert, The Holocaust, p. 280
[454] See: Ibid. Martin Gilbert, The Holocaust, p. 282

forced labor and the organized starvation[455], as well as the ghettos[456], all for which the Nazis were responsible, up to 6 million Jews alone were killed.[457] Snyder reports that by December 1941, before the Wannsee Konferenz, Himmler's *SS* and police had already killed up to 1 million Jews in the German-occupied part of the Soviet Union. The "Final Solution" was therefore once again only the inevitable formalization of existing Nazi policy[458]. Gilbert quotes a widely disseminated speech Hitler gave at the Sports Palace in Berlin only 10 days after the Wannsee meeting and which was recorded word for word by the Allied Powers' information service. The speech in clear terms publicly confirmed the *"Endlösung"* policy and described the Jews as "universal enemies":

"(..) the war will not end as the Jews imagine it will, namely with the uprooting of the Aryans, but the result of this war will be the complete annihilation of the Jew. (..) And the hour will come when the most evil universal enemy of all time will be finished, at least for a thousand years."[459]

With this perverse idea the Holocaust took its final ugly turn whilst the Nazi machine run by German efficiency rolled out a well-planned scheme that foresaw the deportation of Jews, Gypsies and other *"Staatsfeinde"* from all over Europe to the death camps in the East and the many concentration camps wherever the German writ was upheld. Adolf Eichmann is reported on his last visit to the death camp of Theresienstadt in 1944 to have said: "I shall gladly jump into the pit, knowing that in the same pit there are five million enemies of the state."[460] Even countries not occupied by the Germans, like for example Bulgaria, were pressured and often forcibly obliged to deport Jews to the death camps. Local Nazi leaders were given lists and quotas of Jews that needed to be put on transport. No effort was spared. Gilbert reports that on 20 January 1943 Himmler, the head of the

[455] Timothy Snyder points out that the Nazis killed as many people by mass executions and starvation as they did through the six extermination camps. A distinction also needs to be made between concentration camps, where people had to work and had a chance to survive, and extermination camps where people were sent straight the gas chambers, such as Treblinka. See: Ibid. Timothy Snyder, Bloodlands, pp. 380-383
[456] Alone in 1941, the number of deaths by starvation in the Jewish ghetto of Warsaw had reached the staggering number of 50.000. See. Ibid. Martin Gilbert, The Holocaust, p. 294
[457] See: Ibid. Fragen an die deutsche Geschichte, p. 317
[458] See: Ibid. Timothy Snyder, Bloodlands, p. 218
[459] See: Ibid. Martin Gilbert, The Holocaust, p. 285
[460] See: Ibid. Martin Gilbert, The Holocaust, p. 792

SS, sent the German transport minister a special letter imploring the latter to urgently send more trains for the deportation of the Jews[461]. As a result, four hundred thousand Hungarian Jews alone were gassed in Birkenau in the summer of 1944[462]. The persecution and the killing of Jews in and outside of the camps continued on a large scale and with great dedication right until the end of the war in Europe in May 1945[463], even as the Allied armies swept into Germany and the occupied territories[464]. One of the last trains of Jews deported from Vienna reached the concentration camp of Theresienstadt on April 15, 1945; two days after the Red Army had entered Vienna[465]. It was typical for the efficiency and dedication with which the Nazis pursued their *"Endlösung"*. Right until the end they were convinced that Jews and other "opponents" were either not human, or "lesser humans" and should thus be deprived of their lives. The following harrowing account of a Holocaust survivor, Chaim Hirszman, written up by his wife, sums up in conclusion what the institutionalized dehumanization of other human beings ultimately leads to - the unthinkable:

"When a transport with children up to three years old arrived [,] 'The workers were told to dig one big hole into which the children were thrown and buried alive. My husband recollected this with horror. He couldn't forget how the earth had been rising until the children suffocated'."[466]

1.3. Communism

Echoing Norman Davies as quoted above, the French historian Stéphane Courtois observes: "The fact remains that our century has outdone its predecessors in its bloodthirstiness."[467] Together with Timothy Snyder, Courtois is one of few well-known

[461] See: Ibid. Martin Gilbert, The Holocaust, p. 526
[462] See: Ibid. Martin Gilbert, The Holocaust, p. 735
[463] As Martin Gilbert puts it: "The Nazi killing machine had the power and the will to continue behind German lines until Germany itself was overrun." Ibid. Martin Gilbert, Auschwitz and the Allies, p. viii
[464] It should be noted here that anti-Jewish pogroms flared up again in Poland after the end of the war, in 1945 and 1946, leading to the deaths of thousands of Jewish civilians.
[465] See: Ibid. Martin Gilbert, The Holocaust, p. 793
[466] See: Ibid. Martin Gilbert, The Holocaust, p. 305
[467] Stéphane Courtois – Nicolas Werth – Jean-Louis Panné – Andrzej Paczkowski – Karel Bartosek – Jean-Louis Margolin, The Black Book of Communism – Crimes, Terror, Repression, translated from the original French version by Jonathan Murphy and Mark Kramer, Harvard University Press 2004, p. 1

historians willing to explicitly compare Nazism and Communism as evil regimes of the same league[468]. He underlines this point by starting his investigation into the crimes and genocides of Communism with listing a rough estimate of the deaths caused by Communism throughout the 20th century: approximating 100 million, mostly civilians. The Soviet Union and Europe with 21 million and China with 65 million are responsible for the large majority of deaths[469]. The Communist regimes, Coutois notes, "in order to consolidate their grip on power, turned mass crime into a full-blown system of government."[470] Indeed here the comparison with Nazism is justified: also the Nazis promoted mass murder to a system of centralized government, allowing them to deport and kill countless millions of perceived opponents, also most of them civilians. In both systems, the dehumanization of the persecuted constituted the justification of the killings. Courtois puts it bitterly: "Thus in the name of an ideological belief system were tens of millions of innocent victims systematically butchered, unless of course it is a crime to be middle-class, of noble birth, a kulak, a Ukrainian, or even a worker or a member of the Communist Party."[471] This was the extent of the Soviet agenda of intolerance, especially under Lenin and Stalin. Whole groups of people were from one day to the other, like the Nazis did it, identified as lacking the quality of human beings. At the whim of the totalitarian leaders it was decided whether people's humanity would be respected or not. Where people or groups were considered to be an "enemy of the state" or an "anti-Soviet element", they simply needed to be eliminated. The following quote from a 1917 speech by Feliks Dzerzhinsky, the founder of the Soviet KGB (secret police), shows how the Communist regime from the earliest stages of its development rejected justice in the name of revolution:

"(..) *we must make use of determined comrades – solid, hard men without pity – who are ready to sacrifice everything for the sake of the revolution. Do not imagine, comrades, that I am simply looking for a revolutionary form of justice. We have no concern about*

[468] See for example: Ibid. Stéphane Courtois, The Black Book of Communism, pp. 14-17
[469] See: Ibid. Stéphane Courtois, The Black Book of Communism, pp. 4-5. It should be noted here that Courtois' figures differ substantially from those of Norman Davies discussed above, where for example Davies estimates the death toll of the Soviet Gulag alone at 27 million. Most probably Courtois limits his statistical evidence to recorded deaths, whilst Davies also makes use of demographical shortfalls.
[470] Ibid. Stéphane Courtois, The Black Book of Communism, p. 2
[471] Ibid. Stéphane Courtois, The Black Book of Communism, p. 7

justice at this hour! (...) What I am proposing, what I am demanding, is the creation of a mechanism that, in a truly revolutionary and suitably Bolshevik fashion, will filter out the counterrevolutionaries once and for all!"[472]

It would be the beginning of a first massive wave of arbitrary arrests, tortures and executions directed against anybody that stood in the way of the new Communist dictatorship. It is a familiar pattern in history and would repeat itself, as we discussed above, in 1933 when Hitler rose to power in Germany. Terror in the Communist system was even a formally accepted method of governance that needed to be enshrined in the Criminal Code, as Lenin himself wrote in 1922 to his Commissar of Justice, Kursky:

"(...) the basic concept, I hope, is clear, notwithstanding all the shortcomings of the rough draft: openly to set forth a statute which is both principled and politically truthful (...) to supply the motivation for the essence *and the* justification *of terror, its necessity, its limits. The court must not exclude terror (...), it is necessary to formulate it as broadly as possible, for only revolutionary righteousness and a revolutionary conscience will provide the conditions for applying it more or less broadly in practice."*[473]

Already in the 1920's, the Communists were constructing a large network of concentration camps to lock up and kill opponents by means of forced labor, malnutrition or execution, something the Nazis would start repeating a decade later. Deportation of large numbers of innocent civilians and "political opponents" by cattle trains was not a German invention. The Soviets did it long before them. Solzhenitsyn vividly describes how the red cattle or coal cars were prepared, not by cleaning or with bunk beds, ventilation or hygiene for the prisoners, but rather with guard platforms and the barring of windows to ensure maximum security and minimal comfort[474]. Here the prisoners had to endure for up to 24 hours, or more. The Soviet concentration camp system, known as "The Gulag", already contained over 925.000 prisoners as of January 1935, performing

[472] Ibid. Stéphane Courtois, The Black Book of Communism, pp. 57-58
[473] As quoted and commented in: Aleksandr I. Solzhenitsyn, The Gulag Archipelago 1918-1956 – An Experiment in Literary Investigation, translated by Thomas P. Whitney, Harper & Row 1973, pp. 353-354
[474] See: Ibid. Aleksandr Solzhenitsyn, The Gulag Archipelago, pp. 565-567

forced labor under extreme conditions of climate and undernourishment and leading to a camp mortality rate of up to 10%. By 1941 the total Gulag population had doubled to 1.930.000 prisoners[475]. Only a very small percentage of these almost two million people were actual criminals; most were labeled "class enemies" or considered to be a threat to the Communist system in other ways. Fair trials were nonexistent. By the beginning of the Second World War, the NKVD (later the KGB), in the territories the Soviets occupied as a result of the 1939 Molotov-Von Ribbentrop Pact[476], initiated a series of campaigns of "cleansing", executions and deportations on a scale that matched those of the Nazis in other areas of Europe. Alone in the 1940-1941 period, 381.000 Polish civilians were forcibly deported eastwards into the Soviet Union, many of them not surviving the ordeal. The NKVD did not even provide food for the deportation transport, whilst the journey could take up to twelve weeks[477]. The scale of the deportation of whole ethnic groups within the Soviet Union during the Second World War is unparalleled in European history. For example, by 1942, up to 1.209.430 ethnic Germans, most of them descendants of Germans invited to come and live in Russia in the 18th Century by Catherine the Great, were deported to Kazakhstan and Siberia. The ethnically German population of the Soviet Union, according to a 1939 census, was 1.427.000[478]. This was followed in 1943 and 1944 by the massive deportation of Chechens, Ingush, Crimean Tatars, Karachai, Balkars and Kalmyks under the pretext of these peoples having "collaborated with the Nazis". Alone in 1944, 521.247 Chechens and Ingush were deported to far-flung eastern regions, most of them women, children and old people labeled as "potentially dangerous elements".[479] The Soviets were no less cruel with the civilian population coming under their control elsewhere at the end of the war: Norman Davies reports how Nazi concentration camps, like for example Buchenwald, were merely turned into oppression centers for a newly defined group of "state enemies"[480].

[475] See: Ibid. Stéphane Courtois, The Black Book of Communism, pp. 203-205 (Nicolas Werth)
[476] The Molotov-Von Ribbentrop Pact of 23 August 1939 was essentially a non-aggression treaty between the Soviet Union and Germany. It contained a secret protocol, its existence denied by the USSR until 1989, dividing Poland between Germany and the USSR, as well as giving the latter "permission" to take over the Baltic states, Finland, Bessarabia and part of Boekovina
[477] See: Ibid. Stéphane Courtois, The Black Book of Communism, pp. 208-209, 213 (Nicolas Werth)
[478] See: Ibid. Stéphane Courtois, The Black Book of Communism, pp. 216-218 (Nicolas Werth)
[479] See: Ibid. Stéphane Courtois, The Black Book of Communism, pp. 219-221 (Nicolas Werth)
[480] See: Ibid. Norman Davies, Europe – A History, p. 1061

Millions of civilian refugees who had fled the fighting in the East adamantly refused to return to their homelands when these were under Soviet control, being keenly aware of the atrocities taking place there at the hands of the new rulers. But the forcible expulsion requested by Stalin and followed through by the Western Allies went on. The latter were well informed of the communist barbarities towards returning civilians, yet it took hundreds of thousands of deaths of forcibly returned exiles for the Western Allies to stop this practice[481]. Simultaneously, at least 9 million German civilians were forcibly expelled from their lands and homes in Czechoslovakia and Poland. Former Nazi camps were used by the Soviets as collection centers for the expelled. Maltreatment and persecution led to tens of thousands of more deaths[482]. The litany of barbarism, specifically against the defenseless civilian population of many countries, goes on throughout the reign of Stalin and beyond. By the beginning of the 1950's, over 5,5 million people were administered as prisoners or "specially displaced people" by the Gulag concentration camp system[483], excluding the many millions of others forcibly expelled from their homes and deported to Siberia and other inhabitable regions of the Soviet Union. The following original wording from Soviet deportation and execution orders under Stalin's reign shows how large groups of innocent civilians, whole ethnic populations, were deprived of the protection of their humanity and dignity by a few words of utter arbitrariness[484]:

- "potentially hostile to the Soviet system"
- "members of the families of socially alien elements, bandits and nationalists"
- "all individuals refusing to comply with the minimum number of work days in the *kolkhozy* and living like parasites"

Official charges were even standardized. Solzhenitsyn[485] lists a further collection of "charges" used in politically motivated persecution whereby it is hard not to laugh – yet

[481] See: Ibid. Norman Davies, Europe – A History, p. 1059
[482] See: Ibid. Norman Davies, Europe – A History, p. 1060
[483] See: Ibid. Stéphane Courtois, The Black Book of Communism, p. 238 (Nicolas Werth)
[484] See: Ibid. Stéphane Courtois, The Black Book of Communism, pp. 223, 229-230, 235 (Nicolas Werth)
[485] Aleksandr Solzhenitsyn, The Gulag Archipelago 1918-56, Harvill Press 2007 edition, translated by Thomas P. Whitney and Harry Willets and abridged by Edward Ericson, p. 241

hundreds of thousands of people were sent to concentration camps with these fabrications:

- A negative attitude towards the collective-farm structure
- A negative attitude toward the Stalinist constitution
- A negative attitude toward whatever was the immediate, particular measure being carried out by the Party
- Sympathy for Trotsky

It was this perverse arbitrariness that the Stalinist regime used to strip ordinary civilians of the protection of their dignity as human beings. Such charges were used widely and implemented blindly by many other human beings. The arbitrariness knew no limits. A striking example is the case of Irina Tuchinskaya who was sentenced to 25 years behind bars on terrorism charges after being arrested whilst exiting her church following a religious service. The official charge was "prayed in the church for the death of Stalin."[486]

It is for good reason that this period of Stalin's reign was called "The Great Terror". The totalitarian system would use all means at its disposal to make its grip on power firmer, even leading to approaches that contradicted its own avowed principles of anti-fascism and feeding the Soviet people. Two examples stand out here as specifically noteworthy: the orchestrated revival of anti-Semitism in the post-War Soviet Union as of 1946, and deliberately ignoring the failures of the forced collectivization leading to massive death by starvation. Starting in 1946 and continuing until Stalin's death in 1953 anti-Semitism of the same sort produced by the Nazis led to the large-scale exclusion of Jews from all positions of authority, the arts and the media in especially Moscow and Leningrad. This happened mostly under the pretext of having engaged in "counterrevolutionary activities[487]. It included arrests, executions and sending Jews to the Gulag. At the same time the 1946-1947 famine in the provinces of Kursk, Tambov, Voronezh, Orel and

[486] See: Ibid. Aleksandr Solzhenitsyn, The Gulag Archipelago 1918-56, Harvill Press edition, p. 241
[487] See: Ibid. Stéphane Courtois, The Black Book of Communism, pp. 244-245 (Nicolas Werth)

Rostov led to death by starvation of at least 500.000 people. Due to the draconic obligatory "collection targets" imposed on farmers, combined with an already failing agricultural forced collectivization system and massive drought, shortage quickly became famine. The famine was completely ignored by the authorities[488]. It bore close resemblance to the Great Famine of 1921 and 1922 during which at least 5 million Soviet citizens died, although this famine had a strong element of institutionalized starvation of the restive peasantry[489]. This is illustrated by Lenin's openly expressed view of famine as a political tool for social change. At the time Lenin praised famine as an instrument that could and should be used "to strike a mortal blow against the enemy", which he considered then to be the Orthodox Church. He also held that starvation was an effective tool to bring about socialism and "numerous positive results".[490] Stalin would more than once use starvation as a method of carefully planned mass murder, for example during the 1932-1933 collectivization campaign which led to millions of peasant deaths in Soviet Ukraine alone[491]. Snyder reports: "no matter what peasants did, "they went on dying, dying, dying." The death was slow, humiliating (..). To die of starvation with some sort of dignity was beyond the reach of almost anyone."[492]

The calculated destruction of dignified human life becomes strikingly clear when one further studies Solzhenitsyn. In "The Gulag Archipelago" he masterfully analyses how this was done, how the camps were "calculated and intended to corrupt"[493]. Under the title "Our Muzzled Freedom" Solzhenitsyn lists the 10 ways in which the whole country was infected by the "loathsomeness of the state" [494], its methods and attitudes as they permeated throughout Soviet society[495]:

1. *Constant Fear*. "Peace of mind is something our citizens have never known."[496]

[488] See: Ibid. Stéphane Courtois, The Black Book of Communism, p. 233 (Nicolas Werth)
[489] See: Ibid. Stéphane Courtois, The Black Book of Communism, p. 123 (Nicolas Werth)
[490] See: Ibid. Stéphane Courtois, The Black Book of Communism, pp. 123-124 (Nicolas Werth)
[491] See: Ibid. Timothy Snyder, Bloodlands, pp. 42-46
[492] See: Ibid. Yimothy Snyder, Bloodlands, pp. 46-47
[493] Ibid: Aleksandr Solzhenitsyn, The Gulag Archipelago, Harvill Press edition, p. 319
[494] Ibid: Aleksandr Solzhenitsyn, The Gulag Archipelago, Harvill Press edition, p. 320
[495] See: Ibid. Aleksandr Solzhenitsyn, The Gulag Archipelago, Harvill Press edition, pp. 321-327
[496] Ibid. Aleksandr Solzhenitsyn, The Gulag Archipelago, Harvill Press edition, p. 321

2. *Servitude.* The meticulously bureaucratic system making it practically impossible to escape the system, thus making even the smallest dissent hazardous.
3. *Secrecy and Mistrust.* Openhearted cordiality and hospitality, a former hallmark of the Russian people, became a threat to one's freedom and thus disappeared.
4. *Universal Ignorance.* Hiding things from each other and not trusting each other helped implement a totalitarian system of absolute secrecy and thus control.
5. *Squealing.* The organized informing on others and the involvement of so many people in this system that "in every group of people, in every office, in every apartment, either there would be an informer or else the people there would be afraid there was."[497]
6. *Betrayal as a Form of Existence.* Because of the constant fear people where exposed to over many years a "human being became a vassal of fear" which led many to the pragmatic conclusion that "the least dangerous form of existence was constant betrayal". This betrayal mostly consisted of turning away quietly from the doomed people around oneself: "You acted as if you had not noticed"[498].
7. *Corruption.* The many years of fear and betrayal led to a widespread corruption of the inner life of human beings, of which large-scale denunciations were the clearest example.
8. *The Lie as a Form of Existence.* "The permanent lie becomes the only safe form of existence, in the same way as betrayal. Every wag of the tongue can be overheard by someone, every facial expression observed by someone. Therefore every word, if it does not have to be a direct lie, is nonetheless obliged not to contradict the general, common lie."[499]
9. *Cruelty.* In a society where "class cruelty" was promoted, pity and mercy were ridiculed and one had to constantly protect oneself against the state machine, there was little place left for kindheartedness. The cruel regime only became crueler to sustain itself.
10. *Slave Psychology.* A people subjected to a state that treats them as slaves.

[497] Ibid. Aleksandr Solzhenitsyn, The Gulag Archipelago, Harvill Press edition, pp. 322-323
[498] Ibid. Aleksandr Solzhenitsyn, The Gulag Archipelago, Harvill Press edition, p. 323
[499] Ibid. Aleksandr Solzhenitsyn, The Gulag Archipelago, Harvill Press edition, p. 325

These 10 points show how the regime was systematically trying to dismantle the principles and social behavior required to guarantee the respect and protection of the dignity of each human being, not only by the state, but also by its ordinary citizens amongst themselves. Hannah Arendt explains how a system of "mass atomization" through repeated purges destroyed all social and family ties employing fears of "guilt by association" to create a society of isolated individuals[500]. Snyder, in paraphrasing Hannah Arendt, speaks here of the "alienation of all from all".[501] It is striking to see how this list can be applied word-for-word to other totalitarian systems as well, beginning with the Nazis. The stark difference between Nazism and Communism is however that the Nazis reserved their disregard for human beings to certain groups of its citizens and those of occupied countries, whilst the Soviet Communists, especially under Stalin, subjected the entire population to this system, leading to a far greater death toll. All this shows how the Communist and Stalinist ideology serves itself from a worldview that utterly despises the individual human being. It bases itself on a purely materialistic philosophy where the end of a so-called collective "workers paradise" justifies all the means, even if this leads to the targeted and large-scale destruction of human life. It is an all too familiar pattern in modern European history. What these examples of unspeakable injustice and human suffering at the hands of Communist ideology also show is that the institutionalized rejection of the humanity and therefore the dignity of whole groups of people as well as individuals were indeed made possible by unlimited power and indifference coupled with blind obedience. Once again, it is Solzhenitsyn who brings this to the point where he describes his personal experience with "The Bluecaps", the men of the Soviet State Security apparatus performing their interrogations and torture in the Gulag and other prisons:

"They understood that the cases were fabricated, yet they kept on working year after year. How could they? (…) they forced themselves not to think (and this in itself means the ruin of a human being), and simply accepted that this was the way it had to be and that the person who gave them their orders was always right…

[500] Ibid. Hannah Arendt, The Origins of Totalitarianism, pp. 323-324
[501] Ibid. Timothy Snyder, Bloodlands, p. 46

But didn't the Nazis, too, it comes to mind, argue the same way?"[502]

Solzhenitsyn here shows us the common roots of the Nazi and Communist ideologies. In a footnote to this observation, he notes that "there is no way of sidestepping this comparison: both the years and the methods coincide too closely." Where they coincide, one could summarize, is in the decision of the regime's followers and accommodators "not to think" which is "the ruin of a human being", as Solzhenitsyn rightly puts it. Here we come to the core of the lesson the history of 20th century Europe teaches us: the violation of human dignity was and is made possible by those that decide not to think, not to use human reason, to be blind to the injustices that happen in front of their eyes. They therefore allow indifference and irrational emotions to lead to the dehumanization of others – whether individuals or groups. It is the classical recipe for all forms of genocide, mass killing and persecution in general and – as history shows us – the beginning of the end of such regimes. Communism fell precisely because it so consistently disregarded human dignity. The Polish *Solidarnosc* movement, which stood at the basis of the fall of the Iron Curtain in 1989, was inspired by an open and peaceful revolt of conscience of millions of Polish citizens against the disregard of their human dignity and their subsequent exploitation by the Communist authorities. It was, as the leader of this movement and later president of Poland, Lech Walesa, put it in 1984[503] a "communion of the people who do not wish to participate in a lie." Jósef Tischner, one of the other leading figures of *Solidarnosc*, explains how this peaceful revolt of conscience works in practice. The final outcome of this struggle was the end of Communism in Europe:

"One who condones moral oppression tightens a noose over his or her own humanity. To rebel against moral exploitation is a basic duty of conscience. Obviously, it is also crucial that the means of carrying on this rebellion not be contrary to conscience.
A mutiny of conscience against the moral exploitation of work brings to the forefront the question of human dignity. (…) Human dignity does not imply pride and empty ambition.

[502] Ibid. Aleksandr Solzhenitsyn, The Gulag Archipelago, p. 145
[503] See: Jósef Tischner, The Spirit of Solidarity, Harper & Row 1984, translated from Polish by Marek Zaleski and Benjamin Fiore with a Foreword by Zbigniew Brzezinsky and an Afterword by Lech Walesa, p. 106

One who thinks so does not understand human beings. Since treachery has occurred, fidelity must follow. Since humiliation has been inflicted, respect must ensue. Since there was degradation, equality must come. Dialogue is possible only when there is a common grammar. Ethics are the grammar of relationships between people, and their principle, human dignity.
It is for this reason that our present defiance is not an ordinary mutiny. Rather, it is a voice – great and piercing – calling the people to fidelity."[504]

1.4. Ethnic Nationalism

With the euphoric scenes of 1989 still vividly present on the minds of Europeans and the continent looking with new hope to the future, persecution, concentration camps and massacres happened all over again before the dust of the fallen Berlin Wall had even settled. As conflict broke out once again on the Balkan in 1991, lasting till 1999, and despite the lessons Europeans fighting for human dignity thought to have learned from modern history, only two years after the demise of Europe's murderous Communist ideology mass graves were once again being created. This Balkan war cost over 200.000 – mostly civilian – lives whilst an estimated 60.000 Bosnian women alone were raped, let alone the 2 million refugees the conflict caused. The same old pattern was enthusiastically repeated: the state-sponsored and publicly promoted rejection of the humanity of whole groups of people. Those now rejected were the same human beings one had lived with peacefully as family members, neighbors, friends and colleagues since after the end of World War II. This time an ideology reemerged that had been thought dead at least since the end of World War II: nationalism inspired by ethnic rivalries. Communism was defeated, yet as a direct consequence of the moral desert and power vacuum this system had left behind, now ex-communist leaders in the disintegrating Yugoslavia quickly seized the opportunity to step into the void they had themselves created. Power-addicted as they were, former communist leaders turned "democrats" overnight. Helped by a willing media they deliberately revived and invigorated nationalistic sentiments and myths to stay in power through the classic method of "divide

[504] Ibid. Jósef Tischner, The Spirit of Solidarity, p. 24

and rule"[505]. Mass hysteria was the result. Suddenly, and quite unexpectedly[506], Europe was presented with the horror of "ethnic cleansing" – a euphemism in practice mostly meaning outright genocide[507]. This was something the majority of Europeans had thought was merely part of long passed Balkan history. The hope of 1989 was as quickly gone as it had come. As Michael Ignatieff puts it in 1994: "When the Berlin Wall came down, when Václav Havel stood on the balcony in Prague's Wenceslas Square and crowds cheered the collapse of the Communist regimes across Europe, I thought, like many people, that we were about to witness a new era of liberal democracy. (…) We soon found out how wrong we were. For what succeeded the last age of empire is a new age of violence."[508] Large scale ethnic cleansing in Bosnia-Herzegovina started immediately at the onset of the Bosnian war in April 1992 when a majority of Bosnians had voted for independence. But as early as 1991 both Serbs and Croats had already partaken in targeted campaigns of ethnic cleansing[509]. Even though the new independent Republic of Bosnia-Herzegovina received almost instant recognition from the main Western powers, its Serb citizens rejected the new nationhood, supported by their Serbian brethren on the other side of the border in Serbia proper. In January 1992 they had already declared their own *"Republika Srpska"*. Bosnian Serb forces supported by the Serbian government and military quickly started a campaign to drive countless Bosnian Muslims (also referred to as "Bosniaks") out of their homes whilst looting and destroying their villages. Hundreds of villages were soon flattened and in the spring and summer of 1992 an average of 200 homes were destroyed each day[510]. The campaign included thousands of random killings of civilians even before the massacre of Srebrenica took place three years later. By

[505] Cf. Misha Glenny, The Balkans 1804-1999 – Nationalism, War and the Great Powers, Granta Books 2000, pp. 634-635

[506] Ibid. Cf. Misha Glenny, The Balkans 1804-1999, p. 634 where Glenny describes how in February 1991 his superiors at the BBC reprimanded him for writing too "alarmist" a piece when he described that the leaders of Yugoslavia were "stirring a cauldron of blood that would soon boil over." Western Europe and the US, he goes on to say, were completely unprepared for a Balkan conflict as most politicians could not imagine a new war happening.

[507] Slavenka Drakulic rightly points this out in her book: They Would Never Hurt a Fly, Abacus 2004, p. 6

[508] Michael Ignatieff, Blood & Belonging, Vintage Books 1994, p. 2

[509] The siege and almost complete destruction by the Serbs of the Croation town of Vukovar in the autumn of 1991 cost over 10.000 lives. See Ibid. Slavenka Drakulic, They Would Never Hurt a Fly, p. 5

[510] See: An unfinished peace – report of the International Commission on the Balkans, Carnegie Endowment 1996, p. 40

August 1992 the death toll had already reached 35.000[511]. Once again the Western powers were looking on and proved incapable or unwilling to stop a new chapter of massive human dignity violation on European soil. This was due mostly, as Glenny points out, to ignorance or other preoccupations[512]. The fall in July 1995 of the *United Nations Safe Area*[513] of Srebrenica to Bosnian Serb forces and the subsequent largest-scale massacre of civilians since World War II – under the eyes of the Western powers - was the climax of the orgy of violence. It constituted a clear case of genocide that finally forced the West to act decisively[514]. The Carnegie report leaves no doubt that the international community knew perfectly well what was happening from the moment Srebrenica fell to the Bosnian Serb forces. Speaking of the days – 11 and 12 July 1995 - Srebrenica was overrun it reports in 1996: "(…) in front of Dutch peacekeepers and the world's television cameras, the troops commanded by General Ratko Mladic selected out the men and older boys. The evidence indicated that they were taken away and slaughtered."[515] The genocide of Srebrenica alone left well over 8000 Bosnian men and boys dead[516]. When reading the once again harrowing accounts by survivors of the Srebrenica massacre, the parallels to the Nazi and Communist barbarism become immediately clear: the familiar pattern of well-organized executions planned with precision, soldiers "just following orders" and civilians – who were once peaceful neighbors - turning a blind eye or sometimes cooperating outright. Solzhenitsyn's concept of those involved deciding "not to think" is once again omnipresent. This time soldiers of the Bosnian Serb army decided that Bosniak men, women and children should be denied their humanity. Apart from the mass killings, rape, torture and looting also took place on a large scale. The following testimony by a survivor, Ramiza Gurdic, shows the

[511] Ibid. An unfinished peace – report of the International Commission on the Balkans, p. 40
[512] See: Ibid. Misha Glenny, The Balkans 1804-1999, p. 635 + 641
[513] By Resolution 819 (1993) of 16 April 1993 the Unites Nations Security Council called upon "all parties and others concerned treat Srebrenica and its surroundings as a safe area which should be free from any armed attack or any other hostile act." (1st paragraph of the Resolution)
[514] See for example: Ibid. An unfinished peace – report of the International Commission on the Balkans, p. 41. The Bosnian Serb leaders involved were in the same year indicted by the International Criminal Tribunal for the Former Yugoslavia in The Hague and arrest warrants issued. It would take 16 years for the last of those leaders, including General Mladic, to be arrested and brought to The Hague to face trial.
[515] Ibid. An unfinished peace – report of the International Commission on the Balkans, p. 41
[516] Cf. Ibid. Misha Glenny, The Balkans 1804-1999, pp. 649-650

same total disregard for human life we discussed above and revives memories of the worst Nazi crimes:

"At one time, I saw how a young boy of about ten was killed by Serbs in Dutch uniform. This happened in front of my own eyes. The mother sat on the ground and her young son sat beside her. The young boy was placed on his mother's lap. The young boy was killed. His head was cut off. The body remained on the lap of the mother. The Serbian soldier placed the head of the young boy on his knife and showed it to everyone. (…) I saw how a pregnant woman was slaughtered. There were Serbs who stabbed her in the stomach, cut her open and took two small children out of her stomach and then beat them to death on the ground. I saw this with my own eyes."[517]

But even as the Dayton peace accords that were signed on 21 November 1995 by the presidents of Serbia, Croatia and Bosnia-Herzegovina ended the military conflicts between and within these now independent countries of the former Yugoslavia, the genocide and ethnic cleansing had still not come to an end. It required yet another Balkan conflict to be halted. The bitter irony is, as Glenny describes, that the Dayton Agreement hailed a new constitution for Bosnia-Herzegovina that "included the most advanced provisions for the protection of human rights anywhere in the world."[518] The 1996-1999 Kosovo conflict can however be qualified as nothing less then deliberately in full contempt of the letter and spirit of the Dayton peace agreement and its constitution supposedly ending the Balkan war in 1995. The ink had hardly dried when Serb troops and paramilitaries as well as Kosovo Albanian fighters were once again committing atrocities amongst civilians. The conflict got fully out of control with the 27 April 1998 entering into Kosovo of Serbian units of what was left of the Yugoslav army. A new round of ethnic cleansing and mass murder had begun in earnest, including the destruction of countless villages throughout Kosovo. It would take the March-June 1999 war between NATO and Serbia, with the relentless bombing campaign by NATO

[517] Writ of Summons of 4 June 2007 before the District Court of The Hague, The Netherlands on behalf of Ramiza Gurdic and others against the State of the Netherlands and the United Nations, p. 101. Writ available under http://www.vandiepen.com/en/srebrenica/detail/79-1)-writ-of-summons-(4-june-2007).html (retrieved 5 August 2011)
[518] Ibid. Misha Glenny, The Balkans 1804-1999, p. 651

airpower, to finally stop the killing and destruction. This allowed the over 1 million Kosovo refugees to return to their looted and burnt-down homes and villages. Martin Gilbert describes what NATO troops encountered upon entering Kosovo after the withdrawal of Serb troops: "Within twenty-four hours of entering Kosovo, British and German troops found mass graves of victims of 'ethnic cleansing' at five villages. (…) Within a week a further fifty mass murder sites had been located."[519] Although Europe responded faster to the massacres of the 1992-1995 and the 1996-1999 conflicts than it did during the Second World War, it only did so after intense – and mostly failed – diplomacy. It was above all the massive pressure and diplomatic and military involvement of the United States that ended the bloodshed. The bitter irony is how once again the United States was needed to come to the rescue of Europe's grandly proclaimed human dignity and human rights principles. A positive outcome of the Balkan conflicts however was the creation in 1993 – during the war - of the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague, which has so far indicted 161 persons from all parts of the former Yugoslavia, of which Slobodan Milosevic, Radovan Karadjic and Ratko Mladic are the most well-known accused. Proceedings for 35 of the indicted are ongoing, whilst cases for 126 accused have been concluded[520]. The ICTY has since served as an international model to administer justice in the aftermath of other conflicts where the states involved are either unwilling or incapable to do so themselves. It goes beyond the scope of this research to make an in-depth study of the Balkan wars of the latter part of the twentieth century (the start of the twentieth century, as well as the middle of the century also saw bloody ethnic-nationalistic conflict on the Balkans). Instead, we will again analyze, as we did with Nazism and Communism, what thinking – if any – lay behind the politics of ethnic Nationalism and what methods or attitudes were used to deny the humanity of men and women not belonging to one's own "group". Although sadly the patterns are all too familiar, it is still useful to expose them here from a different angle giving us a better understanding of why Europe, despite its worthy post-War human dignity policies, once again became the scene of a human slaughterhouse.

[519] Ibid. Martin Gilbert, History of the Twentieth Century, pp. 676-677
[520] See the ICTY official website: http://www.icty.org/sections/TheCases/KeyFigures (retrieved 12-8-2011)

Why were the principles of human dignity so easily forgotten? Drakulic[521] describes in vivid and shocking detail how war crimes were committed by all groups in the Balkan conflicts, military or civilian; Croats, Serbs and Muslims. Whilst not all participated in the killings, many did in the looting. Drakulic for example tells the story of the Gospic massacre where in October 1991, shortly after an unsuccessful attempt by Serb forces to capture this Croatian town, some 120 Serb civilians having lived peacefully in Gospic for generations, were taken from their homes at night and immediately executed and secretly buried outside the town. The perpetrators were not only the Croatian civil and military leaders of the town, but also a group of ordinary civilians[522]. The motivation of the killing was that these civilians did not deserve for their humanity to be respected because "they had the wrong blood", as Drakulic bitterly puts the commonly held view at the time amongst local Croats[523]. The main reason for committing these atrocities, Ignatieff puts it pointedly, was the politically motivated "narcissism of minor difference"[524] brought to a murderous zeal by creating a climate of fear. This climate was created by targeted use of nationalistic sentiments and manipulation of the media leading to mass hysteria. The infamous 1987 speech of Slobodan Milosevic on the Kosovo Polje, promising the Kosovo Serbs that they would never be run over again by the Turks (read: Muslims) as had occurred in 1389, was a deliberate political move to create fear and a pretext for persecution and violence. Fear of the "other" nationalities or ethnic groups was slowly but persistently introduced and led the way to dehumanizing them. In other words: ethnic nationalism was created on the assumption that since Yugoslavia had fallen apart, who else then your fellow ethnic or national group would protect you against all the others? This in spite of the fact that these others were until recently family, friends, colleagues and neighbors. Who else would protect you from the international "conspiracies" against your small and defenseless nation? The Carnegie report echoes Ignatieff's observation where it notes in its analysis of the *Republika Srpska*: "Everyone in Bosnia and Herzegovina must live according to Karadzic's conception of that country, where cultural distinctions are elevated to differences in species, and "cats and dogs" (Karadzic phrase)

[521] Ibid. Slavenka Drakulic, They Would Never Hurt a Fly – which is a compilation of detailed descriptions of the men and woman that have appeared before the ICTY in The Hague.
[522] See: Ibid. Slavenka Drakulic, They Would Never Hurt a Fly, pp. 23-45
[523] See: Ibid. Slavenka Drakulic, They Would Never Hurt a Fly, p. 23
[524] Ibid. Michael Ignatieff, Blood & Belonging, p. 14

are no longer expected to cohabit."[525] It is history repeating itself. Did not Hitler and the Nazis refer to the Jews as dogs? Did the Nazi ideology not qualify the Jewish people as "an inferior race", another species? Did not Stalin deny the humanity of whole ethnic populations by forced deportation and mass executions, simply because they were deemed "a threat to the Communist state"? The level of disregard for human dignity people like Mladic and Karadzic displayed was therefore quite the same as Hitler's and Stalin's views – and fear was used to promote these views to become more generally accepted. Numbers do not matter when it comes to the primary consideration of any given action, and this consideration was the same for all these men. But the crimes and the motivations of these men are obvious. Yet it is even more revealing to study the thinking and methods of the "ordinary" people that did most of the killings or stood idly by. Without them dictators and war criminals cannot fulfill their aims[526]. Draculic brings this to the point in her analysis of the Balkan war criminals where she says: "Only if we understand that most perpetrators are people like us can we see that we too might one day be in danger of succumbing to the same kind of pressure."[527] This understanding of human nature, of its potentially destructive sides, is essential to understanding the true meaning of human dignity. Draculic rightly points out that we need to move away from the concept that war criminals are only monsters with which we have nothing in common. Doing so blinds us for the fact that most of the perpetrators are simple, ordinary citizens. In order to come closer to grasping the meaning of human dignity, we need to ask: What led them to do this? What led them to decide that "it has been 'proved' that our enemies are no longer human beings" and therefore "we are no longer obliged to treat them as such."[528] Following Draculic' minute research on the individuals standing accused before the ICTY in The Hague, three main patterns can be distinguished that lead to such behavior: fear, the moral slippery slope and conviction. The motivations of war criminals are often a mixture of these three. We will briefly discuss these three patterns, aided by examples of war criminals convicted by the ICTY.

[525] Ibid. An unfinished peace – report of the International Commission on the Balkans, p. 79
[526] It is generally believed that Milosevic himself did not kill anybody during the war, but used willing civilians and military to do the killings for him
[527] Ibid. Slavenka Drakulic, They Would Never Hurt a Fly, p. 169
[528] Ibid. Slavenka Drakulic, They Would Never Hurt a Fly, p. 170

First of all, as most writers on the Balkan wars underline, fear was and is the major motivating factor for human dignity violations by ordinary civilians. We already discussed the fear of the other nationality and its exploitation by politicians and the media. This led to a step by step exclusion of whole groups from society with rape, looting and killings as a consequence directly accommodated by this process. The deputy Bosnian-Serb leader under Karadzic, Biljana Plavsic – also convicted by the ICTY for war crimes – describes this fear as a "blinding fear" leading to an obsessive determination to not ever become victims again: "In this obsession not to become victims ever again, we allowed ourselves to become perpetrators."[529] One can speak here of a "general fear" of society caused by a perceived threat from "alien" elements in this particular society, leading to the notion that these threats need to be removed, if necessary by force. The subsequent dehumanization of those that posed a "threat" was the logical consequence of a well-orchestrated propaganda of fear. But there was another sort of fear as well, what one could call the 'individual fear' caused by (perceived) pressure or threats from within one's own 'group'. One could call this extreme peer pressure. An clear example is where Draculic describes[530] the ICTY case of Drazen Erdemovic, a young Serbian-Croatian soldier in the Bosnian Serb army who participated in the Srebrenica massacre in July 1995. The ICTY acknowledged that Drazen had acted under "extreme duress" after hearing his own and witnesses' statements on how he repeatedly protested before his commanding officer against the order to execute the unarmed civilians kneeling in front of his firing squad. He ultimately obeyed the order when threatened to be executed himself along with the civilians. He caved in after receiving this direct threat to his life whilst thinking of his young wife and child he felt could not be left alone. The Court obviously did not accept this in any way as a justification for the 70 people he alone executed that day, but took this into consideration as sentence was passed. The ICTY hereby noted that throughout the whole war this was the only time Drazen had killed. Drazen is a typical example of an ordinary citizen that nobody around him could imagine would ever do such a thing, yet circumstances - above all fear - let him to a situation where everything he believed in was thrown overboard, leading to great bloodshed. Even

[529] Ibid. Slavenka Drakulic, They Would Never Hurt a Fly, p. 160
[530] See: Ibid. Slavenka Drakulic, They Would Never Hurt a Fly, pp. 94-106

reason did not have a chance in this situation. Draculic describes how during the shooting Drazen took apart an older Muslim man who pleaded with him to stop the killing and asked him how he could do this. The soldier, even giving the man a cigarette, answered with a weak "I don't know" and continued the executions when the threat to his own life was repeated. This example highlights how the human will to survive, to preserve one's own dignity, can – inspired by genuine fear - easily lead to the conscious or unconscious decision that in order to avert this threat, the other's life and dignity – the weaker human being over whom one can exert power - should be sacrificed. This pattern of peer pressure and fear is also what led a far larger number of ordinary people to participate in the "lesser" crimes of the Balkan wars, such as the expulsion of "other" families from their houses and the looting and burning that followed.

Secondly, it is equally the "moral slippery slope" that leads to large scale human dignity violations. It is a process of ceding ground to injustice by small steps that in themselves seem harmless. The case of General Radislav Krstic[531] shows how such a "policy of small steps", of everyday decisions and concessions, of a collaboration on a much smaller scale, brought men like Krstic into situations where they "had either to obey or disobey the orders of men like Ratko Mladic", Draculic observes. As commander of the armed forces of *Republika Srpska* he was sentenced to 46 years imprisonment by the ICTY for his direct role in the Srebrenica massacre of 1995. Krstic, however, was not a man with a record of violence or criminality; neither did he display any interest in nationalistic policies. In fact, he was a quiet career soldier who joined the Yugoslav National Army mostly because of the economic advantages this brought him at the time of Communism: an apartment, an income and a pension. He was not an especially good or courageous soldier; he just happened to be promoted by the circumstances of war and went on to serve directly under Ratko Mladic. Krstic was "an opportunist who went with the tide"[532], which led him into a situation where he could no longer disobey the orders of General Ratko Mladic without endangering his own life. In the final analysis, which once again is given by Draculic, we see that the threat to human life and dignity is so much closer to

[531] See: Ibid. Slavenka Drakulic, They Would Never Hurt a Fly, pp. 74-93
[532] Ibid. Slavenka Drakulic, They Would Never Hurt a Fly, p. 84

home where she says; "Krstic wanted to portray himself as a bystander, but in war there are no bystanders." It is exactly this "policy of small steps", followed by a policy of *compartmentalizing* human dignity where the ultimate danger comes from. It is in gradually only acknowledging human dignity protection for certain 'groups' that history has shown lays the threat to upholding the inviolable dignity of every human being.

Thirdly, the case of Goran Jelisic[533] shows how the Balkan conflict also brought forward men and women acting from a strong conviction that the "others" or "dogs" needed to be eliminated. The Balkan wars equally produced sufficient willing executioners. These were men and women who enjoyed torturing, raping and killing at random. They acted in the belief that they were doing the right thing because the others were "lower" beings or "animals" and they themselves had the power to decide over their lives. Jelisic randomly killed over a hundred prisoners at the Luka prison camp in Bosnia alone. But Jelisic was also an ordinary citizen with no criminal record to speak of, other than petty crime. He was even known by his family and friends as somebody who "would never hurt a fly", always helping others, whether Muslim, Croat or Serb. What then, turned this young man into a war criminal who killed with relish believing he was doing the right thing? Draculic - describing the ICTY Foca case that deals with the systematic rape of Muslim women[534] - provides us with an explanation that is hard to swallow, but entirely correct:

"(...) the war itself turned ordinary men – a driver, a waiter and a salesman, as were the three accused – into criminals because of opportunism, fear and, not least, conviction. Hundreds of thousands had to have been convinced that they were right in what they were doing. Otherwise such vast numbers of rapes and murders simply cannot be explained – and this is even more frightening."[535]

Human dignity, 20th century history of Europe shows us through the atrocities of Nazism, Communism and Nationalism, is not something that is only violated by the infamous totalitarian regimes and dictators such as Hitler, Stalin and Milosevic. It suffers its real

[533] See: Ibid. Slavenka Drakulic, They Would Never Hurt a Fly, pp. 59-73
[534] See: Ibid. Slavenka Drakulic, They Would Never Hurt a Fly, pp. 46-58
[535] Ibid. Slavenka Drakulic, They Would Never Hurt a Fly, p. 50

setbacks at the hands of ordinary citizens who in one way or the other accommodate the horrors. Judge Florence Mumba of the ICTY summarized this point well when she read out the verdict in the *Foca* case on 22 February 2001:

"The three accused are not ordinary soldiers, whose morals were merely loosened by the hardships of war. These are men with no known criminal past. However, they thrived in the dark atmosphere of the dehumanization of those believed to be enemies, when one would not even ask, in the words of Eleanor Roosevelt, 'Where, after all, do universal human rights begin? In small places, close to home.' Political leaders and war generals are powerless if the ordinary people refuse to carry out criminal activities in the course of war. Lawless opportunists should expect no mercy, no matter how low their position in the chain of command may be."[536]

Draculic rightly asks the question where all this leaves us if we realize the perpetrators were ordinary people "just like you and me". They were people that through circumstances made the wrong moral decisions – their behavior thus had less to do with character but more with circumstances. We should not yield to the temptation, Snyder says, to simply dismiss the perpetrators as inhuman, thereby abandoning the search for understanding how these atrocities could happen[537]. That is why, when looking at ways to better protect human dignity, we should really first and foremost look at how *ordinary* people react to *extraordinary* situations[538]. In Bosnia, Serbia and Croatia in the years leading up to the war and during the war itself, most citizens gradually – almost without noticing – adjusted to a society that was being led by a combination of state propaganda, opportunism, fear and indifference leading to a behavior the consequences of which people were not really aware of[539]. A "normality of hatred" set in, as Draculic puts it. This institutionalized hatred, which is not much different from the anti-Semitism in Germany under Hitler, made the step to active or passive participation in the dehumanization of other human beings a small one. The amount of normal law-abiding

[536] Ibid. Slavenka Drakulic, They Would Never Hurt a Fly, p. 55
[537] See: Ibid. Timothy Snyder, Bloodlands, p. 400
[538] Cf. Ibid. Slavenka Drakulic, They Would Never Hurt a Fly, p. 169 where this is discussed in a general sense, not specifically related to human dignity
[539] See: Ibid. Slavenka Drakulic, They Would Never Hurt a Fly, p. 171

citizens collaborating with the injustices as a result grew naturally. This is a tendency of human nature that is all too familiar as we have observed through the many examples presented in this research. It is still no justification for the barbarous acts. Draculic reminds us: "But turning your head away or remaining silent in the face of injustice and crime means collaborating with a politics whose programme is death and destruction. And whether it is willing or unwilling collaboration doesn't really matter, because the result is the same."[540]

The Second World War brings together in a bitter way the three most murderous ideologies of the twentieth century. Their convergence on Balkan lands between 1940 and 1945 confirms what we have already stated above, namely that Nazism, Communism and ethnic Nationalism were basically the same in their intent and methods. The different (official) labels matter little in the reality of what they caused. Yugoslavia during World War II was the scene of atrocities beyond imagination where the fascist Croatian Ustache, the nationalist Serb Chetniks, the Tito-led communist partisans and an unusually bloodthirsty German *Wehrmacht* all partook in indiscriminate killings of civilians and other human dignity violations, whilst also fiercely combating each other. It is telling how each of these groups – with their different ideological backgrounds yet many similarities - was equally involved in human dignity violations of the worst kind. There is for example the massacre of Kragujevac in October 1941. Here a retaliatory round of executions by the Germans in response to the killing of 10 of its *Wehrmacht* soldiers in an earlier attack by Chetnik and partisan fighters left 2,324 men – mostly civilians - dead. Of these men, 144 were secondary school students from the ages of twelve onwards[541]. Not much later, in December 1941, the Chetniks themselves massacred between 2000 and 3000 Muslim men, women and children in the Bosnian town of Foca by way of reprisal because of the latter's perceived 'collaboration' with Tito's partisans[542]. The Ustache was no less genocidal; they were amongst others responsible for the creation and running of the Jasenovac concentration camp, where the Croatians actively cooperated with the Nazis as to the extermination of the Jews. The Ustache especially targeted ethnic

[540] Ibid. Slavenka Drakulic, They Would Never Hurt a Fly, p. 171
[541] See: Ibid. Misha Glenny, The Balkans 1804-1999, pp. 492-493
[542] See: Ibid. Misha Glenny, The Balkans 1804-1999, pp. 494-495

Serbs who were tortured and killed in Jasenovac on a massive scale[543]. The bloody history of the Balkans with its most recent violent eruptions between 1991 and 1999 confirms that indeed the program of death and destruction was really the same for all three ideologies of the twentieth century described in this research. Here, as Frans Alting von Geusau puts it, "Humiliation of fellow human beings is the instrument of choice to gradually destroy the human spirit and human dignity."[544]

1.5. Response to the violations

The intense human tragedies of the 20th century led to various (international) responses, the effects of which can be felt clearly today, especially in our political and legal systems. The Nuremberg Trials, the European Court of Human Rights and the International Criminal Tribunal for the former Yugoslavia or the development of the European Union and the Council of Europe are all a direct result of these conflicts and the massive human dignity violations they caused. The creation of the International Criminal Court (ICC) in 1998 was also inspired by the bloodletting of the 20th century. It is the symbolic value and political relevance of the Nuremberg (1945) and The Hague - ICTY (1993) tribunals and the precedent they set in international law that is especially relevant for the development of the human dignity notion in its legal context. Neither in the charter establishing the Nuremberg Tribunal[545], nor in the statute erecting the ICTY[546] do we find specific mention made of the legal concept or principle of human dignity. Also a definition of what constitutes its violation is not to be found. Other than in international human rights law, human dignity *as a separate legal concept or principle* does not play a prominent role in international criminal law. The latter discipline focuses mainly on prosecuting clearly defined internationally recognized "elements of crimes": genocide, war crimes and crimes against humanity. The ICC has also added the category "crimes of

[543] See; Ibid. Misha Glenny, The Balkans 1804-1999, pp. 495-497. Until today there is still no agreement amongst historians on how many people were killed in Jasenovac. Estimates vary between 100.000 and 600.000 victims

[544] Frans A.M. Alting von Geusau, Sporen van de Twintigste Eeuw – Prolegomena, 3rd edition, Wolf Legal Publishers 2011, p. 32 (translated from the original Dutch text)

[545] See: Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"), 8 August 1945

[546] See: Statute of the International Criminal Tribunal for the former Yugoslavia, 25 May 1993 (UNSC 827), last amended on 7 July 2009 (UNSC 1877)

aggression" to the list. Obviously each of these crimes would constitute a violation of human dignity, yet the detailed catalogues of crimes the statutes of the international criminal tribunals provide only tell us what is punishable, without in any way referring to human dignity. This can still give us a useful insight into *what* would generally be considered a human dignity violation today, but not *why* this is so in order that also undefined crimes could fall within the scope of its protection. In this respect we have not advanced much further since the end of World War II. This reminds us of what Jacques Maritain observed in relation to the Universal Declaration of Human Rights, the authors of which specifically agreed on a catalogue of human dignity violations without being able to agree on the philosophical and legal underpinnings of human dignity and human rights itself. Like the Declaration, the legal documents establishing the various international criminal tribunals in post-War Europe have therefore all reverted to merely defining what crimes these institutions may prosecute. Although this is certainly a major step forward from a historical and legal perspective, the process still lacks a discussion and agreement on the core principles that are needed to come to a legal system – at least in Europe - that is indeed able to guarantee the inviolability of the human dignity of every human being.

We will not discuss the tribunals and international criminal law in detail but rather point out some of their distinctive historical and legal elements, as well as political consequences relevant for a better understanding of human dignity as a legal principle in Europe today.

The creation of the Nuremberg Tribunal in 1945 and the ICTY in 1993 indeed constitute two decisive stages in the development of international criminal law and were a direct response to the massive violations of human dignity and human rights brought forth by the Nazi regime and the war that accompanied the disintegration of Yugoslavia as of 1992. One interesting aspect of the evolving role of international (criminal) law can be observed in the timing of the founding of these tribunals. Both tribunals were founded through the United Nations Organization (UN), however with the important difference that the Nuremberg Tribunal was founded directly *after* the end of the war on 8 August

1945[547], whilst the Hague Tribunal (ICTY) was founded *during* the 1992-1995 war, already in May 1993[548]. The ICTY furthermore also handed down its first indictment on 7 November 1994 whilst the war was still going on. These details of timing indicate that since the end of World War II the influence and weight of the principles of international law have increased, as well as the willingness of political leaders to enforce them. One can also observe this trend on other continents, where both in Africa (Rwanda, Sierra Leone) and Asia (Cambodia) post-conflict tribunals were created that are modeled on the Nuremberg and ICTY tribunals. It can thus be marked as an indirect positive development in the protection of human dignity and human rights that at least the response to the violation of these and other principles of international law in *national* jurisdictions has become more efficient and more forceful. It is no small achievement, as we already noted above, that all of the individuals indicted by the ICTY have either been prosecuted or are currently undergoing prosecution at the Tribunal. It is a major step forward in the development of international human rights law that the centuries-long impregnable concept of the unaccountable sovereign state - so long having kept the crimes of totalitarian regimes hidden from international scrutiny - has now been seriously breached in many – yet certainly not all – countries. This in itself is a serious advance for the cause of human dignity protection, as it exposes ever more violations and helps to forward the slow process of finding ways to come to a broader application of the notion of inviolable human dignity. The creation in 1998 of the ICC with seat in The Hague[549] has been a further step in breaking through the system of mutually recognized impunity. The latest examples of this process are telling: the indictment and issuing of arrest warrants by the ICC for Sudanese president Omar al-Bashir in 2009 and Libyan leader Muhammar Gadaffi in 2011, both whilst they were still in office.

As we discussed above, international criminal law is relevant for the development of the legal concept and legal principle of human dignity insofar as it offers an "introvert

[547] Ibid. United Nations, Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"), 8 August 1945, available at: http://www.unhcr.org/refworld/docid/3ae6b39614.html (retrieved 9-9-2011)
[548] Resolution 827 of the United Nations Security Council of 25 May 1993
[549] Established by the "Rome Statute" of the International Criminal Court and adopted on 17 July 1998 by the "United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court". As of 1 November 2011, 117 countries are Parties to the Rome Statute

definition" of what constitutes human dignity. This is achieved by interpreting it as defining what *violates* human dignity instead of what *constitutes* human dignity. For example, article 5 of the statute of the ICTY reads[550]:

"Crimes against humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
(a) murder;
(b) extermination;
(c) enslavement;
(d) deportation;
(e) imprisonment;
(f) torture;
(g) rape;
(h) persecutions on political, racial and religious grounds;
(i) other inhumane acts."

A more limited wording can be found in Principle VI (c) of the *"Principles of International Law"* applied by the Nuremberg Tribunal[551]:

"Crimes against humanity:
Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime."

[550] Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, as amended on 7 July 2009 by UNSC Resolution 1877, see:
http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (retrieved 9-9-2011)
[551] Principles of International Law Recognized in the Charter of the
Nürnberg Tribunal and in the Judgment of the Tribunal as published by the United Nations in 2005. See:
http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_1_1950.pdf (retrieved 11-9-2011)

These provisions are limited in application and scope to situations of armed conflict and do not apply to the broader field of law and governance in general (other than is the case with the jurisdiction of the ICC). However, this shows how the European understanding of crimes that need to be prosecuted, regardless of real or imagined national sovereignty, created a political climate that made it possible for human dignity evolving into the legal principle to be found today in the EU Charter. Such crimes are self-evidently in violation of human dignity. As Lynn Hunt observes:"The process had and has an undeniable circularity to it: you know the meaning of human rights because you feel distressed when they are violated. The truths of human rights might be paradoxical in this sense, but they are nonetheless still self-evident."[552]

As a final point concluding the discussion of Europe's 20th century organized bloodshed, there is one striking fact that cannot be overlooked and needs brief discussion here. Although it is true that the way in which the different World War II perpetrators have dealt with their past is quite varied, it can be said that the main aggressor, Germany, went to great lengths to do so correctly, of course much under the influence of the victors of that war and the Nuremberg trials. This process of coming to terms with the past is still ongoing. As to the most recent Balkan wars, the matter lies more complicated, yet here it can be noted that, especially under pressure from the EU and the ICTY, the Bosnians, the Serbs and the Croats are little by little starting to deal with their own crimes during the conflict. This is an ongoing process too, even if it is very slow and often marred by political deadlock and the unwillingness of many in these countries to accept their part of the guilt. Very much still needs to be done here, but some important first steps have been made, given the fact that none of the war crimes' suspects indicted by the ICTY is now unaccounted for[553]. None of this however can be said of the main force of Communism in twentieth century Europe, the former Soviet Union. It should be noted that no tribunal of any kind or even a "truth commission" was set up to investigate the crimes of

[552] Lynn Hunt, Inventing Human Rights, W.W. Norton & company 2007, p. 214
[553] All war crimes suspects indicted by the ICTY are either in custody (awaiting trial or serving out their sentence), acquitted because of lack of evidence or have died. In the end the governments of the countries involved – Croatia, Serbia and Bosnia - all cooperated with the ICTY

Communism in the former Soviet Union. It is equally bitter to note that both the Nuremberg tribunal and the ICTY were created with the explicit (UN Security Council) support of the Soviet Union in the former case and the Russian Federation in the latter case. But it seems the Russian political leadership does not measure the country's own past in the same way as it does that of others. Apart from former Russian president Vladimir Putin's infamous remark that the demise of the Soviet Union was the greatest geopolitical tragedy of the twentieth century, we have so far not seen any serious effort in Russia or other former Soviet republics to deal with the human tragedies caused by decades of a Communist totalitarian regime. Despite the above described human dignity violations that lead to the death of tens of millions of civilians throughout seven decades of Communist rule, there has not even been a national court or other institution seriously and methodically investigating the full extend of the crimes of Communism and who was responsible for it. Even countries like Rwanda and South Africa, both the scene of much bloodshed in the latter part of the twentieth century, established their own national legal mechanisms to deal with their troubled past. Of course these mechanisms are not perfect but at least they start a process of information and reconciliation that can help a country to diminish the risk of renewed large-scale human dignity violations. Such a process contributes to a better, if still imperfect, understanding of the notion of human dignity as the founding principle of civil society and the rule of law. It is therefore a cause for great concern that Europe's largest country, Russia, seems not to be interested in evaluating its own human rights record and past violations. This in turn has led to the continuation – be it on a much smaller scale – of the serious violation of human dignity in Russia and many other former Soviet republics until today. The current official Russian attitude towards its Communist, and especially Stalinist, past will prove to be a serious obstacle for lasting stability and peace in Europe and Asia Minor since the central role of human dignity protection is paramount to achieving this. Is this current attitude in the former Soviet Union merely a form of organized forgetting, as was commonly practiced in communist times, or does a deeper reason explain this? Echoing what Draculic said about the former Yugoslavia, the historian Timothy Snyder sheds some light on this attitude:

"*Ideology, when stripped by time or partisanship of its political and economic connection, becomes a moralizing form of explanation of mass killing, one that comfortably separates the people who explain from the people who kill. It is convenient to see the perpetrator just as someone who holds the wrong idea and is therefore different for that reason.*"[554]

The conclusion we may draw from the study of Europe's bloody 20th century is one that may be repulsive or even unacceptable to us: the massive human dignity violations at the hands of Nazis, Communists and Nationalists were not simply perpetrated by inhuman monsters. They were performed mostly by ordinary human beings to whom the mass killings actually made sense.[555] Human dignity and its violations, history has shown us, lies exclusively in the hands of ordinary human beings – you and me.

[554] Ibid. Timothy Snyder, Bloodlands, p. 399
[555] Cf. Ibid. Timothy Snyder, Bloodlands, p. 400 where he comes to basically the same conclusion as Draculic in "They Would Never Hurt a Fly" as quoted above

Chapter 2: Legal-historical context – from concept to principle

2.1. Introduction

Collective shock and fear of Europeans in the final years and the years following the end of World War II led to a powerful movement inspired by the "never again" mantra which in turn provided the final push for national and European human dignity legislation. It seemed all were in agreement – all at least realized - that human dignity had been grossly violated and should from now on be legally protected on a supranational level, preferably enhanced with effective enforcement instruments. Still today we accept the "never again" argument as the main explanation of the protection of human dignity having such a prominent role in the European legal system, whether on the national or the supranational level. But the historically self-evident legal prominence of human dignity has in modern times also highlighted the increasing need to specifically protect more recent victims of human dignity violations, especially the most vulnerable members of modern society. These are, amongst others, the elderly, the handicapped, the (unborn) children, the poor, and the immigrants. Without a consistent application of the legal concept and legal principle of human dignity, their position becomes ever more precarious. The European legal system would undermine itself and the democracies that underpin it when these most vulnerable of people do not receive the full protection of the law. This means that each of them is equally able to invoke his or her inherent dignity and right to life, integrity and liberty as any other citizen. A 2010 ground-breaking cover article in the influential international newspaper *The Economist* illustrates this point in a chilling way[556]. The magazine describes under the title "Gendercide" how at least a 100 million baby girls –both unborn and born- have been killed in the past decades through the Chinese forced one-child policy combined with the cultural preference for having boys. Both abortion and the killing of just-born baby girls is common practice in China (and India as well). The main reason: baby girls are killed because the government mostly only allows one child and couples prefer in that case to have a son. Both the one-child policy and the killing of children because they are female is a flagrant violation of human dignity and the right to life. European governments have done little to stop this gross

[556] The Economist, Gendercide - the world wide war on baby girls, March 6th-12th 2010, pp. 61-64

injustice. But it was exactly the unspeakable crimes committed against those that could not – for reasons outside of their control - invoke their inherent dignity and rights which led to the post-War process of enshrining human dignity as a "central organizing principle in the idea of human rights (...)."[557] This notion is inspired by different philosophical roots and national constitutional traditions, and leading to varying judicial interpretations.

2.2. Chronology of post-War European human dignity legislation

The drafting of the EU Charter and the predominance of human dignity in this document is strongly linked to the constitutional development in the EU member states. Gradually the human dignity notion was included as a fundamental principle of governance, especially after World War II. As we will see in this chapter, the EU Charter is the logical answer to a constitutional tradition which established itself in EU member states and beyond, as well as the pivotal role played by the Universal Declaration and the European Convention. It cannot be said however that the notion of human dignity had not entered European constitutions before World War II at all. Weimar Germany[558], Ireland[559], Portugal[560] and Finland[561] all included the concept of human dignity in their constitutions before 1939, albeit mostly as a secondary legal concept or a limited legal principle. But it was as a direct response to World War II that the legal protection of human dignity became an international - especially European - aim and also a more broadly codified primary concept of law in the national constitutions of European countries. An example to illustrate this shift in the weight of human dignity wording in constitutional documents

[557] Ibid. Christopher McCrudden, Human dignity and Judicial Interpretation of Human rights, p. 675
[558] Verfassung des Deutschen Reichs vom 11. August 1919, article 151
[559] Irish Constitution of 1 July 1937 states in its preamble: "(..) so that the dignity and freedom of the individual may be assured (..)"
[560] The Portuguese Constitution of 1933 spoke of human dignity in article 45. The current Constitution of 2 April 1976 regulates human dignity in article 1: "Portugal shall be a sovereign Republic, based on the dignity of the human person and the will of the people and committed to building a free, just and solidary society". Also in articles 26, 59, 67. Translation by the Portuguese Tribunal Constitucional
[561] Finnish Constitution of 17 July 1919 (repealed by the new Constitution of 1999, which however includes extensive human dignity provisions as well), Section I, para. 1: "Finland is a sovereign Republic, the constitution of which shall guarantee the inviolability of human dignity and the freedom and rights of the individual as well as promoting justice in society." Ibid. ICL – University of Bern Switzerland: http://www.servat.unibe.ch/law/icl/info.html (retrieved 2-11-2010)

is the Weimar Constitution of 1919. The pre-War constitution of the Weimar Republic only mentions human dignity in relation to economic activity in article 151:

"Die Ordnung des Wirtschaftslebens muß den Grundsätzen der Gerechtigkeit mit dem Ziele der Gewährleistung eines menschenwürdigen Daseins für alle entsprechen".

The incorporation of human dignity protection as a *general* principle of constitutional law happened in Germany only after 1945. The Grundgesetz holds in article 1.1.:

"*Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt.*" [562]

Its inclusion in the Grundgesetz (1949) has subsequently been very influential for the further development of the legal concept and the legal principle of human dignity throughout Europe, along with the Universal Declaration, which preceded and inspired it. Because of the large amount of case law the BVerfG has developed interpreting and applying article 1.1. of the Basic Law, the German conception of human dignity and human rights in general is of leading importance today, as one can see by comparing article 1 EU Charter with article 1.1. of the Basic Law. The wording in both articles is very similar, making clear that the latter inspired the former[563].

The utter destruction and desolation caused by World War II also gave the world a rare moment of unity and resolve on an international level. The urgency of legislating on human dignity was understood by its massive violation. The newly created United Nations Organization (UN), the successor of the failed League of Nations, was able to relatively quickly draft and officially proclaim a universal human rights catalogue including human dignity provisions. This was preceded by the founding Charter of the

[562] Grundgesetz für die Bundesrepublik Deutschland vom 23. Mai 1949 (BGB1.) p. 1
[563] This fact is generally recognized in literature. See for example: EU Network of Independent Experts on Fundamental Rights (CFR-CDF), June 2006 commentary on the EU Charter, p. 23

United Nations of 1945 also introducing the notion of human dignity[564]. The Universal Declaration of Human Rights was adopted and proclaimed by the General Assembly of the United Nations on December 10th, 1948[565]. Although eight countries, including the Soviet Union, abstained from the General Assembly vote, all other UN member states at the time voted for the document. The proclamation was accompanied by the bold and apparently effective appeal to member countries to publicize widely the Universal Declaration and "to cause it to be disseminated, displayed, read and expounded principally in schools and other educational institutions, without distinction based on the political status of countries or territories"[566]. Until that time there had been no other international legal document in which human dignity was so firmly established. The Declaration therefore has been a source of inspiration for many subsequent human rights documents that formally enshrined the concept of human dignity, for example the 1966 UN "International Covenant on Civil and Political Rights" (ICCPR). The Helsinki Final Act of 1975[567] contains an explicit reference to the obligation the signatories take upon themselves to respect human dignity. It was at the time a mere political statement and not an international treaty, yet it had historically proven far-reaching consequences for the later demise of the Iron Curtain. The emerging human rights movements in Eastern- and Central Europe used the document to challenge their totalitarian regimes with their own words. The Helsinki Final Act reads in §VII, second paragraph:

"They will promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for his free and full development."
Other post-War European constitutions have included the legal concept or legal principle of human dignity as well, for example Italy[568], Spain[569] and Portugal. But also Belgium,

[564] Charter of the United Nations, San Francisco, 26 June 1945, second paragraph. It came into force on 24 October 1945
[565] Resolution 217 A (III) of 10 December 1948
[566] Ibid. Resolution 217 A (III)
[567] The Helsinki Final Act, signed at the Conference on Security and Co-operation in Europe (CSCE) in Helsinki, held from 30 July to 1 August 1975. Thirty-five Heads of State or Government from the whole of Europe - including all Eastern and Central European countries - the USA and Canada gathered for the signing. Among them were US president Gerald Ford and Chairman Leonid Brezhnev of the USSR
[568] Italian Constitution of 22 December 1947 and entering into force on 1 January 1948. The exact wording "human dignity" is only used in article 41; article 32 speaks of "respect for the human being", whilst article

Ireland, the Scandinavian countries, Slovakia, Slovenia and more recently the Baltic States have all included human dignity wording in their constitutions[570]. The 1946 and 1958 constitutions of the French 4th and 5th Republics include no direct referral to human dignity and neither does the 1789 French Bill of Rights that forms an integral part of these constitutions through incorporation in the preamble[571]. However, the preamble of the 1946 Constitution carried all the content of a human dignity provision, which was then incorporated in the 1958 Constitution by referral:

Constitution of the 4th Republic, 27 October 1946:
"Au lendemain de la victoire remportée par les peuples libres sur les régimes qui ont tenté d'asservir et de dégrader la personne humaine, le peuple français proclame à nouveau que tout être humain, sans distinction de race, de religion ni de croyance, possède des droits inaliénables et sacrés. Il réaffirme solennellement les droits et libertés de l'homme et du citoyen consacrés par la Déclaration des droits de 1789 et les principes fondamentaux reconnus par les lois de la République. "

Constitution of the 5th Republic, 4 October 1958:
"Le peuple français proclame solennellement son attachement aux Droits de l'homme et aux principes de la souveraineté nationale tels qu'ils ont été définis par la Déclaration de 1789, confirmée et complétée par le préambule de la Constitution de 1946, ainsi qu'aux droits et devoirs définis dans la Charte de l'environnement de 2004."

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2 and 119 speak of respecting human rights. English translation from: Ibid. International Constitutional Law (ICL) project of the University of Bern

[569] Spanish Constitution of 29 December 1978 speaks of the 'dignity of the person' in article 10, para. 1. Ibid. ICL – University of Bern. The 1945 Basic Law designed by Franco also included human dignity wording.

[570] Two useful overviews of human dignity wording in national European constitutions should be mentioned here: Council of Europe, The principle of respect for human dignity – proceedings of the 1998 Montpellier meeting of the European Commission for Democracy through Law (Venice Commission), Council of Europe Publishing 1999, pp. 15-79 (various authors) and the European Parliament's Committee on Civil Liberties, Justice and Home Affairs' overview of EU member states constitutions under http://www.europarl.europa.eu/comparl/libe/elsj/charter/art01/default_en.htm (retrieved 18-1-2012)

[571] French Constitution of the 4th Republic, 27 October 1946 and the Fifth Republic, 4 October 1958. French version as published by the Conseil Constitutionel.

The United Kingdom (UK) applies the Common Law system and has no single written constitutional document. What passes as the 'constitution' of the UK consists of a collection of statutes, court judgments and treaties. British legal scholars debate whether or not this can be called an actual constitution. In any case, human dignity wording seems to have no prominent place in the UK legal tradition, only indirectly through the 1998 Human Rights Act which basically incorporates the Convention into the legal system and abolishes the death penalty[572].

The 1997 Constitution of Poland[573] leans heavily on the notion of human dignity, which is not surprising due to its tragic history under Nazism and Communism and the subsequent influence of the *Solidarnosz* movement as well as Pope John Paul II on the country. Human dignity was one of the main messages of the pontificate of this Polish Pope. He had a decisive influence on the country and its return to democracy and the rule of law. The preamble of the Polish Constitution reads:

"We call upon all those who will apply this Constitution for the good of the Third Republic to do so paying respect to the inherent dignity of the person, his or her right to freedom, the obligation of solidarity with others, and respect for these principles as the unshakeable foundation of the Republic of Poland."
and article 30:
"The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities."

The 1999 constitution of Switzerland includes a human dignity provision in article 7 as the first provision under the heading "basic rights" providing that "Human dignity is to be respected and protected." The most recent example of a European constitution including human dignity wording is the much debated Fundamental Law of Hungary which entered into force on 1 January 2012. Apart from mentioning human dignity as a founding

[572] Human Rights Act 1998 (c.42). Act of Parliament that entered into force 2 October 2000
[573] Polish Constitution adopted by the Sejm (National Assembly) on 2 April 1997. English translation; Ibid.

principle in the third paragraph of the preamble, it also introduces the legal principle of human dignity in the constitution itself. Article II reads:

"Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; embryonic and foetal life shall be subject to protection from the moment of conception."[574]

Another essential European development relevant for the development of human dignity in its legal context was the founding of the Council of Europe in 1949 and the subsequent signing of the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention) in Rome on 4 November 1950[575]. The creation of the Council of Europe was a direct answer to the deep trauma *and* dangers of post-War Europe in which human dignity had once again come under threat, most notably because of the increasing menace posed by the Soviet Union and the rise of communist totalitarian regimes in Central and Eastern Europe. The signing of the Convention followed the successful Hague Congress of May 1948 and the European Movement that helped strengthen the political will to erect the Council of Europe. As we will discuss in greater detail later, the Convention does not stipulate directly the protection of human dignity. Only by mentioning the Universal Declaration in the preamble of the Convention did human dignity become a relevant legal concept for application of the Convention.

The Treaty on European Union (TEU) – revised by the Lisbon Reform Treaty – speaks about "respect for human dignity" in articles 2 and 21, in both cases however not as an operational legal principle but as a mere 'consideration' whereby it is stated that the Union is founded on a certain set of values, amongst them human dignity. Article 2 TEU, General Provisions, holds that:

[574] Official English translation provided by the Hungarian Parliament under: http://www.kormany.hu/download/4/c3/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf (retrieved 23-12-2011)
[575] Ratified and entered into force on 3 September 1953; it has 13 protocols, the last of which dates from 3 May 2002 and abolishes the death penalty

"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.(..)";
article 21 TEU, External Action:
"The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law."

We finally come to the EU Charter itself, entered into force on 1 December 2009. It should once again be noted how obvious is the influence of the German post-War constitutional development on the drafting of the EU Charter. The text of article 1 clearly derives from article 1.1. of the Grundgesetz. It is also no coincidence that Roman Herzog, former president of the Federal Republic of Germany and former president of the BVerfG, presided over the convention that drafted the EU Charter.

In legal-historical terms, the actual process that led from the term human dignity being introduced into the European legal system(s) to the moment it became a legal principle through the EU Charter constitutes five main milestones. Each of these milestones was the result of a political process that had started during the Second World War and continues until today with the scope and meaning of human dignity protection still being debated. Without these milestones, it is difficult to imagine how article 1 Charter of Fundamental Rights of the European Union would have existed today as the legal principle of human dignity it is. We will now discuss each of these stages in more detail from a legal-historical perspective in order to gain more insight into the motivations behind each of these documents. Whilst we will focus on five key international legal documents on human dignity, they are certainly not the only ones of importance in this regard. We will therefore also briefly discuss additional treaties signed by members of the UN, the Council of Europe and the EU that are relevant for human dignity legislation.

The central question here will also be: what definition and scope – if any – did the drafters of the following documents have in mind for human dignity protection?

2.3. 1945 – Charter of the United Nations

The second paragraph of the preamble of the Charter of the United Nations reads: *"to reaffirm faith in fundamental human rights, in the dignity and worth of the human person…"* Articles 1.3 and 55c of the UN Charter reaffirm this call for human rights protection and include the provision that these rights should be applied "without distinction as to race, sex, language, or religion".

This document is of such importance for the development of the legal concept and principle of human dignity in Europe because, being the founding charter of the United Nations, it set the tone for future discussions and documents on the subject of human dignity and human rights within the perspective of international law. Within that perspective of international law, the Charter of the United Nations also has a special status, an extraordinary legal position. The UN Charter can be characterized as a sort of 'constitution' for the world community of nations, whereby the International Court of Justice (ICJ) indeed characterizes charters in general as 'constitutions' and therefore treats the UN Charter as if it were a constitution[576]. Additionally, the UN itself has also been attributed a special legal status by the ICJ where it is regarded as an 'objective international (legal) personality' allowing it to operate globally fulfilling its main objective of maintaining peace and security[577]. These legal attributes give special weight to what is being said in the UN Charter; also where it concerns the place and meaning the document gives to human dignity.

The UN itself was a direct response to the horrors of war and a renewed effort after the failed post-World War I League of Nations to bring about an international organization that could be a promoter of peace and human rights. Interestingly, the political and drafting process leading up to the signing of the UN Charter in June 1945 did not

[576] See: Bruno Simma (ed.), The Charter of the United Nations – A Commentary, Oxford University Press 1995, pp 26-27

[577] Ibid. Bruno Simma (ed.), The Charter of the United Nations – A Commentary, p. 27

prominently feature human rights. As Glendon describes[578], it was the pressure applied by NGO's and delegates of smaller (especially Latin American) countries at the drafting conference in San Francisco as well as emerging horror reports of Nazi atrocities that finally led the United States to push for human dignity and human rights wording to be included in the UN Charter. The Soviet Union, Great Britain and China still remained very skeptical of such language, as the US government itself had been until briefly before the San Francisco conference. Glendon in this respect notes dryly: "On the eve of the San Francisco conference one thing was clear: The Great Powers were not going to take the initiative in making human rights a centerpiece of their postwar arrangements. It was not in their interest to do so."[579] Before his sudden death in April 1945, US president Franklin Delano Roosevelt had been the only Allied leader to push for human rights language in the upcoming UN Charter. Surprisingly, one would find today, there was still at that time broad consensus amongst international lawyers that the treatment by a sovereign state of its citizens was exclusively a matter of the nation's internal affairs and only in very exceptional cases warranted international intervention[580]. It has to be said though that this was at a time during the final stages of World War II where the full scale of the Nazi crimes was not yet widely known. As we have observed throughout this research, opinions started shifting dramatically as the details of the death camps and gas chambers became more widely known. Now it would be political foolishness not to support international human rights mechanisms as the Allied Powers realized in June 1945. The Nuremberg Principles (regulating the administration of justice by the Nuremberg War Crimes Tribunal) only dealt with human dignity violations in wartime and without using this specific term. It was therefore ultimately seen as opportune to also agree on such principles for peacetime. The UN Charter provided this, but it had been a close call – the omission of generic human rights in the charter of the UN predecessor, the League of Nations, had almost been repeated. This would certainly have been a major

[578] Mary Ann Glendon, A World Made New – Eleanor Roosevelt and the Universal Declaration of Human Rights, Random House 2002, pp. 6-19
[579] Ibid. Mary Ann Glendon, A World Made New, p. 10
[580] See: Ibid. Mary Ann Glendon, A World Made New, p. 9

setback for the development of the concept of human dignity as a guiding principle of international law[581].

2.4. 1948 – Universal Declaration of Human Rights

Much has already been written and discussed about the Universal Declaration of Human Rights (Declaration), also called the "International Bill of Human Rights"[582], adopted and proclaimed by the UN General Assembly on 10 December 1948. We will focus here on pointing out some of the relevant legal-historical background with regard to the inclusion of human dignity language in the document. The Declaration, Glendon points out, brings together two distinct rights traditions: the Anglo-American liberal tradition focused on the rights of the individual and the Continental tradition focused on the dignity of every human being[583]. It was the earlier proclaimed "American Declaration of the Rights and Duties of Man" (also called the "Pan-American Declaration") adopted in Bogota on May 2, 1948, that seems to have been the inspiration for including the legal concept of human dignity in the 10 December 1948 Universal Declaration.

The drafting process of the Declaration was a political minefield and accompanied by many disagreements, as the drafting committee, presided over by Eleanor Roosevelt – widow of former US President Franklin Delano Roosevelt – tried to come up with a document that would be acceptable for all United Nations' member states. They obviously represented many different religions, cultures and traditions. One should also not forget that the committee – called the "Human Rights Commission" - was doing its work against the backdrop of rising tensions between the Soviet Union and Western powers, especially the United States, over the spread of Communism and its influence in Europe and beyond. Although the pressure on the committee to produce a legally binding international bill of rights was enormous, especially the opposition from the Great Powers resulted in the document becoming a declaration only. But even with this being the case, nobody could have predicted how much influence this 'mere declaration' would have on international and national human rights discourse. Thomas Buergenthal writes:

[581] Cf. Ibid. Mary Ann Glendon, A World Made New, pp. 9-10 who rightly underlines the fact that the Nuremberg Principles alone were not enough to secure human dignity protection in a general sense
[582] See the official text of the UN General Assembly Resolution 217 (III), 10 December 1948
[583] Ibid. Mary Ann Glendon, A World Made New, pp. 173ff

"The great irony here is that the Universal Declaration was drafted in hortatory language designed to emphasize its non-binding character because many member states of the United Nations did not want a binding legal document. Their governments no doubt believed that 'mere words' could do no harm, provided they did not impose legal obligations. How wrong they were! It is precisely the Declaration's language – at once eloquent, expansive and simple – that allowed it to express universal truths in words human beings all over the world could understand and wanted to hear. No formal legal instrument could have achieved that result and had quite the same inspirational impact on the human rights movement."[584]

The irony of history continues as the Declaration became the foundation on which most subsequently agreed *legally binding* international human rights documents and national constitutions are directly or indirectly based. It clearly set the standard for human rights internationally[585]. The Declaration provides "the basic building blocks of the normative edifice on which the contemporary code of human rights rests."[586] All UN treaties dealing with human rights, as well as the various European human rights documents, can in essence be traced back to the Declaration. Countless official documents were inspired by or based on the Declaration, which also includes independence declarations and charters of international organizations[587]. Notable examples of human rights treaties in this regard are the European Convention (1950), the International Covenant for Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966). Each of these documents specifically incorporated the Declaration and its human dignity language and therefore affirmed these provisions as having the status of at least customary law[588]. Finally it is worth noting that by 2002 at least 146 national

[584] Thomas Buergenthal, Centerpiece of the Human Rights Revolution, in: Reflections on the Universal Declaration of Human Rights – A Fiftieth Anniversary Anthology, Kluwer Law International 1998, p. 91
[585] Cf. Ibid. Lynn Hunt, Inventing Human Rights, p. 205
[586] Ibid. Thomas Buergenthal, Centerpiece of the Human Rights Revolution, p. 92
[587] Nihal Jayawickrama researched this, see: Nihal Jayawickrama, The Judicial Application of Human Rights Law – National, Regional and International Jurisprudence, Cambridge University Press 2002, pp. 36-38
[588] Cf. Ibid. Nihal Jayawickrama, The Judicial Application of Human Rights Law, p. 39. Jayawickrama speaks here of it being conventional law which we agree would apply to the cited covenants themselves but not to the Declaration, in spite of its wide acceptance

constitutions drafted since 1948 included fundamental rights language which can be traced back to the Declaration[589]. Most of the human rights treaties inspired by the Declaration follow its emphasis on the primacy of human dignity. The relevance of the Declaration for understanding the current legal concept and principle of human dignity in European law is therefore not to be underestimated. This becomes even clearer when observing the prominent place human dignity has in the Declaration:

The preamble states in its first paragraph:
"Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world"
and in the fifth paragraph:
"Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person (..)"

The preamble of the Declaration "reflects in a few words the fundamental dialogue of the World War II years" and observes that "the barbarous acts that had outraged the conscience of mankind were caused by disregard and contempt for human rights (...)"[590], which this Declaration now seeks to forestall for the future of mankind.

Article 1 of the Declaration affirms:
"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

In effect through article 1 the Declaration formalized the notion of human dignity as being the foundation of human rights *as such*, therefore turning it from a mere philosophical notion into a legal concept[591]. This major development in international law

[589] See: Ibid. Nihal Jayawickrama, The Judicial Application of Human Rights Law, p. 40
[590] Jan Martenson, in: Asbjorn Eide a.o. (ed.), The Universal Declaration of Human Rights: A Commentary, Scandinavian University Press 2nd edition 1993, p. 19
[591] It should be noted here that in spite of the codifaction of the Declaration through subsequent UN treaties like the ICCPR and the ICESCR, human dignity did not become a legal norm because article 1 of of the

was however not easily achieved as Glendon describes in her detailed account of the drafting process. Rather, article 1 as it appears today was preceded by intense debate within the committee and countless proposed amendments later in the drafting process from around the world that amongst others argued that dignity could not be a right and should therefore not be included in the Declaration. Let us not forget that because of the highly pluralistic nature of the United Nations it was practically impossible to come to a common understanding on matters of human nature and destiny. Michael Novak expresses this point well: "Although consciences on all sides had been shocked by the bloodshed, the newly discovered death camps (...), no one way of thinking about moral issues commanded consensus."[592] Human dignity as a term or legal concept does not even appear in the 1947 first official draft of the Declaration, but only in the 1948 re-draft by the UN committee[593]. Article 1 received much attention towards the end of the drafting process, apparently under the influence of the large Latin American delegation. During the 88th through the 179th meetings of the Third Committee of the UN General Assembly (September-December 1948) and representing the final round of discussions involving all 58 member states at the time, 6 entire sessions were devoted to article 1, not counting the general discussions where it was intensely debated as well[594]. Much of the discussion was whether article 1, and thus human dignity, should be seen as a right or a statement of fact. This was relevant for answering the question of where in the Declaration the proposed text of article 1 belonged. It was argued for example by the Dutch representative De Beaufort that if it were a statement of fact it belonged in the preamble as the function of the latter was "to furnish a basis upon which the whole structure of the declaration could be erected. It was, consequently, the logical place for the insertion of fundamental principles which would justify the existence of that

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Declaration and the texts based on it in these treaties still have a declaratory character rather than a normative character. The same counts for the ECHR which incorporates the Declaration text.

[592] Michael Novak, Human Dignity – Human Rights, in: First Things 97 (November 1999), p. 39

[593] See: Drafting Committee International Bill of Human Rights, 1st Session, June 1947 and Drafting Committee International Bill of Human Rights, 2nd Session, May 1948, published on http://www.un.org/Depts/dhl/udhr/, where the complete traveaux préparatoires of the Universal Declaration are available (retrieved 21-10-2011)

[594] See for a detailed description of the discussions on article 1: Tore Lindholm, in: Ibid. Asbjorn Eide a.o. (ed.), The Universal Declaration of Human Rights: A Commentary, pp. 42-51

international instrument."[595] In the end, it seems that the Third Committee concluded that article 1 is the "foundation and cornerstone of the entire declaration" with a "normative status" rather than a statement of fact[596]. With regard to human dignity as a legal concept, the Declaration also explicitly refers to it in the first paragraph of the preamble, thus making it obvious that it indeed is its fundamental guiding principle. There is no doubt that the drafters of the Charter of Fundamental Rights of the European Union followed the Declaration in this regard, where human dignity features various times, also in the preamble.

Two of the other key members of the drafting committee, René Cassin and Charles Malik, assisted Roosevelt in overcoming the opposition against the inclusion of 'dignity' by stating that in the structure of the Declaration article 1 was meant to refer to the fact that every human being is worthy of respect and to underline what is the basic foundation for human rights[597]. The Declaration in its whole, as Glendon puts it unequivocally, is "an integrated document that rests on a concept of the dignity of the human person within the human family."[598] The preamble makes this very clear by proclaiming that freedom, justice and peace in the world *depend* on the recognition of the human being's inherent dignity[599]. However, René Cassin, widely credited as the main author of the final draft of the Declaration[600], had no illusions about the lack of a common definition of what would exactly constitute this human dignity. He says: "The dignity of man has been reaffirmed by philosophers, sociologists, and statesmen regardless of religious beliefs, and has been detached from religious credos or cults. What is incontestable is the permanence of the idea through the centuries and despite the most profound divergences of interpretation of

[595] As quoted by Tore Lindholm in: Ibid. Asbjorn Eide a.o. (ed.), The Universal Declaration of Human Rights: A Commentary, p. 43
[596] Ibid. Tore Lindholm in: : Ibid. Asbjorn Eide a.o. (ed.), The Universal Declaration of Human Rights: A Commentary, pp. 47-48, 51
[597] See. Ibid. Mary Ann Glendon, A World Made New, p. 146
[598] Ibid. Mary Ann Glendon, A World Made New, p. 174
[599] Cf. Ibid. Mary Ann Glendon, A World Made New, p. 176
[600] Cf. Ibid. Christopher McCrudden, Human Dignity and the Judicial Interpretation of Human Rights, p. 12. It is of historical importance to note here that René Cassin was a French Jewish lawyer who lost the majority of his family to the Nazi death camps. He was therefore keenly aware of the importance of a universal understanding or at least protection of human dignity

the doctrine."[601] Yet, taking into consideration the decisive role Cassin played in preparing the final text of the Declaration as we know it today, the core aspect of human dignity we have discussed at length in Part I, namely that human dignity exists because the human being is created in the image and likeness of God, does after all appear as a foundational principle of the Declaration where Cassin says:

"First of all, if any relationship between the Universal Declaration and more generally the place of the rights of man in the modern world on the one hand, and the Decalogue as the first formulation of man's basic duties on the other hand does exist, this relation is not a formal one. Nevertheless, its reality is evident and must be traced back to the earliest periods of ancient history, when man, standing erect, mastering fire, and enjoying the benefits of written language, became aware of his innate dignity."[602]

In spite of the fact that article 1 of the Declaration speaks about human beings as "*born free and equal in dignity"*, it is proven by the available documents of the drafting process that the word "born" was not meant to limit human dignity to the actually born human being as such as opposed to unborn human beings. In the context of current "human rights" arguments in favor of abortion it is important to underline that the drafters of the Declaration never had the intention to exclude the pre-born life from protection. This becomes clear when looking at the discussion about the use of the word "men" instead of "men and women" in an earlier stage of the drafting process, where it was finally agreed that *all human beings* were referred to in article 1 of the Declaration[603]. Later the term "men" was then replaced by "human beings", which indeed does more justice to the necessary broad understanding of its scope, not only from the perspective of respecting the two sexes, but also for it to be inclusive of all human life regardless of its state of

[601] René Cassin, From the Ten Commandments to the Rights of Man, speech given in January 1969, published on the official Franklin and Eleanor Institute's website commemorating the 50th anniversary of the Declaration: http://www.udhr.org/history/tencomms.htm (retrieved: 23-9-2011). Where Cassin refers to the "Decalogue", he refers to the Ten Commandments in the Old Testament Book of Exodus (20, 1-17)
[602] Ibid. René Cassin, From the Ten Commandments to the Rights of Man
[603] See: Ibid. Tore Lindholm in: Asbjorn Eide a.o. (ed.), The Universal Declaration of Human Rights: A Commentary, p. 35

development. The wording "are born", as Lindholm[604] explains well, was generally interpreted by the drafters as pointing towards the specific human character of freedom and equal dignity as such, not as to *who* amongst humans could claim these attributes. The unique character of freedom and dignity is their being of a pre-positive nature, as we discussed above. This means that they are given each human being independent of the state. Article 1, therefore is the "thin, but crucially important normative basis, on which representatives of several cultures could reach agreement."[605]

2.5. 1949 – Grundgesetz (German Basic Law)

Considering the vast amount of literature that is available on the principle of human dignity in the German Basic Law on the one hand, and the increasing tendency of rejecting its distinctly (but not exclusively) Christian roots on the other hand, we will focus primarily on the important relationship of the preamble's reference to 'God and Man' with the human dignity understanding of the 'constitution fathers'. The latter forms the basis of article 1.1. of the Basic Law and its intended application. In the specific context of the EU Charter that the Basic Law is being discussed here, there is a need to pay special attention to this relationship in order to better understand the prerequisites for applying article 1 EU Charter and related articles truly indiscriminately.

From a legal-historical perspective, the Grundgesetz was first of all influenced by the constitution of the 1918-1933 Weimar Republic. The constitutions of the German states of Bayern (1946), Hessen (1946) and Bremen (1947) were then further building stones for the human dignity clause in the Basic Law. Each of these state constitutions explicitly included human dignity provisions[606] The UN Charter (1945) and especially the Universal Declaration (1948) also had an important impact on the drafting process of the Grundgesetz[607]. The aim with the Basic Law was to radically reshape the German State

[604] See: Ibid. Tore Lindholm in: Asbjorn Eide a.o. (ed.), The Universal Declaration of Human Rights: A Commentary, p. 48
[605] Ibid. Tore Lindholm in: Asbjorn Eide a.o. (ed.), The Universal Declaration of Human Rights: A Commentary, p. 51
[606] See: Roman Herzog, Matthias Herdegen, Rupert Scholz, Hans H. Klein (ed.), Maunz/Dürg, Grundgesetz – Kommentar, Verlag C.H. Beck 2011, p. 11, with exact wording of relevant constitutions
[607] See: Ibid. Maunz/Dürg, Grundgesetz – Kommentar, p. 11

and establish a full parliamentary democracy within a federal system[608]. But before it came to the 23 September 1949 signing and proclamation of the Basic Law by the new political leaders of Germany and after the approval of the document by Western military governors, a period of major disagreements leading to intense negotiations almost derailed the whole project. When on 1 July 1948 the Western military governors formally asked the prime ministers of the German states to convene a constitutional assembly, their first reaction was to refuse. German leaders felt there was not enough of a prospect for Germany to regain its full territory and sovereignty. They could not agree to a permanently divided Germany. Amongst disagreements between Germany's political parties and states it would also require much pressure from the Western powers to reach a compromise whereby not a "constitution" would be drafted, but rather a "basic law". This would however have the same function as a constitution until Germany would once again be an integral sovereign state on 3 October 1990 when Germany was reunified [609]. But in spite of this formal confirmation of the Grundgesetz actually being a constitution taking place only in 1990, the document soon after 1949 became the de-facto constitution and was adhered to by state and citizens as if it were a full constitution.

Together with the Universal Declaration the 1949 German Basic Law is the document that has most influenced the EU Charter. This especially counts for the development of the legal concept of human dignity into a legal principle. Both the EU Charter and the Grundgesetz speak about the protection of human dignity in the first article, whereby the wording of the EU Charter is clearly inspired by, if not derived from, the Grundgesetz[610]. The Basic Law was the first post-War constitution in Europe that made human dignity not only an operational legal term, but also the leading principle for all state activity. It set a constitutional limit to state power. Given Germany's Nazi past, it was no surprise that its new rulers wanted to write a constitution that would create a constitutional system clearly distancing itself from the regime that preceded it. The text of its preamble and article 1 leave no doubt as to where the framers of the Grundgesetz were coming from:

[608] Cf. Ibid. Fragen an die Deutsche Geschichte, pp. 345-346, 350-351
[609] Cf. Ibid. Fragen an die Deutsche Geschichte, pp. 349-350
[610] Cf. Horst Dreier (ed.), Grundgesetz Kommentar – Band I, 2. Auflage, Mohr Siebeck 2004, p. 158 §32

*"**Präambel***

Im Bewusstsein seiner Verantwortung vor Gott und den Menschen.

(..)

I. Die Grundrechte

Artikel 1

(1) Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt.

(2) Das Deutsche Volk bekennt sich darum zu unverletzlichen und unveräußerlichen Menschenrechten als Grundlage jeder menschlichen Gemeinschaft, des Friedens und der Gerechtigkeit in der Welt.

(3) Die nachfolgenden Grundrechte binden Gesetzgebung, vollziehende Gewalt und Rechtsprechung als unmittelbar geltendes Recht."

The Basic Law through its preamble and specific reference to God and Man clearly does away with the extreme legal positivist approach and the totalitarian system of the Third Reich. The Grundgesetz instead puts a *transcendental* and *humane* principle in place by subjecting all activity of the state to *"Verantwortung für Gott und den Menschen"* and the resulting high legal standard of human dignity. The drafters wanted to create a new and more humane order[611]. Human dignity, as the authors of the Basic Law understood it, derives from the unique relationship of the human being to its creator – the *Gottesebenbildlichkeit*. There is no doubt that the majority of German post-War politicians having drafted the Grundgesetz was guided by the Christian understanding of the human person as standing in a personal relation to God its creator[612], without however in any way imposing Christianity or turning Germany into a Christian state[613].

To better understand this profound development in German constitutional law we will look at the text proposals presented as a result of the two main phases in which the drafting of the Grundgestez took place – the *Herrenchiemsee Verfassungskonvent* of

[611] Cf. Christian Walter, Human Dignity in German Constitutional Law, in: Ibid. The principle of respect for human dignity – proceedings of the 1998 Montpellier meeting of the European Commission for Democracy through Law (Venice Commission), p. 25

[612] Cf. Ibid. Horst Dreier (ed.), Grundgesetz Kommentar – Band I, p. 14, §27

[613] Cf. Ibid. Christian Starck (ed.), Mangoldt-Klein Kommentar zum Grundgesetz, p. 17, §36. See also: Ibid. Horst Dreier (ed.), Grundgesetz Kommentar – Band I, p. 17, §32

August 1948 followed by the *Parlamentarischer Rat* of 1948-1949. The two references we discuss here – God and human dignity – were indeed much debated and led to a final text that is very different from the original draft. The *Herrenchiemsee* draft did not include a reference to God in the preamble at all. Human dignity was formulated in a more limited way as pertaining only to the *"menschliche Persönlichkeit"* – the human personality rather than the much broader application we see in the Grundgestez today where it refers to *"des Menschen"* – the human being as such[614]. In general one can observe that the wording authored by the *Parlamentarischer Rat* was more unambiguous and stronger[615]. In Christian Starck's commentary on the Grundgesetz[616] we find a useful explanation why the reference to God was included, whereby his analysis seems to be generally accepted in literature on the subject[617]. It reflects, Starck points out, the general agreement amongst the drafters of the *Parlamentarischer Rat* that a constitution should be created once and far all banning totalitarian systems of government on German soil. But this was only possible when the Basic Law would explicitly set the limits of the state: *"Der Staat soll begrenzt sein und soll nicht über alles verfügen dürfen. Imperium semper limitatum est (..)"*[618] The reference to 'God and Man' in the Basic Law is an expression of *"die Summe des bisherigen Wissens über die Grenzen menschlicher Fähigkeit."*[619] The reference to God merely acknowledges the limits of human capability and thus the limits of the state and its imperfection. The reference to the human being, on the other hand, highlights the state's acknowledgement that the state is created for Man, not Man for the state[620]. Starck rightly sees this reference to God and Man as the basis for human dignity protection itself: the state's objective should always be to conduct its activity in full respect of the human being and its dignity. This can only be achieved when the state recognizes its own limits, especially where it concerns the human being. The drafters of the most recent Swiss constitution[621] re-introduced the reference to God and its prominent

[614] See: Ibid. Auf dem Weg zum Grundgesetz, pp. 52-53
[615] See for a more detailed discussion of the drafting process on this wording: Ibid. Horst Dreier (ed.), Grundgesetz Kommentar – Band I, pp. 153-155
[616] Ibid. Christian Starck (ed), Mangoldt-Klein Kommentar zum Grundgesetz, pp. 17-18
[617] For example: Ibid. Horst Dreier (ed.), Grundgesetz Kommentar – Band I, pp. 14-16
[618] Ibid. Christian Starck (ed), Mangoldt-Klein Kommentar zum Grundgesetz, p. 17
[619] Ibid. Christian Starck (ed), Mangoldt-Klein Kommentar zum Grundgesetz, p. 17
[620] Cf. Ibid. Christian Starck (ed), Mangoldt-Klein Kommentar zum Grundgesetz, p. 33
[621] It entered into force on 1 January 2000. The Swiss reference to God is much stronger where it says: "Im Namen Gottes des Allmächtigen!" – 'In the name of God!' instead of 'In responsibility towards God'

placing for this exact same reason: *"In der Anrufung Gottes liege 'ein Bekenntnis zur Relativität aller staatlichen Macht' (...)"*[622]. The essence of understanding human dignity in its legal context lies here: only when the state recognizes and accepts her absolute limits in relation to the individual human being, which includes not being able to control or change its exclusive attribute, can the dignity of the human being truly be protected. The commentary on the new Swiss constitution puts it well where it says about the *Gottesbezug*:

"Es kommt darin die ganze Ambivalenz staatlicher Macht zum Ausdruck. Der Staat hat keine letzte Verfügungsgewalt über die ihm unterstellten Menschen, was ein Bekenntnis zu Humanität und Menschenwürde bedeutet. In der Berufung auf eine höhere Instanz erinnert die Verfassung selbst daran, dass das durch sie geschaffene Staatswesen unvollkommenes Menschenwerk ist."[623]

The reference to God, Ehrenzeller paraphrases Böckenforde[624], expresses a fundamental agreement that the law of the state and its dealings are rooted in a common set of principles that cannot be created by the liberal democratic state itself but that pre-date the state. It acknowledges that *"sich Mensch und Staat nicht auf sich selbst gründen wollen"*[625]. This seems to be the core message the authors of the Grundgesetz wanted to relay in the preamble and article 1: human relations cannot function and the state cannot exist without recognizing the pre-positive human order that *should* be their foundation. The reference to God, Man and human dignity points to this foundation on which the Bas Law is built. The content and scope of the legal principle of human dignity therefore is not to be found primarily in the exact phrasing of human dignity in the Grundgesetz or even in case law dealing with it. Rather it should be found in the process of human history that led to it being codified through invoking a set of common principles. In drafting article 1.1 of the Basic law, the *Parlamentarischer Rat* indeed responded directly

[622] Ibid. Christian Starck (ed), Mangoldt-Klein Kommentar zum Grundgesetz, pp. 17-18
[623] Bernhard Ehrenzeller (ed), Die schweizerische Bundesverfassung – Kommentar, Dike Verlag 2002, p. 9
[624] See: Ibid. Bernhard Ehrenzeller (ed), Die schweizerische Bundesverfassung – Kommentar, pp. 9-10
[625] Ibid. Christian Starck (ed), Mangoldt-Klein Kommentar zum Grundgesetz, p. 18; here Starck quotes the expert commission for the new Swiss constitution

to the Nazi atrocities by reintroducing the traditional – mostly Christian - concept of "Man before the state"[626]. Starck points out:

"Wie sich aus dem Vorangehenden ergibt, steht der Begriff der Menschenwürde in Art. 1 Abs. 1 in der Kontinuität der philosophischen Überlieferung (..) und ist zugleich unmittelbare Reaktion auf die Zeit der nationalsozialistischen Diktatur."[627]

The opinions in literature on this subject are however divided as to how much the Christian tradition did actually influence the current legal principle and understanding of human dignity in German constitutional law. Starck[628] and Dreier[629] for example, in their respective commentaries on the Grundgesetz, give a fundamentally different appraisal of the Christian roots of the human dignity principle and with it highlight an ongoing controversy on the importance of Christian thinking. Dreier, although recognizing the relevance of the Christian tradition in general, points to the combination of Antiquity, Enlightenment and Humanism (thus skipping the Middle Ages) as the main sources of today's human dignity concept. Starck, on the other hand, whilst explicitly recognizing the influence of the Enlightenment and Humanism, still sees the Christian tradition as a whole (including the Middle Ages) as the main source and unbroken conduit of human dignity norms throughout Western history. The notion of human dignity, he says, *"hat ihren Keim im christlichen Menschenbild und ist in einem komplizierten Säkularisierungsprozess philosophisch ausgearbeitet und rechtlich gesichert worden"*[630]. The reason why the Christian tradition is of such importance to the legal-historical analysis of article 1.1. Grundgesetz is because it considers the inviolability and equal application of human dignity absolute. In the various traditions that played and currently play their part in interpreting the human dignity principle in the Grundgesetz, only the Christian tradition acknowledges the inviolability of human dignity and its equal application to all human beings from conception to death, under all circumstances, within

[626] See: Ibid. Christian Starck (ed.), Mangoldt-Klein Kommentar zum Grundgesetz, pp. 27, 32
[627] Ibid. Christian Starck (ed), Mangoldt-Klein Kommentar zum Grundgesetz, p. 36
[628] See: Ibid. Christian Starck (ed.), Mangoldt-Klein Kommentar zum Grundgesetz, pp. 29-30
[629] See: Ibid. Horst Dreier (ed.), Grundgesetz Kommentar – Band I, pp. 146-147
[630] Ibid. Christian Starck (ed), Mangoldt-Klein Kommentar zum Grundgesetz, p. 30

any human condition and without exception. In Böckenförde's critique[631] of the revised 2003 Maunz/Dürig Grundgesetz commentary on article 1.1. (authored by Matthias Herdegen) it is well illustrated how the inviolability of human dignity is undermined when it is disconnected from its roots in Christian tradition. What results is, as Böckenförde puts it: *"Die Menschenwürde als rechtlicher Begriff wird ganz auf sich gestellt, abgelöst (und abgeschnitten) von der Verknüpfung mit dem vorgelagerten geistig-ethischen Inhalt, der dem Parlamentarischer Rat präsent (...) war."* The basis and content of the human dignity principle is herewith replaced by a system of interpretation through case law and mere circumstances. There is no doubt that this will lead to a serious limitation to the scope of human dignity protection through the law, whereby once again the weak will be ruled by the strong. Böckenförde rightly points to far-reaching consequences of Herdegen's commentary on the scope of protection of the human dignity principle where the latter says: *"Der kategorische Würdeschutz kommt allen Menschen als Person zu. Im Sinne der gebotenen Gesamtbetrachtung sind Art und Maß des Würdeschutzes für Differenzierungen durchaus offen, die den konkreten Umständen Rechnung tragen."*[632] The word "categorical" in this quote refers to the Kantian human dignity paradigm that in Herdegen's interpretation would exclude the much broader Christian understanding. The actual scope of article 1.1. Grundgesetz is then further limited by making its application dependent on "differentiations" and "concrete circumstances". Any trace of the true inviolability of human dignity is herewith erased as the principle becomes a mere instrument of circumstance and current interpretation. The core norm, the unchangeable principle, is done away with and replaced with what one could call an 'empirical principle', meaning that the applicability of human dignity protection is decided in view of variable circumstances rather than an absolute truth about the human being.

The relevance and even suitability of the Christian tradition for current human dignity interpretation is not only disputed in academic discourse. In today's highly secularized

[631] Ernst-Wolfgang Böckenförde, Die Würde des Menschen war unantastbar – Abschied von den Verfassungsvätern: Die Neukommentierung von Artikel 1 des Grundgesetzes markiert einen Epochenbruch, in: Frankfurter Allgemeine Zeitung 3-9-2003, p. 33
[632] Ibid. Maunz/Dürig, Grundgesetz – Kommentar, p. 39

society in general many outright reject Christian anthropology as being a primary – or even a relevant - source for understanding the notion of human dignity. Since religion is relegated to the "private sphere", any reference to Christian or other religious thinking is increasingly considered inappropriate, especially where it regards the understanding of human dignity and human rights. Instead it is pointed out, as we discussed above, that Antiquity, Enlightenment and Humanism are its real and truly relevant foundations[633]. What these writers seem to overlook however is the fact that Enlightenment and Humanism, as well as the process of codifying human dignity in the Grundgesetz, cannot be forcibly disconnected from the Christian tradition because these movements grew out of it and developed along with it – and often within it[634]. As a matter of historical fact both movements were born out of or at least developed within a society that at that time was still deeply Christian and religious, even when increasingly anti-clerical (for example the French revolution). This society remained firmly rooted in the essentially Christian understanding ("*Menschenbild*") of Man as a unique, free and intelligent being. Other than is often suggested, rather than being able to throw the whole of Christian tradition overboard and re-inventing the basic understanding of human life as such, the Enlightenment was amongst others an effort to take away the exclusive moral authority from the Church in this regard and transfer it to the people and the civil and state institutions they created. Church and State were separated and religion was privatized but not extinguished. Yet in spite of the fact that this led to an ever more visible exclusion of God from public life, it were still individual Christians formed by their tradition that shaped the Enlightenment. The Enlightenment built on the Christian tradition. Kant was a Christian who did not reject his faith whilst developing his rationalistic approach to human dignity and autonomy. Humanism – finding its first roots in Antiquity - was a movement equally developed in and by a distinctly Christian European culture. Many Catholic scholars for example shaped the renaissance humanism. The great humanist Erasmus was himself a deeply religious man firmly rooted in his Christian faith. It is mostly modern humanism that has shown a desire to ignore its essential Christian foundations. It goes beyond the scope of this research to discuss in-depth this correlation

[633] See for example: Ibid. Horst Dreier (ed.), Grundgesetz Kommentar – Band I, pp. 17-18, 146-147
[634] Herdegen seems to support this view. See. Ibid. Maunz/Dürig, Grundgesetz – Kommentar, p. 8

between the Christian tradition and Enlightenment and Humanism, yet the point needs to be made here is that Christian thought, in its various forms, has continued to shape our understanding of the human being and thus its dignity and was not simply replaced or overwritten by Enlightenment and Humanism. It developed together with these traditions and thus remains crucially relevant for our understanding of human dignity today. An argument put forward by Horst Dreier[635] echoes this general skeptical view of Christianity that exists in Europe today: this argument rejects the relevance of the Christian tradition for human dignity interpretation or waters it down, pointing for example to slavery and colonialism as being condoned by Catholics and Protestants alike. Such line of reasoning however ignores the fact that the Christian moral and intellectual tradition itself and its development with regard to human dignity is rooted in the much older Jewish tradition leading us back to the Book of Genesis written in approximately 1300 B.C. and much inspired by the philosophers of the antiquity. Both these sources were explicitly incorporated in Christian teaching from the beginning. The unfortunate fact that the Christian churches and many Christians themselves took such a long time to acknowledge the full meaning and extend of the concept of human dignity and fundamental rights does not therefore make the Christian tradition itself less relevant for understanding human dignity today[636]. Once again, all this is not to say that Christianity is the exclusively relevant tradition for explaining article 1.1. Grundgesetz. Indeed Antiquity, the Enlightenment and Humanism have all played an important part in its conception, yet this cannot be detached from the Judeo-Christian tradition as the "all-encompassing" driving force. It incorporated and unfolded the Greek and Roman traditions and was the springboard for the Enlightenment and Humanist movements. There is also sufficient evidence that the Christian philosophical-theological tradition played a key role in the deliberations of the *Parlamentarischer Rat*, which alone is enough reason to take this tradition into account when applying the human dignity

[635] Horst Dreier (ed.), Grundgesetz Kommentar – Band I, pp. 44-45

[636] It was only the Second Vatican Council of the Catholic Church that opened a new chapter in Church history actively promoting human rights, with Pope John Paul II being the first pontiff to make human dignity the central theme of his papacy

principle today[637]. The preamble itself proves this point where it states the German people's responsibility *towards God*, rather than towards Zeus, Erasmus or Kant. A very clear understanding of the deep roots of the Grundgesetz and the specific role Christian thought and other traditions played in it was presented by Pope Benedict XVI during his speech to the German *Bundestag* (lower house of parliament) in September 2011[638]:

"Im Gegensatz zu anderen großen Religionen hat das Christentum dem Staat und der Gesellschaft nie ein Offenbarungsrecht, nie eine Rechtsordnung aus Offenbarung vorgegeben. Es hat stattdessen auf Natur und Vernunft als die wahren Rechtsquellen verwiesen – auf den Zusammenklang von objektiver und subjektiver Vernunft, der freilich das Gegründet sein beider Sphären in der schöpferischen Vernunft Gottes voraussetzt. Die christlichen Theologen haben sich damit einer philosophischen und juristischen Bewegung angeschlossen, die sich seit dem 2. Jahrhundert v. Chr. gebildet hatte. In der ersten Hälfte des 2. vorchristlichen Jahrhunderts kam es zu einer Begegnung zwischen dem von stoischen Philosophen entwickelten sozialen Naturrecht und verantwortlichen Lehrern des römischen Rechts. In dieser Berührung ist die abendländische Rechtskultur geboren worden, die für die Rechtskultur der Menschheit von entscheidender Bedeutung war und ist. Von dieser vorchristlichen Verbindung von Recht und Philosophie geht der Weg über das christliche Mittelalter in die Rechtsentfaltung der Aufklärungszeit bis hin zur Erklärung der Menschenrechte und bis zu unserem deutschen Grundgesetz, mit dem sich unser Volk 1949 zu den „unverletzlichen und unveräußerlichen Menschenrechten als Grundlage jeder menschlichen Gemeinschaft, des Friedens und der Gerechtigkeit in der Welt" bekannt hat."

As a result of the discussion on the inviolability of human dignity and its rejection in practice – through excluding certain groups of human beings as we see it today - it is

[637] See: Ibid. Christian Starck (ed.), Mangoldt-Klein Kommentar zum Grundgesetz, p. 30; Heiner Bielefeldt would disagree with this, as we discussed in Part II. See: Ibid. Heiner Bielefeldt, Auslaufmodell Menschenwürde?, p. 145

[638] Benedict XVI, speech at the Bundestag in Berlin, 22 September 2011, Libreria Editrice Vaticana 2011, published at www.vatican.va

necessary at this point to briefly discuss the legal-historical background of the *subject* of the human dignity principle. To whom does it actually apply? The common understanding of the fathers of the German Basic Law was that the subject of human dignity protection was every living human being regardless of its state of development or mental or physical health. Human dignity cannot be dependent on *"die Fähigkeit zum geistig-seelischen Werterlebnis"* or even the ability of self-determination[639]. This consideration was the more so relevant in post-War Germany as the new rulers clearly wanted to distance themselves from the Nazi regime's "inferior race" theories. These theories had led to the massive state-organized killing of Jews and other groups as well as widespread forced sterilization, eugenic and euthanasia practices. Nazis believed that their targets for extinction were "lesser" human beings or no human beings at all. Therefore, in post-War Germany, also the unborn, the handicapped and the comatose life are *in principle* equally subject of the full scope of the constitutional human dignity protection. The BVerfG has in various rulings expressly confirmed the full protection of article 1.1. of the Basic Law for the unborn life[640]. But it is precisely this notion of *unlimited* human dignity protection for *every* human being regardless of its stage of development that is no longer practiced by the BVerfG as we will see in the next chapter. Herdegen, for example, does not accept the inviolability of human dignity *prima facie* and makes a clear distinction between the born and unborn human in this regard[641]. The former would in any case qualify, he argues, yet the latter's human dignity might not always be secured by the Basic Law and might depend on specific circumstances. Interestingly though, Herdegen eventually has to unwillingly concede that for all practical purposes the human dignity principle as such can only be effectively upheld when its starting point lies at conception. He says:

"Die Zuerkennung eines kategorischen Würdeanspruches ab Empfängnis erspart auch heikle, an bestimmte Entwicklungsstufen anknüpfende Differenzierungen schon bei der

[639] Ibid. Christian Starck (ed.), Mangoldt-Klein Kommentar zum Grundgesetz, p. 37, where he quotes various authors in this regard
[640] See: Ibid. Maunz/Dürig, Grundgesetz – Kommentar, pp. 44-46 for a discussion of relevant case law by the BVerfG
[641] Ibid. Maunz/Dürig, Grundgesetz – Kommentar, pp. 38-46

Frage nach einem 'Ob' des Würdeschutzes. Der Menschenwürde des nasciturus entspricht die Anerkennung seiner Rechssubjektivität."[642]

When article 1.1. is applied in ordering the relationships between different human beings, it should therefore not be used in a way that would disregard the duty to fully respect the other's dignity as well[643], *every* others' dignity, and regardless of the circumstances. This is also why the notion of human dignity that constitutes the foundation of the Basic Law cannot condone such measures as the death penalty or torture. Both these measures in essence reject the human dignity of the person concerned.
As we will see later, the still unresolved discussion on the foundations of the human dignity principle in the Grundgesetz has had a profound impact on the understanding of this principle in article 1 of the EU Charter. Still, there is no doubt that the influence of the German Basic Law's human dignity principle and its clearly identifiable roots in the Christian tradition are undeniable and vital for securing the real and lasting inviolability of human dignity for all "members of the human family", as the Universal Declaration puts it. Böckenförde, in commenting on the above discussed Herdegen commentary, underlines that human dignity as a legal principle is only sustainable when it has a nonnegotiable "normative core", even when ongoing stages of human development continuously ask for new solutions and approaches for defending the inviolable dignity of the human being:

"Zwar ist der Begriff der Menschenwürde durchaus ein offener Begriff, der in seinen konkreten Auswirkungen nicht ein für alle Mal festgelegt ist, vielmehr eine gewisse Variationsbreite aufweist und auf neue Herausforderungen entsprechend reagieren kann und auch muss. Diese konkreten Auswirkungen fließen aber aus einem festen Kern, dem normativen Grundgehalt."[644]

[642] Ibid. Maunz/Dürig, Grundgesetz – Kommentar, p. 46
[643] Cf. Ibid. Christian Starck (ed.), Mangoldt-Klein Kommentar zum Grundgesetz, p. 75
[644] Ibid. Ernst-Wolfgang Böckenförde, Bleibt die Menschenwürde unantastbar?, p. 1225

2.6. 1950 – Convention on the Protection of Human Rights and Fundamental Freedoms

The text of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR, Convention) does not mention the term human dignity, in spite of the fact that the European Court of Human Rights (ECtHR) does use the notion in its case law as we will see in the next chapter. Although Maurer calls this omission an "embarrassing absence", she confirms general agreement in literature that this has not decreased the relevance of the legal concept of human dignity for the Convention in any way[645]. The Convention's drafting history, as well as the catalogue of rights that are held to violate human dignity, speak for themselves. Equally relevant is the allusion to the Universal Declaration in the Convention's preamble. For our discussion the document is relevant because its legal-historical background shows how much the post-War understanding of human dignity and its violation by the Nazis and the Communists shaped the European human rights system and ultimately the legal principle of human dignity as we see it in the EU Charter today.

The Convention was signed in Rome on 4 November 1950 and drafted by the Council of Europe, the latter founded on 5 May 1949 and which currently has 47 members. The ECHR entered into force on 3 September 1953 and established the ECtHR in Strasbourg to uphold the human rights treaty. The Convention was a direct response not only to the Nazi atrocities, as was the case with the Universal Declaration and the Grundgesetz, but also meant as a "bulwark' against the rising threat of Communism from the East, and the totalitarian regimes it led to[646]. There was general agreement amongst Western European states that human dignity and the human rights based on it could no longer be guaranteed by national jurisdictions alone and required joint international supervision and enforcement. Of all current international human rights treaties and mechanisms, it is the enforcement system of the Convention that is the strongest and most effective[647]. In the case a breach of the Convention is being claimed, both member states and individuals may bring an application for review before the European Commission of Human Rights

[645] Ibid. Béatrice Maurer, Le principe de respect de la dignité humaine et la Convention européenne des droits de l'homme, pp. 16-17
[646] Cf. DJ Harris, M. O'Boyle, C. Warbrick, Law of the European Convention on Human Rights, Butterworths 1995, pp. 1-2
[647] Ibid. Cf. DJ Harris et al., Law of the European Convention on Human Rights, p. 5

in first instance. The final instance is the ECtHR whose decisions are binding for the parties involved. Via judicial interpretation and precedence parts of these judgments can become customary law. The Convention requires its signatories to grant the rights specified in it to "everyone within their jurisdiction" as article 1 puts it. The term "everyone" means that nationality or residence is irrelevant for application of the Convention. Whether an individual is a national or resident of a contracting state is not what counts, but rather "when they are in some respect subject to the jurisdiction of the State from which they claim that guarantee."[648]

With regard to the European development of the legal concept of human dignity it is the preamble of the Convention that is the most relevant. In the first paragraph the preamble explicitly mentions the Universal Declaration whilst subsequently providing the list of protected human rights the 1948 UN document calls for. The drafters of the ECHR clearly saw their document as a fulfillment of the lofty goals that were set out by the Universal Declaration[649]. Since international law generally allows preambles to be used for interpretation of the texts of international treaties, the human dignity provisions incorporated into the Universal Declaration therefore have direct relevance for the Convention itself[650]. We will see this confirmed when discussing the case law of the Strasbourg and Luxembourg courts. This however does not mean that the scope of the legal concept of human dignity as the authors of the Declaration viewed it has always been exactly the same as the one used by the Strasbourg institutions applying the Convention. As was discussed above, the "normative basis" of the Declaration that is provided through article 1 and the preamble was necessarily thin because of the wide spectrum of cultural backgrounds of the UN members. When it comes to the Convention, on the other hand, it is a purely European legal instrument that therefore logically draws upon both the Christian as well as the Kantian human dignity understandings.

[648] P. van Dijk, G.J.H. van Hoof, Theory and Practice of the European Convention on Human Rights, Kluwer Law and Taxation Publishers 2nd edition 1990, p. 3
[649] Cf. Jochen Abr. Frowein, Wolfgang Peukert, Europäische MenschenRechtsKonvention – EMRK-Kommentar, 2nd edition N.P. Engel Verlag 1996, pp. 14-15
[650] See article 31.2 of the 1969 Vienna Convention on the Law of Treaties: "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes (..)"

The most relevant documents for the legal-historical analysis of the Convention and its relevance for understanding article 1 EU Charter are the so-called *"Traveaux Préparatoires"* in which we find the discussions that were held in the 1949-1950 drafting process of the ECHR. Here we see confirmed how the recent events in Europe and the new threats it was facing had a decisive impact on the conception of the human dignity notion. The *Traveaux Préparatoires* give us an insight into the "normative core" which was meant to underpin the legal concept of human dignity. There is for example the rousing speech from the French committee member Teitgen - who saw many of his family members end up in the Nazi death camps - which contains a message that is of great relevance today. Many of his proposals – including that of the permanent ECtHR - found their way into the final text. He remarks, referring to the proposed text of the Convention's preamble:

"This fundamental affirmation is thus inscribed at the very foundation of our union: every man, by reason of his origin, his nature and his destiny, has certain indefensible rights, against which no reason of State may prevail. (..)
When the scourges of the modern world descended – Fascism, Hitlerism, Communism – they found us relaxed, skeptical and unarmed. We needed war, and for some of us, enemy occupation, to make us realize afresh the value of our humanism."[651]

The Greek representative Antonopoulus observed:

"Man is an end in himself! The city and the State are so many organs constituting the means of preserving his dignity, of ensuring the pacific development of his personality and of guaranteeing for him human living conditions.
This, it seems to me, is the common ideology of free Europe, the ideology which, down the centuries, has been subject to many attacks but which, from the times of ancient Greece – which gave it birth – up to our own time, has shaped that European culture without which existence itself cannot be conceived.

[651] Teitgen, remarks during the Eighth Sitting held 19th of August 1949, in: Collected Edition of the "Traveaux Préparatoires" Volume I – Preparatory Commission of the Council of Europe, Committee of Ministers, Consultative Assembly 11 May-8 September 1949, Martinus Nijhoff 1975, pp. 38, 40

We must, therefore, fortify the structure and widen the bases of these fundamental freedoms which form the veritable ramparts of human dignity."[652]

Finally the remarks of the Danish representative Kraft provide evidence of the convictions in which the post-War understanding of human dignity as a legal concept was rooted, giving us a deeper understanding of how and why it should be applied:

"I consider this debate to be just as essential to the building up of a new Europe as the debate on the general political problems we are facing. That is my opinion, because the Europe, whose life and welfare we are gathered here to preserve and protect, through the creation of a firmer union, is not primarily a geographical and geopolitical or strategic conception, but a Europe with a common spiritual basis in its views on man, his dignity and his rights."[653]

It however remains unclear why human dignity wording as such, other than in all other documents discussed in this chapter, was not included in the ECHR. The most plausible explanation for this seems to be the prominently placed referral to the Universal Declaration in the Convention's rather short preamble. This suggests that the former document – with its strong human dignity emphasis – was meant to serve as the preamble to the latter. Repetition of the key considerations – including those on human dignity - would then not be necessary.

2.7. 2000/2007/2009 – Charter of Fundamental Rights of the European Union

Article 1 EU Charter holds: "Human dignity is inviolable. It must be respected and protected." The human dignity provision is understood as the "mother basic right" or the foundation of all rights included in the EU Charter[654]. The word inviolable means - at least theoretically – "that human dignity cannot be taken away from any human being. It

[652] Antonopoulus, remarks during the Eighth Sitting held 19th of August 1949, in: Ibid. Collected Edition of the "Traveaux Préparatoires" Volume I, p. 56
[653] Kraft, remarks during the Eighth Sitting held 19th of August 1949, in: Ibid. Collected Edition of the "Traveaux Préparatoires" Volume I, p. 64
[654] See: Ibid. EU Network of Independent Experts on Fundamental Rights (CFR-CDF), June 2006 commentary on the EU Charter, pp. 23, 25, 28

can neither be forfeited nor renounced."[655] This would also mean that the human dignity of the one cannot be balanced against the human dignity of the other. However, as the EU Independent Experts on Fundamental Rights' commentary rightly points out, in practice this balancing of interests cannot be prevented by the EU Charter and will therefore in such cases lead to one human dignity claim having to stand back fully, for example in the case of the unborn child versus the mother[656]. As we already noted earlier, the introduction of article 1 EU Charter has not provided any more clarity on its definition and scope, nor will the application of the provision by the ECJ bring forward a comprehensive understanding of what the legal principle of human dignity entails and for whom.

As we have seen earlier on in this chapter, the EU Charter (as well as the European legal concept of human dignity in general) has been strongly influenced by the constitutional traditions of the individual member states, especially with regard to the notion of human dignity. The EU Charter should be read and interpreted against this background, taking into consideration that the variety of legal traditions and opinions on human dignity in the EU member states is diverse, even if the "minimal core" McCrudden speaks about can be observed to be generally present.

Exactly 50 years after the signing of the Convention on 4 November 1950 in Rome, the Charter of Fundamental Rights of the European Union was proclaimed in Nice on 7 December 2000[657]. It would still take 9 years of political deadlock, further negotiations and referendums for the proclamation to actually become binding law across the EU when the Lisbon Reform Treaty entered into force on 1 December 2009[658]. The Lisbon Treaty incorporated the Charter in article 6 (1) of the Treaty of European Union (TEU):

[655] Ibid. EU Network of Independent Experts on Fundamental Rights (CFR-CDF), June 2006 commentary on the EU Charter, p. 25
[656] Ibid. EU Network of Independent Experts on Fundamental Rights (CFR-CDF), June 2006 commentary on the EU Charter, p. 29
[657] Official Journal of the European Communities 18-12-2000 (2000/C 364/01)
[658] Official Journal of the European Union 17 December 2007: Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (2007/C 306/01)

"The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties."

As of December 1st, 2009, all EU institutions are legally bound by the Charter, as well as EU member states themselves, but only within the framework of the latter implementing EU law in their jurisdictions[659]. According to article 51 (§§1, 2) the EU Charter therefore does not replace national procedures for protecting fundamental rights. Nor does it create new powers for the European Union. In other words: the EU Charter is relevant only in the relation between the citizen and the EU and the relation between the citizen and the member state implementing EU law and policy. Article 52 (5) of the Charter – which was only added to the 2007 redraft – sets further limits to its application as follows:

"The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality"

In combination with the general rules on access to the Court of Justice of the European Union as specified in article 263 of the Treaty on the functioning of the European Union (TFEU), the above means that the direct recourse of European citizens to article 1 EU Charter is still limited. The Lisbon Treaty did however introduce new rules for individual access to the ECJ in article 263 TFEU which has led to an easing of the rules for admissibility of actions brought by individual natural or legal persons[660]. Also relevant to the applicability of the EU Charter in this regard is that in 2007 the "European Union

[659] The United Kingdom, Poland and later the Czech Republic opted out of the EU Charter for various reasons of national interest

[660] Article 263 TFEU now reads in the 4th paragraph: "Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures."

Agency for Fundamental Rights" was set up to study fundamental rights at EU institutions and in EU member states within the framework of EU law in general, however not being empowered to regulate, examine individual complaints or carry out systematic monitoring of individual member states. The European Commission has instead given itself the task to monitor systematically the application of the EU Charter by Union institutions, including itself (?), through annual reports[661].

Because of the placing in the TEU of the EU Charter reference and the related wording "shall have the same legal value as the Treaties" – rather than as a preamble or a full-text inclusion in the Treaty itself - the EU Charter has an independent legal standing of potentially great significance within the corpus of Union law as a whole[662]. Human dignity also finds direct reference in article 2 TEU, although merely referring to the subjective and thus weak "values of respect for human dignity". Even though article 6 (2) TEU now provides for the EU to eventually accede to the Council of Europe in order to become a party to the ECHR, the Court of Justice of the EU (ECJ) will remain the competent Union institution to enforce fundamental rights, which now includes the EU Charter as an additional – yet not the only – available legal instrument. This competence of the ECJ and its relation to the Convention and the ECtHR is currently still hotly debated. The outcome of this debate together with the limitations to direct individual recourse to the EU Charter as discussed above means that it will largely depend on future case law of the ECJ how much of an impact article 1 will have on the actual protection of human dignity in the European Union.

The discussion about drawing up a specific EU fundamental rights catalogue with treaty status as distinct from the Convention (which includes far more parties) had been going on for some years already, especially since 1995 as the EU's common justice and security policies were being developed. Concrete efforts were for example made and failed to include a human rights catalogue in the Treaty of Amsterdam (1997) which amended the

[661] See: European Commission, Communication from the Commission – Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, COM (2010) 573 final, pp. 12-13

[662] Cf. Ingolf Pernice, The Treaty of Lisbon and Fundamental Rights, in: Stefan Griller/Jaques Ziller (eds.), The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?, Springer 2008, p. 241

EU and EC treaties. A *"Comité des Sages"* was appointed by the European Commission in March 1996 that provided a series of concrete recommendations to this extend. It called for an explicit recognition and detailed cataloguing of fundamental rights by the EU[663]. Instead, the Amsterdam Treaty merely continued the tradition of referring to the Union's adherence to the fundamental rights as expressed in the Convention, the constitutions of the member states and Community law in general. Article 6 (1) TEU (old) did however explicitly recognize the EU's adherence to human rights and fundamental freedoms in general (the Lisbon Reform Treaty changed this same article 6 (1) TEU into its current version). Although surprisingly not specifically referring to human dignity as such the said 1999 expert report stressed there was an urgent need to explicitly outline the fundamental rights and freedoms within the framework of EU law. The experts held that it was not sufficient that these rights could already be found in the legal traditions of the member states and in international treaties. The Expert Group notes:

"Where rights are concerned, ways and means must be found to make them as visible as possible. This involves spelling rights out at the risk of repetition, rather than merely referring to them in general terms as contained in other documents."[664]

There was a distinct need to set clear 'constitutional' limits to the long-established principle of the primacy of EU law, especially with regard to its citizens[665]. As the areas of involvement of the EU institutions have continued to grow, so has the need to reaffirm legal boundaries and create a framework where especially the EU's self-declared rootedness in the respect for human dignity is strengthened. In the Union's relation to its citizens there was and is a need to also reaffirm that the institution is primarily designed

[663] See: European Commission - Expert Group on Fundamental Rights. Directorate-General for Employment, Industrial Relations, and Social Affairs (Unit V/D.2), Affirming Fundamental Rights in the European Union: Time to Act, Office for Official Publications of the European Communities, 1999, pp. 5-7
[664] Ibid. European Commission - Expert Group on Fundamental Rights, p. 11
[665] The primacy of EU law in the case of conflict with the national law of a member state was firmly established by the ECJ in the 1964 Costa/ENEL ruling where it held that the functioning of Community law was dependent on it having primacy over national law. See: Judgment of the Court of 15 July 1964 in Flaminio Costa v. E.N.E.L., Case 6/64

to serve the human person for its well-being[666]. The EU Charter was therefore needed to clarify the obvious, yet not always visible, normative basis of the EU and the relation between the Union and its citizens, whereby the latter would receive protection from threats of the former[667]:

"The Charter of Fundamental Rights, consequently, not only underlines and clarifies the legal status and freedoms of the Union's citizens facing the institutions of the Union, but also gives the Union and, in particular, the policies regarding the area of "freedom, security and justice" a new explicit normative foundation."[668]

The drafting process of the EU Charter itself was unique in the sense that it was not written through the usual inter-governmental procedure that has been used for EU treaties, but rather by means of a more or less broadly representative "convention". In view of the above discussed, namely the need to reaffirm the boundaries between the Union and the individual rights of its citizens, such a drafting process was a welcome development for a document as foundational as the EU Charter. The Cologne European Council of June 3-4, 1999 assigned this convention the task of drafting the Charter. The convention consisted of 15 representatives of governments of EU member states, 16 members of the European Parliament, 30 members of parliaments of member states and one representative of the European Commission. The final draft of the EU Charter was adopted by the convention on 2 October 2000 and unanimously approved by the Biarritz European Council later that month. The European Parliament and the European Commission approved the text on 14 November 2000 and 6 December 2000 respectively. The EU Constitutional Treaty signed on 29 October 2004, through which the EU Charter was first meant to become binding, was rejected by French and Dutch voters in May and June of 2005. With the Constitutional Treaty now defunct, a new treaty had to be negotiated. This finally led to the Lisbon Reform Treaty signed in December 2007. The Lisbon Treaty is essentially the same document with limited changes and another name to

[666] Frank Schorkopf, Würde des Menschen, in: Dirk Ehlers (ed.), Europäische Grundrechte und Grundfreiheiten, De Gruyter Recht 3rd edition 2009, pp. 486-487
[667] Cf. Ibid. Ingolf Pernice, The Treaty of Lisbon and Fundamental Rights, p. 238
[668] Ibid. Ingolf Pernice, The Treaty of Lisbon and Fundamental Rights, pp. 238-239

appease French, Dutch and other European voters have rejected the Constitutional Treaty. As part of the Lisbon Treaty the EU Charter had then to be re-introduced with some changes to the original text. This happened on 12 December 2007 by a "solemn proclamation" of the presidents of the European Parliament, the Commission and the Council[669].

The EU Charter is the first of its kind in the history of the European Union and sets out in systematic order "the whole range of civil, political, economic and social rights of European citizens and all persons resident in the EU."[670] The EU Charter has so far been the most important milestone in the long process of enshrining the legal principle of human dignity in European law. It is interesting to see how much of a direct influence the Universal Declaration has had on the EU Charter. Like the Universal Declaration, we find human dignity prominently placed in both the preamble and in article 1 of the EU Charter. Human dignity is now affirmed as one of the founding values of the European Union, as the preamble says in the second paragraph: "Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom (..)". Article 1 subsequently states: "Human dignity is inviolable. It must be respected and protected." The October 2000 version of the official convention Praesidium explanation of the EU Charter refers directly to the Universal Declaration where it says that human dignity is not only a fundamental right in itself; it is the true foundation of fundamental rights[671]. Human dignity as codified in article 1 EU Charter is a basic right and therefore not subject to any limitation. The Praesidium explanatory note explains what this foundational attribute of human dignity means in practice:

"It results that none of the rights laid down in this Charter may be used to harm the dignity of another person, and that the dignity of the human person is part of the substance of the rights laid down in this Charter. It must therefore be respected, even where a right is restricted."[672]

[669] See: Official Journal of the European Union: 2007/C 303/01
[670] See, including detailed chronological details and related texts: http://www.europarl.europa.eu/charter
[671] See: Note from the Praesidium of 11 October 2000, CHARTRE 4473/00, p. 3
[672] Ibid. Note from the Prasidium of 11 October 2000, p. 3

The slightly adapted December 2007 version of the official Praesidium explanation adds a further important insight to the otherwise minimal official records of the EU Charter drafting process. The fundamental right to human dignity, the explanatory note quotes the ECJ, is an *existing* part of Union law[673]. The TEU itself weakly confirms this latter point by stating in article 2 of the Lisbon-amended current version: "The Union is founded on the values of respect for human dignity, freedom (..)". The use of the word "value" is problematic within the context of the current use of this word because it represents something clearly distinct from fundamental principles. Basing human dignity on "values" rather than principles undermines the inviolability of human dignity. Values can be changed through shifting opinions and positive law, fundamental principles cannot. Therefore, if, apart from the Union itself, the legal principle of article 1 EU Charter were also based on these "values" only, this cannot guarantee the inviolability and thus the indiscriminate protection of human dignity. The question then remains to be answered whether article 1 EU Charter is not going to have the unintended adverse effect of being a threat to human dignity when its application becomes merely dependent on the "values of the day". This brings us back to the Böckenförde-Herdegen debate discussed above. One can only hope that because the EU Charter is of recent date, literature and possibly ECJ case law will identify a set of unchangeable principles that underpin article 1 EU Charter. A powerful thought of the Polish philosopher Józef Tischner highlights the need for this:

"Dialogue is possible only when there is a common grammar. Ethics are the grammar of relationships between people, and their principle, human dignity."[674]

Two other European documents can furthermore be seen as having had an important impact on the EU Charter, especially with regard to human dignity. The 1989 European Parliament Resolution on adopting the "Declaration of fundamental rights and

[673] See: Explanations Relating to the Charter of Fundamental Rights, Official Journal of the European Union (2007/C 303/02), p. 17. The Note refers to the ECJ judgment in Case C-377/98, Netherlands v European Parliament and Council [2001] ECR I-7079, grounds 70-77
[674] Ibid. Józef Tischner, The Spirit of Solidarity, p. 24

freedoms"[675] asserted in article 1 that "Human dignity shall be inviolable" and called upon all European institutions to uphold it, clearly inspired by the events of 1989 that led to the fall of the Iron Curtain in that same year. With regard to human dignity the "Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine" signed in Oviedo on 4 April 1997 is probably even more important, as this treaty provides in article 1 for the legal protection of "the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine." Even more noteworthy is the wording of article 2 of this document under the heading "The primacy of the human being": "The interests and welfare of the human being shall prevail over the sole interest of society or science." The wording of the Oviedo Convention and its heavy emphasis on human dignity in the preamble is the most far-reaching legal protection of human dignity in Europe until today and it is decisive for the interpretation of article 1 EU Charter and its application in practice. Interestingly, the Oviedo Convention represents an understanding of human dignity that neither before 1997, nor after its entering into force, has been expressed so clearly in human rights discourse in Europe. It would therefore be desirable to apply this high standard to the application of article 1 EU Charter. This would clearly offer the broadest legal protection of human dignity currently available.

Finally relevant for the drafting process of the EU Charter is the discussion which continues until today as to when and through what mechanism the EU should sign the ECHR and become a member of the Council of Europe. It has often been argued in literature that there is no real need for the EU to have its own catalogue of fundamental rights and that instead it should accede to the ECHR which would also allow for a more unified approach to human rights enforcement within Europe as a whole. Even though article 6 (2) TEU now includes the provision that the EU "shall accede" to the ECHR, not all legal hurdles have yet been taken to make this possible and it is not clear when such accession will finally take place. Regardless of this discussion, the European Court of Justice in Luxembourg has throughout the decades consistently developed a case-law that

[675] Official Journal of the European Communities of 16 May 1989 (1989/ C 120/51)

has closely followed the ECHR and the principles applied by the European Court of Human Rights in Strasbourg in matters pertaining to human rights. The ECJ has also itself formulated relevant principles of Union law in this regard. This has subsequently led to the Luxembourg court developing its own catalogue of unwritten fundamental rights[676]. The latter catalogue does not differ essentially from the EU Charter. Rather, the ECJ catalogue has naturally much influenced the content of the EU Charter and thus brings the European Convention full circle back to the heart of EU-specific human rights law. This is independent of a formal accession by the European Union as such. Apart from the practical advantages of EU accession to the ECHR, from the perspective of the fundamental rights' principles of the ECHR, these have de-facto already been part of the EU legal system for decades. This once again underlines the fact that the EU Charter, rather than presenting an entirely new set of fundamental rights and freedoms, codifies in one systematically ordered document of specific EU legislation what post-War Europe has come to understand as the basis of democracy and the rule of law:

"The rights and principles enshrined in the Charter stem from the constitutional traditions and international conventions common to the Member States, the European Convention on Human Rights, the Social Charters adopted by the Community and the Council of Europe, and the case law of the Court of Justice of the Union and the European Court of Human Rights."[677]

2.8. What is covered by 'human dignity' in these documents?

The answer to this question is one of intense debate as we have already seen in our discussion of the extensive literature on this subject. We will see in our analysis of case law in the next chapter that the answer to this question is indeed far from conclusive. The dignity argument is widely used to support the two opposing sides of the same argument, as was already illustrated by McCrudden's statement in our introduction. As McCrudden points out, an often occurring debate illustrating this well is the legal and political battle

[676] See: Christian Walter, Geschichte und Entwicklung der Europäische Grundrechte und Grundfreiheiten,, in: Ibid. Dirk Ehlers (ed.), Europäische Grundrechte und Grundfreiheiten, p. 12

[677] Ibid. European Commission, Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, p. 3 footnote 7

surrounding abortion in the EU[678]: those in favor of making abortion a woman's human right claim that her dignity and physical integrity as a human being gives her the undeniable right to choose freely what to do with her body and thus also to have the complete freedom to decide whether or not to carry through a pregnancy. Opponents of abortion disagree and stress that the dignity and right to life of the human being that lives in the mother's womb can never be superseded by the woman's right to choose what to do with her body. This is a classical collision of rights-claims that the vast array of human rights' treaties and declarations do not answer. An interesting illustration of the elusiveness of the answer to the question "what is covered by human dignity" is the debate between Ernst-Wolfgang Böckenförde and Matthias Herdegen[679] on the inviolability of human dignity in article 1 of the German Basic Law and its function as a *legal principle*. Herdegen is of the opinion that it is a flexible principle that in its application is dependent on constantly developing socio-cultural realities and interpretations. Böckenförde points out that the normative core of article 1 is unchangeable and can never be reinterpreted, as was also meant by the authors of this provision[680]. Böckenförde is able to bring the disagreement on the scope of protection of the human dignity principle back to a central point, namely the question at what stage of the development of human life human dignity becomes an inviolable right or from what moment human dignity is deemed to exist? That the human dignity of the *born* human should be protected at all times, according to Böckenförde, few question[681]:

"Mir scheint, der Grundgehalt dieser Garantie, was ihren festen Kernbestand ungeachtet gegebener Offenheit ausmacht, ist weniger umstritten als es gegenwärtig den Anschein hat. Bei verschiedenen Ansätzen, den Inhalt der Menschenwürde zu bestimmen, lässt sich dieser Kernbestand mit der von Kant entlehnten Formel „Zweck an sich selbst" oder der

[678] Ibid. Christopher McCrudden, Human Dignity and the Judicial Interpretation of Human Rights, p. 698
[679] Ernst-Wolfgang Böckenförde, in: Bleibt die Menschenwürde unantastbar? Blätter für deutsche und internationale Politik 10/2004, pp. 1216-1227
[680] It seems that even Jürgen Habermas would agree with this. See our earlier quote on the normative basis of human dignity: Ibid. Jürgen Habermas, Das utopische Gefälle. Das Konzept der Menschenwürde und die realistische Utopie der Menschenrechte, pp. 44-45
[681] Although we can follow the point Böckenförde makes here, it seems no longer accurate to say that few today question the need to protect the dignity of the born human being at all times. In medicine for example, the argument for euthanasia on young children with severe handicaps is gaining momentum, especially in countries such as the Netherlands and Belgium

vom Bundesverfassungsgericht gegebenen Definition „Dasein um seiner selbst willen" umschreiben. Darin sind die Stellung und Anerkennung als eigenes Subjekt, die Freiheit zur eigenen Entfaltung, der Ausschluss von Erniedrigung und Instrumentalisierung nach Art einer Sache, über die einfach verfügt werden kann, positiv gewendet, das Recht auf Rechte, die es zu achten und zu schützen gilt, eingeschlossen. Der eigentliche Streit- und Angelpunkt in der Auseinandersetzung um die Relativierung und Antastbarkeit der Menschenwürde ist weniger dies als die Frage, ob und inwieweit diese Garantie neben geborenen Menschen auch dem noch ungeborenen Menschenleben zukommt."[682]

But the paradox of the human dignity discussion is that the lack of clarity in its legal scope is at least partly attributable to the fact that the content of the notion of human dignity was originally held to be self-evident and thus would be in no need of further explanation. Lynn Hunt explains this well in her treatise on the history of human rights[683]. Hunt compares the wording of the 1776 Declaration of Independence "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness" with that of the 1948 Universal Declaration which begins with "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family (..)". "Whereas" means the same as "self-evident" since the former term refers to "it being the fact that" and thus it is a "legalistic way of asserting a given, something self-evident"[684]. But as for example case law on this subject shows, as well as the above described contradicting use of the human dignity argument, the self-evident principle underlying human dignity in human rights' documents is in practice not so obvious any more. Why else, as Hunt once again puts it pointedly, have scholars "argued for more than two hundred years about what Jefferson meant by his phrase ["We hold these truths to be self-evident."]?"[685]

[682] Ibid. Böckenförde, p. 1225. See also for a comparable analysis: Ibid. Christopher McCrudden: Human Dignity and the Judicial Interpretation of Human Rights, p. 708
[683] Ibid. Lynn Hunt, Inventing Human Rights, pp. 15-22
[684] Ibid. Lynn Hunt, Inventing Human Rights, p. 19
[685] Ibid. Lynn Hunt, Inventing Human Rights, pp. 19-20

Chapter 3: European case law on human dignity

3.1. Introduction

The notion of human dignity in its specific legal sense has been tested by courts in post-War Europe, although not on a very large scale and with mixed results. It is no easy task to apply a legal concept or a legal principle that is so broadly used yet so differently understood, let alone clearly defined. Béatrice Maurer, in her extensive research on the use of the legal concept of human dignity by the European Court of Human Rights, remarks pointedly: *"La dignité se présente en effet comme un mystère"*[686]. The Advocate General of the Court of Justice of the European Union, Mrs. Sixt-Hackl, expresses this same point in her opinion in the Omega Case[687]: "There is hardly any legal principle more difficult to fathom in law than that of human dignity."[688] Catherine Dupré in her commentary on human dignity case law ads that "While human dignity is generally well understood in some national legal orders, it remains a concept which does not fit easily into the existing theoretical categories of law and which has no definition at the European level."[689] Case law therefore is certainly not conclusive, although essential in better understanding human dignity in real life situations and in its legal context. As we have seen throughout this research, and this is very much confirmed by the study of relevant case law, human dignity as a legal concept or legal principle is passing through an ongoing process of development ever since the end of World War II. In concluding this chapter, we will against this background discuss the actual application of the human dignity legal concept or legal principle by three of the most important courts in Europe and find out whether (a) human dignity is applied as the highest principle of law and (b) whether the courts have a clear general understanding of what this legal concept or legal principle entails in concluding a violation of human dignity. We will go over a selection of relevant case law in order to try answering these two questions and focus on rulings of the German Federal Constitutional Court (BVerfG) in Karlsruhe, the European Court of

[686] Ibid. Béatrice Maurer, Le principe de respect de la dignité humaine et la Convention européenne des droits de l'homme, p. 7
[687] Opinion of Advocate General Sixt-Hackl delivered on 18 March 2004, Case C-36/02; Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, Judgment rendered on 14 October 2004
[688] Ibid. Opinion of Advocate General Sixt-Hackl, Case C-36/02, §74
[689] Ibid. Catherine Dupré, Unlocking Human Dignity: towards a theory for the 21st Century, pp. 191-192

Human Rights **(**ECtHR) in Strasbourg and the Court of Justice of the European Union (ECJ) in Luxembourg[690]. The BVerfG has dealt most extensively with the issue due of course to the inclusion of human dignity as a constitutional principle in article 1.1. of the German Basic Law.

When looking at relevant case law it is important to note on the outset that there is a distinct difference, yet unbreakable link, between the legal concept or legal principle of human dignity and the right to life and we will see how the courts struggle with this dichotomy. Literature and case law fundamentally agree that the concept of the inherent dignity of every human being is the basis on which each of the individual human rights stand. As Dupré puts it well: "Human dignity is (..) foundational to all types of rights, transcending these categories and drawing them together, acting as a reminder of their principled indivisibility."[691] Stix-Hackl observes that: "Human dignity, as a fundamental expression of an element of mankind founded simply on humanity, forms the underlying basis and starting point for all human rights distinguishable from it (..)."[692] However, claiming human dignity for all is not consistent with reality when the right to life for all from conception till natural death is not acknowledged in the same breath. The understanding of every human life being endowed with inalienable dignity, as case law across the spectrum repeatedly affirms, would logically presuppose that we consequently accept the right to life for every human being as well, without which human dignity itself is an empty notion. Stix-Hackl observes: "(..) as specific expressions of human dignity, however, all (particular) human rights ultimately serve to achieve and safeguard human dignity (..)"[693] To continue this reasoning, not respecting the individual right to life of every human being means that human dignity is thereby not sufficiently safeguarded. One sees this problem reflected in the difficulties the courts have in trying to rule on mutually conflicting claims to the protection of human dignity and rights. A good example of this dilemma is the right to life of the unborn child as rooted in its inherent

[690] Case law updated until 1-1-2012. Although many European national constitutional and supreme courts have developed case law on human dignity, it goes beyond the scope of our research to discuss each of these jurisdictions separately. Instead, our focus will be on the two European courts and on the leading national court in this regard.
[691] Ibid. Catherine Dupré, Unlocking Human Dignity: towards a theory for the 21st Century, p. 202
[692] Ibid. Opinion of Advocate General Sixt-Hackl, Case C-36/02, §76
[693] Ibid. Opinion of Advocate General Sixt-Hackl, Case C-36/02, §81

human dignity versus the right to autonomy of the mother equally rooted in her inherent human dignity. Autonomy of the mother is the most often used argument in favor of abortion, in most cases expressed through the right to privacy or human integrity (see for example article 3 EU Charter; right to integrity of the person). What right prevails, as both are rooted in what we consider the inalienable human dignity? Since human dignity is regarded as being inalienable, how can it be that the rights of two human beings collide although they stem from the same fundamental basis of human dignity that is perceived to be "inalienable"? Does this mean that human dignity is not inalienable after all, or that one of the two in fact claims a right it does not have, or that is at least subject to the right of the other? The same problem occurs, although within a different context, when governments have to deal with national security threats or war-like situations where the killing of human beings is justified by the right to self-defense. As we will see in the case law discussed below, occurrences of these examples often lead to lives being weighed against each other, something that goes against the core idea of human dignity. In some cases the courts sanction this, in others they don't. This is the central dilemma surrounding the legal application of the human dignity notion within the realities of human life. As we will see, there is no easy solution in sight.

3.2. Recent case law of the Bundesverfassungsgericht (BVerfG)

The extensive case law of the Federal Constitutional Court of Germany (BVerfG) is of primary importance for a better understanding of the legal concept and especially the legal principle of human dignity in Europe today[694]. As already discussed at length above, Germany anchored human dignity in its 1949 constitution as the *highest principle of law* by which the constitutionality of all other rights, laws and actions of the state and its institutions have to be judged. It is therefore an actual legal principle directly enforceable in court by the state's subjects. The principle is above all a mechanism to protect the individual human being against the (arbitrary) power of the state. It is for this reason that the case law of the BVerfG on the subject of human dignity is so extensive. In the German constitutional order, the respect for human dignity is the most important of

[694] Due to the very large amount of case law of the BVerfG related to human dignity, we will only discuss the more recent relevant cases. Wherever the court however develops or affirms established case law, it always refers back to earlier cases where the precedent was set

fundamental rights in which all other rights are rooted[695]. It is a constitutional principle that cannot be altered or limited by other rights, the state, its institutions or its citizens (see article 79 §3 of the German Basic Law). To uphold this principle, in its case law the Court applies the so-called "*Objektformel*", derived from the Kantian human dignity concept. In this understanding the state, called upon to respect the inalienable dignity of every human being, always has to treat the individual human being as a *subject* and not as an *object*. "At the core of this definition is the concept of autonomy, an exclusively human attribute which distinguishes humans from other beings and allows them to be active participants in the making of the laws which bind them."[696] It is from this Kantian perspective that the case law of the BVerfG is written.

The BVerfG has throughout the decades developed now established case law specifying how far the protection of human dignity extends, or in other words: where it starts and where it ends. Christian Walter makes a useful division of specific areas in which the Court has ruled on human dignity: the beginning of life (A), during lifetime (B), end of life (C) and post mortem effects (D). Within category (B) Walter furthermore distinguishes between fives areas: physical integrity, minimum conditions for human life, conditions for imprisonment and prosecution, privacy and challenges to human dignity by modern technologies[697]. Rulings in each of these categories will be discussed below.

Beginning of life

A number of rulings have confirmed that every human being, also the developing child in the mother's womb, is entitled to the constitutional right of the protection of its human dignity and the right to life. This was for example confirmed by the Court in its groundbreaking 28 May 1993 ruling[698] on the German abortion law where it held that:

[695] There is some discussion in German legal literature on the exact legal nature of the human dignity principle and whether article 1.1. is actually a basic right itself or not. The BVerfG itself uses the principle in broad terms. See: Ibid. Christian Walter, Human Dignity in German Constitutional Law, pp. 26-27
[696] Ibid. Catherine Dupré, Unlocking Human Dignity, p. 193
[697] See: Ibid. Christian Walter, Human Dignity in German Constitutional Law, pp. 28-37
[698] BVerfG, 2 BvF 2/90 of 05/28/1993, http://www.bverfg.de/entscheidungen/fs19930528_2bvf000290en.html (official English translation) This is referred to as the "second abortion ruling" of the BVerfG. Its first ruling on the matter was on 25 February 1975, 1 BvF – 1/74 till 6/74

"The Basic Law requires the state to protect human life. Human life includes the life of the unborn. It too is entitled to the protection of the state. The Basic Law does more than just prohibit direct interference by the state in the life of the unborn, it enjoins it to protect and support such life, i.e. above all to guard it against illegal interference by third parties. (..) The obligation to protect is based on Article 1, Paragraph 1 of the Basic Law, which expressly requires the state to respect and protect human dignity (..)"[699]

and in §§146-147:

"Unborn human life - and not just human life after birth or an established personality - is accorded human dignity. (..)
"The dignity accorded to human life and also that accorded to unborn life exists for its own sake. In order for it to be respected and protected, the legal system must guarantee the legal framework for its development by providing the unborn with its own right to life. (..) This right to life which does not depend upon acceptance by the mother for its existence, but which the unborn is entitled to simply by virtue of its existence is an elementary and inalienable right stemming from the dignity of the person."

It is clear from this statement by the Court that the personhood of the unborn human life is in fact accepted, other than is the case with the ECtHR, which we will see later. In spite of these clear words confirming that from the moment of conception a human being is entitled to the full protection of articles 1 and 2 of the Basic Law, the fact remains that the BVerfG has, in this ruling and others, developed a doctrine whereby abortion is nonetheless permitted under conditions the Court leaves to the legislature to specify within the constitutional framework the Court itself provides[700]. The duty of the state to protect the unborn human life because of its inherent dignity remains in force, the Court reiterates, as does the inclusion of abortion as a crime in the German criminal code. However, the law may allow for situations in which performing an abortion is not

[699] BVerfG, 2 BvF 2/90 of 05/28/1993, §145
[700] See for a detailed discussion on this ruling: Hans Thomas/Winfried Kluth (ed.), Das zumutbare Kind – Die zweite Bonner Fristenregelung vor dem BVerfG, BusseSeewald 1993

unconstitutional and therefore also not subject to criminal proceedings. The German parliament introduced the so-called "*Beratungsschein*" (proof of mandatory consultation prior to an abortion whereby the options other than termination have to be discussed in an open-ended way), "medical indication" and "criminal indication" as grounds for a legal abortion. This has been conditionally accepted by the Court in its 1993 ruling as sufficiently counterbalancing the otherwise unconstitutional practice of abortion, when certain criteria would be met. The legislator is of the opinion that this procedure fulfills the constitutional requirement of the protection of the human dignity of the unborn child because it theoretically promotes the idea of the mother carrying out the pregnancy. The current practically unlimited practice of abortion in Germany shows how the Court does not see articles 1 (human dignity) and 2 (right to life) of the Basic Law being violated as a result of the German abortion law. As an indicator, official statistics by the *Statistisches Bundesamt*[701] show that 110.431 abortions took place in Germany in the year 2010. Of these abortions 92.7% took place after a "*Beratungsschein*" was provided of which it is public knowledge they are very easy to obtain. Only 2.8% was related to a "medical indication", such as danger to the life of the mother. 0% of the abortions had to do with what is called a "criminal indication", being cases of rape or incest. This means that almost all abortions taking place in Germany involve situations where only social aspects play a role. No matter how dramatic and painful the individual situations of mothers with unwanted pregnancies often are, the above figures show a worrying reality where the BVerfG has not been able to indiscriminately protect the constitutional guarantees to the protection of the dignity and life of every human being it repeatedly proclaims. In light of the Court's established and detailed case law on the equal dignity and right to life of the unborn and born human life, one could reason that abortions deriving from medical or criminal indications are not unconstitutional. It might be that we have misunderstood what the Court is trying to say, but a consistent reading and application of the Court's established doctrine on human dignity and life leaves serious questions as to why the 92.7% of abortions in Germany described above are not considered to be in violation of articles 1 and 2 of the Basic Law, taking into account that these terminations are the

[701] Statistisches Bundesamt, Fachserie 12, Reihe 3, 2010 – Gesundheit/Schwangerschaftsabbrüche, see pages 9 and 22 of this study

result of entirely subjective considerations where the worth of one life is weighed against the other. McCrudden might shed some light here. He observes that the BVerfG in 1993 made an important shift away from the human dignity doctrine developed in its first abortion ruling in 1975 where the Court primarily focused on the life interest of the unborn child and gave it precedence[702]. The 1993 decision however gives greater weight to the rights of the mother by using the notion of human dignity itself to justify a balancing of colliding rights to the protection thereof, pointing out the need to solve this: "Its application is subject to requirements of proportionality." [703] In their dissenting opinion, Judges Mahrenholz and Sommer seem to support this where they observe that "the legislature is obliged to strike an appropriate balance between its duty to the unborn and the woman's position under the Basic Law" Although they immediately ad that "the legislature is given scope to weigh up considerations and make decisions, but the scope is restricted, on the one hand, by the prohibition on too little protection vis-à-vis the unborn life, and restricted, on the other hand, by the prohibition on too much protection vis-à-vis the woman, and ultimately restricted by the principle of proportionality"[704], they confirm that with this ruling the door was opened to human dignity protection in practice becoming a relative principle. This situation is all the more problematic for the indiscriminate application of the legal principle of human dignity on a broader scale, since the Court continues to rule on its - theoretical - inviolability for every human being as having the same worth: *"Jedes menschliche Leben ist als solches gleich wertvoll"*[705] says the Court in its famous 2006 ruling on the German Air Safety Law. If that is so, how is it possible the Court allows so many human lives to be ended in violation of this same principle? This seemingly discrepancy between case law theory and sanctioned (legal) practice is probably best explained by the Court's well-known Kantian view on human dignity which gives the *expression* of the absolute autonomy of the individual human being primary importance. Exercising this absolute autonomy, the pregnant mother is held to also have the right to decide over the fate of the unborn child in her womb as an

[702] See: Ibid. Christopher McCrudden: Human Dignity and the Judicial Interpretation of Human Rights, pp. 717-718
[703] Ibid. BVerfG, 2 BvF 2/90 of 05/28/1993, §164
[704] Ibid. BVerfG, 2 BvF 2/90 of 05/28/1993, §377
[705] BVerfG, 1 BvR 357/05 of 15-2-2006, §85, http://www.bverfg.de/entscheidungen/rs20060215_1bvr035705.html

intrinsic part of her body, even when theoretically upholding the child's constitutional rights by following the procedure of the "*Beratungsschein*". Human dignity protection and the right to life that flows from it herewith has indeed become a relative principle, depending increasingly on, as Herdegen argues in his commentary on article 1.1. of the Basic Law, "constantly developing socio-cultural realities and interpretations."[706]
The German situation is however a clear example of how far-reaching the consequences would be when the human dignity and right to life of every human life would be consistently upheld in the way the Court at least says they should be upheld. There is no doubt the Court could then sanction pregnancy termination in the general way it does now. As recently as 2006 the Court confirmed its 1993 doctrine in an even broader sense:

"Art. 2 Abs. 2 Satz 1 GG gewährleistet das Recht auf Leben als Freiheitsrecht. (..) Mit diesem Recht wird die biologisch-physische Existenz jedes Menschen vom Zeitpunkt ihres Entstehens an bis zum Eintritt des Todes unabhängig von den Lebensumständen des Einzelnen, seiner körperlichen und seelischen Befindlichkeit, gegen staatliche Eingriffe geschützt. Jedes menschliche Leben ist als solches gleich wertvoll. (..)"[707]

<u>During lifetime</u>

Two decisions of the BVerfG of 27 February 2002[708] and 13 March 2002[709] regarding the protection of the human dignity of prisoners reiterate the established case law of the Court that the constitutional principle holds such high rank in the German legal system that there is basically no limit to the timing of its invocation by the parties involved[710]. A prisoner of the German State claimed that he had been subjected to inhuman treatment by being forced to share a very small prison cell with another inmate for a certain amount of time. A lower court held that he had no recourse since the situation had been already repaired and he was now in a cell alone under normal prison conditions. The Court

[706] As cited above. See: Ibid. Ernst-Wolfgang Böckenförde, in: Bleibt die Menschenwürde unantastbar?, pp. 1216-1227
[707] BVerfG, 1 BvR 357/05 of 15-2-2006, §85
[708] BVerfG, 2 BvR 553/01 of 27-2-2002, http://www.bverfg.de/entscheidungen/rk20020227_2bvr055301.html
[709] BVerfG, 2 BvR 261/01 of 13-3-2002, http://www.bverfg.de/entscheidungen/rk20020313_2bvr026101.html
[710] See for example §12 of the13-3-2002 decision

however held that since it concerned a breach of article 1 of the Basic Law whereby the previous situation had indeed violated the human dignity of the prisoner, he did have recourse to the provision, regardless of the current situation:

" (..) Das Rechtsschutzinteresse ist nicht dadurch entfallen, dass die beanstandete Unterbringungssituation nicht mehr besteht. (..) Zudem ist nach der Rechtsprechung des Bundesverfassungsgerichts bei schwer wiegenden Grundrechtseingriffen davon auszugehen, dass auch nachträglich ein Interesse an der Feststellung ihrer Rechtswidrigkeit zu bejahen ist (..) Steht insoweit eine Verletzung der Menschenwürde (Art. 1 Abs. 1 GG) in Frage, dann muss ein Rechtsschutzbegehren zur nachträglichen gerichtlichen Überprüfung zulässig sein."[711]

This is established case law of the BVerfG, for example confirmed in a 23 November 2005 decision[712] regarding a similar case of inhumane prison conditions. A 22 February 2011[713] ruling concluded along similar lines that the incarceration of various prisoners in a small (8 sqm) cell was in violation of their human dignity: *"Aus Art. 1 Abs. 1 GG in Verbindung mit dem Sozialstaatsprinzip folgt die Verpflichtung des Staates, den Strafvollzug menschenwürdig auszugestalten, mithin das Existenzminimum zu gewähren, das ein menschenwürdiges Dasein überhaupt erst ausmacht (..)"* (§29).

The famous 11 March 2003 Benetton ruling[714] of the BVerfG deals with the relationship between the constitutional principle of human dignity and the freedom of expression through commercial advertising. Benetton had published an advertisement showing part of a naked body with the letters "H.I.V. POSITIVE" printed above it. The Center for the Prevention of unfair Competion e.V. filed suit against Benetton amongst others claiming this advertisement violated the human dignity of people suffering from H.I.V. because it stigmatized them. Although the Court held in this case that there had been no violation of

[711] BVerfG, 2 BvR 553/01 of 27-2-2002, §11
[712] BVerfG, 2 BvR 1514/03 of 23-11-2005, §11, http://www.bverfg.de/entscheidungen/rk20051123_2bvr151403.html
[713] BVerfG, 1 BvR 409/09 of 22-2-2011, http://www.bverfg.de/entscheidungen/rk20110222_1bvr040909.html
[714] BVerfG, 1 BvR 426/02 of 11-3-2003, http://www.bverfg.de/entscheidungen/rs20030311_1bvr042602.htm

article 1 of the Basic Law, it did discuss in detail how the constitutional principle of human dignity can never be overruled by the freedom of expression, whereby it once again underlines that the human dignity principle is the foundation of all fundamental rights and cannot be weighed against other individual rights: *"Die Menschenwürde setzt der Meinungsfreiheit auch im Wettbewerbsrecht eine absolute Grenze. (..) Die Menschenwürde als Fundament aller Grundrechte ist mit keinem Einzelgrundrecht abwägungsfähig."*[715] This observation of the Court therefore underlines that a fundamental right of one person (in this case the freedom of expression) cannot overrule the constitutional obligation to protect the human dignity of another.

The BVerfG has dealt extensively with questions surrounding the fight against terrorism and its effect on fundamental rights, of which its 3 March 2004 ruling on the use of acoustic eavesdropping equipment by the police is a prominent example[716]. The case, initiated by private citizens, was amongst others directed against the constitutional reform of article 13, §§3-6 of the Basic Law, followed by changes in the criminal code as decided by the German parliament and allowing for acoustic eavesdropping of citizens under certain strict conditions. The plaintiffs held that the revised article 13 violated the human dignity principle of article 1 of the Basic Law because it disregarded the right to the privacy of one's home. The Court first observes that parliament has the right to change the constitution as long as such changes do not affect the fundamental principles laid down in articles 1 and 20 of the Basic Law (§111). In the case of acoustic eavesdropping in general and the changes to article 13 specifically, the Court is of the opinion that the human dignity principle is not violated (§114). Concrete situations of eavesdropping can however occur that do violate the constitutional principle, especially when the principle is not observed that human beings cannot be treated as objects of arbitrary state power (§§116-117). It then goes on to explain how the principle of human dignity is described in response to violations brought to the Court's attention, whereby throughout time diverging situations require individual treatment by the Court:

[715] BVerfG, 1 BvR 426/02 of 11-3-2003, §26
[716] BVerfG, 1 BvR 2378/98 of 3-3-2004, http://www.bverfg.de/entscheidungen/rs20040303_1bvr237898.html

"Dabei wird der Begriff der Menschenwürde häufig vom Verletzungsvorgang her beschrieben. (..) Anknüpfend an die Erfahrungen in der Zeit des Nationalsozialismus standen in der Rechtsprechung zunächst Erscheinungen wie Misshandlung, Verfolgung und Diskriminierung im Zentrum der Überlegungen. (..) Später wurde die Menschenwürdegarantie im Hinblick auf neue Gefährdungen maßgebend, so in den 1980er Jahren für den Missbrauch der Erhebung und Verwertung von Daten. (..) Im Zusammenhang der Aufarbeitung des Unrechts aus der Deutschen Demokratischen Republik wurde die Verletzung von Grundsätzen der Menschlichkeit unter anderem bei der Beschaffung und Weitergabe von Informationen zum Gegenstand der Rechtsprechung. (..) Gegenwärtig bestimmen insbesondere Fragen des Schutzes der personalen Identität und der psychisch-sozialen Integrität die Auseinandersetzungen über den Menschenwürdegehalt."[717]

What the Court says here is very relevant for the broader perspective of human dignity protection under the EU Charter in two respects: first, the BVerfG makes clear here that in most cases the constitutional norm can only be upheld by concluding *how* human dignity was violated in concrete situations. We are reminded here of the revolt of conscience in post-War Europe leading to human dignity being enshrined as a legal concept but not being defined. It was clear from the atrocities themselves that human dignity had been violated. Secondly, and this is linked to the first point, the Court also says here that a comprehensive definition of human dignity and the scope of its application is not really possible because different phases of history bring different collisions with human dignity needing an individual approach each and every time. The acoustic eavesdropping decision has been controversial, as the unusually lengthy dissenting opinion of judges Jaeger and Hohmann-Dennhardt underlines. The dissenting judges fear that by this majority ruling a practice is consolidated whereby constitutional reform and unconstitutional laws that violate article 79 §3 are upheld by mere judicial interpretation that declares conformity with the Basic Law. This, the judges fear, will lead to a gradual discarding of articles 1 and 20 themselves of the Basic Law because it undermines the understanding of the human person on which the constitution rests:

[717] BVerfG, 1 BvR 2378/98 of 3-3-2004, §115

"Inzwischen scheint man sich an den Gedanken gewöhnt zu haben, dass mit den mittlerweile entwickelten technischen Möglichkeiten auch deren grenzenloser Einsatz hinzunehmen ist. Wenn aber selbst die persönliche Intimsphäre, manifestiert in den eigenen vier Wänden, kein Tabu mehr ist, vor dem das Sicherheitsbedürfnis Halt zu machen hat, stellt sich auch verfassungsrechtlich die Frage, ob das Menschenbild, das eine solche Vorgehensweise erzeugt, noch einer freiheitlich-rechtsstaatlichen Demokratie entspricht. Umso mehr ist Art. 79 Abs. 3 GG streng und unnachgiebig auszulegen, um heute nicht mehr den Anfängen, sondern einem bitteren Ende zu wehren."[718]

We have already quoted some parts above of the "*Luftsicherheitsgesetz*" (Aviation Security Act) case in which the BVerfG was asked to rule on the constitutionality of a law that would have allowed the German Air Force to shoot down hijacked commercial planes being turned by the hijackers into a weapon that is about to be used against a civil target. The 15 February 2006 ruling[719] of the Court discusses some key aspects of the scope of the human dignity guarantee of article 1 of the Basic Law. The most important consideration of the Court is that the law in question was unconstitutional because it violated article 2 §2 in connection with 1 §1 of the Basic Law – the right to life in connection with the human dignity guarantee[720]. The Court held that the state (in this case the armed forces under the direction of the secretary of defense) can never deliberately end the lives of one group of people in order to save the lives of another group of people, even when it concerns the sacrifice of a smaller number of people in order to save a larger number of people[721]. The Basic Law forbids the state to make an appraisal of one life against another life because this would amount to human beings becoming an *object*

[718] BVerfG, 1 BvR 2378/98 of 3-3-2004, §373
[719] BVerfG, 1 BvR 357/05 of 15-2-2006, http://www.bverfg.de/entscheidungen/rs20060215_1bvr035705.html
[720] Official translation of the ruling of the Court in English: "The armed forces' authorisation pursuant to § 14.3 of the Aviation Security Act (Luftsicherheitsgesetz – LuftSiG) to shoot down by the direct use of armed force an aircraft that is intended to be used against human lives is incompatible with the right to life under article 2.2 sentence 1 of the Basic Law in conjunction with the guarantee of human dignity under article 1.1 of the Basic Law to the extent that it affects persons on board the aircraft who are not participants in the crime." See: BVerfG, 1 BvR 357/05 vom 15.2.2006, Headnote 3, http://www.bverfg.de/entscheidungen/rs20060215_1bvr035705en.html
[721] BVerfG, 1 BvR 357/05 of 15-2-2006, §38

of state intervention which the Basic Law was written for to avoid[722]. The Court rejects the argument that the disputed law falls under the exception of article 2 § 2 that says: *"In diese Rechte darf nur auf Grund eines Gesetzes eingegriffen werden."* The strict conditions under which such an exception would be allowed have not been met in this case, these conditions being that *"(..) das betreffende Gesetz in jeder Hinsicht den Anforderungen des Grundgesetzes entspricht. Es muss kompetenzgemäß erlassen worden sein, nach Art. 19 Abs. 2 GG den Wesensgehalt des Grundrechts unangetastet lassen und darf auch sonst den Grundentscheidungen der Verfassung nicht widersprechen."*[723] The Court observes that the disputed law violates the constitutional right to life because crew and passengers of the plane would almost certainly die as a result of the state-sanctioned downing of the plane in a situation whereby they are in no way responsible for the act that has led the state to decide for this use of force. The Aviation Security Act therefore is both in material and formal violation of article 2 of the Basic Law, in combination with the human dignity principle of article 1[724].

A 8 November 2006 ruling[725] of the BVerfG dealt with the question whether the actual imprisonment for life of a notoriously dangerous criminal was constitutional, specifically with regard to the constitutional principles of human dignity and liberty of person (articles 1 §1 and 2 §2 of the Basic Law). The Court held that, as long as the *"Verhältnismäßigkeitsprinzip"* has been observed, the execution of a life-long prison sentence is not unconstitutional in a case like the one at hand where the person affected has committed a very serious crime and also poses a great risk to society[726]. This guiding principle requires the state to apply the law in a way that stands in relation to the act it responds to. In this case, the severity of the crime allowed for an equally severe application of the criminal code.

[722] Cf. BVerfG, 1 BvR 357/05 of 15-2-2006, §39
[723] BVerfG, 1 BvR 357/05 of 15-2-2006, §85
[724] See: BVerfG, 1 BvR 357/05 of 15-2-2006, §§86-88
[725] BVerfG, 2 BvR 578/02 of 8-11-2006, http://www.bverfg.de/entscheidungen/rs20061108_2bvr057802.html
[726] See: BVerfG, 2 BvR 578/02 of 8-11-2006, §§67-70 + 106

A 4 February 2009 judgment[727] concerns the violation of the human dignity principle by the state prosecuting authorities in the process of arresting and searching a suspect. A professional tax advisor had been arrested on suspicion of fraud and was subsequently subjected to harsh internment conditions as well as a full body search including a procedure of investigating the anus. The claimant asked the Court to rule this treatment as violating his rights to respect of his human dignity and bodily integrity. The BVerfG decided that the claimant's rights deriving from article 2 §1 in combination with article 1 § 1 of the Basic Law had indeed been violated. The circumstances of the case did not justify the applied investigative procedure. The authorities had only generally applied the law, without taking into consideration the individual constitutional rights of the claimant in relation to the reasons for his arrest[728]. The above discussed *"Verhältnismäßigkeitsprinzip"* had not been observed by the prosecuting authorities and the lower court. This led the Court to conclude that a procedure that was constitutionally sanctioned as such, in this specific case violated the claimant's human dignity.

The much debated *"Hartz IV"* ruling[729] of the BVerfG deals with the German Code of Social Law and the subsistence minimum income people receiving social welfare from the state are entitled to in line with the constitutional protection of their human dignity. The Court holds in §133: "The fundamental right to the guarantee of a subsistence minimum that is in line with human dignity emerges from article 1.1 of the Basic Law in conjunction with article 20.1 of the Basic Law (..)". It goes on to say that an existence minimum "must be safeguarded by a statutory claim." (§136) The ruling outlines how human dignity protection cannot be simply generalized but always has a specifically individual dimension to it. The Court reaffirms its established case law whereby on the one hand it underlines the special nature of the human dignity principle as having an "autonomous significance" and carrying "absolute effect" for each individual (equally for children as well), whilst also conceding that each individual situation must be judged on its own merits. The Court says that human dignity is never subject to the legislature's

[727] BVerfG, 2 BvR 455/08 of 4-2-2009, http://www.bverfg.de/entscheidungen/rk20090204_2bvr045508.html
[728] See: BVerfG, 2 BvR 455/08 of 4-2-2009, §36 in combination with §28
[729] BVerfG, 1 BvL 1/09 of 9-2-2010, http://www.bverfg.de/entscheidungen/ls20100209_1bvl000109en.html

discretionary power ("*freies Ermessen*") yet that the actual way of applying it must be "regularly updated".[730] Here we see another example of how with the legal application of human dignity there is logically and necessarily a constant tension between the general principle and the specific situation.

The ruling of the BVerfG of 11 January 2011[731] on the German Trans-sexuality Law opens a whole new – and problematic - chapter in the enforcement of the constitutional human dignity principle. The case concerns a person born as a male, but no longer wanting to be a man and therefore now taking on a female identity ("Mrs. L.I."). After having performed what is referred to as the "small solution" to alter his gender, namely the change of name in official documents, Mrs. L.I. subsequently entered into a relationship with a woman. The couple then wanted to conclude a same-sex civil partnership. The German Transsexuality Law however barred them from entering into this civil partnership because the law requires that the person having changed its gender first undergoes an operation taking away the physical attributes of the original gender as well as the capacity to procreate (the "big solution"). It also requires that the new gender identity is being lived by the person concerned and has led to public recognition of the new sex. The reason for these requirements is to uphold the distinctive nature of same-sex civil partnerships, namely that it is a legal instrument exclusively meant for people of the same gender whereby the relationship itself logically excludes the natural possibility of procreation. The Court ruled however that the legal requirement to physically change the gender and remove the procreative capacity from the body before being allowed to enter into a same-sex civil partnership violated Mrs. L.I.' s constitutional right to the respect of human dignity and sexual self-determination as derived from article 2 §1 in combination with article 1 §1 of the Basic Law.[732] The Court ruled this in spite of the fact that legally speaking the couple would have been able to enter into a civil heterosexual marriage since the law is exclusively based on the physical attributes of the gender of each of the partners, not their personal preferences. This ruling is highly problematic for

[730] See Ibid. BVerfG, 1 BvL 1/09 of 9-2-2010, §2 of the headnotes
[731] BVerfG, 1 BvR 3295/07 of 11-1-2011, http://www.bverfg.de/entscheidungen/rs20110111_1bvr329507.html
[732] See: BVerfG, 1 BvR 3295/07 of 11-1-2011, §59

various reasons. The Court's decision first of all undermines the same-sex civil partnership law itself. By nature of the specific relationships it is asked to govern, the law has to build upon a set of physical realities or prerequisites which are the reason why this law was introduced in the first place. These realities are that the persons involved are of the same sex and do not have procreative abilities as a couple. The constitutional human dignity argument is used however to claim that it is unfair to require the objective physical realities of such relationship to be decisive for the legal instrument as such, instead placing the subjective considerations of the persons involved on the foreground. This reasoning cannot be considered as a solid basis for any law, let alone as an indicator of human dignity violation. The latter always relates to a concrete *event* – as the Court repeatedly says throughout its established case law - that is in disregard of the dignity of the human being whereby the way the person feels or experiences this is not what counts, but rather the objective reality of how this person is affected. In itself, requiring a person by law to undergo a gender-change operation would indeed be in violation of its human dignity. But his is not what is happening here. The law merely stipulates the conditions that need to be met in order to be able to conclude a certain form of civil partnership. Requiring by law that both partners in a same-sex civil partnership should have the physical attributes of the same gender is not a violation of their human dignity because it is the essence of this law without which there is no point in having such a law. Although the Court seems to admit this, it still concludes that in this specific situation the human dignity of the claimant was violated by applying that same law:

"Es ist verfassungsrechtlich nicht zu beanstanden, dass der Gesetzgeber beim Zugang zu einer eingetragenen Lebenspartnerschaft auch bei Transsexuellen mit homosexueller Orientierung auf das personenstandsrechtlich festgestellte Geschlecht der Partner abstellt und die personenstandsrechtliche Geschlechtsbestimmung von objektivierbaren Voraussetzungen abhängig macht. Es verstößt jedoch gegen das Recht auf sexuelle Selbstbestimmung aus Art. 2 Abs. 1 in Verbindung mit Art. 1 Abs. 1 GG, wenn er die personenstandsrechtliche Anerkennung eines Transsexuellen an zu hohe und damit unzumutbare Voraussetzungen knüpft."[733]

[733] BVerfG, 1 BvR 3295/07 of 11-1-2011, §59

This conclusion is contradictory as it recognizes on the one hand the need for the law to base on certain objective factual prerequisites, whilst on the other hand concluding that in this case asking for these prerequisites to be met violates the claimant's human dignity principle. It seems the Court has applied the *"Verhältnismässigkeitsprinzip"* in this case too, but did so at the peril of undermining the law in a fundamental way. It is unclear how the Court sees it possible for this law to be effectively upheld in the future, now that it has denied the state the right to enforce its core provision of partners in a same-sex civil partnership needing to be of the same sex.

End of life

End of life questions in relation to the human dignity norm have also been dealt with by the BVerfG. A 4 November 2008 decision[734] of the Court - comparable to the Pretty case of the ECtHR which we will discuss later - dealt with the question whether the refusal of the state to accommodate the euthanasia of a woman suffering unbearably violates this person's right to the protection of her human dignity. The *Bundesinstitut für Artzneimittel und Medizinprodukte* (Federal Agency for Medicines and Medical Products) refused to provide for the lethal dose of Natrium-Pentobarital the woman had requested to kill herself, arguing that the Agency by law was only allowed to provide medication that sustains life. The Court avoided answering the question directly by holding itself not competent to hear this case due to the fact that the woman concerned had already died and her husband did not have the legal competence in this specific case to invoke his deceased wife's constitutional rights[735]. It seems the Court here deliberately used a technical legal rule to avoid having to answer the currently hotly debated question on human dignity and euthanasia. However, as we will see when discussing the case law of the European Court of Human Rights, this case has now landed in Strasbourg where it seems the court cannot avoid ruling on the matter itself[736].

[734] BVerfG, 1 BvR 1832/07 of 4-11-2008, http://www.bverfg.de/entscheidungen/rk20081104_1bvr183207.html
[735] See: BVerfG, 1 BvR 1832/07 of 4-11-2008, §§7, 8
[736] Case of Koch v. Germany, no. 497/09; ruling expected in 2012

Post mortem effects

We now come to the reach of human dignity protection beyond the end of life. In its 5 April 2001[737] ruling on a case involving the use of a deceased politician's name and image in the election campaign for a far-right party the former would certainly not have supported, the Court held that human dignity protection even extends *beyond* the death of a person:

"Geschützt ist bei Verstorbenen zum einen der allgemeine Achtungsanspruch, der dem Menschen kraft seines Personseins zusteht. Dieser Schutz bewahrt den Verstorbenen insbesondere davor, herabgewürdigt oder erniedrigt zu werden (..). Schutz genießt aber auch der sittliche, personale und soziale Geltungswert, den die Person durch ihre eigene Lebensleistung erworben hat. Steht fest, dass eine Maßnahme in den Schutzbereich des postmortalen Persönlichkeitsrechts eingreift, ist zugleich ihre Rechtswidrigkeit geklärt. Der Schutz kann nicht etwa im Zuge einer Güterabwägung relativiert werden."[738]

The problem with this ruling is that the Court raises reputational damage of a deceased person to the level of human dignity violation of a living human being. Because of the inseparable link between life and dignity discussed in the introduction to this chapter, it is at least questionable whether article 1.1. even allows for such post-mortem effect of human dignity protection as such. It also seems this is an isolated case.

The above selection of case law of the BVerfG on the application of the constitutional human dignity principle is by no means exhaustive but indicates in key areas of conflict how article 1 of the Basic Law is applied in practice. Where the Court is clear and consistent on the theoretical scope of protection of the human dignity principle and its inviolability from conception until after death, it is not clear and consistent on how this translates into concrete situations of various life-ending and life-changing procedures it is asked to decide upon. Citing the inviolable dignity of every human being, the Court rightly rejects eugenic practices, the mistreatment of prisoners and the shooting down of

[737] BVerfG, 1 BvR 932/94 of 5-4-2001, http://www.bverfg.de/entscheidungen/rk20010405_1bvr093294.html
[738] BVerfG, 1 BvR 932/94 of 5-4-2001, §19

hijacked civil aircraft. At the same time the Court has accepted a well-established practice of "non-indicated" socially motivated pregnancy terminations, whilst formally explicitly upholding in its case law the inviolability of the dignity of the unborn and its right to life. The Court also applies the human dignity principle to deny the state to enforce legislation and procedures that in themselves are constitutional. We can conclude that in the area of human dignity protection and the right to life the BVerfG is increasingly developing a case law that contradicts and ignores the Christian human dignity tradition, whilst taking to new heights the modern Kantian idea of absolute autonomy. It remains to be seen whether in this light the Court will be able to uphold human dignity as "the state's highest duty to protect."

3.3. Case law of the European Court of Human Rights **(***ECtHR)*

It is important to note here once more that the term "human dignity" as such is not used in the text of the European Convention itself, the treaty the ECtHR is bound to interpret and enforce. As we will see however, the Court does specifically and repeatedly (although not very often) refer to the legal concept of human dignity as being defining for its deliberations and rulings[739]. As Beatrice Maurer puts it in her study of the Convention, the notion of human dignity is so important for judges because – in her opinion - it helps them avoid morality: *"Il permettrait, en particulier, au juge d'échapper à la morale, reference qu'il craint."*[740]

The first time the legal concept of human dignity is mentioned by the ECtHR is in its judgment in the case of *Tyrer v. United Kingdom* of 25 April 1978[741]. The corporal punishment to which the applicant was subjected under the law of the Isle of Man was held to be in violation of article 3 of the Convention and the human dignity of the applicant. In §33 of the ruling the Court observes that the harsh treatment of Mr. Tryer

[739] The ECtHR case law quoted in this chapter has been retrieved from the Court's on line HUDOC database (http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Decisions+and+judgments/HUDOC+database/) We have also made use of the overview produced by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs' under: http://www.europarl.europa.eu/comparl/libe/elsj/charter/art01/default_en.htm (retrieved 18-1-2012)
[740] Ibid. Béatrice Maurer, Le principe de respect de la dignité humaine et la Convention européenne des droits de l'homme, p. 17
[741] Case of Tyrer v. The United Kingdom, no. 5856/72; Judgment of 25 April 1978

"constituted an assault on precisely that which it is one of the main purposes of article 3 to protect, namely a person's dignity and physical integrity." It would then take 10 years for the Court to hand down judgment in its first case where the actual violation of the human dignity concept itself was examined in one of the main arguments of the case. In this case, *Abdulaziz and others v. United Kingdom* of 28 May 1985[742] the Court however concluded there had been no violation of the human dignity of the applicants because their treatment had not been humiliating or degrading but rather in accord with justified procedure under the circumstances of the case. The Court observed: "(..) the difference of treatment complained of did not denote any contempt or lack of respect for the personality of the applicants (..)"[743]

It would not be until the mid-nineties that the Court started to make the legal concept of human dignity a more central aspect of its rulings. The judgment in *Ribitsch v. Austria* of 4 December 1995[744] stipulates human dignity as the basis for article 3 of the Convention and goes on to say that "in respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in article 3 of the Convention."[745] This principle was reiterated and explicitly referred back to in later rulings of the Court, for example in the 9 June 1998 *Tekin v. Turkey* and the 28 October 1998 Assenov v. Bulgaria decisions[746]. In the case of *Kudla v. Poland* the Court in its 26 October 2000 judgment[747] ruled that prison conditions are to be in accordance with the protection of the inmate's human dignity, including the need for the health and well-being of the prisoner being "adequately secured".

[742] Case of Abdulaziz, Cabales and Balkandali v. United Kingdom, nos. 9214/80; 9473/81; 9474/81; Judgment of 28 May 1985
[743] Judgment of 28 May 1985, §91. The Court concluded article 3 of the Convention had not been violated.
[744] Case of Ribitsch v. Austria, no. 18896/9; Judgment of 4 December 1995
[745] Judgment of 4 December 1995, §38
[746] Case of Tekin v. Turkey, no. 52/1997/836/1042; Judgment of 9 June 1998 (see § 53) and Case of Assenov and Others v. Bulgaria, no. 90/1997/874/1086; Judgment of 28 October 1998 (see §94)
[747] Case of Kudła v. Poland, no. 30210/96; Judgment of 26 October 2000 (see §94)

In the case of *Streletz, Kessler and Krenz v. Germany*[748] we return to a post-War discussion on the legally enshrined protection of human dignity that is especially relevant because of its historical significance. The three plaintiffs, referring to article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention), had complained to the Strasbourg Court that after the unification of Germany the German courts had unlawfully punished them for their role in the shooting and imprisonment of people trying to flee from the German Democratic Republic (East Germany) prior to the fall of the Berlin wall in 1989. One of the key arguments of the plaintiffs was that they were merely following a practice that they never expected would be deemed illegal. This defense sounds all too familiar of the defendants at the post-War Nuremberg trials ("We were only following orders") and the Court clearly rejects it. The ECtHR underlines that the overarching principle of inviolable human dignity and the ensuing hierarchically superior right to life was well-known by the plaintiffs and should have been the guiding intention of all their actions as rulers:

"However, the Court points out that the reason of State thus pleaded must be limited by the principles enunciated in the Constitution and legislation of the GDR itself; it must above all respect the need to preserve human life, enshrined in the GDR's Constitution, People's Police Act and State Borders Act, regard being had to the fact that even at the material time the right to life was already, internationally, the supreme value in the hierarchy of human rights (see paragraph 94 below)."[749]

This case shows how, unsurprisingly, even if the protection of human dignity is written in a country's constitution and the country has also subscribed to international treaties in this regard, this constitutes no guarantee as to its application. Moreover, the Court seems to imply that even if the German Democratic Republic's laws would not have included specific references to the protection of human dignity and life, it would have still held the plaintiffs accountable for their orders to shoot those trying to cross the border. Referring to the various international human rights instruments in relation to the right to life, the

[748] Case of Streletz, Kessler and Krenz v. Germany, nos. 34044/96, 35532/97 and 44801/98; Judgment of 22 March 2001
[749] See §72 of the Judgment of 22 March 2001

Court holds: "The convergence of the above-mentioned instruments is significant: it indicates that the right to life is an inalienable attribute of human beings and forms the supreme value in the hierarchy of human rights."[750] Human dignity protection, therefore, can equally never be dependent on it being written into law, since it is an "inalienable attribute" of the human being.

The much discussed case of *Pretty v. The United Kingdom*[751] deals with the protection of human dignity through articles 2 (right to life) and 3 (ban on torture) of the Convention and euthanasia. The plaintiff saw these rights violated because of the state's refusal to refrain from prosecuting her spouse in case he would help her to commit the suicide she had planned because of her unbearable physical situation. Mrs. Pretty claimed that by refusing assistance the state directly caused her inhumane suffering and disregarded her dignity and rights under the Convention. The Court rejected her claims on the basis of the argument that the right to life and the ban on torture are absolute rights that do not allow for exceptions of whichever kind, not even under article 15 of the Convention (derogation in times of emergency)[752]. Although there are cases where there is a positive obligation of the state to protect against inhuman or degrading treatment[753], there cannot be a positive obligation of the state under article 3 of the Convention to take actions leading to or aiding the actual termination of human life[754]. "The very essence of the Convention", the Court later underlines, "is respect for human dignity and human freedom."[755] The role of the Court hereby is not to offer abstract opinions but "to apply the Convention to the concrete facts of the individual case". The resulting judgments however, establish legal precedents that are relevant for application in later cases[756]. The *Pretty* judgment is thus very relevant for the application of the human dignity concept. It confirms established case-law of the Strasbourg court that the respect for human dignity is at the core of the Convention and its application, even though the term itself cannot be found in the

[750] See §94 of the Judgment of 22 March 2001
[751] Case of Pretty v. The United Kingdom, no. 2346/02; Judgment of 29 April 2002
[752] See §49 of the Judgment of 29 April 2002
[753] See §§51 and 71 of the Judgment of 29 April 2002
[754] See §§55-56 of the Judgment of 29 April 2002
[755] See §65 of the Judgment of 29 April 2002
[756] See §75 of the Judgment of 29 April 2002

Convention[757]. Even more important is the Court's assertion that the right to life and the ban on torture are inalienable rights. Since human dignity as a legal concept is the basis of articles 2 and 3 of the Convention, it can be distilled from the Court's observations in the Pretty case that the right to the protection of human dignity itself is indeed inviolable. It furthermore indicates that the most fundamental concrete application of human dignity protection – which we can also read in the *Streletz* case - lies in the defense of life and personal integrity. But as we will see with the Vo. v. France ruling, the Court explicitly limits the application of this stated 'inviolability' to the post-natal human life. The case of *Haas v. Switzerland*[758] also deals with euthanasia and here the Court confirms its case law developed in the Pretty case, that no right to suicide exists under the Convention and that the state has no positive obligation to allow for or assist euthanasia. However, in a problematic further development of the Court's understanding of the right to privacy, and hereby explicitely referring to the *Pretty* case, it does recognize the right of an individual to end its own life: *"(..) la Cour estime que le droit d'un individu de décider de quelle manière et à quel moment sa vie doit prendre fin, à condition qu'il soit en mesure de forger librement sa propre volonté à ce propos et d'agir en conséquence, est l'un des aspects du droit au respect de sa vie privée au sens de l'article 8 de la Convention."*[759] We will see in the still to be ruled on case of *Koch v. Germany*[760] if the Court further develops its case law in this regard. It should be noted here that the Parliamentary Assembly of the Council of Europe (PACE) on 25 January 2012 adopted a resolution rejecting euthanasia as a matter of principle, citing the need to protect the human dignity and rights of patients.[761]

The case of *Vo. v. France*[762] shows that the Court in Strasbourg, although in principle clear on the theoretical non-negotiability of human dignity protection, is not consistent in

[757] See for example (listing by judges Pielman and Jebens in their dissenting opinion in Vereinigung Bildender Künstler v. Austria, no. 68354/01): Pretty v. the United Kingdom, no. 2346/02, § 65, Christine Goodwin v. the United Kingdom, no. 28957/95, § 90; Valašinas v. Lithuania, no. 44558/98, § 102
[758] Case of Haas v. Switzerland, no. 31322/07; Judgment of 20 January 2011
[759] See §51 of the Judgment of 20 January 2011
[760] Case of Koch v. Germany, no. 497/09; this is a continuation of the case BVerfG, 1 BvR 1832/07 of 4-11-2008 as discussed above
[761] Parliamentary Assembly of the Council of Europe, Protecting human rights and dignity by taking into account previously expressed wishes of patients, Resolution 1859 (20120, adopted on 25 January 2012
[762] Case of Vo. V. France, no. 53924/00; Judgment of 8 July 2004

the actual application to all human beings. The case concerns a woman whose five-month old unborn child was aborted "for medical reasons" as a result of an unwanted operation for the removal of a contraceptive coil intended for another woman with a similar name. Mrs. Vo asked the Court to rule that the fact that French criminal law did not provide for recourse in the case of unintentional homicide of an unborn child was in violation of article 2 (right to life) of the Convention. The Court refused to affirm the right to life of the unborn child in light of article 2 of the Convention, stating that the legal status of unborn life is a matter of disagreement between the Council of Europe member states and falls within their national competence to decide on: "It follows that the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere (..)."[763] The Court then further justifies its "hand-off" approach to the reach of the right to life and the protection of human dignity under the Convention by holding:

"At European level, the Court observes that there is no consensus on the nature and status of the embryo and/or foetus (see paragraphs 39-40 above), although they are beginning to receive some protection in the light of scientific progress and the potential consequences of research into genetic engineering, medically assisted procreation or embryo experimentation. At best, it may be regarded as common ground between States that the embryo/foetus belongs to the human race. The potentiality of that being and its capacity to become a person – enjoying protection under the civil law, moreover, in many States, such as France, in the context of inheritance and gifts, and also in the United Kingdom (see paragraph 72 above) – require protection in the name of human dignity, without making it a "person" with the "right to life" for the purposes of Article 2."[764]

This is an unfortunate decision of the Court and supported by the flawed argumentation that human dignity protection does not apply equally to all human beings, or, in the words of the Court, all members of "the human race". The Court bases this argument on the incorrect presumption that the 'human race' apparently consists of different

[763] See §82 of the Judgment of 8 July 2004
[764] §84 of the Judgment of 8 July 2004

'categories' of humans, namely 'persons' and 'non-persons', each as a consequence enjoying more or less protection by the law. This statement lacks any scientific basis, since science – other than the Catholic tradition for that matter - until now has not been able to agree on the exact moment in the development of human life when a 'mere human being' becomes a 'human being that is a person'. Opinions on this matter in the scientific community vary widely. The Court itself underlines this fact in the Vo v. France ruling where in §§ 39 and 40 it discusses the scientific and legal debate on personhood and quotes the 1998 opinion of the *European Group on Ethics in Science and New Technologies at the European Commission* that concludes: "Existing legislation in the Member States differs considerably from one another regarding the question of when life begins and about the definition of 'personhood'. As a result, no consensual definition, neither scientifically nor legally, of when life begins exists.".[765] Although the Court does admit that as born humans do, unborn human beings belong to the same 'race' and they have the 'potentiality' to personhood and enjoy protection ´in the name of human dignity", it still refuses to extend this protection of the law to them and instead holds, without scientific proof to support this statement, that "(..) the unborn child is not regarded as a "person" directly protected by article 2 of the Convention and that if the unborn does have a "right" to "life", it is implicitly limited by the mother's rights and interests."[766] The mother's "rights and interests" trump what the Court itself considers to be the supreme right derived from the Convention, namely the right to life (see for example the above mentioned *Sterletz* judgment). From a strictly legal point of view alone questions can be raised about the actual application of justice when a certain group of human beings decides that another group of human beings cannot appeal to the protection of their dignity and right to life, even if this decision comes from a court of law. Is this not exactly what the post-War European order tried to abolish by forwarding the legal concept of the *inalienable* dignity of *every* human being? Should the Court not have done what the application of justice presupposes, namely that in cases of doubt the course of action is chosen afflicting the least harm to those involved? Since neither scientifically nor legally there exists a European consensus on when personhood begins,

[765] §40 of the Judgment of 8 July 2004
[766] §80 of the Judgment of 8 July 2004

the correct way of applying the law would be to give the weakest party the benefit of the doubt and protect its life[767]. The various separate, dissenting and concurring opinions on this ruling show that the Court itself was divided on the issue. For example, the dissenting opinion of Judge Mularoni joined by Judge Straznika, holding that in this case article 2 of the Convention was indeed violated, underlines the contradictory nature of the Court's majority opinion. Mularoni also affirms that the right to life and with it the protection of the dignity of all human beings also extends fully to the unborn life:

"Although legal personality is only acquired at birth, this does not to my mind mean that there must be no recognition or protection of "everyone's right to life" before birth. Indeed, this seems to me to be a principle that is shared by all the member States of the Council of Europe, as domestic legislation permitting the voluntary termination of pregnancy would not have been necessary if the foetus was not regarded as having a life that should be protected. Abortion therefore constitutes an exception to the rule that the right to life should be protected, even before birth."[768]

The dissenting opinion of Judge Ress in this case summarizes the problem the Court was not willing to decide on: "As this case illustrates, the embryo and the mother, as two separate "human beings", need separate protection."[769]
The case of *Tysiac v. Poland*[770] also deals with the question of abortion, this time the denial by Polish doctors to perform the termination of a pregnancy about which the mother feared it would lead to her eyesight severely deteriorating. Although a team of medical specialists concluded there was no direct link between the pregnancy and the worsening myopia after delivery, the Court ruled article 8 had been violated because the woman's right to privacy – and therefore her dignity - had not been respected by denying her an abortion under the circumstances. In spite of the fact that domestic procedure and law – in such cases normally respected by the Court – gave a conclusive answer, the

[767] The opinions in literature on this Judgment are divided, see for example: Tanya Goldman, Vo. V. France and Fetal Rights: the Decision not to decide, in: Harvard Human Rights Journal, Vol. 18 – Spring 2005, pp. 277-282. Goldman argues – without providing evidence – that international treaties and the Convention history itself clearly point to denying the protection of article 2 to fetal life
[768] Dissenting opinion of Judge Mularoni joined by Straznika, Judgment of 8 July 2004, p. 58
[769] Dissenting opinion of Judge Ress, Judgment of 8 July 2004, p. 51
[770] Case of Tysiac v. Poland, no. 5410/03; Judgment of 20 March 2007

Court disregarded this and applied the Convention to implicitly give the woman a right to abortion. The Court's ruling in the case of *A, B and C v. Ireland*[771] is another illustration of this same problem. The plaintiffs in this case – two Irish women and a Lithuanian woman- argued that the Irish constitutional protection of human life from conception onwards and thus the near-total ban on abortion in this country violate a woman's right to integrity of body and her right to privacy under article 8 of the Convention, but also – paradoxically- violated article 2 (right to life, due to the stated lethal health risks connected to having to travel abroad for an abortion), article 3 (prohibition of degrading treatment) and article 14 (prohibition of discrimination) of the Convention. The applicants maintained that the criminalization of abortion in Ireland was an affront to women's human dignity and deliberately degrading (§163). The Court thus had to weigh the human dignity and right to life of the unborn child against the above mentioned fundamental rights of the applicants and conclude whether the human dignity of both could be equally protected. The Court clearly avoided answering this question, however it did underline that there can be no right to abortion under article 8 of the Convention[772]. It could be interpreted here that the Court wanted to retract the implicit suggestion to the contrary that had come out of the *Tysiac* case. At the same time, however, the Court concluded that Ms. C's rights under article 8 were violated because she was allegedly not given enough opportunity within the Irish legal system to assess whether she would have access to a legal abortion in Ireland due to her health situation. Here the Court clearly answers the applicants' claim that the lack of access to abortion in Ireland was degrading for them. This case shows how the ECtHR is increasingly asked to define the scope of human dignity protection where there is an absence of a common European understanding that could underpin this concept.

Also the ECtHR has had to deal, like the BVerfG, with human dignity in relation to gender change. The case *Goodwin v. the United Kingdom* concerns a male to female transsexual having undergone a physical sex change and as a result experiencing

[771] Case of A, B and C v. Ireland, no 25579/05; Judgment of 16 December 2010
[772] See. Ibid. Case of A, B and C v. Ireland, §214

discrimination. In its ruling of 11 July 2002[773] the Court invoked the legal protection of human dignity in its function as essence of the Convention to rule that transsexuals have the right to be fully and indiscriminately recognized in their new gender by the society they live in. The Court observes in §90:

"Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings (..). In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy (..)."

As we see in this case and which represents a general trend in ECtHR (and also the BVerfG) case law, autonomy and human dignity are often insufficiently distinguished where it concerns the need to always give primary importance to the legal concept of human dignity as such, whereby autonomy is only one of the visible *expressions* of human dignity[774]. To be able to act autonomously as a human being cannot be considered as a *prerequisite* for human dignity itself because this would undermine the whole concept; many human beings in different stages of life are at least limited in their capabilities to act autonomously. Does this make them less human? It would be problematic to consider a person (for example a comatose patient) who has (temporarily) lost the ability to make use of its autonomy as no longer in possession of its human dignity. For a detailed study of the Court's case law on personal autonomy as such we refer here to an extensive paper published by Nelleke Koffeman for the Dutch *State Commission for the Constitution* in June 2010[775]. The commission was asked to prepare possible changes to the Dutch constitution in the light of international and European human rights developments.

[773] Case of Christine Goodwin v. the United Kingdom, no. 28957/95; Judgment of 11 July 2002
[774] As already discussed, many adherents to the modern Kantian understanding of human dignity would disagree here and consider the expressed autonomy as the core element of human dignity
[775] Nelleke Koffeman, (The right to) personal autonomy in the case law of the European Court of Human Rights, Leiden June 2010; published at: http://www.law.leidenuniv.nl/org/publiekrecht/europainstituut/medewerkers/koffeman-nr.html#publications-2010 (retrieved 18-1-2012)

The case of *Vereinigung Bildender Künstler v. Austria*[776] deals with article 10 of the Convention and the freedom of expression after the Austrian government had forbidden the continuation of an exhibition of a particularly hateful and vulgar painting of Otto Mühl. In spite of a majority of the Court concluding a violation of article 10 of the Convention by the Republic of Austria, the various dissenting opinions argue the protection of the human dignity of those depicted in the disputed painting as the argument against concluding a violation of article 10 convention, thus underlining what the majority of the Court held in the Pretty case, namely that articles 2 and 3 – with their "embedded" human dignity provision - are inalienable rights that cannot be trumped by other Convention rights like for example article 10. Judge Loucaides observes:

"*(..) so we must exclude from the legitimate expression of artists insulting pictures that undermine the reputation or dignity of others, especially if they are devoid of any meaningful message and contain nothing more than senseless, repugnant and disgusting images, as in the present case.*"[777]

Judges Spielman and Jebens observe:

"*In a word, a person's human dignity must be respected, regardless of whether the person is a well-known figure or not. Returning to the case before us, we therefore consider that the reasons that led the Court to find a violation (see paragraph 4 above) are not relevant. Such considerations must be subordinate to respect for human dignity.*"[778]

The dissenting judges clearly hold on to the established Strasbourg case law stressing the hierarchically superior nature of human dignity protection whilst they bring this quality in position against other Convention rights, herewith underlining that there is indeed a hierarchy of rights amongst which human dignity is first. In a later case, Judge Loucaides

[776] Case of Vereinigung Bildender Künstler v. Austria, no. 68354/01; Judgment of 25 January 2007
[777] Dissenting opinion of Judge Loucaides, p. 13 of the Judgment of 25 January 2007
[778] Dissenting opinion of Judges Spielman and Jebens, p. 19 (§§12 and 13) of the Judgment of 25 January 2007

concurring opinion continues this line of thought with regard to article 10 of the Convention in relation to article 8 (right to privacy), where he says that it cannot be in line with established case law of the Court that the right to the freedom of speech would lead to there no longer being an appropriate remedy for the protection of human dignity in relation to false and defamatory accusations which could ruin a person's life[779]. He rightly poses the question whether truth and dignity should be overruled by freedom of speech?[780] It is also interesting to note here that in a partly dissenting opinion in the case of *Akpinar and Altun v. Turkey*[781] which the Court decided on some weeks later, Judge Fura-Sandström goes even further and says that the respect for human dignity extends also to the dead, hereby referring to established case law of the German Federal Constitutional Court as discussed above:

"*(..) the duty imposed on the State authorities to respect an individual's human dignity, and to protect bodily integrity, cannot be deemed to end with the death of the individual in question where a person is killed by the security forces and the corpse immediately subjected to deliberate and cruel acts, as in the present case*."[782]

In the 2010 case of *Gäfgen v. Germany*[783] the Court affirms its case law on human dignity protection where it further excludes limitations to this protection as claimed by the police officers. The case deals with the gross mistreatment of a prisoner by German police and concludes a violation of article 3 of the Convention. The violation of human dignity in this case was defended whilst pointing to the "necessity" to take strong measures. The Court rejects this argument and expressly follows the reasoning of the Frankfurt am Main Regional court in the same case where it holds that:

"*The Regional Court observed that the method of investigation had not been justified. It rejected the defense of "necessity" because the method in question violated human*

[779] Case of Lindon, Otchakovsky-Laurens and July v. France, nos. 21279/02 and 36448/02; Judgment of 22 October 2007, concurring opinion of Judge Loucaides, p. 39
[780] See Judgment of 22 October 2007, concurring opinion of Judge Loucaides, pp. 41-42
[781] Case of Akpinar and Altun v. Turkey, no. 56760/00; Judgment of 25 February 2007. see p. 19 (§§4 and 5) of the partly dissenting opinion of Judge Fura-Sandström
[782] Partly dissenting opinion of Judge Fura-Sandström, p. 19 (§4); Judgment of 25 February 2007
[783] Case of Gäfgen v. Germany, no. 22978/05; Judgment of 1 June 2010

dignity, as codified in Article 1 of the Basic Law. Respect for human dignity also lay at the heart of Article 104 § 1, second sentence, of the Basic Law and Article 3 of the Convention. The protection of human dignity was absolute, allowing of no exceptions or any balancing of interests."[784]

Looking at the recent case of *V.C. v. Slovakia*[785] which dealt with a case of unauthorized sterilization performed in the process of a caesarian delivery operation in a state hospital, the Court once again confirmed the theoretical scope and application of its understanding of human dignity protection under the Convention. It concludes a violation of article 3 of the Convention by the Slovakian state[786] and argues:

"*(..) in line with the Court's case-law referred to above, the position is different in the case of imposition of such medical treatment without the consent of a mentally competent adult patient. Such way of proceeding is to be interpreted as incompatible with the requirement of respect for human freedom and dignity, that is one of the fundamental principles on which the Convention is based.*"[787]

On a final note with regard to human dignity relevant case law of the ECtHR, it is disturbing to see the large number of cases the Court has decided upon in recent years, and those that are still pending, in which violations of article 3 have been concluded. This especially concerns the treatment of prisoners by state authorities whereby Russia, France and a number of Eastern- and Central European countries are the worst offenders. The broadly applicable concept of human dignity protection under the Convention as repeatedly stated by the Court seems not to have led to sufficient reform in prisoner treatment in certain member states of the Council of Europe. As we discussed above with regard to former communist countries in Europe, this insufficient improvement is partly due to a lack of transparent investigation and coming to terms with the crimes of past regimes in those countries. Russia and Romania are good examples of this problem as

[784] See Judgment of 1 June 2010, §§48 and 120
[785] Case of V. C. v. Slovakia, no. 18968/07; Judgment of 8 November 2011 (not yet final)
[786] See Judgment of 8 November 2011, §§119-120
[787] See Judgment of 8 November 2011, §107

reflected in the case law of the Strasbourg court where – when reading the facts of the cases - one wonders if the concept of human dignity is at all known to these signatories of the Convention.

3.4.Case law of the Court of Justice of the European Union (ECJ)

Until the entering into force of the EU Charter on 1 December 2009 the Court of Justice of the European Union (ECJ) did not have a formal mandate to provide judgment on human rights issues in general. The subject of human dignity has therefore not been a key component of ECJ case law[788]. Matters relating to human dignity have however been discussed in some cases where the observance of fundamental human rights in relation to the application of EU law was at stake. This has led to a series of important ECJ rulings discussing human dignity[789]. In relation to these judgments it should also be noted that by the year 2000, when the EU Charter was first proclaimed, the central role of human dignity in the application of Union law was already increasingly established and accepted by the Court, preparing the way for the EU Charter to become law[790]. The emergence of the legal concept of human dignity in ECJ case law finds its beginning, like is the case with the ECtHR, in the nineties. For example, the 9 December 1992 Opinion of Advocate General Jacobs in the *Konstantinidis* case[791] includes a series of referrals to the legal concept of human dignity serving as key arguments for the opinion. Jacobs expresses his surprise at the fact that the Convention does not include "a general provision recognizing the individual's right to be treated with respect for his dignity and moral integrity (..)" and observes that this omission to a certain extend has been repaired by the constitutions of the member states[792]. Therefore, he continues, it is possible to infer from these constitutional traditions of the member states and the provisions of the Convention itself the existence of "a principle according to which the State must respect not only the

[788] Cf. Ibid. Frank Schorkopf, Würde des Menschen, p. 487. Schorkopf goes as far to say that human dignity hardly played a role in the case law of the ECJ until recently

[789] The ECJ case law quoted in this chapter has been retrieved from the Court's on line database under http://curia.europa.eu/ . We have also made use of the European Parliament's Committee on Civil Liberties, Justice and Home Affairs' overview on the EU Charter and relevant early case law under *Ibid*. http://www.europarl.europa.eu/comparl/libe/elsj/charter/art01/default_en.htm (retrieved 18-1-2012)

[790] Cf. Ibid. Frank Schorkopf, Würde des Menschen, pp. 486-487

[791] Case C-168/91: Konstantinidis v Stadt Altensteig and Landratsamt Calw; Opinion of Advocate General Jacobs delivered on 9 December 1992

[792] §36 of the Opinion of Advocate General Jacobs of 9 December 1992

physical well-being of the individual but also his dignity, moral integrity and sense of personal identity.".[793] In its judgment in the case of *P. v. S. and Cornwall County Council*[794] the ECJ rules that discrimination based on gender or gender change is "a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard" and herby refers to the case law of the ECtHR with regard to transsexual people.[795]

An important example of the evolvement of human dignity protection into a *foundational* concept of EU law application is the 2001 case of *Netherlands v. Parliament and Council*[796]. In this case, which deals with the implementation of Directive 98/44/EC on biotechnological inventions, the ECJ indeed gives itself a clear mandate to provide human dignity protection, although limited to the horizontal application: "It is for the Court of Justice, in its review of the compatibility of acts of the institutions with the general principles of Community law, to ensure that the fundamental right to human dignity and integrity is observed."[797] The Court rejects the plaintiff's claim that applying Directive 98/44/EC would violate human dignity and outlines the various provisions in the Directive that ensure that nothing human can be patented. It observes: "It is clear from those provisions that, as regards living matter of human origin, the Directive frames the law on patents in a manner sufficiently rigorous to ensure that the human body effectively remains unavailable and inalienable and that human dignity is thus safeguarded."[798] The relevance of this case lies in the explicit responsibility the ECJ takes where it comes to the protection of human dignity, even though as a legal concept it was never a codified operational principle of law until the EU Charter (the EU treaties only referring to it in a general manner). The ECJ's *Brüstle* ruling to be discussed later builds on this development in the Court's case law. Here we see, as Christian Walter[799]

[793] §39 of the Opinion of Advocate General Jacobs of 9 December 1992
[794] Case C-13/94: P. v. S. and Cornwall County Council, Judgment of 30 April 1996
[795] §22 and §16 of the Judgment of 30 April 1996
[796] Case C-377/98: Kingdom of the Netherlands v. European Parliament and Council of the European Union, Judgment of 9 October 2001
[797] §70 of the Judgment of 9 October 2001
[798] §77 of the Judgment of 9 October 2001
[799] See: Ibid. Christian Walter, Geschichte und Entwicklung der Europäische Grundrechte und Grundfreiheiten, pp. 10-23

discusses in detail, how the ECJ has been influenced by the case law of the ECtHR and as a result developed a catalogue of human rights and human dignity protection in essence not very different from the Convention and the EU Charter. This gives the ECJ an existing tradition to lean on when actually applying article 1 EU Charter in the years to come. Human dignity protection under article 1 EU Charter is not new to the ECJ.

In the case of *Omega v. Bonn*[800] the ECJ was asked to decide on the question "whether the prohibition of an economic activity for reasons arising from the protection of fundamental values laid down by the national constitution, such as, in this case, human dignity, is compatible with Community law (..)"[801]. The Court concludes that indeed such a prohibition is compatible with Community law since it concerns not only a fundamental right as enshrined in the German Basic Law, but also a fundamental principle by which the ECJ itself is guided[802]. The Court once again confirms its now established case law on the question of human dignity protection. It says: "(..) the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law. There can therefore be no doubt that the objective of protecting human dignity is compatible with Community law (..)"[803] In the 2007 *Laval un Partneri and International Transport Workers' Federation and Finnish Seamen's Union* cases[804] the Court explicitly confirms this doctrine and refers back to the *Omega* case as a point of reference for its established case law on the matter. In the *Omega* case, the Court largely followed the Advocate General's human dignity argumentation discussed above. Stix-Hackl does

[800] Case C-36/02: Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, Judgment of 14 October 2004
[801] §23 of the Judgment of 14 October 2004
[802] See §32 of the Judgment of 14 October 2004, where the ECJ repeats the essence of established case law on this subject: "It should be recalled in that context that, according to settled case-law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures, and that, for that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The European Convention on Human Rights and Fundamental Freedoms has special significance in that respect (see, inter alia, Case C-260/89 ERT [1991] ECR I-2925, paragraph 41; Case C-274/99 P Connolly v Commission [2001] ECR I-1611, paragraph 37; Case C-94/00 Roquette Frères [2002] ECR I-9011, paragraph 25; Case C-112/00 Schmidberger[2003] ECR I-5659, paragraph 71)."
[803] §34 of the Judgment of 14 October 2004
[804] Case C-341/05: Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet a.o.; Judgment of 18 December 2007 – see §94, and case 438/05: International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti; Judgment of 11 December 2007 – see §46

however underline that human dignity is not a concept that is clearly defined: "As far as the constitutional systems of the Member States are concerned, therefore, the concept of human dignity enjoys full recognition in one form or another, especially when one considers (..) that this concept can be expressed in different ways."[805] She goes on to say that the Court, like is the case with the text of article 1 EU Charter, applies "the concept of human dignity on a comparatively wide understanding (..)".[806]

The *Pupino* case is another example of the wide-ranging implementation of the legal concept of human dignity by the Court since this concept emerged as foundational for the implementation of Community law. In its 16 June 2005 ruling[807], the Court explicitly stated that the protection of human dignity is also a basic consideration where it concerns the treatment of vulnerable victims in criminal proceedings who are being asked to give testimony. The Court held that there was a need of "guaranteeing to all victims treatment which pays due respect to their individual dignity (..)".[808]

A landmark case is the matter of *Oliver Brüstle v. Greenpeace e.V.* in which the ECJ passed judgment on 18 October 2011[809]. The discussion once again focused on the correct interpretation of Directive 98/44/EC with regard to the patentability of human embryos. The Court affirms the blanket prohibition of patenting human life which it already did in the 2001 *Netherlands v. Parliament and Council* case discussed above. A key consideration of the ECJ in the *Brüstle* case is the legal protection of the dignity of the human being which, it says, should be taken into consideration from the moment of fertilization of the human ovum. In §35 of the ruling the Courts holds that

"(..) any human ovum must, as soon as fertilised, be regarded as a 'human embryo' within the meaning and for the purposes of the application of Article 6(2)(c) of the

[805] Ibid. Opinion of Advocate General Sixt-Hackl, Case C-36/02, §83
[806] Ibid. Opinion of Advocate General Sixt-Hackl, Case C-36/02, §91
[807] Case C-105/03: Pupino, Judgment of 16 June 2005
[808] §54 of the Judgment of 16 June 2005. see also §59 where the Court in this regard refers to the case law of the ECtHR
[809] Case C-34/10: Oliver Brüstle v. Greenpeace e.V.; Judgment of 18 October 2011.

Directive, since that fertilisation is such as to commence the process of development of a human being."

The ECJ rules that for the sake of human dignity protection within the framework of the Directive the term "human embryo" should be interpreted in a wide sense (see §34) so as to avoid any misinterpretation of the prohibition of any sort of patentability of human embryos for industrial or commercial, as well as scientific purposes (see §46). This "wide sense" is outlined by the Court in its answer to the referring court's first question on what is meant by a "human embryo" in article 6(2) of the Directive:

"(..) any human ovum after fertilisation, any non-fertilised human ovum into which the cell nucleus from a mature human cell has been transplanted and any non-fertilised human ovum whose division and further development have been stimulated by parthenogenesis constitute a 'human embryo' within the meaning of Article 6(2)(c) of the Directive (..)"[810]

§52 of the judgment further specifies the broad application the ECJ here establishes:

"*The answer to the third question is therefore that Article 6(2)(c) of the Directive excludes an invention from patentability where the technical teaching which is the subject-matter of the patent application requires the prior destruction of human embryos or their use as base material, whatever the stage at which that takes place and even if the description of the technical teaching claimed does not refer to the use of human embryos.*"

The only exception the Directive and the ECJ allow is "use for therapeutic or diagnostic purposes which is applied to the human embryo and is useful to it being patentable" (see §46). This provision needs careful reading to understand that the Court only means to exclude from the Directive prohibition specific procedures on individual human embryos that are exclusively meant to diagnose or treat certain ailments of this human being.

[810] §38 of the Judgment of 18 October 2011

This case will be a topic of much debate since it rules on an issue that is key to the implementation of human dignity protection under article 1 EU Charter and an issue of deep divisions within European society. It touches upon the hotly debated question as of what moment unborn human life is eligible for the full and unimpeded protection of the law, meaning the acceptance that equal rights to life and freedom apply to both the born and the unborn human being as a result of their inherent human dignity. When we consistently follow the Court's reasoning in the *Brüstle* case, namely that a fertilized human egg cannot be patented because this violates the principle of human dignity because it is to be considered a human embryo in the process of the *development of a human being*[811], it becomes difficult to continue to deny the full and equal protection of articles 1 and 2 of the EU Charter - or similar provisions of the German Basic law and the Universal Declaration - from the moment of conception for all human beings[812]. This would in turn mean that any claimed or perceived constitutional or general legal arguments that justify abortion and (destructive) embryonic stem cell research are now to be further questioned. If, as the Court holds, the *patenting* of a human embryo is prohibited by European law because this would violate its human dignity, surely the deliberate *destruction* of these same human embryos can no longer be justified because this equally violates their human dignity? That the ECJ in this case is not merely ruling on a stand-alone situation whereby no legal precedent of the judgment can be claimed at all is made clear by the Court itself:

"Die Richtlinie enthält zwar keine Definition des „menschlichen Embryos", doch verweist sie in Bezug auf die Bedeutung dieses Ausdrucks auch nicht auf die nationalen Rechtsvorschriften. Der Ausdruck ist daher für die Anwendung der Richtlinie als autonomer Begriff des Unionsrechts anzusehen, der im gesamten Gebiet der Union einheitlich auszulegen ist."[813]

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[811] See §35 of the Judgment of 18 October 2011. Note the wording of the Court where it does not speak of development of the human embryo *into* a human being but rather development *of a* human being, thus accepting that the fertilized ovum is already a human being

[812] See for a detailed analysis of human dignity protection in relation to the unborn: Philipp Wallau, Die Menschenwürde in der Grundrechtsordnung der Europäischen Union, Bonn University Press 2010, pp. 194 ff. It was published in 2010 and therefore does not include the findings of the Court in the Brüstle case.

[813] See in §26 of the Judgment of 18 October 2011. (The German original version is used for this reference since the English translation of this paragraph is incomplete.) The Court does however stress in §30 that its

3.5. The 'minimum core' in case law

We have seen that all three courts, each in their own specific wording, repeatedly affirm as established case law the 'inalienable' or sometimes even 'absolute' nature of the human dignity principle as to be extended to all human beings, especially to be guaranteed by the state. McCrudden concludes the same in his analysis of relevant European case law until 2008 and observes that the courts have generally applied the earlier mentioned "minimum core" when dealing with human dignity questions in their rulings[814]. He finds that the ontological, the relational and the limited-state claim are mostly confirmed by the courts, however that this fundamental principle to which "the positive law should be accountable" camouflages the significantly different theoretical conceptions of human dignity and their application in different jurisdictions. This "enables the incorporation of just the type of ideological, religious, and cultural differences that a common theory of human rights would need to transcend, he notes"[815] McCrudden subsequently confirms what we have already stated before, namely the fact that no common conception of human dignity can be identified at this point, even though there is general agreement on the "minimum core" itself[816]. To put it in other words: we agree that human dignity is inviolable; we just do not know and agree what this should lead to. What we therefore *can* conclude from analyzing relevant case law is that the Courts do not apply human dignity protection equally to all human beings and situations, thus making the principle in effect relative. The answers to the two questions formulated in the introduction to this chapter are that within its legal context – and despite judicial or political proclamations to the contrary - human dignity is a relative principle, and not the highest principle, whereby the courts do not have a clear general understanding of what it entails but rather apply the principle on the basis of its claimed violation brought before the court on a case by case basis and often led by what Herdegen calls the "flexible

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ruling on this matter is a purely legal interpretation of the term "human embryo" and does not intend to answer questions of medical or ethical nature which it admits are a matter of debate in member states.

[814] See. Ibid. Christopher McCrudden: Human Dignity and the Judicial Interpretation of Human Rights, p. 697

[815] Ibid. Christopher McCrudden: Human Dignity and the Judicial Interpretation of Human Rights, pp. 697, 710

[816] See: Ibid. Christopher McCrudden: Human Dignity and the Judicial Interpretation of Human Rights, p. 712

principle that in its application is dependent on constantly developing socio-cultural realities and interpretations" whilst at other times being led by the much more useful "revolt of conscience" that has been, after all, the main engine behind the key moments in history when human dignity was further strengthened as a notion relevant in its legal context.

EVALUATION AND CONCLUSIONS

1.1. Evaluation

As our research in Part I has shown the notion of the dignity of the human being has a long history in philosophical and religious thought. Only in post-War Europe the human dignity notion developed into a legal concept and a legal principle. Jürgen Habermas speaks about the notion of human dignity as the "moral source" for human rights today, whereby that notion serves as a "catalyst" to formulate these rights[817]. Human dignity as a relevant philosophical and legal concept was not invented by any parliamentary process; it has rather been the emerging realization of the human being throughout history that it has a unique and privileged position requiring special treatment. This realization, as we have seen in Part II, has always been most strongly present when one group of human beings suffered greatly under the yoke of another group of human beings. The Holocaust, the Gulag and ethnic cleansing are some of the more recent injustices that made people realize the importance of human dignity protection. It was first and foremost the revolt of conscience in post-War Europe as a result of Nazism and Communism that led to the notion of human dignity to become a concept of legal relevance. Jürgen Habermas says *"(..) dass veränderte historische Umstände nur etwas thematisiert und zu Bewusstsein gebracht haben, was den Menschenrechten implizit von Anbeginn eingeschrieben war – nämlich jene normative Substanz der gleichen Menschenwürde eines jeden, die die Menschenrechte gewissermaßen ausbuchstabieren."*[818]

Our philosophical analysis of the roots of article 1 EU Charter indeed points to a long process of discovery that started in the Judaic, Greek and Roman traditions. It then unfolded and was most prominently developed in the Christian tradition and supported by

[817] Ibid. Jürgen Habermas, Das utopische Gefälle. Das Konzept der Menschenwürde und die realistische Utopie der Menschenrechte, pp. 44-45

[818] Ibid. Jürgen Habermas, Das utopische Gefälle. Das Konzept der Menschenwürde und die realistische Utopie der Menschenrechte, p. 45

the humanist and enlightenment (especially Kantian) traditions. This long process finally brought the notion of human dignity into the legal-political framework of European society. Only the Christian tradition was able to develop the human dignity concept to a point where it is held to be a *given* of *each* human being, irrespective of physical development, race, religion, position or gender. It has at its core the biblical "imago Dei" concept and the teachings of the Gospel. Interestingly, it is the atheist philosopher Habermas who stresses that it was indeed this Judeo-Christian tradition that first identified the notion of human dignity with the incomparable and absolute worth of the individual human being[819]. Although it took the Catholic Church long to accept religious freedom in its fullest sense, it was the human dignity argument – as expressed in Pope Paul VI's 1968 *"Declaration on Religious Freedom "Dignitatis Humanae""* - that brought a major shift in the Christian human rights tradition. Pope John Paul II finally brought the emerging Catholic doctrine on human dignity to the fore of the Church's engagement with the world and integrated it into a human rights theory of great depth and relevance for today. At the core of John Paul's thinking on human dignity lies the realization that Man cannot be understood without Christ. Christ as the personification of God becoming Man therefore also portrays the perfect image of what it means to be human. Only when we begin to understand what it means to be human can we begin to understand what human dignity is. What resulted from this development in Christian thought as spearheaded by John Paul II was the public affirmation of the unique and incomparable worth of every human being from the moment of conception until death as the basis for its inalienable dignity and rights. Even when the argumentation leading up to this affirmation will be difficult to accept in a secular political and legal environment, the end result John Paul II proposes is by no means religiously construed and - aided by scientific evidence - entirely accessible through reasoned argument. Robert Spaemann calls it the "transcendental-pragmatic" understanding of human dignity whereby only the biological affiliation as a "homo sapiens" species is decisive. It is scientifically answered and undisputed when the life of a human being starts, namely at the moment of conception, whilst – at least for non-Christians – the question as to when the soul enters

[819] Ibid. Jürgen Habermas, Das utopische Gefälle. Das Konzept der Menschenwürde und die realistische Utopie der Menschenrechte, p. 50

the human body or when personhood starts is still much debated[820]. John Paul II – followed in this by Benedict XVI - proposes a unique notion of human dignity and human rights that does not exclude *any* human being.

Apparently the post-War Christian human dignity tradition is not widely followed. Various other interpretations compete for adherence as well. Most important among them is an understanding of human dignity that is almost exclusively autonomy-based. As the legal concept and the legal principle of human dignity acquired prominence in European political and legal discourse over the past decades, it lacked a clear definition of its scope and meaning in positive law. As a consequence it is increasingly being applied to a wide variety of causes that contradict each other. The example given by McCrudden is still the best illustration of this problem where he says that "(..) the dignity argument is often to be found on both sides of the argument, and in different jurisdictions supporting opposite conclusions."[821] The notion of human dignity, from both the philosophical and historical perspective, was however meant to provide a principled moral clarity in applying the law, as Jürgen Habermas observes when referring to the notion of human dignity as a *"moralische Quelle"*[822]. What we see instead is a consistent application of a modern Kantian understanding of human dignity in the case law of the BVerfG[823], increasingly followed by the ECtHR and the ECJ, whereby the absolute autonomy of the independently operating person is decisive above all else. Human dignity as a foundational and *universal* attribute of every human life as such is hereby often confused with or overruled by the *individual* autonomy which is only one – and a very important - concrete expression of human dignity. The absence of the ability of a human being to act autonomously does not however diminish the dignity of that person in any way. The almost exclusive focus on individual autonomy – mostly expressed through claiming the right to privacy and physical integrity - therefore automatically leads to a selective legal

[820] See: Ibid. Spaemann, Über den Begriff der Menschenwürde, pp. 116-117
[821] Ibid. Christopher McCrudden: Human Dignity and the Judicial Interpretation of Human Rights, p. 698; see footnote 4 in the introduction of this research
[822] See: Ibid. Jürgen Habermas, Das utopische Gefälle. Das Konzept der Menschenwürde und die realistische Utopie der Menschenrechte, pp. 44-45
[823] Cf. Jan Michael Bergmann, Das Menschenbild der Europäischen Menschenrechtenkonvention, Nomos Verlag 1995, p. 190 and ibid, Catherine Dupré, Unlocking Human Dignity: towards a theory for the 21st Century, pp. 192-193 with footnotes 12 and 13 referring to further supporting literature

concept or principle of human dignity because individual autonomy alone is an incomplete foundation for defining human dignity[824]. The incompleteness in this concept of human dignity, according to Catherine Dupré, lies in that the "autonomy based understanding of human dignity provides a very simplistic and partial legal picture of the complex reality of human lives and experiences."[825] It alone is too abstract and not suited to deal with the concrete problems human beings are confronted with in the exercise of their human rights and the protection of their inherent dignity. Once again Dupré: "The highly autonomous subject of rights born with dignity, who goes through his theoretical life, apparently effortlessly asserting his political preferences and living a private family life, does not exist in reality. Real lives are complex and messy; people are not all born in dignity."[826] Whilst Dupré does not reject the primordial importance of Kant's dignity understanding as it is dominant in human rights discourse today, she rightly points out its limitations that are especially visible in the case law of the cited European courts. It is interesting to see that Dupré seems to echo in secular terms Jacques Maritain's fundamental critique of Kantian ethics of many years before. In his work on moral philosophy, Maritain discusses how Kant, although clearly formed and inspired by the Christian tradition and its understanding of the human being, set out creating an "architecture of ethics" founded on an entirely autonomous morality withdrawn from the order of finality and disconnected from what is external to the human being itself. In Kantian thought, not God and striving for love of neighbor and doing good is the object of morality, but duty is, and duty is ruled by practical reason alone. This has lead to a human dignity understanding which Maritain describes as follows:

"*We have said that the Kantian notion of the autonomy of the will requires that the absolute ultimate end be excluded from the proper and constitutive domain of ethics. It is so because the Practical Reason, or the pure rational will (these two notions are apparently identical for Kant) is absolutely autonomous, that is to say, it is not submitted to any other law than that which it gives itself, or rather, which is one with itself. In other*

[824] Cf. Ibid. Catherine Dupré, Unlocking Human Dignity: towards a theory for the 21st Century, p. 193
[825] Ibid. Catherine Dupré, Unlocking Human Dignity: towards a theory for the 21st Century, p. 193
[826] Ibid. Catherine Dupré, Unlocking Human Dignity: towards a theory for the 21st Century, p. 193

terms, the dignity of the person is such that, in the words of Rousseau, it can only obey itself."[827]

When the dignity of the person is construed in such a way that it can only obey itself and is thus deliberately oblivious of that which exists beyond, the logical consequence is an egocentric perception of life ultimately colliding with the dignity of other human beings. This makes human dignity a too abstract concept out of touch with human reality: an autonomy that has no other end than itself, and therefore lacks the transcendent element, logically leads to an incomplete understanding of the reality of human life. The individual human life is however not abstract, it is concrete from its first day and always changing: "(..) dignity is not only about being, but also, very importantly, about the process of becoming."[828] Although the Kantian notion of human dignity in itself provides essential arguments in its legal context, it does not provide a sufficient theoretical basis for understanding and protecting human dignity. This has led to the unavoidable consequence that – as we can see in the case law of the BVerfG - certain groups of human beings – unable to express their autonomy - are excluded from the protection of their human dignity and right to life, something which the post-War revolt of conscience movement had tried to avoid once and for all. As our research has shown, it is only the post-War Christian understanding of the human being and the resulting notion of human dignity that truly accepts its inviolability for *every* human being.

1.2. Conclusion

In concluding this research the question therefore arises whether the legal principle of human dignity as included in article 1 EU Charter is really a principle that can be upheld in a court of law and as a foundational principle of the democratic state? Apart from the provisions of article 52 EU Charter, there is the overriding and much graver problem that both the definition of the human dignity principle in article 1 EU Charter and the scope of its protection remain unclear. When the legal concept of human dignity was first introduced in post-War Europe through the UN Charter and the Universal Declaration,

[827] Ibid. Jacques Maritain, Moral Philosphy, p. 103
[828] Ibid. Catherine Dupré, Unlocking Human Dignity: towards a theory for the 21st Century, p. 201

the drafters of these texts deliberately steered clear of defining its definition and scope. Although all shared in a revolt of conscience at the sight of Nazi and Communist gross violations of human dignity, no agreement was possible what philosophical foundations the post-War legal and political order should be based upon in order to avoid such atrocities from ever happening again. The authors of the various human rights instruments after 1945 instead were left to revert to an understanding of human dignity that derived from the experiences of it being violated. What had violated human dignity was considered to be self-evident. What may be self-evident in the revolt of conscience is however not enough for agreement on a legal principle and its application. It becomes clear from the analysis of the case law discussed above that the current human dignity debate and the development of European and national (case) law on the subject is very limited in its ability to provide transparent and consistent human dignity protection.

Against this background Europe has gone through a process in which the notion of human dignity evolved from a limited legal concept to a broadly applied legal concept and principle, yet without a clear definition. As a consequence, its application in law becomes subject to shifting majority opinions. But as Joseph Ratzinger rightly points out, "the majority principle always leaves open the question of the ethical foundations of the law."[829] We inevitably return to Hannah Arendt's sobering conclusions about the limitations to the "inalienable dignity and rights" of the human being. Also today the reality of human dignity protection is that "this can only be done through the guarantee of participation in a political community."[830] Where a human being does not have a recognized place and voice in such a political community it also loses anybody "willing and able to guarantee any rights whatsoever (..)."[831] This is not mere theory: In Europe itself, as a result of pre-natal screening techniques, 92% of all children with the Down syndrome are aborted[832], only because their lives are considered by others to have 'no

[829] Ibid. Jürgen Habermas and Joseph Ratzinger, The Dialectics of Secularization – On Reason and Religion, p. 60
[830] Ibid. John Helis, Hannah Arendt and Human Dignity: Theoretical Foundations and Constitutional Protection of Human Rights, p. 74
[831] Ibid. Hannah Arendt, The Origins of Totalitarianism, p, 297
[832] See: Joan K. Morris and Eva Alberman, Trends in Down's syndrome live births and antenatal diagnoses in England and Wales from 1989 to 2008. Analysis of data from the National Down Syndrome Cytogenetic

quality' or to constitute a burden. In a number of European countries, the human dignity violations against prisoners, especially those being stateless, without legal status or regarded as a 'threat to national security' are still numerous today. Also Hannah Arendt does not see "the lacking voice in a political community" as a mere theoretical possibility, but as a problematic reality resulting from the fact that modern man sees the guarantee of the right to have rights or for the individual to even belong to humanity and have dignity as coming exclusively from humanity itself. But it is by no means certain whether this is possible, Arendt rightly observes[833]. "A conception of law which identifies what is right with the notion of what is good for - for the individual, or the family, or the people, or the largest number - becomes inevitable once the absolute and transcendent measurements of religion or the law of nature have lost their authority. And this predicament is by no means solved if the unit to which the 'good for' applies is as large as mankind itself. For it is quite conceivable, and even within the realm of practical political possibilities, that one fine day a highly organized and mechanized humanity will conclude quite democratically - namely by majority decision - that for humanity as a whole it would be better to liquidate certain parts thereof. Here, in the problems of factual reality, we are confronted with one of the oldest perplexities of political philosophy, which could remain undetected only so long as a stable Christian theology provided the framework for all political and philosophical problems, but which long ago caused Plato to say: "Not man, but a god, must be the measure of all things.""[834]

Register, British Medical Journal Online: bmj 2009; 339:b3794; doi:10.1136/bmj.b3794. The statistics of continental Europe and Northern America are similar

[833] See: Ibid. Hannah Arendt, The Origins of Totalitarianism, p, 298

[834] Ibid. Hannah Arendt, The Origins of Totalitarianism, p, 299

SELECT BIBLIOGRAPHY

Books and articles

- Aguas, Jove Jim S., The Notions of the Human Person and Human Dignity in Aquinas and Wojtyla; in: Kritike, Volume 3, nr.1, June 2009, pp. 40-60
- Alberman, Eva, with Joan K. Morris, Trends in Down's syndrome live births and antenatal diagnoses in England and Wales from 1989 to 2008. Analysis of data from the National Down Syndrome Cytogenetic Register, British Medical Journal Online: bmj 2009; 339:b3794; doi:10.1136/bmj.b3794 – www.bmj.com
- Alting von Geusau, Frans A.M., European Unification in the 20th Century – A Treasury of Readings, Vidya Publishers 1998
- Alting von Geusau, Frans A.M., Woher die Verwirrung?, in: Europa der Grundrechte? – Beiträge zur Grundrechtencharta der Europäischen Union, Gudrun V. Lang and Michael F. Strohmer (ed.), Edition Pro Mundis 9, Verlag für Kultur und Wissenschaft 2002, pp. 142-158
- Alting von Geusau, Frans A.M., Sporen van de Twintigste Eeuw – Prolegomena, 3rd edition, Wolf Legal Publishers 2011
- Arendt, Hannah, The Origins of Totalitarianism, Meridian books – The World Publishing Company, 7th edition 1962
- Auf dem Weg zum Grundgesetz, Hefte zur Bayerischen Geschichte und Kultur, Haus der Bayerischen Geschichte 1998
- Augustine, Saint, On Free Choice of Will, translated by Benjamin and Hackstaff, New York/London 1964
- Aquinas, Thomas, Summa Theologica, in: St. Thomas Aquinas, Treatise on Law (Summa Theologica, Questions 90-97), Gateway Editions - Washington D.C. 1991

- Benedict XVI, Encyclical Letter "Deus Caritas Est", 25 December 2005, Libreria Editrice Vaticana, 2nd English edition 2006

- Benedict XVI, Encyclical Letter “Caritas in Veritate”, 29 June 2009, Libreria Editrice Vaticana, 2009
- Benedict XVI, speech held at the Bundestag in Berlin, 22 September 2011, Libreria Editrice Vaticana 2011
- Bergmann, Jan Michael, Das Menschenbild der Europäischen Menschenrechtenkonvention, Nomos Verlag 1995
- Bielefeldt, Heiner, Neuzeitliches Freiheitsrecht und politische Gerechtigkeit. Perspektiven der Gesellschaftsvertragstheorien, Würzburg 1990
- Bielefeldt, Heiner, Philosophie der Menschenrechte: Grundlagen eines weltweiten Freiheitsethos, Primus Verlag 1998
- Bielefeldt, Heiner, Towards a Cosmopolitan Framework of Freedom: The Contribution of Kantian Universalism to Cross-Cultural Debates on Human Rights, in: Annual Review of Law and Ethics – 200th Anniversary of Kant’s Metaphysics of Morals, Drucker und Humblot 1998 Volume 5 (1997)
- Bielefeldt, Heiner, Kants Symbolik: ein Schlüssel zur kritischen Freiheitsphilosophie, in: Alber-Reihe praktische Philosophie volume 69, Alber Verlag 2001
- Bielefeldt, Heiner, Auslaufmodell Menschenwürde? Warum sie in Frage steht und warum wir sie verteidigen müssen, Herder-Verlag 2011
- Birnbacher, Dieter, Annäherungen an das Instrumentalisierungsverbot, in: Menschenwürde – Begründung, Konturen, Geschichte, Gerd Brudermüller and Kurt Seelmann (ed.), Königshausen & Neumann 2008
- Böckenförde, Ernst-Wolfgang, Bleibt die Menschenwürde Unantastbar?, Blätter für deutsche und internationale Politik 10/2004, pp. 1216-1227
- Böckenförde, Ernst-Wolfgang, Staat, Gesellschaft, Freiheit - Studien zur Staatstheorie und zum Verfassungsrecht, Suhrkamp 1976
- Böckenförde, Ernst-Wolfgang, Religionsfreiheit – Die Kirche in der modernen Welt, in: Schriften zu Staat, Gesellschaft, Kirche, Band 3, Herder 1990, pp. 15-72
- Böckenförde, Ernst-Wolfgang, Die Würde des Menschen war unantastbar, in: Feuilleton der Frankfurter Allgemeine Zeitung 03-09-2003, nr. 204, p. 33

- Böckenförde, Ernst-Wolfgang with Robert Spaemann (ed.), Menschenrechte und Menschenwürde, Klett-Cotta 1987
- Böckle, Franz, Fundamentalmoral, 6. Auflage, Kösel Verlag 1994
- Böckle, Franz, in: Kirche im Umbruch der Gesellschaft, edited by H. Stirnimann, Paulusverlag 1970
- Böckle, Franz, Ja zum Menschen – Bausteine einer Konkreten Moral, edited by Gerhard Höver, Kösel Verlag 1995
- Böckle, Franz with Gerhard Höver, Menschenrechte/Menschenwürde, in: Neues Handbuch Theologischer Grundbegriffe, edited by Peter Eicher, Volume 3, Kösel Verlag 1985, pp. 95-104
- Bordat, Josef, Menschenbild, Menschenwürde, Menschenrechte. Zur Bedeutung der christlichen Wurzeln Europas für die Grundwerte der Union. In: Heit, H., Die Werte Europas - Verfassungspatriotismus und Wertegemeinschaft in der EU? (= Region, Nation, Europa 31). Münster 2006
- Burns, Tony, Sophocles' Antigone and the History of the Concept of Natural Law, in: Political Studies Volume 50, Issue 3, pp. 545-557, Blackwell Publishers 2002
- Bradley, Gerard V., Natural Law and Constitutional Law, in: The Catholic Social Science Review, Volume 1, 1996 – pp. 36-42.
- Brague, Rémi, Naturrecht heute – Editorial, in: Internationale Katholische Zeitschrift Communio (IKaZ) 39 (2010)
- Brudermüller, Gerd with Kurt Seelmann (ed.), Menschenwürde – Begründung, Konturen, Geschichte, Königshausen & Neumann 2008
- Buergenthal, Thomas, Centerpiece of the Human Rights Revolution, in: Reflections on the Universal Declaration of Human Rights – A Fiftieth Anniversary Anthology, Kluwer Law International 1998, pp. 91-95

- Cassin, René, From the Ten Commandments to the Rights of Man, speech given in January 1969, published on the official Franklin and Eleanor Institute's website commemorating the 50th anniversary of the Declaration: http://www.udhr.org/history/tencomms.htm (retrieved: 23-9-2011)

- Cattaneo, Mario A., Menschewürde bei Kant, in: Menschenwürde als Rechtsbegriff, Reihen Rechts- und Sozialphilosophie - Kurt Seelmann (ed.), Franz Steiner Verlag 2005
- Compendium of the Social Doctrine of the Church, 2nd edition Libreria Editrice Vaticana 2009
- Council of Europe, The principle of respect for human dignity – proceedings of the 1998 Montpellier meeting of the European Commission for Democracy through Law (Venice Commission), Council of Europe Publishing 1999
- Collected Edition of the "Traveaux Préparatoires" of the Convention for the Protection of Human Rights and Fundamental Freedoms, Martinus Nijhoff 1975
- Courtois, Stéphane, with Nicolas Werth, Jean-Louis Panné, Andrzej Paczkowski, Karel Bartosek and Jean-Louis Margolin, The Black Book of Communism – Crimes, Terror, Repression, translated from the original French version by Jonathan Murphy and Mark Kramer, Harvard University Press 2004
- Curran, Charles E., Catholic Social Teaching, 1891-present – An historical theological and ethical analysis, Washington D.C. 2002

- Davies, Norman, Europe, a History, Oxford - New York 1996
- Deutscher Bundestag Bonn, Fragen an die deutsche Geschichte – Ideen, Kräfte, Entscheidungen Von 1800 bis zur Gegenwart, 1986
- Dijk, P. van, with G.J.H. van Hoof, Theory and Practice of the European Convention on Human Rights, Kluwer Law and Taxation Publishers 2nd edition 1990
- Drakulic, Slavenka, They Would Never Hurt a Fly, Abacus 2004
- Dreier, Horst (ed.), Grundgesetz Kommentar – Band I, 2. Auflage, Mohr Siebeck 2004
- Dulles, Avery, Centesimus Annus and the Renewal of Culture, in: Journal of Markets and Morality 2. no. 1 (Spring 1999), pp. 1-7
- Dupré, Catherine, Unlocking Human Dignity: towards a theory for the 21st Century, in: European Human Rights Law Review 2009-2, pp. 190-205

- Economist, The, Gendercide - the world wide war on baby girls, March 6th-12th 2010, pp. 61-64
- Ehrenzeller, Bernhard (ed), Die schweizerische Bundesverfassung – Kommentar, Dike Verlag 2002
- EU Network of Independent Experts on Fundamental Rights (CFR-CDF), June 2006 commentary on the EU Charter

- Fletcher, Joseph, Moral Responsibility: Situation Ethics at Work, Lippincott 1967
- Frowein, Jochen Abr., with Wolfgang Peukert, Europäische MenschenRechtsKonvention – EMRK-Kommentar, 2nd edition N.P. Engel Verlag 1996

- Gaylin, Willard, In Defense of the Dignity of Being Human, in: The Hastings Center Report, Vol. 14, No. 4 (August 1984), pp. 18-22
- Gilbert, Martin, The Holocaust – The Jewish Tragedy, Fontana Press 1987
- Gilbert, Martin, History of the Twentieth Century, Harper Collins Publishers 2001
- Gilbert, Martin, Auschwitz and the Allies, Pimlico Edition 2001
- Glendon, Mary Ann, A Challenge to the Human Sciences, in: A New World Order: John Paul II and Human Freedom, edited by George Weigel, Washington 1992
- Glendon, Mary Ann, A World Made New – Eleanor Roosevelt and the Universal Declaration of Human Rights, Random House 2002
- Glenny, Misha, The Balkans 1804-1999 – Nationalism, War and the Great Powers, Granta Books 2000
- Goldman, Tanya, Vo. V. France and Fetal Rights: the Decision not to decide, in: Harvard Human Rights Journal, Vol. 18 – Spring 2005, pp. 277-282.

- Gormally, Luke, Human dignity: the Christian view and the secularist view, in: J. Vial Correa and Elio Sgreccia (ed.), The Culture of Life: Foundations and Dimensions, Libreria Editrice Vaticana 2002, pp. 52-66
- Grasso, Kenneth L., An Unfinished Argument: Dignitatis Humanae, John Courtney Murray and the Catholic Theory of the State, in: Kenneth L. Grasso and Robert P. Hunt (ed.), Catholicism and Religious Freedom: contemporary reflections on Vatican II's Declaration on religious liberty, Rowan & Littlefield Publishers 2006
- Guardini, Romano, Europe – Reality or Mission. Re-published in: Frans A.M. Alting von Geusau, European Unification in the 20th Century – A Treasury of Readings, Vidya Publishers 1998, pp. 5-11

- Habermas, Jürgen, with Joseph Ratzinger, The Dialectics of Secularization – On Reason and Religion, Ignatius Press 2006
- Habermas, Jürgen, Das utopische Gefälle. Das Konzept der Menschenwürde und die realistische Utopie der Menschenrechte, in: Blätter für deutsche und internationale Politik, 8/2010, pp. 43-53. Also available in English: Jürgen Habermas, The Utopian Gap. The Concept of Human Dignity and the Realistic Utopia of Human Rights, in: Metaphilosophy, Volume 41, Issue 4, July 2010, pp. 464-480
- Haggerty, William P., Heinrich Rommen on Aquinas and Augustine, in : Laval Théologique et Philosophique, 54, 1 (février 1998): pp. 163-174
- Hallowell, John A., Eric Voegelin (1901-1985), in: The Intercollegiate Review – Spring/Summer 1985, pp. 3-4
- Harris, DJ with M. O'Boyle and C. Warbrick, Law of the European Convention on Human Rights, Butterworths 1995
- Helis, John, Hannah Arendt and Human Dignity: Theoretical Foundations and Constitutional Protection of Human Rights, in: Journal of Politics and Law, Vol. 1, No. 3, September 2008, pp. 73-78

- Herdegen, Matthias, in: Maunz/Dürig, Grundgesetz. Kommentar, art. 1, Verlag C.H. Beck 2003, 2011
- Herzog, Roman, Matthias Herdegen, Rupert Scholz, Hans H. Klein (ed.), Maunz/Dürg, Grundgesetz – Kommentar, Verlag C.H. Beck 2011
- Hirsch Ballin, Ernst, Law, Justice, and the Individual, Brill 2011
- Hittinger, Russel, Introduction to the 1998 Liberty Fund reprint of Heinrich Rommen, The Natural Law, pp. xi-xxxii
- Hoof, G.J.H. van, with P. van Dijk, Theory and Practice of the European Convention on Human Rights, Kluwer Law and Taxation Publishers 1990
- Hollerbach, Alexander, Katholizismus und Jurisprudenz – Beiträge zur Katholizismusforschung und zur neueren Wissenschaftsgeschichte, Schöningh Verlag 2004
- Höver, Gerhard with Franz Böckle, Menschenrechte/Menschenwürde, in: Neues Handbuch Theologischer Grundbegriffe, edited by Peter Eicher, Volume 3, Kösel Verlag 1985, pp. 95-104
- Hruschka, Joachim, Kant and Human Dignity, in: Kant and Law, edited by B. Sharon Byrd and Joachim Hruschka, Ashgate 2005, (originally published 2002 in German in: Archiv für Rechts- und Sozialphilosophie 88, pp. 463-480
- Hughes, Glenn, Eric Voegelin and Christianity, in: The Intercollegiate Review – Fall/Winter 2004, pp. 24-34
- Hunt, Lynn, Inventing Human Rights, W.W. Norton & Company 2007

- Ignatieff, Michael, Blood & Belonging, Vintage Books 1994
- International Theological Commission, Communion and Stewardship: Human Persons Created in the Image of God, La Civiltà Cattolica 2004/IV, pp. 254-286
- International Theological Commission - Commission Théologique Internationale, A la Recherche d'une Ethique Universelle: Nouveau Regard sur la Loi Naturelle, published 2009 at www.vatican.va (retrieved 20-11-2011)
- International Commission on the Balkans, An unfinished peace – report of the International Commission on the Balkans, Carnegie Endowment 1996

- Jayawickrama, Nihal, The Judicial Application of Human Rights Law – National, Regional and International Jurisprudence, Cambridge University Press 2002
- John XXIII, Encyclical Letter "Pacem in Terris" on Establishing Universal Peace in Truth, Justice, Charity and Liberty, April 11, 1963. Published at www.vatican.va
- John XXIII, Encyclical Letter "Mater et Magistra", 15 May 1961. Published at www.vatican.va
- John Paul II, Encyclical Letter "Centesimus Annus", 1 May 1991. Published at www.vatican.va
- John Paul II, The Freedom of Conscience and Religion, St. Paul Editions 1980
- John Paul II, Encyclical Letter " Redemptor Homnis", 3 April 1979, Pauline Books & Media 1979
- John Paul II, Encyclical Letter "Veritatis Splendor", 6 August 1993, Pauline Books 1995
- John Paul II , Encyclical Letter "Evangelium Vitae", Pauline Media 1995
- John Paul II, Address for the World Youth Day vigil, 14 August 1993, Denver. Published at www.vatican.va
- John Paul II, Encyclical Letter " Fides et Ratio", Pauline Books & Media 1998
- John Paul II, Encyclical Letter "Laborem exercens", 14 September 1981. Published at www.vatican.va
- John Paul II, Encyclical Letter "Sollicitudo Rei Socialis", 30 December 1987. Published at www.vatican.va
- Jones, Brian, Jacques Maritain and Dignitatis Humanae: Natural Law as the Common Language of Religious Freedom, in: Ignatius Insight December 2009. http://ignatiusinsight.com. (Retrieved on 26-3-2010)

- Kant, Immanuel, Foundations of the Metaphysics of Morals, Macmillan - second edition 1990, translated by Lewis White Beck

- Kant, Immanuel, The Metaphysics of Morals, translated and edited by Mary Gregor, Cambridge University Press 13th edition 2009
- Kaplan, Robert D., Balkan Ghosts – A Journey through History, Picador 2005
- Kaufmann, Franz-Xaver, Wissenssoziologische Überlegungen zu Renaissance und Niedergang des katholischen Naturrechtdenkens im 19. und 20. Jahrhundert, in: Naturrecht in der Kritik, edited by Franz Böckle and Ernst-Wolfgang Böckenförde, Grünewald 1973
- King, Alveda, Civil Rights, Human Dignity and Faith, June 23, 2010 lecture for the All-Party Parliamentary Group on Human Dignity, Houses of Parliament, London – available at: http://davidalton.net/2011/08/09/dr-alveda-king-and-her-uncles-legacy/ (retrieved 2-2-2012)
- Kluth, Hans, with Thomas Winfried (ed.), Das zumutbare Kind – Die zweite Bonner Fristenregelung vor dem Bundesverfassungsgericht, BusseSeewald 1993
- Kobusch, Theo, Nachdenken über die Menschenwürde, in: Allgemeine Zeitschrift für Philosophie, 31.3 – 2006, pp. 207-228
- Koffeman, Nelleke, (The right to) personal autonomy in the case law of the European Court of Human Rights, Leiden June 2010; published at: http://www.law.leidenuniv.nl/org/publiekrecht/europainstituut/medewerkers/koffeman-nr.html#publications-2010 (retrieved 18-1-2012)

- Lebech, Mette, What is Human Dignity?, in: Maynooth Philosophical Papers - edited by M. Lebech, National University of Ireland Maynooth 2004: http://eprints.nuim.ie/392/ (retrieved 18-4-2011). See also: Mette Lebech, Towards a Definition of Human Dignity, in: La cultura della vita: Fondamenti e dimensioni, Supplemento al volume degli Atti della VII Assembla Generale 1-4 marzo 2001, Città del Vaticano: Libreria Editrice Vaticana 2002, pp. 87-101
- Leo XIII, Encyclical Letter on Capital and Labor "Rerum Novarum", 15 May 1891. Published at www.vatican.va
- Lindholm Tore, in: Asbjorn Eide a.o. (ed.), The Universal Declaration of Human Rights: A Commentary, Scandinavian University Press 2nd edition 1993

- Luf, Gerhard, Freiheit als Rechtsprinzip – Rechtsphilosophische Aufsätze, Elisabeth Holtleithner and Alexnader Somek (ed.), Facultas.wuv 2008
- Luf, Gerhard, Der Grund für den Schutz der Menschenwürde – konsequentialistisch oder deontologisch, in: Menschenwürde – Begründung, Konturen, Geschichte, Gerd Brudermüller and Kurt Seelmann (ed.), Königshausen & Neumann 2008

- Maritain, Jacques, Man and the State, Washington D.C. 1998, first published in 1951
- Maritain, Jacques, Natural Law – Reflections on Theory and Practice, South Bend 2001
- Maritain, Jacques, The Rights of Man and Natural Law, 2nd edition, London 1945, translation from the original French version first published in 1942
- Maritain, Jacques, Moral Philosphy, Charles Scribner's Sons 1964
- Martenson, Jan, in: Asbjorn Eide a.o. (ed.), The Universal Declaration of Human Rights: A Commentary, Scandinavian University Press 2nd edition 1993
- Maurer, Béatrice, Le principe de respect de la dignité humaine et la Convention européenne des droits de l'homme, La documentation Française, 1999
- Matejko, Alexander J., book review on: The Priority of Labor: A Commentary on Laborem Exercens by Gregory Baum, in: Relations Industrielles / Industrial Relations, vol. 37, nr. 4, 1982, p. 964
- May, William E., Philosophical Anthropology and Evangelium Vitae, 24 September 2002, in: http://www.christendom-awake.org (retrieved 10-4-2010)
- McCrudden, Christopher, Human Dignity and the Judicial Interpretation of Human Rights, in: The European Journal of International Law – EJIL 19, 2008, pp. 655-724
- Messner, Johannes, Das Naturrecht – Handbuch der Gesellschaftsethik, Staatsethik und Wirtschaftsethik, Tyrolia Verlag 3. Auflage 1958
- Messner, Johannes, Menschenwürde und Menschenrecht – Ausgewählte Artikel (edited by Anton Rauscher and Rudolf Weiler), Oldenbourg Verlag 2004

- Morris, Joan K., with Eva Alberman, Trends in Down's syndrome live births and antenatal diagnoses in England and Wales from 1989 to 2008. Analysis of data from the National Down Syndrome Cytogenetic Register, British Medical Journal Online: bmj 2009; 339:b3794; doi:10.1136/bmj.b3794
- Morris, Clarence (ed.), The Great Legal Philosophers – selected readings in jurisprudence, Philadelphia - University of Pennsylvania Press, 1995

- Neuhaus, Richard, Vatican II, 40 Years later: "Dignitatis Humanae"; a November 20, 2003 interview with "Zenit" on the Declaration on Religious Freedom, www.zenit.org/article-8747?I=english (retrieved 30-4-2011)
- Novak, Michael, The Judeo-Christian Foundation of Human Dignity, Personal Liberty, and the Concept of the Person, in: Journal of Markets and Morality 1, no. 2 October 1998, pp. 107-121
- Novak, Michael, Human Dignity – Human Rights, in: First Things 97 (November 1999), pp. 39-42

- Paul VI, Pastoral Constitution on the Church in the Modern World "Gaudium et Spes" , December 7, 1965, in: The Documents of Vatican II, Vatican Translation, St. Pauls 2009, pp. 125-198
- Paul VI, Declaration on Religious Freedom "Dignitatis Humanae", On the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious, December 7, 1965, in: The Documents of Vatican II, Vatican Translation St. Paul's 2009, pp. 391-402
- Paul VI, Address to the Rulers, 8 December 1965. Published at www.vatican.va
- Pernice, Ingolf, The Treaty of Lisbon and Fundamental Rights, in: Stefan Griller/Jaques Ziller (eds.), The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?, Springer 2008

- Peukert, Wolfgang, with Jochen Abr. Frowein, Europäische MenschenRechtsKonvention – EMRK-Kommentar, 2nd edition N.P. Engel Verlag 1996
- Pius XI, Encyclical Letter on Reconstruction of the Social Order "Quadragesimo Anno", 15 May 1931. Published at www.vatican.va
- Portmann, Heinrich, Kardinal von Galen – Ein Gottesmann seiner Zeit, Münster - Aschendorff 1957

- Rahner, Karl, Das Christemtum und der "Neue Mensch", in: Karl Rahner Sämtliche Werke – Band 15, Verantwortung der Theologie – Im Dialog mit Naturwissenschaften und Gesellschaftstheorie, Herder 2001
- Rahner, Karl, Würde und Freiheit des Menschen, in: Karl Rahner Sämtliche Werke – Band 10, Kirche in den Herausforderungen der Zeit – Studien zur Ekklesiologie und zur kirchlichen Existenz, Herder 2003
- Rahner, Karl, Über die Würde des Menschen, in: Karl Rahner Sämtliche Werke – Band 28 Christentum in Gesellschaft – Schriften zur Pastoral, zur Jugend und zur christlichen Weltgestaltung, Herder 2010
- Ratzinger, Joseph, Culture and Truth: Some Reflections on the Encyclical Letter, Fides et Ratio, lecture of 13-2-1999 at St. Patrick's Seminary, published in: The Patrician – Winter 1999 St. Patrick's Seminary Patrician Magazine, February 1999; also published as: Joseph Ratzinger, Culture and Truth: Reflections on the Encyclical, Origins 28, no. 36 (25 February 1999)
- Ratzinger, Joseph, with Jürgen Habermas, The Dialectics of Secularization – On Reason and Religion, Ignatius Press 2006
- Rommen, Heinrich, The State in Catholic Thought, St. Louis, 1945
- Rommen, Heinrich, The Natural Law: A Study in Legal and Social History and Philosophy (first published1947), new translation by Thomas R. Hanley, Liberty Fund 1998

- Rowland, Tracey, John Paul II and Human Dignity; June 2005 Public Lecture held at the John Paul II Institute for Studies on Marriage and the Family (Melbourne, Australia), retrieved 2-2-2012: www.jp2institute.org

- Schall, James V., The Regensburg Lecture: Thinking Rightly about God and Man, Ignatius Insight 15-9-2006, www.ignatiusinsight.com (retrieved 9-10-2010)
- Schnepp, Gerald J., book review of: The Priority of Labor: A Commentary on Laborem Exercens by Gregory Baum, in: Sociology of Religion 44(2), 1983, pp. 170-171
- Schorkopf, Frank, Würde des Menschen, in: Dirk Ehlers (ed.), Europäische Grundrechte und Grundfreiheiten, De Gruyter Recht 3rd edition 2009
- Seelmann, Kurt with Gerd Brudermüller (ed.), Menschenwürde – Begründung, Konturen, Geschichte, Königshausen & Neumann 2008
- Sensen, Oliver, Kant's Conception of Human Dignity, in: Kant-Studien Volume 100, Walter de Gruyter 2009, pp. 309-331
- Simma, Bruno, The Contribution of Alfred Verdross to the Theory of International Law, European Journal of International Law (EJIL 6 -1995), p. 54 ff
- Simma , Bruno (ed.), The Charter of the United Nations – A Commentary, Oxford University Press 1995
- Smith, Janet E., Natural Law in Veritatis Splendor, Osservatore Romano, January 5, 1994
- Snyder, Timothy, Bloodlands, Basic Books 2010
- Solzhenitsyn, Aleksandr I., The Gulag Archipelago 1918-1956 – An Experiment in Literary Investigation, translated by Thomas P. Whitney, Harper & Row 1973
- Solzhenitsyn, Aleksandr, The Gulag Archipelago 1918-56, translated by Thomas P. Whitney and Harry Willets and abridged by Edward Ericson, Harvill Press 2007
- Sophocles, Antigone, nrs. 450-460; 2005 translation by Ian Johnston, Malaspina University-College, Nanaimo, BC – Canada. Retrieved on 9-4-2010 from http://records.viu.ca/~johnstoi/sophocles/antigone.htm

- Spaemann, Robert, On the Anthropology of the Encyclical Evangelium Vitae, in: Five Years of Confrontation with the Society, Proceedings of the 6th Assembly of the Pontifical Academy for Life, edited by Juan de Dios Vial Correa and Elio Sgreccia, Libreria Editrice Vaticanae 2000
- Spaemann, Robert, Zur Kritik der politischen Utopie, Ernst Klett Verlag 1977
- Spaemann, Robert, Menschenwürde und Menschliche Natur, in: Internationale Katholische Zeitschrift Communio (IKaZ) 39 (2010), pp. 134-139
- Spaemann, Robert, Über den Begriff der Menschenwürde, in: Robert Spaemann, Grenzen – Zur ethischen Dimension des Handelns, Klett-Cotta Verlag 2001
- Spaemann, Robert with Ernst-Wolfgang Böckenförde (ed.), Menschenrechte und Menschenwürde, Klett-Cotta Verlag 1987
- Spindelböck, Josef, Die Katholische Kirche und die Heiligkeit des Menschenlebens, in: Forum Katholische Theologie 27 (2011), pp. 114-128
- Starck, Christian, (ed.), Mangoldt-Klein, Kommentar zum Grundgesetz– Band 1, Verlag Franz Vahlen 2005
- Starck, Christian, Der demokratische Verfassungsstaat: Gestalt, Grundlagen, Gefährdungen, Mohr Verlag 1995
- Starck, Christian, Vom Grund des Grundgesetzes, Edition Interfrom 1979
- Storck, Thomas, in: Catholic Social Teaching: John Paul II, Centesimus Annus, I, The Catholic Faith, vol. 4, no. 4 (July/August 1998), pp. 22-23 and Catholic Social Teaching: John Paul II, Centesimus Annus, II, The Catholic Faith, vol. 4, no. 5 (September/October 1998), pp. 40-41
- Sweet, William, in: Introduction to Jacques Maritain: Life and Thought, in: Jacques Maritain, Natural Law – Reflections on Theory and Practice, pp. 8-9, South Bend 2001

- Thomas, Hans with Winfried Kluth (ed.), Das zumutbare Kind – Die zweite Bonner Fristenregelung vor dem Bundesverfassungsgericht, BusseSeewald 1993
- Tiedemann, Paul, Menschenwürde als Rechtsbegriff. Eine philosophische Klärung, Berliner Wissenschafts Verlag 2007

- Tischner, Jósef, The Spirit of Solidarity, translated from Polish by Marek Zaleski and Benjamin Fiore with a Foreword by Zbigniew Brzezinsky and an Afterword by Lech Walesa, Harper & Row 1984

- Verdross, Alfred, Statisches und Dynamisches Naturrecht, Freiburg 1971
- Verdross, Alfred, Die Würde des Menschen und Ihr Völkerrechtlicher Schutz; Schriftenreihe Niederösterreichische Juristische Gesellschaft, Heft 3, 1975
- Verdross, Alfred, Abendländische Rechtsphilosophie, 2. Auflage Wien 1963
- Voegelin, Eric, Hitler and the Germans - translated, edited, and with an introduction by Detlev Clemens and Brendan Purcell, University of Misouri Press 1999
- Voegelin, Eric, The New Science of Politics, An Introduction; University of Chicago Press 1987

- Waldstein, Michael, Three Kinds of Personalism: Kant, Scheler and John Paul II, in: Forum Teologiczne X, 2009, pp. 1-21
- Wallau, Philipp, Die Menschenwürde in der Grundrechtsordnung der Europäischen Union, Bonn University Press 2010
- Walter, Christian, Human Dignity in German Constitutional Law, in: The principle of respect for human dignity – proceedings of the 1998 Montpellier meeting of the European Commission for Democracy through Law (Venice Commission), Council of Europe Publishing 1999, pp. 25-42
- Walter, Christian, Geschichte und Entwicklung der Europäische Grundrechte und Grundfreiheiten,, in: Dirk Ehlers (ed.), Europäische Grundrechte und Grundfreiheiten, De Gruyter Recht 3rd edition 2009
- Weiler, Josef H.H., Ein Christliches Europa - Erkundungsgänge, übersetzt von Franz Reimer und Vorwort von E.W. Böckenförde, Verlag Anton Pustet 2004

- Weiler, Rudolf (ed.), Die Wiederkehr des naturrechts und die Neuevangelisierung Europas, Verlag für Geschichte und Politik Wien/Oldenbourg Wissenschaftsverlag, 2005
- Wolterstorff, Nicholas, Philosophers respond to Pope John Paul II's encyclical letter Fides et Ratio; in: www.christianitytoday.com (retrieved 7-10-2010)

Major legal documents – alphabetical

- Charter of Fundamental Rights of the European Union (2000, 2007)
- Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (Oviedo 1997)
- European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)
- German Basic Law (Grundgesetz, 1949)
- International Covenant on Civil and Political Rights (1966)
- International Covenant on Economic, Social and Cultural Rights (1966)
- Lisbon Reform Treaty (2007)
- Nuremberg Principles of International Law (1945)
- Statute of the International Criminal Tribunal for the former Yugoslavia
- Treaty on European Union (2007)
- Treaty on the functioning of the European Union (2007)
- Universal Declaration of Human Rights (1948)
- United Nations Charter (1945)

Cited case law – in order of citation

Bundesverfassungsgericht (BVerfG)

All rulings have been obtained online from the official BVerfG website: http://www.bverfg.de/entscheidungen

- BVerfGE 88, 203, 252
- BVerfGE 39, 1 (41)
- BVerfGE 27, 1 (6 f.)
- BVerfGE 45, 187, 1526
- BVerfG, 2 BvF 2/90 of 5-28-1993

- BVerfG, 1 BvR 357/05 of 15-2-2006
- BVerfG, 2 BvR 553/01 of 27-2-2002
- BVerfG, 2 BvR 261/01 of 13-3-2002
- BVerfG, 2 BvR 1514/03 of 23-11-2005
- BVerfG, 1 BvR 409/09 of 22-2-2011
- BVerfG, 1 BvR 426/02 of 11-3-2003
- BVerfG, 1 BvR 2378/98 of 3-3-2004
- BVerfG, 1 BvR 357/05 of 15-2-2006
- BVerfG, 2 BvR 578/02 of 8-11-2006
- BVerfG, 2 BvR 455/08 of 4-2-2009
- BVerfG, 1 BvL 1/09 of 9-2-2010
- BVerfG, 1 BvR 3295/07 of 11-1-2011
- BVerfG, 1 BvR 1832/07 of 4-11-2008
- BVerfG, 1 BvR 932/94 of 5-4-2001

European Court of Human Rights (ECtHR)

All rulings have been obtained online from the Court's HUDOC database: http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Decisions+and+judgments/HUDOC+database/

- Case of Tyrer v. The United Kingdom, no. 5856/72, Judgment of 25 April 1978
- Case of Abdulaziz, Cabales and Balkandali v. United Kingdom, nos. 9214/80; 9473/81; 9474/81, Judgment of 28 May 1985
- Case of Ribitsch v. Austria, no. 18896/9, Judgment of 4 December 1995
- Case of Tekin v. Turkey, no. 52/1997/836/1042, Judgment of 9 June
- Case of Assenov and Others v. Bulgaria, no. 90/1997/874/1086, Judgment of 28 October 1998
- Case of Kudła v. Poland, no. 30210/96, Judgment of 26 October 2000
- Case of Streletz, Kessler and Krenz v. Germany, nos. 34044/96, 35532/97 and 44801/98, Judgment of 22 March 2001

- Case of Pretty v. The United Kingdom, no. 2346/02, Judgment of 29 April 2002
- Case of Haas v. Switzerland, no. 31322/07, Judgment of 20 January 2011
- Case of Koch v. Germany, no. 497/09; this is a continuation of the case BVerfG, 1 BvR 1832/07 of 4-11-2008 as discussed above
- Case of Vo. V. France, no. 53924/00; Judgment of 8 July 2004
- Case of Tysiac v. Poland, no. 5410/03; Judgment of 20 March 2007
- Case of A, B and C v. Ireland, no 25579/05, Judgment of 16 December 2010
- Case of Christine Goodwin v. the United Kingdom, no. 28957/95, Judgment of 11 July 2002
- Case of Vereinigung Bildender Künstler v. Austria, no. 68354/01, Judgment of 25 January 2007
- Case of Lindon, Otchakovsky-Laurens and July v. France, nos. 21279/02 and 36448/02, Judgment of 22 October 2007
- Case of Akpinar and Altun v. Turkey, no. 56760/00; Judgment of 25 February 2007
- Case of Gäfgen v. Germany, no. 22978/05, Judgment of 1 June 2010
- Case of V.C. v. Slovakia, no. 18968/07, Judgment of 8 November 2011 (not yet final)

Court of Justice of the European Union (ECJ)

All rulings have been retrieved online from the Court's database under:

http://curia.europa.eu/

- Case C-6/64: Costa Flaminio Costa v E.N.E.L., Judgment of the Court of 15 July 1964
- Case C-168/91: Konstantinidis v Stadt Altensteig and Landratsamt Calw; Opinion of Advocate General Jacobs delivered on 9 December 1992
- Case C-13/94: P. v. S. and Cornwall County Council, Judgment of 30 April 1996
- Case C-377/98: Kingdom of the Netherlands v. European Parliament and Council of the European Union, Judgment of 9 October 2001

- Case C-36/02: Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, Judgment of 14 October 2004
- Case C-341/05: Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet a.o., Judgment of 18 December 2007
- Case C-438/05: International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti, Judgment of 11 December 2007
- Case C-105/03: Pupino, Judgment of 16 June 2005
- Case C-34/10: Oliver Brüstle v. Greenpeace e.V., Judgment of 18 October 2011

ANNEX

Abstract - English

The Charter of Fundamental Rights of the European Union (EU Charter) became law with the entering into force of the Lisbon Reform Treaty on December 1st, 2009. The legal *principle* of human dignity is now enshrined in EU law through article 1 EU Charter. The *legal concept*, or *Rechtsbegriff*, of human dignity has served as the basis of the European human rights system only since the end of World War II. There is however no basic agreement on the definition and scope of human dignity, neither as a philosophical notion, nor as a legal term. Article 1 EU Charter could therefore prove problematic in its application because it is open to broad and contradictory interpretations. Human dignity is increasingly invoked on both sides of an argument that deals with the protection of apparently conflicting fundamental human rights. In order to be able to effectively protect human dignity under the EU Charter, it is therefore necessary to achieve a better understanding of the roots and realities of this principle as it has been developing within the EU. Otherwise, as a consequence the stated legal principle itself can become a threat to that which it is trying to protect.

This research should contribute to a better understanding of the legal principle of human dignity now enshrined in EU law as well as the legal concept of human dignity in Europe in a broader sense. It aims to provide an insight into the genesis, application and consequences of article 1 EU Charter and the legal concept of human dignity in general, by analyzing the main post-War schools of thought and related historical and legal-historical developments that have shaped the notion of human dignity in Europe until today. The focus will be on the post-War history of Europe and the Christian and Kantian schools of thought that provide the most prominent philosophical foundations for the notion of human dignity in its legal context as it developed in Europe after 1945. It was only in response to the horrors of Nazism and Communism ravaging the European continent and many parts of the world in the 20th century that various European political

and legislative initiatives were introduced to avoid a repeat of this massive and organized disregard of fundamental human rights. Still, definition and scope of human dignity in its legal context remain unclear and much debated. In concluding the research the question is therefore posed whether the legal principle of human dignity as included in article 1 EU Charter can really be upheld in the court of law and as a foundational principle of the democratic state? Within the current framework of human dignity discourse and human rights application in Europe it is concluded that upholding this principle is unlikely to succeed.

Abstract - Deutsch

Die *Charta der Grundrechte der Europäischen Union* (EU Grundrechtscharta) wurde mit dem Inkrafttreten des Reformvertrags von Lissabon am 1. Dezember 2009 geltendes Recht. Die Menschenwürde ist nun als *Rechtsnorm* im EU Recht, Artikel 1 der EU Grundrechtscharta verankert und basiert auf dem *Rechtsbegriff* der Menschenwürde, der seit dem 2. Weltkrieg die Grundlage der Europäischen Menschenrechtsentwicklung bildete. Dennoch gibt es bis heute keine Übereinstimmung in Bezug auf Definition und Anwendungsbereich der Menschenwürde – weder als philosophischen Begriff noch als rechtlichen Terminus. Artikel 1 der EU Grundrechtscharta kann sich auch deshalb als problematisch erweisen, da seiner Anwendung zu undeutliche und einander widersprechende Interpretationen zugrunde liegen. Beim Schutz von offensichtlich einander widersprechenden grundlegenden Menschenrechten beruft man sich zunehmend auf die Menschenwürde, um dementsprechend unterschiedliche Positionen mit ein und demselben Argument zu legitimieren. Um die Menschenwürde in der EU Grundrechtscharta wirksam schützen zu können, ist es notwendig, die Entwicklung und den tatsächlichen Charakter dieser Norm besser zu verstehen. Es wäre sonst möglich, dass das festgeschriebene Gesetz selbst zu einer Bedrohung für das werden könnte, was es zu schützen gilt.

Diese Forschungsarbeit leistet einen Beitrag zu einem besseren Verständnis der Menschenwürde als Rechtsnorm, die nun im EU Recht verankert ist, und in einem weiteren Sinne zum Verständnis des Rechtsbegriffs der Menschenwürde in Europa. Ziel dieser Arbeit ist es, Genese, Anwendung und Auswirkungen von Artikel 1 der EU Grundrechtscharta sowie den Rechtsbegriff der Menschenwürde im Allgemeinen aufzuzeigen. Den Analysen liegt eine Auswertung der wichtigsten Rechts-Schulen der Nachkriegszeit und der damit verbundenen historischen und rechts-historischen Entwicklungen, die den Begriff der Menschenwürde in Europa bis heute geformt haben, zugrunde. Der Fokus liegt auf der europäischen Nachkriegsgeschichte, auf den christlichen und „kantischen“ Schulen des Denkens nach 1945, auf die die wichtigsten

philosophischen Grundlagen für die Entwicklung des Begriffs der Menschenwürde in seinem rechtlichen Kontext zurückgehen. Verschiedene politische und legislative Initiativen in Europa sind eine Antwort auf den Horror des Naziregimes und des Kommunismus, der den europäischen Kontinent und viele Teile der Welt im 20. Jahrhundert verwüstet hat, um eine Wiederholung dieser massiven und organisierten Missachtung der Menschenwürde zu verhindern. Dennoch sind Definition und Geltungsbereich der Menschenwürde im rechtlichen Bereich unklar und vieldiskutiert. Abschließend bleibt die Frage offen, ob die Rechtsnorm der Menschenwürde, so, wie sie in Artikel 1 der EU Grundrechtscharta verankert ist, in der Rechtssprechung und als eine grundlegende Norm eines demokratischen Staates wirklich aufrechterhalten werden kann? Der gegenwärtige Diskurs über Menschenwürde und die Anwendung von Menschrechten in Europa lässt den Schluss zu, dass es unwahrscheinlich ist, dass diese Norm Bestand hat.

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Sprachen:	Lesen	Sprechen	Schreiben
Holländisch	Muttersprache	Muttersprache	Muttersprache
Englisch	fließend	fließend	fließend
Deutsch	fließend	fließend	fließend
Französisch	fließend	fließend	gut
Spanisch	gut	gut	Grundkenntnisse