West-östliche Denkwege 21

Walter Schweidler (ed.)

Human Rights and Natural Law

An Intercultural Philosophical Perspective

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West-östliche Denkwege

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Preface

Walter Schweidler

This volume contains the proceedings of the International Summer Academy "Human Rights and Natural Law: An Intercultural Philosophical Perspective" at the Catholic University Eichstaett-Ingolstadt in July/August 2011 and articles of various colleagues who were so kind as to collaborate in the discussion that followed. The intercultural approach to the questions about the ethical, political and juridical foundations of human rights and human dignity is still dependent on the analysis of its presuppositions in the different cultures and civilizations on earth. The general idea of the International Academy was to explicate the classical European idea of natural law as one element among these cultural horizons and to relate it to the traditions of non-European cultures. We hope to have made a contribution to some of the fundamental questions of historic continuity and discontinuity and the intercultural validity of the philosophical substance of human rights. The editor is very grateful to all the contributors to this volume, to the institutions that made the International Academy possible—among them the DAAD, Renovabis, the Hertie Foundation and the Hanns Seidel Foundation—and of course to the University itself and especially its International Office. The publication of this volume was made possible by the Hermann and Marianne Straniak-Stiftung, which has, under the direction of its late president Dr. Herwig Liebscher, been of the highest importance for the initiation and development of intercultural philosophical research, especially in the German-speaking world. The editor also thanks heartily Tobias Holischka and Neil O'Donnell for the immense work they dedicated to this book. He is very glad to continue with this volume the long and valuable cooperation with the publisher.

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Introduction

Walter Schweidler

In 1918 Oswald Spengler attacked the eurocentrism of our traditional scheme of "world history": "Thanks to the subdivision of history into 'Ancient', 'Medieval' and 'Modern' – an incredibly jejune and *meaningless* scheme, which has, however, entirely dominated our historical thinking – we have failed to perceive the true position in the general history of higher mankind, of the little part-world which has developed on West-European soil [...] It is not only that the scheme circumscribes the area of history. What is worse, it rigs the stage. The ground of West Europe is treated as a steady pole, a unique patch chosen on the surface of the sphere for no better reason, it seems, than because we live on it – and great histories of millennial duration and mighty far-away Cultures are made to evolve around this pole in all modesty. It is a quaintly conceived system of sun and planets! We select a single bit of ground as the natural center of the historical system, and make it the central sun. From it all the events of history receive their light, from it their importance is judged in *perspective*. But it is in our own West-European conceit alone that this phantom 'world-history', which a breath of scepticism would dissipate, is acted out."[1] Nowadays, such critical self-distance from eurocentrism has become a common attitude. But the model of history, which Spengler in these words characterized as a core of eurocentrism, seems to be as powerful as it was a 100 years ago. Do we not assume that there is one modernity for mankind, that there is a global hunger for "modernization", an almost God-given tendency towards social progress sweeping from the developed to the less developed parts of the world? And if this is so, then the idea of Human Rights seems to be right in the center of that movement. There are quarrels about its "Western" origin, about its political instrumentalization for establishing and deepening the European-American hegemony on the world stage, about the inconsistency between the values underlying that idea and the political reality in the countries which propagate it; but there is no alternative model which could in any way give us orientation about the historical development in which we stand. There is the reference to, e.g., "Asian values", to different ways of development, to the plurality of cultural heritage in the world; but the framework for all that seems to be still the presupposition of a measure of critique which in the end is based on the claim of freedom and equality for all peoples and so for all human beings in the world – and this means, it is based on the same principles as the idea of human rights.

However, there is at least one conceptual development which contains a very important change. The content of that development is also already contained in the passage quoted from Spengler's "Decline of the West". It is the development of our concept of "culture". We find that change already in the terms which we have used to

[1] The Decline of the West, vol. 1, New York 1944, 17

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design what is discussed in the contributions to this volume: interculturality, multiculturalism, cultural identity, cultural values, and so on. In this conceptual context, we have really overcome eurocentrism. In order to make this clearer, we must remember that our present and widely accepted concept of culture as a historically and ethnically constituted social entity connecting its members by descent, language and legal and social institutions is indeed far from being a "traditional" one, rather, it is relatively new. It has had at least two predecessors of substantial importance. In antiquity and in the Middle Ages the concept of culture was characterized by what we can classify as an accidental-pluralist meaning, i.e. "culture" was seen as a kind of treatment necessarily related *to something* that was treated: the origin of its meaning was "agriculture", it was the land that had been there and had to be "cultivated". Then the concept became more metaphoric, Cicero spoke of philosophy as the *cultura animi*, there was a *cultura dolorum* etc. Culture meant in its essence *care*, and always care *of something*.[2] Then, in the mainstream of modernity, a significantly different concept of culture was developed; it can be classified as a substantially-universal one. There was no "culture of...", but simply "culture", i.e. the final state of humanity which defined the logic of history and which was represented more or less by the European civilization. We are all civilized, said Kant, but we are still far from culture;[3] nevertheless, culture is the aim and meaning of the existence of mankind.

Between all this and our present thinking about culture there was a significant break. We must keep in mind that our present, that one which I would call the "political", concept of culture, was created not before the 19th century and that had a definitely polemic impetus directed against the modern idea of a universal culture. Thinkers like Herder, Nietzsche and Spengler established, as I would classify it, a substantially-pluralistic concept of culture according to which "cultures" are entities of equal quality and equal dignity, and there is no universal culture in the singular that would define the goal or measure for all the others.

What can we learn from that development? There is one thing I want to direct our attention to: in its ancient meaning the term *cultura* characterized essential elements of human forms of life that were thought to belong to every human society and to every human existence, but that were also seen to be dependent on something that lies in our hands. We have to cultivate what in the end shows why we were right and why we were fundamentally obliged to cultivate it. And in the modern meaning *culture* was connected to a way on which mankind was assumed to step forward to its general destination. So, both concepts contained a relation between the meaning of what they called "culture" and what makes us human beings. That was exactly the relation between what then was called "culture" to what was called and what we still have to understand as *our human nature*. And my thesis is that our present concept of culture, as justified as it may be as a result of our overcoming of eurocentrism and mental colonialism, lacks

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[2] Cf. Spengler und der moderne Begriff der Kultur, in: A. Gethmann-Sieferth /E. Weisser-Lohmann, Hg., Kultur-Kunst-Öffentlichkeit. Philosophische Perspektiven auf praktische Probleme, 2001, 95-113.

[3] Immanuel Kant, Idea for a Universal History from a Cosmopolitan Point of View, seventh thesis.

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one decisive relation, namely exactly the relation to an idea of human nature. And, as I think, this is the result of the most important reason that has led us into the crisis in which we now must consider different "cultures" with respect to the convictions of their members concerning the meaning and essence of what is a real "human life". Our awareness of what is "human nature" has been lost to an important degree. Therefore, the horizon in which we may find the only way to overcome that dangerous cultural split seems to me to be the reconsideration of what human nature is.

When we connect these two aspects which, as I tried to point out in these very general remarks, are in theoretical and practical tension -- that is, the hardly having become relativized power of the idea of human rights and the radically changed meaning of the concept of culture -- we are led *nolens volens* to the concept of the *lex naturalis*, to "natural law". It may not demarcate the solution, but it clearly opens our eyes to the problem we are dealing with when we search for the reconciliation of political universalism and the request for cultural autonomy.

"Natural law" is a concept whose origin lies in times long ago. Is it indeed applicable to the discussion in our time? Basically, the contributions to this volume are based on the hypothesis that it is. We will therefore critically discuss the thesis that the natural law remains in the centre of the legitimation and justification of state power in the whole modernity; that it is still the basis for our legislation and for the culture of norms in the heart of our social and international order. It is correct that the original concept of "natural law", as it was developed in the Aristotelian ethics, was bound to an idea of *eudaimonía* that is no longer valid within the theoretical model of the modern state as it has been fundamentally shaped by the political theory of Thomas Hobbes. But Hobbes himself transformed the idea of natural law in a way that until today connects the modern state with the classical idea of the ethical justification of the civil law.[4] Hobbes developed a theory of precontractual conditions of the social contract – conditions like the Golden Rule, equality, gratitude, peacefulness and justice – that he summarized as the impact of what "the ancient" had called the *virtues*! Hobbes emphasized strongly that it is not primarily the quality of life or its improvement that citizens expect to be guaranteed by the state but first of all and above all the guarantee of life itself, the protection of the life of everyone who is born as a member of society. The protection of the life of every citizen is, according to Hobbes, the absolute condition of legitimacy of the state! So, it must be rigorously emphasized that the obligation to any citizen's right to live is a principle of legitimacy of the modern much more than of any ancient state that may have been grounded on metaphysical or religious claims! That is the reason why *terrorism* is a phenomenon that is genuinely related to our modern state. Terrorists claim to show that the state is not able to protect its citizens and *therefore* has no legitimacy.

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[4] Cf. Walter Schweidler: Der gute Staat. Politische Ethik von Platon bis zur Gegenwart, Stuttgart: Reclam 2004. And cf. Walter Schweidler: Über Menschenwürde: Der Ursprung der Person und die Kultur des Lebens. Reihe Das Bild vom Menschen und die Ordnung der Gesellschaft, VS Verlag 2012.

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Thus, we will discuss the hypothesis that the deepest connection between the foundations of the modern state and the cultural forms of our lives is constituted not by a philosophical principle that could be expressed in canonical formulations, but by the reality of the rule of law in our states and societies. It is this constitutional and legal reality in that we find the determination that is constituted by our human nature. "Human dignity" as the core concept of the constitution of the modern state is, correctly understood, the indirect reference to the absolute conviction that there is such a human nature. And it is of crucial importance for the understanding of the ontological and also metaphysical background of the modern view of humanity, that by the principle of "human dignity" we have put an intrinsically *legal* concept on the top of the pyramid of the legitimation and justification of our political order. A legal principle in its essence does not have to create justice but to prevent injustice. The consequence is that in the view of the modern constitutional state the legitimacy of government institutions cannot be finally established through a positive answer to the question of what is human nature. The notion of "human dignity" contains at its core nothing but the *prohibition* of the answering of this question [5]. Nobody has the right to decide whether another human being is worthy of dignity. But at least in this indirect sense, we will have to discuss the thesis that the reference to our common human nature is inherent in the principles of political life and order in culturally pluralistic world.

[5] This kind of prohibition is altogether characteristic for legal terminology, in which it is not said that the notion of dignity has not been defined positively and distinctly laid out. What is implied is that its definition and interpretation always refers to concrete cases of conflict, whose resolution is achieved through law and order. The legitimacy of legislation and administration of justice is opened/disclosed through concrete cases of decision, from the danger and the disruption of which law and order protects society. Insofar as this, legal notions carry constitutionally the character of a negation of negation, when they build on the basis of the idea of human rights. Cf. Walter Schweidler: Geistesmacht und Menschenrecht. Der Universalitätsanspruch der Menschenrechte und das Problem der Ersten Philosophie, Freiburg i.Br. 1994, §§ 36 f., see especially pp. 445; also Walter Schweidler: Menschenrechte und kulturelle Identität, in Walter Schweidler: Das Unantastbare. Beiträge zur Philosophie der Menschenrechte, Münster 2001, pp. 163-188, see especially p. 167.

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I.

Philosophical Foundations

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Human Dignity and Human Nature[1]

Robert Spaemann

Dignity is no empirically given property. To see dignity as such is no human right. It is much more the transcendental basis that human beings have rights and duties. They have rights because they can have duties, that is, because the normal, mature members of the human family are neither animals, shoe-horned into their own body politic, nor mere subjects of desire, operating through pure instinct, whose desires, in the interest of the community, must be held in check by state institutions. Human beings can act rationally and morally from reason and have the duty to do so. So it is recorded in article 6 of the German Constitution: "The care and nature of their children is the natural right of parents and their first duty". That the rights of parents is based on their ability to perform their duty as parents, it follows that this right expires when this duty is crudely neglected. The ability to undertake responsibility is that which we call freedom. Whoever is un-free cannot be made responsible for anything. But whoever can undertake responsibility has the right not to be treated as a mere object, nor to be physically coerced in the execution of his duties. The slave, who has no rights, also has no duties. The state is therefore a community of the free. Slaves can as little be citizens or subjects of the state as can domesticated animals.

If the freedom of the will is a fiction, then the state is based on a fiction, on an "as if" which it is important, that the citizen does not experience that it is a fiction, rather really believes in it. Human dignity has no biological basis, but whether one can belong to those who possess it is dependent upon one's biological membership of a family of the free, for relations of kinship are also personal relations. Father, mother, sister, brother, grandparents et al. are (contrary to animals) life-long personal roles. Nevertheless, it is not a question of whether a member of this family already possesses those properties that occasion us to speak of persons; properties that phenomenally bring something like dignity into appearance.

Talk of a human dignity which is to be respected is based on a particular ambivalence in the thinking of the free subject. From this ambivalence follow two differing ideas concerning those things through which this dignity could be harmed. Human Dignity is inviolable, according to the German Constitution, and Horst Dreier writes, quite correctly, in his commentary on it that it is to be understood normatively, not descriptively. Inviolable: that can indeed mean something which cannot be infringed upon, or that it may not be infringed upon. Both meanings depend on the human being, on the one hand, a person, a free subject, and, as such, is not to be affected by any kind of outside agency. Christian tradition ostensibly has its central symbol in the image of an entirely wretched figure, a crucified naked, to whomever however as such the deep-

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[1] This article was previously published in Internationale Katholische Zeitschrift *Communio*. Nr. 39. März April 2010, S. 134-139. Translation by Neil O'Donnell.

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est honor is rendered. It is of the same tradition as, in Shakespeare, old King Lear, chased away by his daughters and in storm and rain sitting down on the street, is addressed by the Earl of Kent who wishes to enter his service. When Lear protests that he is a nothing, Kent answers "You have that in your countenance which I would fain call master". It is in the deepest indignity that what we call dignity can be seen most clearly.

On the other hand there are evidently actions that infringe upon dignity. There can only be these actions because human beings are not free subjects, floating about in empty space, rather possess a physical and psychical nature in which they present themselves and by which they can be infringed upon, and indeed independent of their own willing. Allow me to make some observations here.

Freedom is a peculiarity of the species homo sapiens. But the nature of human beings is not only characterized through it, that is, in being an expression of freedom. We can imagine rational entities from other stars that come to this planet and encounter human beings whose ways of behaving they do not understand. Imagine if these beings could feel no pain; they possess other signals which cause them to become aware of when their health is in danger. This signal would merely have the character of the blinker of an automobile, which does not itself contain the capacity to eliminate itself. This being could not at all understand why the purposeful bringing-about of such signals, that is, the purposeful infliction of pain, should be something regarded as bad. And if a being cannot understand something such as sleep, it could not understand what systematic self-deprivation means. Almost all the content of our will is a natural content, which is pre-determined through our contingent human nature. And only in this contingent nature is human dignity inviolable. This nature is a nature of the species. Therefore human beings can understand the propensity of other human beings and only hence, so to speak, evaluate the conflicting interests and bring them into the right balance. Otherwise, only the intensity of a wish would count, however wayward and absurd this wish appears to us. And someone could feel harmed in his human dignity if the intensity of his wish is not taken into account. We can only evaluate wishes and interests because we have the same nature. Even the defenders of euthanasia cannot get along without such evaluations. If only suicidal desire as such counted, then the wish of a young, morbidly unhappy boy in love could not be rebuffed, and therefore actively assist him in suicide. The objection that one should in such cases assume, later on in time, that person will change his mind, this person can counter with the argument that: I do not wish that time diminishes my identification with this love; I wish to die as the person that I now at this moment am. If it corresponds at all to the providence of human beings to kill another when bidden by the same, and if human dignity consists only its freedom, entirely uncoupled from nature, then evaluating suicidal desire of this kind at all is an undue act of paternalism. Why should a person not have the right to die as the person that he presently is? I remember another, this time real, example: the Cannibal of Rotenberg, who had the desire to kill a human being and ultimately devour them, and who found someone on the internet who had the complementary wish to be killed and devoured. The thing occurred. The man was accused of murder. His defense was simple: *Volenti non fit iniuria*. Nothing here befell anyone who had not desired it. The

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state does not have the right to assess the value of such desires and to penalize their execution. If he were punished all the same, then therefore because the court evaluated the desire and indeed for reason of yardsticks that support something like a nature of human beings, in which human dignity can, despite assent, can be infringed upon.

If we condemn the behavior of the Cannibal of Rotenberg as perverse, then we support a normative concept of the natural as that of "normal people". Without a concept of normalcy we cannot come to terms with the living. In the realm of physics there is nothing like normalcy, there is only the strict natural law, which suffers no exceptions. If a planetary body deviates from its anticipated course, we do not speak of its bad behavior, rather we feel ourselves occasioned to correct the parameters of our calculation. There is in the realm of the unliving neither right nor wrong. If a hare is born with three legs, if a mother lion does not instruct her cubs in the hunt or if a primate does not possess the necessary ability to attract the opposite member of its sex on which the continued existence of its species is based, then we speak of deviation, anomaly, or defect. The assimilation of animal behavior to an environment is based on the animal counts on specific behavior of other animals, for example, normalcy. So too can we manage, say, in street traffic because we count on the normal behavior of other motorists. In the same way, we cannot, out of regard for human dignity, treat human beings the same without consideration of their sexual orientation. Who-so-ever employs a pedophile as a kindergarten teacher, acts negligently. The sexual desire of the pedophile cannot be placed on a level with someone who assesses things normally. To respect his human dignity does not mean to regard his special inclinations as an expression of this dignity. We must much more expect of him to roundly give up the satisfaction of these inclinations. The satisfaction of such inflicts mental harm on the child, so that it hinders the kind of later life we would call "normal". Without this concept of the normal we could not answer the question why then the interest of a child should have priority over that of the pedophile. He too can claim that it would harm him if he must give up his inclinations. The answer cannot be, that principally the interests of a child have priority over those of an adult, rather that both interests do not stand on the same level. The one, the interest in a normal life, is a normal interest, the interest of the pedophile is not.

The until today canonical interpretation of the German Constitution sees the respecting of human dignity, with recourse to Kant, in that every human being, whether met by direct or indirect treatment, is treated never only as a means, but likewise as an end. It is important here to stress the "only". Human beings can indeed only live in a society if they employ each other as a means to an end. Harm to human dignity occurs if someone is reduced to his function of being in the interest of another and thereby mutability of such instrumentaliszation is excluded. This occurs, for example, through so-called immoral compacts. By virtue of his freedom, a person can be in control of themselves. He can give promises, such as those of marriage and those of the religious life, which command his entire life. But in our legal order such compacts must be legally revocable. Therefore, for example, a contract of submission, by which someone sells himself into slavery and definitively and with intention of legal effect renounces his right to have that other meaning.

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The state protects here the freedom of those who are ready to surrender it. This renunciation is possible. It can be even the highest expression of freedom. And the Church can treat such promises as irreversible and hence insist on the freedom of who is in control of the entirety of his life. It is important, however, that the Church, through the enforcement of this right, cannot make use of the organ of the state. The personhood of a human being has a temporal dimension. It begins sometime and ends sometime. It belongs to the actuality of the human person, that it possesses a biography, that it can identify itself over a long stretch of time with each stage of its natural existence. In this way we say "I was conceived on such and such a date", "my parents considered aborting me", "I was then born", "perhaps in advanced age I shall no longer be in dispose of a clear consciousness", or "at such and such a time I was unconscious". The person pronoun "I" does not refer to "an I"—an invention of philosophers—rather a natural organism that begins to exist as soon as DNA has formed, and which with respect to the mother is independent and from the moment of conception onward continues to develop autonomously. The human person is not the aggregate of states that cycle through it, rather is always the one identical person who cycles through these states. Kant encapsulates this when he wrote: "Because someone who is conceived is a person, and it is impossible to form an idea of the conception of a being endowed with freedom through a physical operation, so, in a practical sense, it is a entirely right and necessary idea to see the act of generation as such through which we bring a person into the world by our own hand and without their approval". However, in what concerns the end of a life, the concept of human dignity in connection to euthanasia is often used and suicide is understood as a dignified death. I shall not discuss here the question of the moral and legal estimation of suicide. It is absurd to punish the suicide attempt, but it is likewise absurd to speak of a "right to suicide". The truth is: Whoever kills themselves deprives themselves of that social framework within which there can be talk of justice and rights. The person who kills themselves removes themselves from the sphere of right. To be able to do this—not, to do it—belongs to that which signalizes the person. It is entirely different with assisted suicide. It is an action not without, but within the legal sphere and cannot be allowed. The making of suicide into a right has bad consequences. Then the holder of this right is responsible for all consequences, all burdens of a personal and financial kind that result from it, that he cannot truly avail of this right. Through logical necessity then emerges an undue pressure on the old and the infirm. The patient is free from the responsibility only when there is no legal possibility for him to achieve his death through others. No human being can be forced by another to say: "There should be no more of you". An irrevocable contract of submission is an unethical and therefore ineffective contract. A death contract is in the moment, where it is carried out, completely irreversible. Hence it is in a yet greater measure an unethical contract than that with which someone betakes themselves into slavery. The word "liberation" is for this action unfitting. For the aim and end of every act of liberation is freedom. The aim and end of assisted suicide is, however, the destruction of the subject's possible freedom, non-existence. Dying with dignity is a death in which one is cared for, accompanied and saved from great pain by fellow human beings. Likewise, it is undignified to prolong the life of a human being through medical practices, for example force-feeding,

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beyond a reasonable measure, as it is to directly cause a death. In both cases the patient is no longer an end in himself. Here it comes down to human dignity. Human rights are not absolute. They can mutually limit themselves. In this way the right to freedom of research or the right to artistic expression find their limits at the right to property. The artist may not paint walls which do not belong to him. The scientist may not, in the pursuit of his research, take possession of property which does not belong to him nor sacrifice human life. The right to property has its own limits. Human dignity, however, knows no compromise. It demands that even with the limitation of rights the question must always be whether in the consideration of justice, which calls for or permits this limiting, the interest of which in what is legally limited is adopted in an impartial way, that is, whether the limiting of those concerned can be rationally justified—granted that the person concerned is right thinking. Human dignity can never stand against human dignity. When my own interests take a back seat there must be behind them those of another, which means that there is no harm to my dignity, so long as this harm can be justified. The dignity of a human being is harmed when it is openly or indeed tacitly said: it does not depend on him. The Kantian formula of the end in itself can also simply be so modified: it depends on everyone.

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Nature—Reason—Freedom. Thinking about Natural Law in Modern Philosophy[1]

Holger Zaborowski

1. Natural Law in the Thinking of Modernity

Natural law is one of the most important themes in modern philosophy of law, especially because of the reliance in many contexts—from legal theory to philosophical, and even mundane, political discussions—upon natural law to establish universal *human rights* (cf. Kriele 1992, 9f.). If human rights are the rights of all men, after all, then the numerous attempts to justify these rights assume at least a common human nature, which gives rise to universal equality, and this means ultimately that something that can be called "natural law" is the ground of positive law. For example, in John Locke's *Second Treatise of Government* we read the following remarks on the *state of nature* as a *state of perfect freedom* and *of equality* (§4). This state has

> [a] law of nature to govern it, which obliges everyone: and reason, which is that law, teaches all mankind, who will but consult it, that being all *equal and independent*, no one ought to harm another in his life, health, liberty, or possession (ibid., §6; my emphasis).

The importance of John Locke's reflections on political philosophy and the philosophy of law is manifest, *inter alia*, in the American "Declaration of Independence" of 1776, in which the "self-evidence" of the truth that "all men are created equal," and "that they are endowed by their Creator with certain unalienable Rights" is assumed (on Locke's theory of natural law and its proximity to the classical understanding of natural law cf. Hancey 1976). While the American "Declaration of Independence" (as well as John Locke) justified human rights with reference to a Creator God, this reference is absent in another important document in the history of modern natural law and human rights. The French "Declaration of the Rights of Man and the Citizen" (1789) speaks without reference to a Creator God, but only of the "natural, unalienable and sacred rights of man" (*les droits naturels, inaliénables et sacrés de l'homme*) "in the presence of and under the protection of the supreme Being" (*en presence et sous les auspices de l'être supreme*, Preamble; on the French "Declaration of the Rights of Man and the Citizen" cf. Sandweg 1972).

Especially in the years after the American and French revolutions an intense interest in the question of natural law and human rights grew in Germany. To a certain extent the theme was in the air now pregnant with revolution. Thus the jurist and phi-

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losopher of law Paul Johann Anselm Feuerbach wrote in his *Critique of Natural Law* (1796) following Immanuel Kant's critical philosophy (on Feuerbach, cf. Radbruch 1969):

> No science in our age has found such a universal interest, none has been treated with so much zeal as the science of the rights of man. [. . .] While the problems of natural law were usually only debated in the studies of scholars, were resigned to speculative reason and reckoned as only proper in its forum, they [the "rights of man"] are now debated by the people's representatives in the convention halls of a newly created nation and presented as themselves the praxis of theoretical reason (3f).

The fact that thinking about natural law in the late 18th, as well as in the early 19th, century was no longer of a merely theoretical importance indicates a radical change of situation in society. The importance of thinking about natural law is indicative of those situations in which traditional certainties were radically questioned. Again and again, one is able to discern similar connections in the history of thinking about natural law—from the challenge of the sophists, to which Plato and Aristotle reacted with their attempts at thinking about natural law, up to the renaissance of thinking about natural law in the years after the Second World War.

However, anyone involved in the contemporary philosophical discussion will notice that natural law appears to play nothing more than the role that Feuerbach ascribed to it over two hundred years ago in today's juristic and political-philosophical discourse. In the political and philosophical discourse, at least in the German-speaking world, the discussion rarely resorts explicitly to forms of argumentation based on natural law.[2] Natural law seems to have lost its importance, and this means, most notably, its task of critical justification and scrutiny of positive law. Other models of argumentation and justification in the philosophy of law have taken its place: besides *transcendental-philosophical* models in the tradition of Kant and the post-Kantian idealist or neo-Kantian philosophy, there are also *discourse theoretical*, *positivist* or *hermeneutic* models.

From a historical view, it must be noted that there were already growing signs of a decreasing importance of the classical reflection on natural law in the 19th century. Natural law, so it at first appears, has survived in the late 19th and in the 20th century only in certain contexts—for instance in the context of Marxist philosophy[3] or in the context of Christian, especially Catholic theology (on the history of natural law with particular consideration of the Christian understanding of natural law, cf. Hollerbach

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[2] In the English-speaking world the situation looks differently insofar as the place of natural law in the English and American discussions of the philosophy of law plays a not unimportant role. For example, one thinks here of Leo Strauss' Natural Right and History or of the works in which the New Natural Law Theory is developed and defended (compare on this footnote 7). Numerous further contributions with partly very different perspectives could be named, for instance the English translation of Jacques Maritain's reflections on natural law and human rights, cf. on this Zaborowski 2010.

[3] Compare Ernst Bloch's understanding of natural law: "The concern of natural law was and is the upright as law such that it would be honored in persons and secured in their collective" (1999, 237f.).

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1973; Herms 2007). In Catholic theology, questions of natural law are discussed intensely today, even though clear signs of an increasing aversion to the concept of natural law—though perhaps not absolutely to the "subject"—are recognized (cf. Schockenhoff 1996, particularly 11-51). This *context-limitedness of its survival* or of *its contemporary importance*, however, appears to contradict natural law's *claim of validity* and *justification*; for this indeed implies not only that natural law may have universal validity, but also that it could be understood by all men, independent of particular religious, philosophical or ideological perspectives (cf. Spaemann 2007). One could now argue that natural law perhaps may require a certain situation in terms of the history of thought or ideas, a certain perspective or the context of a certain life praxis—namely a life praxis which is not necessary for knowledge of natural law in the strict sense, but still inherently facilitates knowledge of the law substantially—whereas other forms of life praxis prove to be more than debilitating. This, however, would mean to take a position which, in certain ways, deprives thinking about natural law of its radicality—not to mention the fact that within these contexts (or the theoretical-practical "contexts of life") discussions of the validity and justification of natural law, as well as the exact understanding of what is actually meant by natural law, are anything but uncontroversial.

The crisis of thinking about natural law arose even much earlier than in the late 19th century, in fact precisely during the time in which it appeared to experience an efflorescence. For especially in connection to Kant's critical philosophy, natural law was transformed into a pure *law of reason and freedom*. Kant himself had very seldom spoken of natural law and transformed it via transcendental philosophy; it depends "on pure *a priori* principles", according to Kant in his critical turn against the enlightenment and rationalist understanding of natural law. This meant that empirical knowledge of nature (and the nature of man) could not be the foundation for natural law, but only a purely transcendental knowledge of its *a priori*, i.e., independent of experience, principles (cf. *Metaphysics of Morals* AB 45; on Kant's theory of natural law, cf. Hoffmann 2001; on the thinking about natural law in the early Enlightenment, cf. especially Hochstrasser 2006; on the relation of Kant to the thinking about natural law in the early Enlightenment, cf. ibid, 197ff.). For this reason, Kant stands in the tradition of interpretation of natural law as a law of reason (a tradition in which *mutatis mutandis* Thomas Aquinas and Locke, among others, stand, too), but interprets natural law in a way previously unknown—as a law of freedom; for according to Kant, from our freedom "all moral laws, hence all laws as well as duties follow" (*Metaphysics of Morals* AB 48).

This interpretation of natural law as an *a priori* law of reason and freedom is also found in the philosophy of German idealism, which followed from Kant's critical philosophy: in Fichte's *Groundwork for Natural Law* (cf. *GA* I 3, 291-260; I 4, 1-165; on this cf. Merle 2001), in Schelling's *New Deduction of the Natural Law* (1795/96) or in Hegel's *Concerning the Scientific Treatment of Natural Law, its Place in Practical Philosophy, and its Relation to the Positive Science of Law*, to the so called "Essay on Natural Law" (cf. *GW* IV, 417-485). The impact of this transformation of the role of natural law under the influence of Kant's critical philosophy is manifest very clearly,

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e.g., in Hegel's philosophy. In the *Philosophy of Right*—whose full title (*Elements of the Philosophy of Right. Natural Law and Political Science in Outline*) at least has still preserved the term 'natural law'—one sees to what extent Hegel stands in the tradition of the Kantian transformation of natural law, in whose center stands not only the concept of *nature*, but also the concepts *reason* (or *spirit*) and *freedom*:

> The ground of law is, in general, the *spiritual*; and its precise point of origin is the will. The will is free, so that freedom constitutes its substance and purpose, while the system of law is the domain of freedom made actual, the world of spirit brought forth out of itself like a second nature (*GW* XIV, 31).

Natural law is therefore, for Hegel, ultimately the "philosophical law", which is to be distinguished from *positive law*, though it does not conflict with the latter or oppose it.[4] For philosophy, according to Hegel, should not instruct on "how the world should be" (ibid., 16), but merely state what is real, and that means it should embrace the rational (cf. ibid., 14). Therefore the task of the philosophy of law is "to apprehend and represent the state as what is inherently rational" (ibid., 15). Thinking about natural law can, therefore, no longer assume a *critical function*—perhaps in the sense of an exhortation to what *should* be—if both the real coincides with the rational and natural law is to be understood as a law of reason (or spirit).

It is only consistent if the concept "nature" loses its normative dimension, too. In the *Encyclopedia of Philosophical Sciences in Outline* (1830) Hegel—in critical confrontation with the tradition in which, among others, Locke and Kant[5] stand—explicitly rejects every reference to nature in order to establish the equality of all men. "By nature", according to Hegel, "men are only unequal":

> But that this equality should exist, that it should be *man* (and not as in Greece, Rome, etc., only *some* men) who is recognized and is considered by law as a person, is so little by *nature* that it is, on the contrary, the product and result of the consciousness of the deepest principle of spirit and of the universality and expansion of this consciousness (§539, *GW* XX, 510).

An *end* of a certain kind is thus manifest in the post-Kantian idealist tradition, one abiding in the central meaning of the concept of nature for the tradition of thinking about natural law—with partial retention of the concept "natural law". This only seems to be ironic if one does not realize that, albeit partially, we are dealing with a *transformation* of natural law in terms of the history of ideas, which essentially preserves important contents of classical thinking about natural law on the basis of a law of reason and freedom understood in the modern context.

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[4] Cf. ibid., §3 (GW XIV, 25-26): "Natural law, or the philosophical law, is distinct from positive law. But to pervert their difference into an opposition and a contradiction would be a gross misunderstanding. The relation between them is much more like that between the Institutes and the Pandects."

[5] Kant talks about a single "innate" law, "which, independent of all legal acts, befits everyone by nature". This law, which is owed "to every human, by virtue of his humanity" (i.e., human nature), is "freedom (autonomy from another's coercing caprice) provided that it can exist together with everyone else's freedom, according to a universal law" (Metaphysics of Morals, AB 45).

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2. Inquiries into Thinking about the Natural Law

The fact that natural law in the 19th, 20th, and early 21st centuries, at least in certain contexts, finds itself in a *crisis of validity* may astonish only at first glance. Because a second glance shows very clearly that this crisis of validity is well accounted for as a *crisis of justification*: thinking about natural law is anything but uncontroversial. Not only the concept of *nature*, but also the concept of *law* itself are extremely ambiguous and complex concepts: their meaning is not easily determined provided that such a determination not only depends on the prevailing language game in which these concepts find concrete application, but also on the broader (philosophical) horizon within which the prevailing language game is played. The difficulties associated with both these concepts seem to increase if they are combined and if one speaks of "natural law". So, among other things, the question arises whether a narrow or wider concept of natural law is assumed—in other words, whether one finds in natural law something like a code of concrete universal norms (for example, the so-called moral law) or purely meta-legal norms that help to analyze the legitimacy of positive legal statutes.

That "natural law" no longer plays the role that it once did in the areas of the philosophy of law, political philosophy, and moral philosophy, is thus also connected with the fact that—to a certain extent prior to questions of the "subject" of natural law—the *concept* of natural law itself has proven to be ambiguous and debatable and appears to be less suitable for reflection in moral philosophy. For such a debatable concept hardly seems to be able to generate the kind of *justification* that is necessary. Recourse to human freedom or the consensus of a community of discourse seems to be much more promising for the pressing questions of justification and also to correspond more readily with the demand for democratic legitimization, which has become ever more important in modernity, than the connection to a concept debated since the beginning of thinking about natural law in Greek philosophy.

But if the crisis of thinking about natural law has intensified as a result, then not only the concept, but even the "subject itself" of natural law has become questionable. Not only is the question posed of what could be meant by "natural law" in general, but also the question whether in general something could be designated by "natural law" meaningfully and whether "natural law" is not ultimately illusory. In doing so the following *inquiries* into thinking about natural law from the perspective of philosophy (or the philosophy of law) have been formulated:

(1) *The criticism that thinking about natural law is based on a fallacious inference from is to ought and therefore may claim no validity*. The current objection to classical thinking about natural law—most notably, that it presupposes what G.E. Moore later called a "naturalistic fallacy"—began with David Hume.[6] Hume assumes that there is no transition from is to ought (cf. *A Treatise of Human Nature*, 455-470). Therefore, assertions about what *is* the case cannot lead to assertions about what *ought* to be the

[6] Cf. on this J. Müller 2010.

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case. A similar position is found in Immanuel Kant's philosophy.[7] But that is precisely the point of importance for the traditions of natural law: that a reflection on nature—the cosmos or the world as a divine creation, generally speaking, or the human rational nature specifically—leads to normatively relevant assertions; that, therefore, "is" and "ought" cannot be divided from one another and strictly segregated into separate spheres of reality, but rather are relevant to one another to such an extent that a conclusion from is to ought is indeed possible and partly even necessary. On the basis of the modern understanding of nature, Hume's critique of the naturalistic fallacy became an essential factor for the crisis of thinking about natural law in modernity, even though there are attempts to establish natural law *using* David Hume (and Immanuel Kant)—attempts based not on a rejection of the prohibition against the "naturalistic fallacy", but rather on an appropriation of Hume's basic position.[8]

(2) *The objection that contrary to its own claim of justification, thinking about natural law has achieved anything but consensus on central questions both of justification and application of natural law; and that there is not only a plurality, but even a conflict of different theories*. Critics of thinking about natural law point out that there is a pluralism of different "natural laws": one must not only carefully distinguish between ancient, medieval, and modern natural law, but entirely different ways of understanding natural law are found even within the various periods of the history of philosophy. Thus, a Stoic conception of natural law stands alongside a (internally-conflicted) Platonic-Aristotelian one, a Thomistic conception alongside an Augustinian one, a post-critical (i.e., a post-Kantian modern conception of natural law) alongside a pre-critical one. And this is not to mention the question whether we are sometimes dealing with a form of thinking about natural law wherein one does not speak of nature or natural law explicitly (just as it seems we are no longer dealing with natural law in the traditional sense, even in cases where one speaks of natural law explicitly). This insight primarily is of an *intellectual-historical* nature. But it seems to have an impact on natural law's claim to validity. For, if there is such a pluralism of conceptions of natural law, then inevitably the question is raised whether natural law ultimately is not simply an expression of a specific historically contingent tradition or convention. With that said, the claim of natural law to embody a universal foundation of positive law and of moral philosophy independent of definite historical contexts would be put in question. Therefore, it is apparently an open question whether it is meaningful to speak any longer of natural law—or whether this concept is rather evidence of a definite, though no longer

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[7] Cf. concerning this, for example, I. Kant, Critique of Pure Reason, B575f./A547f. "No matter how many natural grounds or how many sensuous impulses may impel me to will, they can never give rise to the ought, but only to a willing which, while very far from being necessary, is always conditioned; and the ought pronounced by reason confronts such willing with a limit and an end—nay more, forbids or authorizes it."

[8] For example, one calls to mind the so-called New Natural Law Theory of G. Grisez, J. Finnis and J.M. Boyle. In Natural Law and Natural Rights Finnis explicitly grapples with David Hume's position and assumes that it is not necessary to infer an ought from an is (cf. 1980, 33f.). This certainly constitutes one of the most controversial aspects of Finnis' theory (cf. on this George 1999).

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current, phase of the history of spirit—with the result that the claim to universality for a normative "ordering" prior to all positive laws either must be abandoned or established differently.

(3) *The question whether natural law might not merely be justified circularly and therefore could not be established in philosophically satisfying ways*. A much more important objection to natural law points out the uncontroversial thesis (at least from the perspective of the history of philosophy) that one can only speak of natural law on the condition of a certain understanding of nature and law. This means that whoever speaks of natural law would already assume certain (and themselves not uncontroversial) concepts of nature and law. This is particularly true of the *concept of nature*: In general, can natural law's claim to validity be retained if it depends on a certain concept of nature and, hence, possibly on metaphysical assumptions that are not shared by all citizens in a liberal society?[9] One can formulate a similar question with respect to natural law understood as a pure law of reason. Even if one could defend theoretically a circular justification of natural law, the question arises whether this simply occurs on the basis of metaphysical assumptions, which depend on certain, albeit not universal and not universally mediating assumptions.

(4) *The criticism of concrete manifestations of natural law*. The criticism of concrete manifestations of natural law often indicates the abuse, or what one can call an "overworking", of natural law, pointing out, for instance, that the conception of natural law from a historical perspective was used to justify what was, from today's perspective, a clearly unjust situation of positive law. Moreover a dimension that is resistant to progress seems to be immanent in natural law: it appears to stipulate not only the existing political status quo, but also that of science and technology, without this always appearing consistent or reasonable in hindsight. This is in certain ways the weakest question concerning thinking about natural law. For one could point out over against this inquiry (1) the fact that there is a politically progressive (e.g., Marxist) tradition of thinking about natural law existing alongside that of the conservative or restorative one, and that revolutions often require a justification by natural law—one need only think of the example of the French Revolution and the French "Declaration of the Rights of Man and the Citizen"[10]; but also (2) the fact—much more important in this context, since one can critically confront the revolutionary and Marxist tradition of natural law—that the misunderstanding or abuse of natural law in no way precludes a correct understanding of natural law.

(5) *The inquiries from other Academic disciplines such as Christian theology, whether it is still meaningful to speak of natural law*. Even from the perspective of Academic disciplines other than philosophy (of law) thinking about natural law has been criticized. For example, in the framework of theological discussions about natural

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[9] Habermas 1992 answers this question in the negative and tries another form of justification for positive law.

[10] Revolutionary features of thinking about natural law are already manifest before the late-scholastic justification of the people's rights; cf. concerning this Hollerbach 1973, 21.

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law it will be pointed out that a problematic understanding of *nature* and *grace* (and their relation to one another) was used as a base, especially for the important Neo-Scholastic thinking about natural law in the 19th and 20th centuries. It may also be pointed out that natural law has been a certain *historically-contingent* manifestation of the "dialogue" of philosophical reason and biblical-Christian faith in place of which, now, another dialogue has stepped—hence the dialogue with the modern philosophy of the subject, the philosophy of intersubjectivity mediated through the philosophy of language, or postmodern deconstruction. Alternatively there are, in addition to these, attempts at rediscovery of natural law traditions and sources—such as the biblical theology of law or Augustine's or Thomas Aquinas's conceptions of natural law[11]; these rediscoveries can avoid the problems of the often rationalistically constricted Neo-Scholastic conceptions of natural law, and natural law itself (as well as reason) is classified in the framework of a theological understanding of reality.

3. Critical Resistance and the Renaissance of Natural Law

Whoever is concerned with the history and contemporary state of thinking about natural law will discover a persistent resistance of natural law toward attempts to criticize it alongside clear indications of criticism of natural law (with often very good reasons). Despite its repeated dismissal, natural law appears to cling to life with a certain tenacity. Thus in the 1930s, Heinrich Rommen (1936) spoke of an "eternal return of natural law". The historical context, as it has already been shown, is not unimportant: precisely at the time of a crisis or perversion of positive law (such as the period of, and after, National Socialism) the question urgently arises whether there is something like a law of nature that takes the liberty of ascertaining the injustice of a positive legal system. It is, then, no surprise that there was a renaissance of natural law in the years after National Socialism (cf. including Conig 1947; Manser 1947; Thieme 1947; Mitteis 1948; Küchenhoff 1948; Stadtmüller 1948; Kipp 1950; Messner 1950; Schrey 1951; Welzel 1951; Wolf 1955; on the "return" of natural law critically cf. Beyer 1947). Even among today's authors natural law does not appear to be "exhausted". On the contrary, there is something like an enduring "necessity of natural law" due precisely to the importance possessed by human rights and the notion that all men have their own human dignity based on their human nature (on the "inexhaustible" character of natural law cf. for instance Brieskorn 2007, 114).

Furthermore, natural law, as has already been suggested, seems to be alive even where the discussion is not expressly about "natural law". The transformation of natural law into a law of reason is not *eo ipso* equated with a dissolution of natural law, but can indeed be read as a reinterpretation of natural law in the context of other philosophical paradigms. It thus seems important from a historical view to emphasize that the history

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[11] Cf. on Augustine's understanding of natural law the still important study by Demmer 1961. On the difference between the classical/pre-Christian and the Augustinian understanding of natural law cf. also Giradet 1995. On Thomas cf. Bormann 1999.

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of thinking about natural law in modernity involves moments of continuity and development, and not only the moment of a break.[12] The intellectual-historical process of a transformation of natural law—with all its problems—can be understood as the occurrence of an appropriation and consolidation. Just as Augustine and Thomas Aquinas appropriated important elements of the pre-Christian tradition of natural law, a similar reinterpretation of natural law occurred under the terms of the modern turn to the subject in Kant's philosophy and German idealism, or under the terms of the turns to language and intersubjectivity, observable in 20th century discourse ethics, as it has unfolded for instance with Karl-Otto Apel and Jürgen Habermas. However, the fact will remain unaffected that definite processes of transformation at least *in the long run* lead, or can lead, to an erosion of natural law, since assumptions, which are made implicitly at first, can fade into obscurity at a later point in time and, as a result, can lead to an abbreviated understanding of certain theories or elements of theories.[13]

These reflections point out an important element in thinking about natural law, namely its *historicity*. Thinking about natural law, like all thinking, stands in a close connection to historicity—and not only to the historicity of thinking on the philosophy of law or juristics, but also to the historicity of the human itself. Therefore, there is a historicity peculiar to natural law (often not considered adequately or disavowed) which, among other things, is traced back to the fact that natural law cannot be observed empirically or explained scientifically, but rather is depended on a *"hermeneutic" understanding of the natural*. This hermeneutic of the natural is contingent on a certain "vagueness" with the result that thinking about natural law both in its justification and in its application always requires the ever-new historic update in the context of a definite historical situation. In thinking about natural law one thinks at the same time of the ever-concrete political, societal, religious, and ideological situation, but also of the current level of knowledge in the social and natural sciences.[14]

At this point these reflections concerning the relation of natural law and history, as well as the relation of thinking about natural law to the social and natural sciences,

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[12] Hollerbach 1973, 23 and 28, therefore points out that the law of reason found in Grotius, Pufendorf, Thomasius and Wolff has its roots in the high scholasticism of the medieval period. Many earlier works on the history of thinking on natural law since high scholasticism not only show this very clearly, but also that the later Neo-Scholastic thinking is dependent on Wolff. Schockenhoff 1996, 296, proceeds from a continuing presence of the "matter" of natural law where it does not speak expressly of natural law.

[13] This applies, among other things, to the philosophies of Kant and German idealism: both Kant's philosophy, on the one hand, and Fichte's, Schelling's, and Hegel's philosophies, on the other hand, are in their arguments often dependent on tacit assumptions with the result that their arguments can no longer be understood adequately once these assumptions stand not only in the background, but are forgotten.

[14] For example, one may not discount the contribution of modern biology—especially genetics and evolutionary biology—for the justification and the deeper understanding of the sameness of all humans. The necessity of a dialogue (decisive in its possibilities and limitations) between representatives of thinking about natural law and the social and natural sciences is increasingly evident. But, at the same time, one not only thinks of biology, but also of psychology or the political and social sciences.

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cannot be continued. With this, we touch on the most highly complex (as well as controversially discussed) issues and must confine ourselves here to indicating the complexity, only being able to do justice to its rudiments in the scope of this essay. What still can and should be achieved in what remains, from a *systematic* philosophical view, is to develop arguments for the continuing significance of thinking about natural law. The aspiration does not lie in achieving a comprehensive justification natural law that may claim validity under the conditions of the early 21st century. On the contrary, it is concerned to reveal, on the first degree of reflection, *elements of a possible foundation for thinking about natural law* on which natural law can then be built—namely in a dialogue with the tradition of natural law thinking as well as with other traditions of understanding and the justification of positive law.

4. Fundamental Reflections on the Possibility, Significance, and Justification of Thinking about Natural Law

Even though there are several attempts to build on the tradition of thinking about natural law with (and not against) David Hume and Immanuel Kant, with every attempt at a new appropriation of thinking about natural law the question initially arises whether the thesis—that one can in no way conclude ought from is and must decide radically between the *domain of nature* and the *domain of freedom*—is plausible. For important rudiments in the tradition of thinking about natural law are dependent on a conclusion of that kind. An initial response to this question can be developed on the foundation of our everyday self-understanding and the understanding of reality. For this points out that there does not seem to be—as Hume and many other critics of the "naturalistic fallacy" following him have stated—an insurmountable rift between, on the one hand, what factually is the case and, on the other hand, what should be the case. Two examples may be named which illustrate this: namely, (1) the experience of the givenness of "beings in general" and their metaphysical interpretation and (2) the experience of the negativity of pain. In conjunction with both of these examples we will discuss further arguments that are of central importance for contemplation on the conditions and possibilities of thinking about natural law, namely, on the one hand, (3) a natural-philosophical argument and, on the other hand, (4) an argument from moral philosophy and the philosophy of law.

(1) *The experience of the givenness of "beings in general" and their metaphysical interpretation*. The "fact"—considered by Leibniz, Schelling, or Heidegger as the peculiar wonder of philosophy—that in general there is something rather than nothing, is not simply the assessment of a normatively neutral "datum". One must not link this question to Leibniz's thoughts about the "best of all possible worlds" in order to judge that it is better that in general there is something rather than "nothing". We cannot react to the fact that in general there is something other than to affirm it, and that means: to call it good, unless we are ready to place our own existence radically in question. The wonder that in general there is something rather than nothing is, therefore, accompanied by the recognition that this should be the case. This is not only a purely theoretical consid-

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eration, but also is accompanied by the practical experience of an obligation toward Being: "Being, as it testifies to itself," according to Hans Jonas in his attempt to bridge the "nastily broad rift" between is and ought, between ontology and ethics "gives tidings not only of what it is, but also of what we owe to it" (Jonas 1992, 130). As humans, therefore, we do not stand in a relation of master and lord of being to nature, but rather in a relation of *obligation* and consequently, as Jonas supposes, of *responsibility*—and this concerns not only the relation that we have to one another as human, but also, as the ecological crisis shows, the increasingly endangered relation of human to non-human nature.[15]

If we should advocate a radical skepticism or a radical nihilism, then we will not be able to understand this kind of reasoning. But even these positions themselves point out that there is another possibility, which is deemed "better", namely the unthinkable possibility that there is "nothing", which then should be "the case"—and that there is something in general is then conversely something that should *not* be. Hume's thesis would be correct only under the condition that there are not even the alternatives considered as purely mental possibilities by Leibniz, Schelling, and Heidegger, i.e., it would be correct only under under the condition that "Being in general" admits no alternative, that is, under the condition of the alternative-less "facticity" of beings. This thesis, however, stands under the assumption of a definite metaphysical interpretation of "Being in general" that is anything but unbiased, namely an interpretation which precludes from the start the possibility (purely philosophically considered) of a world-transcendent creator. From this perspective the dispute over the naturalistic fallacy then is no dispute over the figures of justification in moral philosophy or the philosophy of law, but a dispute over a metaphysical or ontological basic assumption concerning the character of reality and the possibility of a concept of radical contingency, i.e., the possibility that on the contrary nothing could be.

If, however, we follow the metaphysical assumption that precludes a conclusion from is to ought, there is not only no longer the possibility of inferring an ought from what is, but it also collapses the possibility of an ought in general since this is no longer secured through a postulated theism (as happened with Kant). For in a world of mere positivity there is no ought, but only what is the case. The only ethics that could been developed on this foundation would be an ethics of *amor fati*—but even this only at the price of performative contradiction.

These considerations are only plausible on the basis of certain metaphysical assumptions. Those for whom these assumptions appear too speculative at first can find clues for them on a concrete plane in the fact that we do not proceed from an unbridgeable cleft between is and ought in our everyday self-understanding.

(2) *The experience of the negativity of pain*. Again and again we have the experience of something that is, but should not be, namely in the example of pain (cf. con-

15 That means that precisely in light of the ecological crisis thinking about natural law should experience a renewed significance.

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cerning this Spaemann 1996, 55f.). Thus the absence of pain—which can be called "health"—appears to us as something that should be. Only if abstracted from lived experience and if this experience is considered secondary, if not illusionary, is an understanding of pain or health possible which has absolutely no normative dimensions. Pain is then a phenomenon described purely neuro-physiologically, and health describes simply a scientifically determined, statistical normal condition—for instance, blood levels that range within a certain scope. But even here the question arises whether this view of things is in fact as unprejudiced as it at first appears; for it indeed stands under certain metaphysical assumptions which concern the relation of our pre-scientific self-understanding to the scientific understanding of ourselves.

(3) *A natural-philosophical argument*. Even from a natural-philosophical view inquiries arise about the critique of thinking about natural law. As meditation on what nature actually means shows, one need not share the thesis that there is no transition from is to ought. For one need not share the basic assumption of this view—namely the construction of an insurmountable dualism of *nature* and *freedom* on the basis of a non-teleological understanding of nature. One can, rather, start from the fact that a teleological understanding of nature, by which we always already understand not only nature but also ourselves, is essentially more legitimate than a non-teleological understanding that makes possible the mathematicization of nature and thereby the scientific-technical mastery over nature. The latter view pays the price of an abstract concept of nature in consequence of which it appears that we can no longer understand even ourselves. If, however, nature is understood teleologically, then the relation of nature to human freedom is understood differently than in the tradition of the modern non-teleological concept of nature. Nature is, then, not opposed dualistically as the "other" of freedom, but rather the assumption of every performance of freedom. For human freedom is never without nature, but always a way of "self-conduct" toward nature, which must be thought of as the condition of the possibility of performances of freedom. It is precisely this insight on which the thinking about natural law viewed historically has been built and, further, can be built.

(4) *An argument from moral philosophy and the philosophy of law*. But not only these metaphysical, phenomenological, or natural-philosophical considerations point to the possibility of rejecting the radical separation of is and ought, and retaining at least the important elements of the tradition of thinking about natural law. Even the discourse of moral philosophy, and the philosophy of law more specifically, points to this possibility. We must confine ourselves also here to a few brief remarks. If one assumes that there are universal ethical norms, the question is immediately raised how they can be understood and justified. One could interpret these norms as being the result of a certain tradition of law or (closely associated with it) as being the outcome of a certain discourse in moral philosophy. Justified purely theoretically, however, a universal claim to validity is not warranted in such a way: for one must have posited as absolute either a certain historically-contingent tradition or the result of a certain (but likewise historically-contingent) discourse, but this would be evident even for the one who stands outside the tradition or the respective discourse at issue. Precisely in view of this

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question of justification, thinking about natural law in modernity—as natural law, narrowly considered, or as a law of reason—has indeed been able to develop its sustained reality up to today. For, *independent of certain traditions* mediated through a reflection on nature (or the rational nature of the human), it takes the liberty of justifying a universal claim and thereby, among other things, satisfying even modern thinking on human rights. For declarations of human rights are always declarations that concern all men and not only those who live in a certain culture or historical and social situation.

The importance of thinking on natural law is clear precisely where the concrete law does not agree with what is just "by nature". We can say "That is not fair!" even in connection to concrete laws or works of law. The *idea of justice* is not simply only a result, but always an assumption and a standard of concrete positive law and concrete legislation so that it is possible in certain cases to speak meaningfully of unjust laws—namely where this ineluctable assumption of the practice of law is not born in mind. To suppose, like Jürgen Habermas, that legitimacy is generated from legality misconstrues the fact that even the "autonomous grounding of constitutional principles that claims to be rationally acceptable to all citizens" (2005, 109) does not generate justice discursively. For justice is always already implicitly assumed and explicitly discovered in the framework of procedural processes. Otherwise there would be no possibility of a comparison of diverse systems of law with one another; even the concept of legitimacy is put in question thereby and ultimately reduced to legality. For if there is no pre-positive "natural" standard of law, then a comparison of various systems of law is either impossible or only possible if the standard preserved in thinking about natural law is replaced by an equivalent one—thus by the approval of the citizens or by the accordance of a certain system of law with a certain positive divine law. However, such a standard cannot necessarily stipulate what is expressed in the idea of justice. The majority of citizens can resolve or endorse thoroughly unjust laws consensually. In a similar way the accordance of a certain system of law with the understanding of law of a certain positive religion (as in Christianity or Islam) cannot be the evaluative criterion for the justice of a concrete system of law as long as one adheres to the modern insight into the significance of an autonomous establishment of law—and not an establishment of law dependent on a certain religion.

Precisely when one adheres to the thought of the autonomy of law and maintains that the insights of the modern liberal tradition of law should not be abandoned, one will remain dependent on forms of thinking about natural law. Theological or religious motives may have played an important role for the establishment of law in certain historical connections—for instance, the reference to the fact that the equality of all men lies in the intention of the divine will of creation. John Locke (like the American "Declaration of Independence" that followed him) can still consider this as an element of the establishment of the natural law because at least he could still assume a fundamental accordance of the subjects of law on the belief in creation. In today's context of a globalized late modernity which distinguishes itself not only through the plurality of various religions, but also through the privatization of religion and a propagated atheism or agnosticism in certain parts of the world, one will have to forego as far as possi-

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ble religious-theological elements in the justification of natural law. However, this is not to say that the consideration of this element could not admit a deeper understanding of the "law of nature" or that it is necessary to translate this element into the language of a universally accepted discourse—like a philosophical theology in a rigorous sense. The latter is a task at which the history of thinking about natural law (from a historical view) has proven to be fruitful.

However, one will not be able to forego certain metaphysical assumptions about what is denoted by "nature" and "law" as well as (closely associated with these) about the nature, reason, and freedom of the human being more specifically. Human reason and freedom continue to point to nature. As humans, we cannot dispense with this "assumption" of freedom without bargaining against ourselves. And precisely because we, when it concerns ourselves, *cannot* think of *freedom without nature* and *nature without freedom* and never live in isolation, but always in community, it is understandable why there is (1) a metaphysical natural-philosophical, (2) a freedom- and reason-focused, and (3) a discursive approach to the question concerning the establishment of what was called "natural law" in the tradition of thinking about natural law. Although their complex relation cannot be discussed any further here, these various approaches to what is indicated by the concept "natural law" can be crowned with success wherever they avoid the danger of a naturalistic contraction of the concept of nature as well as a subjectivist contraction of the concepts of reason or freedom (as they conversely inevitably fail if they lose sight of the complementary relation of nature and freedom). In doing so, an appropriation of natural law probably continues to depend on the concept of nature, but not necessarily on the concept of natural law—there are, as we have already seen, various ways of reformulating natural law.[16] For the "subject" of natural law is of central importance—if nothing else, it is of importance in view of the political and social questions, which are posed at the beginning of the 21st century in many sciences in addition to philosophy, and which especially concern the universal dignity of man and universal human rights.

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[16] In this connection, one thinks of the philosophy of H. Jonas, who can be read as a reformulation of certain motives of thinking about natural law, without Jonas himself drawing on the concept of natural law. Cf. on this Nusser 2010.

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'Renewal is the Universal Call': Trials of Reason in Edmund Husserl

Nathan Phillips

> And then there is the symbol of Rembrandt, which truly does not just hang on my wall like a dead picture: Jacob's battle with God, 'til his ribs crack – and his God as the angel blesses him.
>
> *Letter of Edmund Husserl to Eugen Fink, March 6, 1933 (Briefwechsel 4, 91)*[1]

The two themes of "crisis" and "renewal" cut across the writings of Edmund Husserl (1859-1938), the founder of twentieth-century phenomenology. On the one hand, Husserl consistently highlights what he regards as a prevailing "crisis" of philosophical rationality, from the critique of psychologism in the Prolegomena to the *Logische Untersuchungen* (1900-1901)[2] to the final meditations on the life-world in *Die Krisis der europäischen Wissenschaften und die transzendentale Phänomenologie* in the late-1930s.[3] Yet the discussion of "crisis" is everywhere intertwined with a discusssion of "renewal." The four short articles commissioned by the Japanese periodical *Kaizo* in 1922-1924,[4] bring to a fullness of presentation the ethical and social issues related to the problem of "renewal" in the time of cultural "crisis." When we find Husserl again returning to the topic in the mid-1930s, this time in a lecture to the Vienna Kulturband in May of 1935, the mobilization of the events to come were already upon Husserl's mind and in the general horizon. This paper will examine themes of "crisis" and "renewal" in three central texts: Husserl's manifesto, "Philosophie als strenge Wissenschaft,"[5] published in the journal *Logos* in 1910-1911; the *Kaizo* articles on "renewal" from 1922-1924, and the 1935 Vienna lecture on "Die Krisis des euopäischen Men-

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[1] Edmund Husserl, *Briefwechsel*. Band IV. Dordrecht: Kluwer Academic Publishers, 1994, p. 91. Cited by Marcus Brainard, *Belief and its Neutralization*, New York: State University of New York Press, 2002, p. 249n70.

[2] Edmund Husserl, *Logische* Untersuchungen. *Erster Band: Prolegomena zur reinen Logik*. Husserliana XVIII. The Hague: Martinus Nijhoff Publishers, 1975. English translation: *Logical Investigations*, trans. J. N. Findlay, New York: Routledge Publishing, 2001.

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[5] Edmund Husserl, "Philosophie als strenge Wissenschaft," in *Aufsätze und Vorträge*, Husserliana XXV. Dordrecht: Martinus Nijhoff Publishers, 1987. English translation: "Philosophy as Rigorous Science," trans. Marcus Brainard, in *The New Yearbook for Phenomenology and Phenomenological Philosophy* II (2002), pp. 249-295.

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schentums und die Philosophie."[6] In so doing, this paper will provide a sketch for the phenomenology of "natural law" and "human rights."

For Edmund Husserl, "Europe" is first and foremost an idea.[7] The meaning of "Europe" is thus not limited to the geographical location of the European contintent, but extends to wherever the idea of "Europe" is found. For Husserl, the essence of "European" civilization and culture is found in a constant return to the original source of inspiration for philosophical reflection found with the ancient Greeks. It is *only* with philosophy, Husserl writes, that the critical question of *how* one comes to know something for sure, the question of *evidence*, is first addressed. And it is with Plato that the original philosophical drive is brought into the systematic form of philosophy, the demand that all true knowledge be contained within a universe of pure ideas.[8] The idea of "Europe" is thus connected for Husserl with a certain understanding of the philosophical drive as a "will to truth," according to a certain type of "rational activity." The "will to truth" is concerned not with finite goods attained in a practical way, but with truth itself, that is, absolute and unconditioned truth. To be concerned with absolute and unconditioned truth is to be open to the possibility for an infinite extension of the "will to truth." For to speak about absolute truth is to be positioned toward that which cannot be circumscribed. To open the sense of truth beyond the partial horizons of a finite humanity is the beginning of the development of the idea of "Europe," willingness for infinite tasks.

The modern world is a world which no longer believes in its capacity for absolute truth. After the Hegelian synthesis, and with the rise of the natural sciences, Husserl identifies a growing sense of skepticism, an incapacity or unwillingness to believe in a pure ideality or in the univocal direction of history toward an absolute end. Thus the prevailing sense of history is taken from Hegel but turned into a relativistic historicism. The "crisis" that results from the development of nineteenth century thought was the "making finite" of the human imagination. Husserl sees in the political fallout from the First World War a "pessimism," a "self-interestedness," and an "utterly degenerate nationalism."[9] The *Realpolitiker* no longer speak about "possibilities," but only about "realities" and "actualities." The general reason for the pessimism and self-interestedness at the personal and social levels stems from a skepticism regarding the end and

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[6] Edmund Husserl, "Die Krisis des euopäischen Menschentums und die Philosophie," in Husserliana VI, pp. 314-348. English translation: "Philosophy and the Crisis of European Humanity," in *The Crisis of European Sciences and Transcendental Phenomenology*, pp. 269-299. This text, along with "Philosophy as Rigorous Science," are found in *Phenomenology and the Crisis of Philosophy*, trans. Quentin Lauer, New York: Harper & Row, 1965.

[7] Hua. VI, p. 319f., English trans., p. 274f.

[8] Edmund Husserl, "Die Idee einer philosophischen Kultur. Ihr erstes Aufkeimen in der griechischen Philosophie," in *Japanisch-Deutsche Zeitschrift für Wissenschaft und Technik 1* (1923), pp. 45-51. See also Edmund Husserl, *Erste Philosophie* (1923/24). *Erster Teil.* Kritische *Ideengeschichte*, ed. Rudolf Boehm, Husserliana VII. The Hague: Marintus Nijhoff Publishers, 1956). English translation: "The Idea of a Philosophical Culture: Its First Germination in Greek Philosophy," trans. Marcus Brainard, in *The New Yearbook for Phenomenology and Phenomenological Philosophy III* (2003), pp. 285-293.

[9] Hua. XXVI, pp. 5-6, English trans., p. 326.

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purpose of human activity, and by extension, the meaning of the common good. The principles which direct community life remain unclarified and ambiguous.

The challenge is to locate a principle which can both resist devalution [*Entwertung*] and can stand at the center for cultural renewal.[10] This is a universal project for Husserl, and requires change at the most fundamental levels of human inquiry. Since the need itself stems from the sciences, it is to the sciences, defined as systems for the production of knowledge, that Husserl turns his attention. What is needed is "the 'positive,' hence principial, critique of foundations, methods, accomplishments [...] Our age is according to its vocation a great age – only it suffers from the neglible development and force of philosophy, which has not yet progressed enough *to overcome skeptical negativism (which calls itself positivism) by means a true positivism*."[11] The first task of science is to make valid, rational, distinctions concerning the order of knowledge. Revolutions in the history of science occur through the critique of presumed foundations and methods of previous sciences. Husserl sees the immediate task of phenomenology as a *preparatory* science, in the sense of laying the groundwork for the development of the sciences into their fullest and highest possibilities. "There cannot be any doubt about what our *duty* is. It is a matter of personally searching for the scientific ways which, unfortunately, no previous science has prepared."[12] In order to maintain an absolutely secured position against devaluation [*Entwertung*], the new science must be an eidetic science, a science of essences: "The only fruitful type of reflection is the one that is essential reflection [*Wesensbetrachtung*], for only it can open the way to rational science that not only treats human being as such, but also the renewal of human being."[13] To the extent that phenomenology as an eidetic science is intended to provoke a *renewal* in all orders of rational life, the field of research for phenomenology must be rooted in the essence of the human being. Since the human being is only possible within human communities, phenomenology aims to be a "*rational science of the human being and the human community*."[14]

Thus, the *problem* for Husserl is the "crisis" of philosophical rationality, the *method* is the research of essences, and the *field of research* is the human being and the human community. The final end of phenomenology would be "a universal philosophy that has given itself in its principial disciplines its absolute system of laws, the universal law for all possible, genuine laws."[15] The universal law of phenomenology concerns "the truly humane development of humanity" [*eine wahrhaft humane Menschheit-*

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[10] See Friedrich Nietzsche, *Der Wille zur Macht*, Kröner, 1996, p. 10: "Was bedeutet Nihilismus? – *Daß die obersten Werte sich entwerten*. Es fehlt das Ziel; es fehlt die Antwort auf das 'Warum'?" See also Martin Heidegger, "Nietzsches Wort 'Gott ist tot,'" in *Holzwege*, Klostermann, 2003, pp. 222-223. English trans., "Nietzsche's Word, 'God is Dead,'" in *Off the Beaten Path*, trans. Julian Young and Kenneth Haynes, p. 166f.

[11] Hua. XXV, pp. 297, 340, English trans., pp. 256, 293.

[12] Hua., XXVI, p. 14, English trans., p. 331.

[13] Hua., XXVI, p. 14, English trans., p. 331.

[14] Hua., XXVI, p. 6, English trans., p. 328.

[15] Hua., VII, p. 46, English trans., p. 287.

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sentwicklung].[16] Universal law in the sense of "a development toward an ideal shape of life and being as an eternal pole" [*einer Entwicklung auf eine ideale Lebens- und Seinsgestalt als einen ewigen Pol*.][17]

In developing this science of "purely rational, *a priori* truths rooted in the essence of human being," Husserl draws the comparison between the eidetic method for determining the pure idea of human beings [*Idee des Menschen*] and human community, and the method for determining the idea of nature [*Idee der Natur*] in mathematical-natural sciences.[18] The mathematical-natural sciences enable the scientist to perceive in the things of nature not merely pre-existing actualities or realites, but the order of *possibilities* or essences. The greatness of the natural sciences, for Husserl, is that they do not rest content with merely empirical observation, but strive to find within the empirical-intuitive the passage to exact explanation. The natural scientist identifies within the intuitively given appearances of nature not merely subjective-relative aspects of human perception, but the "objective" features of "nature itself." That is, according to the method of the natural sciences, the relativities of sensible experience are sublimated into an overarching structure of pure ideas. To see nature in this way is to construct a system of "true" nature determined by "natural" laws, "encompassed by homogeneous space-time, divided into particular things, all being alike as *res extensa* and determining one another causally."[19] Pre-determined nature, within the causal nexus of the homogeneous space-time, is thus divisible to infinity and extendable to infinity by way of "the idealization of magnitudes, of numbers, figures, straight-lines, poles, surfaces, etc."[20] In fact, there is no perfect "circle" in nature, but the mathematician abstracts from the relativities of experience to derive the idea of the "circle itself." This method of idealization first becomes necessary due to the exigencies of practical life: "From the art of surveying comes geometry, from the art of numbers, arithmetic, from everyday mechanics, mathematical mechanics, etc."[21] Intuitively given natural world is made into the "true" mathematical world, thus open to increasing perfection and refinement due to an infinite adequation to pure ideas.

If we perform a similar eidetic analysis on the pure idea of human beings [*Idee des Menschen*], the goal would be to develop a measure for evaluating and directing the course of the development of human beings in general [*überhaupt*], in terms of individual human beings and the universal human community. The most immediate demand concerns the standard by which an evaluation of human beings and human community might be secured. If Husserl's critical philosophical gaze renders a judgment of condemnation on the existing state of things, there must be some barometer or point of reference for the justification of such a judgment: "Implicit in our judgment is our

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16 Hua., VII, p. 46, English trans., p. 287.
17 Hua., VI, p. 320, English trans., p. 276.
18 Hua., XXVI, p. 6, English trans., p. 328.
19 Hua., VI, p. 340, English trans., p. 293.
20 Hua., VI, p. 340, English trans., p. 293.
21 Hua., VI, p. 340, English trans., p. 293.

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belief in a 'true and genuine' *humanity* as an objectively valid idea,"[22] […] "An idea against which, therefore, the social bonds of humanity and historically developed forms of social life are to be judged normatively."[23] Thus the goal of reform in human community must aim at the *fulfillment* or realization of pure ideas.

Husserl describes ideas as "meaning-structures" [*Sinngebilde*] which have "the miraculous way of containing *intentional* infinities [*intentionale Unendlichkeiten*] within themselves."[24] Ideas contain goals for the will in terms of pure possibilities over and above the real things within space-time. When an idea becomes the conscious aim of the will, then the idea is translated back into the real in terms of a newly transformed praxis. This new praxis in relation to the pure ideas implies a universal critical attitude toward the nature of the real. The critical attitude of the philosopher toward the pregiven universe both makes way for the production of new ideas and has the reflexive effect of reforming the state of the existing order. Thus, the ideas make a difference in two directions, both in terms of an infinite extension toward the idea itself, and in terms of the infinite critique of all things not yet in conformity with the idea. The production of pure ideas generates a universe of normative principles which unfold beneath the pure idea and serve to mediate the progress of humanity to the idea itself.

With the production of pure ideas, existing human beings find within the flux of temporal reality the traces of something eternal, the pure idea that compels an infinite extension of ideals aiming in a normative fashion toward the idea itself. But the goal of the pure idea must not be some merely utopian fantasy; rather the idea itself must always be derived as a possibility through imaginative variations of the existing actualities. The recognition of essential truths for Husserl does not pre-exist the givenness of the real. It is by means of the given that an intuition into the absolute is possible. If the end is the transformation of humanity into a new humanity ["*zu einem von Grund aus neuen Menschentum zu wandeln*]," then the ideas which direct humanity must be derived from a critique of the essence of humanity itself ["*Kritik der Menschheit selbst*"][25] If humanity is always "on the way" to the realization of its essence, even unto infinity, then the norms and principles related to this essence must themselves share in this essential openness. To derive pure norms from an eidetic analysis of the existing conditions of humanity is to recognize that this exercise of thinking is itself historically circumscribed and relative to the particular horizons within which the activity of thinking is located. It must be insisted that any principle for the "truly human development of humanity" [*eine wahrhaft humane Menschheitsentwicklung*][26] must find its condition of possibility within the finitude and openness of human existence. The derivation of pure possibilities from actually existing realities, across time and space, implies the transformation of the actual according to the order of the possible. Thus the possible

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[22] Hua., XXVI, p. 10, English trans., p. 330.
[23] Hua., VII, pp. 50-51, English trans., p. 292.
[24] Hua., VI, p. 320, English trans., pp. 276-277.
[25] Hua., VI, p. 329, English trans., p. 283.
[26] Hua., VII, p. 46, English trans., p. 287.

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stands higher than the actual, but it is *only* within the actual that the possible can be realized.

The individual human being is *a priori*, that is, essentially, connected to human community ["*a priori untrennbare Ideenpaar: Einzelmensch und Gemeinschaft*]. With the production of ideas, a new sort of communalization becomes possible around the common devotion to pure ideas. The production of ideas implies a different sense of time and historicity, and the repeated production of ideas does not end in lack, but in more ideas, "identical in sense and validity" ["*identisch nach Sinn und Geltung*"][27] across cultural and temporal boundaries and barriers. To live with a mind to absolute universality, *sub specie aeterni*, is to make possible new forms and standards for human sociality and community: "Because of the requirement to subject all empirical matters to ideal norms, i.e., those of *unconditioned truth*, there soon results a far-reaching transformation of the whole praxis of human existence, i.e., the whole of cultural life. Henceforth it must receive norms not from naïve experience and tradition of everyday life but from *objective truth* […] If the general idea of truth-in-itself becomes the universal norm of all the relative truths that arise in human life, the actual and supposed situational truths, then this will affect all traditional norms, those of right, of beauty, of usefulness, dominant personal values, values connected with personal characteristics."[28] It is important to highlight that for Husserl the essence of human being is *becoming* or *development*. Positive and negative values are differentiated according to a development-form on the scale of an infinite continuum.[29] Each of these levels are subordinated to the idea which radiates from above and draws them creatively above themselves. This idea is the lure that compels creative becoming internal to the process itself. The idea generates activity from within, and stands apart or transcends any pre-given state as being always more infinite.

A distinction must be made here between the mere "having" of an idea and the realization or the fulfillment of the idea. Husserl identifies the former as faith, or *doxa*, that which always stands beneath the possibility for knowledge. Knowledge, or *episteme*, is the fulfillment and overcoming of faith in realization.[30] The uniqueness of this faith is that it contains in itself its own self-overcoming. To assume this faith is to be dissociated from any pre-given reality for the sake of what is always more. Faith is always essentially related to a certain attitude [*Einstellung*] or attunement. Faith implies an attitude toward reality that itself includes the normative structures of a development-form. "All life is taking position [*Stellungnehmen*], and all taking of position is subject to a "must" – that of doing justice [*Rechtsprechung*] to validity and invalidity according to alleged norms of absolute validation."[31] The faith-position always implies a certain *style* of life, a style which frames the possibilities which are given in terms of the ulti-

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[27] Hua., VI, p. 323, English trans., p. 278.
[28] Hua., VI, p. 334, English trans., p. 287.
[29] See "Die höhere Wertform einer humanen Menschheit," in Hua., XXVI, pp. 55-59.
[30] Hua., VI, p. 332, English trans., p. 285.
[31] Hua. XXV, p. 336, English trans., p. 290.

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mate ends of a development-form: "Attitude, generally speaking, means a habitually fixed style of willing life, comprising directions of the will or interests that are prescribed by this style, comprising the ultimate ends, the cultural accomplishments, whose total style is thereby determined."[32] There is no life without some basic faith regarding what is actual and what is possible.

Husserl often attributes the "crisis" to a general "lack of faith," a "making superficial," or a "making finite" of the ultimate ends of faith. Thus the "crisis" of faith, which is simultaneously the "crisis" of style, Husserl relates to a stubbornness or dogmatism concerning the possibilities for knowledge. The "lack of faith" is attributed to a resolute inability or incapacity to separate oneself from the pre-given realities of the surrounding world [*Umwelt*]. For Husserl, the skepticism regarding faith is finally related to a dogmatism of the world, "the natural, naïve attitude which does not know what it does to the extent that it believes in the world and is ignorant of the reasons for this belief."[33]

If all life implies some faith-position, then the opening of a development-form to the infinite implies the reorientation [*Umstellung*] of certain fundamental attitudes. Thus the emergence of the philosophical attitude implies a change or modification of some more basic, primordial attitude, what Husserl identifies as the *natural attitude*.[34] This natural attitude implies a certain understanding or faith regarding the human community, the directedness of the will, and the world. If the attitude or style serves to direct and form the intentions, then the natural attitude is oriented in an external way toward the world as pre-given and present in a definite object-oriented way. The natural attitude assumes the pre-given validity of the real in terms of the dominant themes of everyday experience. The intention is straightforwardly directed to objects that it assumes to have a real existence in themselves, apart from and independent of the life within which the objects appear. The natural attitude might also be described as a certain tribalism; each natural life is born into the nuclear community, and the natural attitude does not engage in a critical reflection regarding the meaning of and the responsibility to "humanity itself." The natural attitude only cares for its most immediate needs within the closed community of the same. Finally, the meaning of the world, which Husserl will describe in terms of a most primordial faith [*Weltthesis*], is restricted to the collection of external objects within a closed horizon. No effort is made to consider the "world as such," to reflect on the horizons that circumscribe existence, to question their validity, to ask the most basic philosophical question, "Why is there something rather than nothing?" Instead one remains circumscribed within a dogmatic universe closed upon itself, operating according to a pre-given cosmology or metaphysics.

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[32] Hua., VI, p. 326, English trans., p. 280.

[33] See Maurice Merleau-Ponty, *Nature: Course Notes from the Collège de France*, Northwestern University Press, 2003, p. 71f.

[34] On the difference between the "natural" and the "transcendental" attitude, see Dermot Moran, "Husserl's Transcendental Philosophy and the Critique of Naturalism," in *Continental Philosophy Review*, 41.4., pp. 401-25.

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While the natural attitude stands as the dominant pre-given attitude, in truth the natural order is always already superseded by the personal order. We are not dealing with two orders of equal rights, the natural order and the personal order.[35] It is the personal order that takes priority and enables the scientist to perform abstractions upon the surrounding world [*Umwelt*] in order to arrive at objective facts. Thus, the human being is in the curious position of being divided between two orders, the natural order and the personal order. "The human being belongs to the sphere of objective facts, but as persons, as egos, human beings have goals, ends, norms, given by the tradition, norms of truth, eternal norms."[36] If the extension of natural science is possible only on the basis of the surrounding world, more primordial still is the human and cultural life-world [*Lebenswelt*]. "The researcher of nature does not make it clear to himself that the constant fundament of his work of thought is the life-world [*Lebensumwelt*]. The life-world is always presupposed as the ground, as the field of work upon which alone the researcher's questions, the method of thought, make sense."[37] In order for anything to be given in advance, there must be a world within which the given are situated. The natural attitude is informed and constituted relative to a pre-given historical epoch and to the normality of the personal home-world [*Heimwelt*], as opposed to the other worlds deemed foreign [*Fremdwelt*].[38] Thus, a personal or social *habitus* structures the perception of things according to a pre-given normative frame, which demarcates in advance the differences between normal and abnormal.

The "worldview" [*Weltanschauung*] for a human community is always already pre-given, handed down by tradition and custom. "Wisdom" [*Weisheit*] for worldview philosophy implies "living up to" the system of highest values: "The value of world-view philosophy (and thereby also the value of striving for such a philosophy) is primarily conditioned by the *value of wisdom* and striving for wisdom."[39] In this sense, the end or goal of worldview philosophy is a highly refined technique of living in accordance with a pre-given set of values, "by way of a constant approach, like morality."[40] Thus, the worldview of any pre-given cultural horizon provides a dominant paradigm or habit of interpretation that frames the way in which things appear as such. For instance, the meaning of nature for the ancient Greeks, complete with the pantheon of gods, is far removed from the cultural frames of the contemporary European world.[41] Husserl interprets this fact in critical terms. If the natural scientist understands what ultimately "is" in terms of "nature," and the humanist in terms of "spirit," "*both are*

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35 Hua., VI, p. 316, English trans., p. 271.

36 Hua., VI, p. 341, English trans., p. 293.

37 Hua., VI, p. 342, English trans., p. 295.

38 See Anthony Steinbock, *Home and Beyond: Generative Phenomenology after Husserl*, Northwestern University Press, 1995.

39 Hua. XXV, p. 331, English trans., p. 285.

40 Hua. XXV, p. 333, English trans., p. 287.

41 Hua., VI, p. 317, English trans., p. 272.

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inclined to falsify the sense of what cannot be seen in their way."[42] And yet the world is always already there as the necessary pre-given for any other experience, scientific or otherwise. "Is it not absurd [*widersinnig*] and circular [*ein Zirkel*] to want to explain the historical event “natural science” in a natural-scientific way, to explain it by bringing in natural science and its natural laws [*Naturgesetze*], which, as spiritual accomplishment, themselves belong to the problem?”[43] Here Husserl introduces the problem of the *vicious circle*, the problem of self-referentiality for pre-given systems of knowledge.

The historical overturning of systems of value, the fact of paradigm-shifts in the sciences, the revolutions in the fundamental principles and orientations in human cultures and civilizations, all point to a general *relativity*, and thus to a *danger* for philosophy that is concerned with radically non-relative, absolute truth, always "on the way" unto infinity. Herein lies the principal vocation of the philosopher: to maintain a universally critical attitude, to pursue the essence, to search for truth in general, to understand particular contingencies of life in light of what is essential. The universality of the philosophical attitude is tied to a radical critique of the pre-given: "If, however, in specifying the sense of our age we apply ourselves to this great goal, we must also make clear to ourselves that we can achieve it in *only* one way, which is to say, if with the *radicalism* belonging to the essence of genuine philosophical science we accept nothing given in advance, allow nothing traditional to pass as a beginning, nor ourselves to be dazzled by any names however great, but rather seek to attain the beginnings in a free dedication to problems themselves and to the demands stemming from them."[44]

The *vocation* of the philosopher is to be devoted to pure ideas, thus to the true and full sense of any given thing. No one particular perspective on the things, nor one single truth or insight about things, may be isolated in abstraction from the universal coming to fullness of the things themselves. An example may be drawn here from Husserl's analysis of adumbration [*Abschattung*] in §41 of *Ideas 1*.[45] In a perception of the thing, one is limited to a particular perspective, thus to one particular side of the thing seen. In experimental consciousness, a series of observations will result in a multifaceted system of perspectives which together will make up the fullness of intuition. Implied in any perspective is the back-side which remains concealed internal to any given particular standpoint. Thus any perspective contains within itself by an essential necessity the transcending apperception which indicates the possibility for the disclosure of further sides. Thus no single perspective can be isolated from the interrelated system of per-

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[42] Hua. XXV, p. 294, English trans., p. 253.

[43] Hua. VI, p. 318, English trans., p. 273.

[44] Hua. XXV, p. 340, English trans., p. 293.

[45] Edmund Husserl, Ideen zu einer reinen Phänomenologie und phänomenologischen Philosophie. Erstes Buch: Allgemeine Einführung in die reine Phänomenologie. Husserliana III. The Hague: Martinus Nijhoff Publishers, 1950, pp. 91-95. English translation: Ideas Pertaining to a Pure Phenomenology and to a Phenomenological Philosophy. First Book: General Introduction to a Pure Phenomenology, trans. F. Kersten, The Hague: Martinus Nijhoff Publishers, 1983, pp. 86-89.

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spectives, or from the possibility of analogical extension or transcendence. Likewise, any worldview implies a pre-given ideal of perfection or wisdom, and any realization of this ideal assumes repetitions of aspects of it, with the concomitant possibility for ever-greater realizations. The ideal of perfect ability achievable in accord with the measure proper to a respective achievement is a "relatively perfect adumbration [*Abschattung*] of the idea of humanity."[46]

Yet the philosopher is not concerned with any particular point of view [*Gesichtspunkt*] but wants to *know* what the thing is, in itself and according to its own proper integrity. The essence is absolute and allows for no partiality. "There is the constant threat of succumbing to one-sidedness and to premature satisfaction, which take their revenge [*rächen*] in subsequent contradictions."[47] Thus, the worldview philosophy can end in a resentment against the universality of truth. This resentment is not merely a matter of celebrating one point of view to the exclusion of others, or even of assuming the totality of truth when such a totality has not yet been achieved. The "revenge" emerges out of a disposition or an aspiration internal to the "will to truth" itself, a certain "crisis" of mentality that assumes to evaluate truth according to its own measure. The aspiration of philosophy, however, is reorientation of attitude [*Umstellung*] that turns away from straightforward and objective perspectives, to assume a different sort of position or faith. This "conversion" implies the constant struggle to overcome all one-sided perspective and premature satisfaction for the sake of the truth.[48]

To be sure, this self-overcoming includes the critical attitude tied to rigorous universality, the production of ideas due to an imaginative variation and eidetic insight, multiplication of viewpoints in the approach to the thing, and the strength of character implied in the pursuit of wisdom within a human community. *But the ultimate, and indeed decisive, turn, is the radical receptivity to the givenness of the thing itself.* To assumes this position, faith of the theoretical philosopher, is to suspend one's commitments to a pre-given world. It is thus not practical in any usual sense, but it remains detached in a critical attitude open to the sense of *wonder*: "Incipient theoretical curiosity as wonder [*thaumazein*] has its original place in normal life as an intrusion into the course of serious living, either as a result of originally developed life-interests or as playful looking around when one's quite immediate vital needs are satisfied or when working hours are over. Curiosity (here understood not as a habitual "vice") is also a variant, an interest, which has separated itself off from life-interests, has let them

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[46] Hua. XXV, p. 331, English trans., p. 285.

[47] Hua. VI, p. 338, English trans., p. 291.

[48] "Perhaps it will even become manifest that the total phenomenological attitude [*Einstellung*] and the *epoché* belonging to it are destined in essence to effect, at first, a complete personal transformation [*eine völlige personale Wandlung*], comparable in the beginning to a religious conversion [*religiösen Umkehrung*], which then, however, over and above this, bears within itself the significance of the greatest existential transformation [*großten existenziellen Wandlung*] which is assigned as a task to humankind as such [*die der Menschheit als Menschheit aufgegeben ist*]." Hua. VI, p. 140, English trans., p. 137.

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fall."[49] In the attitude of wonder, one becomes aware of the difference between world-representation [*Weltvorstellung*] and the actual world [*wirklicher Welt*]. Thus one is driven to search for the world itself, world apart from any pre-given realities. In this position, one is "gripped by the passion for a world-reflection [*Weltbetrachtung*] and a world-knowledge [*Welterkenntnis*]."[50] One is thus seized by the desire to know the truth of the world itself, to turn and reflect and strive for theoretical knowledge [*theoria*].

The philosopher who achieves this sense of wonder, at least once in his or her life, becomes *receptive* to motivations previously unknown. If reason assumes anything less than the infinite, it turns upon itself and consumes itself, it sinks into something reactive rather than productive and creative. With *philosophical intuition*, a limitless field of work opens on the basis of givenness. It becomes clear that any pre-given thing, precisely to the extent that it is given, is dependent upon some originary givenness: "We see that each theory can only draw its truth itself from originary givenness. Every statement which does no more than confer expression by means of significations precisely conforming to givenness is actually an *absolute beginning* called upon to serve as a foundation, a *principium* in the genuine sense of the word."[51] Here in §24 of *Ideas 1*, we encounter for the first time the "principle of principles" for phenomenology: "Enough now of absurd theories. No conceivable theory can make us err with respect to the principle of principles, that every originary intuition is a legitimating source of knowledge [*Rechtsquelle der Erkenntnis*], that everything originarily (so to speak, in its "enfleshed actuality" [*leibhaften Wirklichkeit*]) offered to us in "intuition" is to be accepted simply as what it is presented as being."[52] It now becomes clear just how radical the revolution is for which Husserl is calling. The "principle of principles" requires the reduction of all pre-givens to "originary intuition," enfleshed intuition. Thus the phenomenological turn implies the radical return to the "intuitive consciousness" of living and embodied subjectivity to whom "originary intuition" is given.

When we speak of "given" or "givenness" [*Gegebenheit*] we are not referring to the "real" thing out there in the sense of the natural attitude, but to the thing as given within the intentional life. The standard of *legitimation* for philosophical knowledge is the fullness of intuition in correspondence to givenness within the intentional life. The challenge is to let the phenomenon itself appear in its fullness of intuition. Husserl understands by "phenomenon" not the pre-given objective reality, but the *appearing* of the thing itself within the immanence of intentional life. “The word ‘phenomenon’ is ambiguous in virtue of an essential correlation between *appearance and that which appears* [*der wesentlichen Korrelation zwischen Erscheinen und Erscheinendem*]. “Phenomenon” in its proper sense means that which appears [*Erscheinende*], and yet it is by preference used for appearing itself [*Erscheinen selbst*], for the subjective phe-

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[49] Hua. VI, p. 332, English trans., p. 285.
[50] Hua. VI, p. 331, English trans., p. 285.
[51] Hua. III, p. 52, English trans., p. 44.
[52] Hua. III, p. 52, English trans., p. 44.

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nomenon (if one may use this expression which is apt to be misunderstood in the vulgar psychological sense)."[53] Immanence is thus not understood merely as a counterpart to the external world, the "in here" as opposed to "out there," but immanence of the thing itself in its own self-givenness. The "originary intuition" serves as the fundamental criteria for philosophical sources of knowledge, disclosing new regions of givenness, from the discovery of categorial intuition in the Sixth Logical Investigation to the life-world [*Lebenswelt*] in the writings from Husserl's final period.[54]

The naïveté of the natural attitude forecloses the possibility of examining the "root of all things," *rizomata panton*. The challenge is to disclose a passivity deeper than pre-given constructions and idealizations: "The unreflected in Husserl is neither maintained as such nor suppressed: it remains a weight and a springboard for consciousness. It plays the role of founding and founded; and to reflect is to reveal the unreflected."[55] The principle of rationality in the sciences is thus that no pre-given framework or paradigm may foreclose the possibility of givenness to the extent that thing is given in the fullness of intuition. The radicalism of this method is that the realm or domain of givenness opens and expands to include any possible intuition. *Thus possibilities stand higher than actualities*. Furthermore, meaning or sense is not something merely projected out there by the subject. Indeed I am called first to suspend pre-given attachments, even to myself. Essences are constituted with "originary intuition," as phenomena, or as Husserl says, "mere phenomena" [*bloßen Phänomene*].[56]

If the "will to truth" is concerned ultimately, and in a radical way, with the truth-in-itself, the ideal of completely self-sufficient truth, in and for itself, then we must ask about *how* truth gives itself, *how* truth is to appear. It is in this way that Husserl describes phenomenology as a *preparatory* science: "Above all science must not rest until it has attained its own absolutely clear beginnings."[57] Husserl insists that at present there is no realized rigorous science, that we remain within the realm of shadows, and must continually negotiate between conflicting worldviews: "Each question is controverted, every position-taking is a matter of individual conviction, the interpretation of a school, a point of view [...] I do not say that philosophy is an imperfect science. I say simply that *it is not yet a science at all, that as science it has not yet begun* [...] Here

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[53] Edmund Husserl, *Die Idee der Phänomenologie. Fünf Vorlesungen*. Husserliana II. The Hague: Martinus Nijhoff Publishers, 1950, p. 14. English translation: *The Idea of Phenomenology*, trans. William P. Alston and George Nakhnikian, Dordrecht: Kluwer Academic Publishers, 1990, p. 11.

[54] See Edmund Husserl, Logische Untersuchungen. Zweiter Band. Zweiter Teil. Untersuchungen zur Phänomenologie und Theories der Erkenntnis. Husserliana XIX/2. The Hague: Martinus Nijhoff Publishers, 1984, §§45-47. English translation: Logical Investigations. 2. trans., J. N. Findlay, New York: Routledge Publishing, 2001, pp. 280-286.

[55] Merleau-Ponty, *Nature*, p. 72.

[56] Edmund Husserl, Einleitung in die Logik und Erkenntnistheorie, Vorlesungen 1906/1907. Husserliana XXIV. Dordrecht: Kluwer Academic Publishers, 1984, p. 209. English translation: Introduction to Logic and Theory of Knowledge, Lectures 1906/07. trans. Claire Ortiz Hill, Dordrecht: Springer Publishers, 2008, p. 204.

[57] Hua. XXV, p. 294, English trans., p. 341.

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there is, by and large, no room for private 'opinions,' 'notions,' or 'points of view.' To the extent that there are indeed such in some part of a science, the science in question is not established as such but is in the process of becoming a science and is in general so judged."[58] The task of phenomenology is to unite the ideal of the eidetic sciences with the immanence of givenness in the intentional life. The critical point for Husserl is the suspension of the naive acceptance of the metaphysical hypothesis of the "thing-in-itself," in order to turn to the immanence of consciousness, in order to examine *how* the appearances are constituted.

The eidetic insight of phenomenology is to analyze the self-giving of the phenomenon in terms of the essence of the phenomenon in general. This is not the psychological analysis of a presumed interiority of the subject, but analysis of *how* the phenomenon gives itself *in a universal sense*. To analyze the phenomenon in terms of its essential constitution is to perceive in the givenness of intentional life the universe of pure ideas. The phenomenological turn critiqued the naive standpoint of the mathematical-natural sciences while maintaining the insight into the need for a universal science of ideas. "As far as intuition extends, so far extends the *possibility* of a corresponding ideation [...] To the extent that the intuition is pure intuition that involves no transient connotations, but deals with the essence of the appearance of phenomena in general, to the same extent is the intuited essence an adequately intuitive one, *an absolutely given essence*."[59] The strangeness of phenomenology is that absolute givenness does not depend upon us, and yet we are still *responsible* for it. "The faith that sustains us – in our culture it must not rest here, it can and must be reformed by human reason and human willing – this faith can 'move mountains,' not merely in fantasy, but in reality, only if it is transformed into prudent, rationally insightful *ideas*, only if in them it brings to complete determination and clarity the essence and possibility of its goal and of the method by which it is attained. In this way, our faith first creates for itself its own rationally justified foundation."[60] It is through the production of ideas by means of insight into the givenness of the things themselves that Husserl believes human culture can attain to a lasting knowledge*: "Only such knowledge can become the enduring possession of all men, so that finally, through unlimited acts of cooperation by those who are convinced of this rationality, mountains will be moved, that is, the mere feeling of renewal will turn into the actual process of renewal."*[61]

With givenness Husserl identifies the deepest and most rigorous philosophical problems, and the only possible response to nihilism. *The loss of the sense of "absolute truth" results in the abdication of the "will to truth" and thus in a loss of the sense of the common good*. For it is truth as it is desired by persons across their differences that makes good. True virtue emerges only spontaneously in the effort and struggle to surpass oneself for the sake of truth. "For all battles for an *autonomy of reason*, for the

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58 Hua. XXV, pp. 290-291, English trans., pp. 250-251.
59 Hua. XXV, p. 315, English trans., p. 272.
60 Hua. XXVI, p. 5, English trans., p. 327.
61 Hua. XXVI, p. 5, English trans., p. 327.

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liberation of man from the bonds of tradition, for "natural" religion, for "natural" law, etc., are finally – or reduce to – battles for the universal normative function of the sciences, which have to be justified again and again, and which ultimately encompass the theoretical universe."[62] In *Ideas II*, Husserl refers to nature as that which embraces all things, "consciousness and philosophy," and this nature is identified as "spiritual nature," the nature of spirit.[63] The "spirit" is understood here not in terms of some metaphysical entity, but as that which gives itself to itself within a radical immanence, we might even say, givenness itself. Thus givenness encompasses all real and ideal being. The *logos* of the natural attitude, the *logos* of the eidetic universe, the *logos* of the life-world, and the *logos* of the transcendental attitude, are all contained within the universal *logos* of "spiritual nature." If the *logos* here refers to different regions of givenness, the task is to examaine *how* each of the different regions are given within one, universal *logos* of "spiritual nature."[64] The task is to rise to the meaning or sense of givenness in general, in terms of particular instantiations and in terms of absolute givenness itself.

The "crisis" of the European sciences is that philosophy has lost its "target sense." What is needed is "the methodical return to the original source of right, and its cognition, to perfect clarity, insight, evidence."[65] If Nietzsche declares the good, the true, and the beautiful, to be "mere words,"[66] Husserl struggles to confront the merely subjective-relative with the things themselves: "In this cognitive method of clarification, what is held to be beautiful and good is normatively confronted with the beautiful and the good itself, which comes into view with complete clarity."[67] This process of discernment comes as a result of attaining to perfect evidence according to the givenness of the things themselves: "In complete clarity the essential content of things themselves achieve intuitive actualization and thus at the same time their very value or lack thereof."[68] The originary givenness of the true, the good, and the beautiful, happens as a transcendental event, in light of the immanence of the phenomenon. The eidetic analysis reflects on the nature or givenness of the event in order to derive certain essential insights on the basis of and according to the standard of originary givenness. True and genuine knowledge of the beautiful and good, originally generated with imperfect evidence and through rigorous reflection brought into ever-greater fullness of intuition,

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62 Hua. VII, p. 207, English trans., p. 292.

63 See Edmund Husserl, Ideen zu einer reinen Phänomenologie und phänomenologischen Philosophie. Zweites Buch: Phänomenologische Untersuchungen zur Konstitution. Husserliana IV. The Hague: Martinus Nijhoff Publishers, 1952. §§48-64. English translation: Ideas Pertaining to a Pure Phenomenology and to a Phenomenological Philosophy. Second Book: Studies in the Phenomenology of Constitution, Dordrecht: Kluwer Academic Publishers, 1989, pp. 181-316.

64 See Jean-Luc Marion, "Husserl et 'le concept large de logique et de *logos*," in *Figures de phénoménologie*, Vrin, 2012, pp. 11-26.

65 Hua. VII, p. 206, English trans., p. 288.

66 Nietzsche, *Der Wille zur Macht*, p. 24: "Jetzt ist alles durch und durch falsch, "Wort," durcheinander, schwach oder überspannt."

67 Hua. VII, p. 206, English trans., p. 288.

68 Hua. VII, p. 206, English trans., p. 288.

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"alone makes human beings truly virtuous."[69] Thus, the concepts of phenomenology contain within themselves their own normative standards, to the extent that the "principle of principles" holds the research accountable to the givenness of the things themselves. "The idea of truth in the sense of science is set apart from the truth of prescientific life. *It wants to be unconditioned truth*. This involves an infinity that gives to each factual confirmation and truth the character of being merely relative, being a mere approach in relation precisely to an infinite horizon in which truth-in-itself counts as an infinitely distant point."[70]

Among the most significant breakthroughs of phenomenology is the insistence that truth be given within the life of the human being.[71] Each human life is unique to the extent that each life receives itself as a gift. Thus, the human community has a *responsibility* not only for fostering these gifts, but for bringing the gift of human life into its fullest possibilities and potentials, to bring each gift into the fullness of its essence. *The call of renewal is universal to the extent that nothing remains outside or beyond the field of givenness*. Each human being, as the one able to ask about the meaning of givenness, is thus responsible for the givenness that is received, and must protect that right and capacity for the others. At the same time, if the "natural law" is to be truly universal, if we claim to speak for the protection of "human rights" and the dignity of the human being, then we must insist that the idea or the essence of the human being is this openness, this incapacity for definition in advance. If the task of phenomenology is in the service of the infinite, and if this infinite is always "on the way," then the human being is made in the image of the infinite, in a constant becoming and development.

In the conclusion to the Vienna Lectures, Husserl presents a final decision, an either-or. Either Europe will fall into a hostility against "its own rational sense of life," into "hostility toward the spirit," and into "barbarism," or Europe will be reborn and renewed "through a heroism of reason."[72] At the center of this "crisis" is a decision regarding the status of the human being, the meaning and the ends of the human community, and the rationality of the gift. The task of philosophy is a constant anticipation of the infinite, and a remembrance of what is constantly being passed over in silence. The paradigm shifts which will come as a consequence of the "will to truth," the transformations and revolutions in the orders of knowledge, are not dissimilar from that of Plato's allegory of the cave. To ascend from the shadows to the things themselves will imply the transformation of the *way* of knowing just as much as it does the meaning and intelligibility of truth. For Husserl, the emphasis is with the receptivity or openness to the truth within one's life. Thus, we must work toward a *preparatory* science: reason

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[69] Hua. VII, p. 206, English trans., p. 288.

[70] Hua. VI, p. 324, English trans., p. 278.

[71] For a recent phenomenological account of "human rights," see James Mensch, "A Theory of Human Rights," February 12, 2010, www.opendemocracy.net. For the development approach to "human rights," see Martha Nussbaum, *Creating Capacities*: *The Human Development Approach*, Harvard University Press, 2011.

[72] Hua. VI, p. 347, English trans., p. 299.

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always "on the way" toward the good, the true, and the beautiful. "Europe's greatest danger is weariness: if we struggle against the greatest of all dangers as 'good Europeans' with the sort of courage that does not fear even an infinite struggle, then out of the destructive blaze of the lack of faith, the smoldering fire of despair over the West's mission to humanity, the ashes of the great weariness, will rise up the phoenix of a new life-inwardness and spiritualization as the pledge of a great and distant future for humankind: *for the spirit alone is eternal*."[73]

[73] Hua. VI, p. 348, English trans., p. 299.

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Interpretation of the pre-ethical difference

On the problem of nature and violence in (the work of) Jacques Derrida.

Florian Bruckmann

Ethics is *the* human characteristic. In hardly any other area does it become clear what sets man apart from all other beings, animals or even plants, than in the fact that man does not only act, but even more reflects about his deeds and distinguishes good from evil. Here, thus, it remains ambivalent whether man himself – based on pure autonomy – creates laws (rules) of his actions and chooses freely or whether he is bound to certain laws, which are given and withdrawn, by someone else.

On the background of this roughly summarized debate between autonomy and heteronomy the following thoughts focus on some remarks by Jacques Derrida. He did not – maybe wrongfully[1] – go down in history as a philosopher of ethics, yet he dealt with the relation of nature and violence from the beginning of his literary work on. Derrida's position stretches between his critic of the metaphysical focus of the Occident on the idea of presence (1) and, consequently, his subtle critic of Emmanuel Levinas' position: Not only goodness and, thus, ethics have to be considered before the subject, but – together with ethics – its violation, i.e. war (2). If the pre-ethical origin of ethics is per se indifferent, then all ethics lies in the interpretation of difference that can also be found in the pre-ethical origin (3).

1. Against the ontology of substance

According to Hegel it has become philosophically en vogue to ostentatiously criticize the occidental way of thinking and to characterize one's own approach as "the big alternative". Derrida, too, shares this attitude and uses the popular topos of criticizing and rethinking everything. This topos can also be discovered in the works of such diverse thinkers as Ludwig Feuerbach, Friedrich Nietzsche, Karl Marx, Sigmund Freud, Martin Heidegger, Jean-Paul Sartre, Emmanuel Levinas and many more.

In *La voix et le phénomèn – Voice and Phenomenon*[2] (1967) Derrida for the first time presents his critic of logo- and phonocentrism, which can also be found in his

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[1] Critchley, Simon, The Ethics of Deconstruction. Derrida and Levinas, Oxford 1992; Ethics – Politics – Subjectivity, London 1999.

[2] Derrida, Jacques, La voix et le phénomène. Introduction au problème du signe dans la phénoménologie de Husserl, Paris 1967; Voice and Phenomenon: Introduction to the Problem of the Sign in Husserl's Phenomenology, trans. by Leonard Lawlor, (Northwestern University Studies in Phenomenology and Existential Philosophy), Evanston/Ill. 2011.

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collection of essays *De la grammatology – Of Grammatology*[3] (1967) creating a relation between truth and voice, a relation which realizes and acknowledges truth as present.

"All the metaphysical determinations of truth ... are more or less immediately inseparable from the instance of the logos ... Within this logos, the original and essential link to the *phonè* has never been broken."[4]

Derrida criticizes an idea of the subject, which is concentrated on consciousness and is constituted from voice: "The voice *is* consciousness."[5] Here the subject is conceived as thinking itself presently,[6] because while thinking it can hear itself speak with its own voice: "The system of 'bearing (understanding)-oneself-speak'"[7]. Derrida criticizes this kind of logo- and phonocentrism and explains that all self-presence of the subject is characterized by the possibility of non-presence, because every subject is mortal.[8] According to Derrida one only grasps the right notion of subjectivity when not reducing it to the presence of consciousness, but at the same time acknowledges the not-presence of the subjection unto time. In *Grammatology* Derrida speaks out for all that has been suppressed and marginalised and develops the science of writing against the precedence of the voice: The former stands for all that is left out during the process of thinking, which is suppressed, which is not or cannot be brought o consciousness. While doing so, Derrida hints at the fact that even voice and especially consciousness cannot exist absolutely, but are both founded on a material basis.

Together with the phonocentrism, Derrida criticizes the marginalisation of the individualizing difference. A subject which can hear itself speak while thinking constructs time-transcendent ideal notions and assorts things, that appear to itself, to those notions. This assorting is relatively vague which leads to a loss of details of the things, which have appeared to the subject. Thus, those details are not realised. Time-transcendent ideal notions allow the subject to think the same thought every time and in every place and to be able to repeat the same. "Ideality is the salvation or the mastery of presence in repetition. In its purity, this presence is the presence of nothing that exists in the world; it is in correlation with acts or repetition which are themselves ideal."[9]

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[3] Derrida, Jacques, De la grammatology, Paris 1967; Of Grammatology, trans. by Gayatri Chakravorty Spivak, Baltimore 1976.

[4] Derrida, Of Grammatology, 10f.

[5] Derrida, Voice, 68.

[6] Derrida, Voice, 37: "As for the certainty of internal existence, it has no need, Husserl thinks, of being signified. It is immediately present to itself."

[7] Derrida, Of Grammatology, 7.

[8] Derrida, Voice, 60f: "The appearing of the *I* to itself in the *I am* is therefore a relation to its own possible disappearance. *I am* means therefore originarily *I am mortal*."

[9] Derrida, Voice, 8. Cp. ibid., 65: "The ideal object is the most objective of objects; it is independent of the *hic et nunc* of events and of the acts of the empirical subjectivity who intends it. The ideal object can be repeated, to infinity, while remaining the same." Cp. Lawlor, Leonard, Derrida and Husserl: The Basic Problem of Phenomenology, (Studies in Continental Thought), Bloomington / In. 2002, 191.

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It is only a matter of being consequent if Derrida does not only reject the ideality of thoughts, but at the same time poses a "task to think about" to classical metaphysics, which cannot solve this task within its own frame of thinking.

In a very far-fetching argument with Jean-Jacques Rousseau, Derrida goes even one step further: He does not only criticize Rousseau's notion of nature because it is an ideal notion, but most of all because it is a culturally defined term. In a culturally agreed act a supplement is put in the place of the meant notion and this supplement is conceived as being the "real one" afterwards.[10] Derrida criticizes this act of suppressing, substituting, supplementing and again speaks out for all that has been degraded as secondary: Writing and voice fulfil the same function of representation without either of them being less important than the other.[11] However, Derrida prefers the "metaphor" of writing or arche-writing: Due to their non-presence in the written word and their materiality, writing or arche-writing allow for an escape from the never-ending connection of reference between (idealised) supplement to supplement. Since Derrida cannot find any outside of text in Rousseau's work,[12] he himself tries to think *différance* by means of arche-writing and trace.[13] This *différance* does neither consider the supplement as the real meaning nor does it causally conclude back to a time-transcendent ideal. From this point of view, Derrida (though he himself might well deny it) wants to acknowledge the need for transcendental philosophy, i.e. its way of reasoning and finding arguments, without being able to define transcendentals themselves on the basis of thinking – all this acknowledgement being an act of postmetaphysical metaphysics.[14]

2. Violence and metaphysics (Emmanuel Levinas)

In his outstandingly prudent essay *Violence et méthaphysique – Violence and metaphysics*[15] Derrida has early dealt with the until then published work of Emmanuel Levinas, a fact which has not missed its effect on the latter. Both thinkers were ex-

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[10] Derrida, Derrida, Of grammatology, 240: "Speech never gives the thing itself, but a simulacrum that touches us more profoundly than the truth, 'strikes' us more effectively. Another ambiguity in the appreciation of speech. It is not the presence of the object which moves us but its phonic sign".

[11] Cp. Derrida, Of Grammatology, 144f.

[12] Cp. Derrida, Of Grammatology, 158.

[13] Derrida, Of grammatology, 167: „The concept of origin or nature is nothing but the myth of addition, of supplementarity annulled by being purely additive. It is the myth of the effacement of the trace, that is to say of an originary difference that is neither absence nor presence, neither negative nor positive."

[14] Cp. Llewelyn, John, Levinas, Derrida and Others vis-à-vis, in: Bernasconi, Robert / Wood, David (Ed.), The Provocation of Levinas. Rethinking the Other, London a.a. 1988, 136–155, 146.

[15] First published: Derrida, Jacques, Violence et métaphysique. Essai sur la pensée d'Emmanuel Lévinas, in: Revue de Métaphysique et de Morale 69 [Nr. 3+4 1964] 322–354; 425–473. Revised: L'écriture et la différence, Paris 1967, 117–228; Violence and Metaphysics. An Essay on the Thought of Emmanuel Levinas, in: Writing and Difference, trans. by Alan Bass, Chicago 1978, 79–153.

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changing their ideas during their lifetime (and beyond).[16] Derrida's influence on Levinas is notable, e.g. in the different style of writing of *Totalité et Infini – Totality and Infinity* and *Autrement qu'être – Otherwise than Being*.[17] In ever new approaches in *Violence and Metaphysics* Derrida defends Georg F. W. Hegel and Edmund Husserl as representatives of Greek philosophy against the Jewish Emmanuel Levinas' and his critic on his phenomenological teachers.[18] It corresponds to the practice of deconstruction to take Levinas' writings in the reconstruction very seriously,[19] which will become explicit in the third part of this essay. The most interesting point of the here mentioned question is, whether ethics or ontology, i.e. metaphysics are to be considered as the first science and where violence has its origin.

Levinas commits the crime of "parricide"[20] and imputes thinking recognition as a possessive act to Husserl, which would make it impossible to virtually realize the otherness of the other. „The imperialism Metaphysics of theoria already bothered Levinas."[21] Levinas confronts this possessive act of recognition with the resistance of the other, who is not willing to be possessed by anyone, but rather means evpe,keina th/j ouvsi,aj – from beyond being. As Levinas speaks out against taking possession of the other and making him uniform in the act of cognition, Derrida detects "metaphysics of separation"[22] in his work,[23] from which originates radical criticism: "Incapable of re-

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16 Levinas, Emmanuel, Tout autrement (sur la philosophie de Jacques Derrida, in: Noms propres, Montpellier 1976, 81–89; Jacques Derrida: Wholly Otherwise, in: Proper names, trans. Michael B. Smith, (Meridian crossing aesthetics), Stanford / Calif. 1996, 55–62.

Derrida, Jacques, En ce moment même dans cet ouvrage me voici, in: Place, Jean-Michel (Ed.), Textes pur Emmanuel Levinas, Paris 1980, 48–53 = Psyché. Inventions de l'autre, Paris 1987, 159–202; At This Very Moment in This Work Here I Am, trans. by Ruben Berezdivin / Peggy Kamuf, in: Psyche: Inventions of the Other, Stanford / Calif. 2007, 143–190.

Derrida, Jacques, Adieu à Emmanuel Lévinas, Paris 1997; Adieu to Emmanuel Levinas, trans. by Pascale-Anne Brault / Michael Naas, (Meridian crossing aesthetics), Stanford / Calif. 1999.

17 Critchley, Ethics (1992), 12: „Indeed, if one may speak of the influence of Derrida on Levinas, then it can best be seen perhaps in the way in which, in *Otherwise than Being*, Levinas is far more conscious of the linguistic and logocentric recoils that arise when the ethical Saying is thematized within the ontological Said."

18 Derrida, Writing, 99: "Levinas is very close to Hegel, much closer than he admits, and at the very moment when he is apparently opposed to Hegel in the most radical fashion." "Levinas and Husserl are quite close here." (125)

19 Critchley, Ethics (1992), 94: „On Derrida´s reading, Levinas attempts to escape Greek logocentrism through recourse to a Hebraic origin and a messianic eschatology which are opened from within an experience of alterity which the Greek philosophical tradition can neither reduce nor comprehend." Cp. Llewelyn, John, Jewgreek or Greekjew, in: Sallis, John u.a. (Ed.), The Collegium Phaenomenologicum the First Ten Years, (Phaenomenologica 105), Dordrecht 1988, 273–287, 277.

20 Derrida, Writing, 89.

21 Derrida, Writing, 84.

22 Derrida, Writing, 87.

23 Against making the other uniform in the act of enjoyment, Levinas starts to talk about desire, which cannot be sated: "Desire, on the contrary, permits itself to be appealed to by the absolutely irreducible exteriority of the other to which it must remain infinitely inadequate. Desire is equal only to excess. No totality will ever encompass it. Thus, the metaphysics of desire is a metaphysics of infinite separation." (93)

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specting the Being and meaning of the other, phenomenology and ontology would be philosophies of violence."[24] Thus, Levinas advocates for ethics and no longer for ontology to be considered as the first science,[25] in order to fight against taking possession of the other by the (recognizing) ego. In this process, the other questions the ego, which means for Levinas that "interrogation … [is] the only incarnated nonviolence."[26]

Derrida again hints at the problem, that the recognition of the otherness of the other in Levinas' work only represents a shift of the problem. To be able think the otherness of the other, Levinas has to suppress the difference between the ego and the self. "The ego is the same. The alterity or negativity interior to the ego, the interior difference, is but an appearance: an illusion".[27] Levinas has no option left to maintain this difference in the subject; he can only think a difference between the ego and the other; the other, thus, standing into the ego, where there is the only place where the other can be conceived as a point of difference.[28] First of all, the ego itself is indifferentiated and unsplitted. Since the ego in itself shows no difference without the strange other, Levinas according to Derrida has the problem, that the ego cannot delimit itself against the other[29] and is confronted with him immediately.[30] The ego cannot defend itself against the other, so to speak, it is absolutely exposed to the other,[31] in such a way that the other is very close to the ego and yet absolutely different and separated. Through this, the other is the condition of the possibility for, both, murder and loving care: "Only a face can arrest violence, but can do so, in the first place, only because a face can provoke it."[32] Since "[t]he ethical relation is a religious relation" (96), Derrida has to re-

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[24] Derrida, Writing, 91.

[25] Derrida, Writing, 97; 137.

[26] Derrida, Writing, 96.

[27] Derrida, Writing, 93; ibid., 109: "Now, in *Totality and Infinity*, where the categories of the same and the other return in force, the *vis demonstrandi* and very energy of the break with tradition is precisely the adequation of ego to the same, and of Others to the other … We have seen this: according to Levinas there would be no interior difference, no fundamental and autochthonous alterity within the ego."

[28] Derrida, Writing, 94: "[S]o the ego cannot engender alterity within itself without encountering the Other."

[29] Cp. Levinas, Emmanuel, Otherwise than being, or, Beyond essence, trans. by Alphonso Lingis, Pennsylvania [9]2011, 85: "Signifyingness, the-one-for-the-other, exposedness of self to another, it is immediacy in caresses and in the contact of saying. It is the immediacy of a skin and a face, a skin which is always a modification of a face, a face that is weighted down with a skin."

[30] Derrida, Writing, 90: "Without intermediary and without communion, neither mediate nor immediate, such is the truth or our relation to the other, the truth to which the traditional logos is forever inhospitable."

[31] Cp. Levinas, Otherwise than Being, 15.

[32] Derrida, Writing, 147. Cp. ibid., 104; 107: "In other words, in a world where the face would be fully respected (as that which is not of this world), there no longer would be war. In a world where the face no longer would be absolutely respected, where there no longer would be a face, there would be no more cause for war. God, therefore, is implicated in war … Therefore war – *for war there is* – is the difference between the face and the finite world without a face. But is not this difference that which has always been called the world, in which the absence-presence of God *plays*?"

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proach Levinas with something unacceptable: "God, therefore, is implicated in war." (107)[33]

In the third part of his essay (106–153) Derrida, on his part, tries to get beyond Levinas together with Levinas by taking three steps: For doing so, he first deals with linguistics and, thus, with the human mind's subjection to tradition (106–118); after that, he tackles the logic of reasoning and the possibility of ethics (118–134), before thinking about new ways of a renewed ontology together with Heidegger (134–153). Which detail of these three steps is of importance for the question of the origin of violence and the possibility of ethics?

1. To begin with, Derrida makes it clear that there is no other language than the one we think and speak in. We have to utilize the given way of thinking and speaking and can only get beyond them together with themselves, but never without them.[34]

At the same time, there does not exist any other possibility than the linguistic discourse to fight for peace in a relatively non-violent way (116–118), since for Levinas face and language are of the same origin and, therefore, for Derrida the confrontation with the other is always characterized by violence.[35] Due to the fact that discourse is a spoken one, Derrida assumes (also in delineation of Levinas)[36], that there is a (transcendental) pre-knowledge about the meaning of war and peace.[37]

2. Concerning possible ethics Derrida sees the problem in Levinas' thoughts in the latter's favor for an absolute asymmetry between the ego and the other, which leads to

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[33] Cp. Krewani, Wolfgang N., Ethik, Krieg, Politik. Gestalten des anderen in der Philosophie Lévinas', in: Orth, Ernst Wolfgang / Lembeck, Karl-Heinz, Phänomenologische Forschungen, Hamburg 2001, 79–197, 96: „Krieg setzt die Transzendenz dessen voraus, gegen den er geführt wird. Der Krieg wird gegen ein transzendentes Wesen angestrengt und zielt darauf ab, diese Transzendenz zu vernichten."

[34] E.g. Derrida, Writing, 113. Critchley, Ethics (1992), 14: "In 'Violence and Metaphysics', *Of Grammatology*, and throughout his work, Derrida is trying to explicate certain necessities within discourse which all philosophers, Levinas and Derrida included, are obliged to face. The questions that Derrida addresses to Levinas, then, are questions that address the whole field of philosophical language, within whose parameters the discourse of deconstruction is also inscribed."

[35] Wyschogrod, Edith, Emmanuel Levinas. The Problem of Ethical Metaphysics, The Hague 1974, 211f: "What is critical is that there is not first the face, then language, but a simultaneous upsurge of face, language and responsibility. Language wells up with the face. Yet, in its very appearing, the face undergoes a primordial act of violence."

[36] Atterton, Peter, Levinas and the Language of Peace: A Response to Derrida, in: Philosophy Today 36 (1992) 59–70, 60: „The apparent overriding force behind his argument rests with Levinas´ claim that thought is language, that 'thought consists in speaking' (TI40/Ti10). Derrida repeatedly draws on this claim …, since the question for ethics then becomes how both to think and not think about the Other, how to have any relation with someone (peace) which isn´t mediated by reflection on her or him and *ex hypothesi* language (violence)."

[37] Derrida, Writing, 121: "Not only nominal definitions but, before them, possibilities of essence which guide all concepts, are presupposed when one speaks of ethics, of transcendence, of infinity, etc. These expressions must have a meaning for concrete consciousness in general, or no discourse and no thought would be possible … Transcendental neutralization is in principle, by its meaning, foreign to all factuality, all existence in general. In fact it is neither before nor after ethics."

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the fact, that the other must never (as in Husserl) be conceived of as alter ego.[38] Derrida, though, has to grant that it might be an act of violence to make the other an object by the intentional act of recognition. However, he asks to consider that this is unavoidable, because language is only possible if the other confronts the ego. According to Derrida one has, thus, to assume "an original, transcendental violence, previous to every ethical choice, even supposed by ethical nonviolence. Is it meaningful to speak of a pre-ethical violence? If the transcendental 'violence' to which we allude is tied to phenomenality itself, and to the possibility of language, it then would be embedded in the root of meaning and logos, before the latter had to be determined as rhetoric, psychagogy, demagogy, etc."[39] If language exists and if there is an outside, so if things and other human beings appear to man and confront him, then there necessarily is 'violence' – 'violence' is printed in inverted commas, because it need not obligatorily be the case of physical violence. However, both the recognition of another human being as other and speaking to the other are acts of violence, according to Derrida, because they pull both the ego and the other out of their solipsism and make them focus on the other. As a consequence, there is no non-violent existence: "War, therefore, is congenital to phenomenality, is the very emergence of speech and of appearing."[40]

At the same time, the other must be – against Levinas and with Husserl – a different ego, he must be alter ego. "To refuse to see in it an ego in this sense is, within the ethical order, the very gesture of all violence. If the other was not recognized as ego, its entire alterity would collapse."[41] Before any dissymmetry there has to exist a symmetry between the ego and the alter ego. Here, however, the "other as other" must not be reduced to the ego, since he, as mentioned before, is an alter ego. "The egoity of the other permits him to say 'ego' as I do; and this is why he is Other, and not a stone".[42]

Derrida summarizes the above explained ideas – the other is an other ego; if there is an ego, there must exist violence – under the term "economy"[43] and by doing so, Derrida, maybe absolutely contrary to Levinas, gets to another starting point for ethics. If violence is necessarily implicated in the factual existence of the subject, then it is only within ethics that the subject can face the other in a peaceful gesture. This facing of the other is economic, that is never transcendental or "*absolutely peaceful*"[44], because it depends on the pre-ethical violence and follows the same. Derrida wishes for a pre-pre-ethical non-violence, he realizes, however, that factual existence has an opposition between the ego and the other in store, which cannot be evaded and, therefore, has to be characterized as pre-ethical or transcendental. Besides, he – in a rather skeptical or culturally pessimistic gesture – regards the facing of the other under the linguistic

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[38] Derrida, Writing, 123.
[39] Derrida, Writing, 125.
[40] Derrida, Writing, 129.
[41] Derrida, Writing, 125.
[42] Derrida, Writing, 125.
[43] Derrida, Writing, 128f; 148: "One never escapes the economy of war."
[44] Derrida, Writing, 128; 146.

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conditions of the existent world (which have been explained in the first step) as the way of least use of violence:

"Discourse, therefore, if it is originally violent, can only *do itself violence*, can only negate itself in order to affirm itself, make war upon the war which institutes it without ever *being able* to reappropriate this negativity, to the extent that it is discourse. … This secondary war, as the avowal of violence, is the least possible violence, the only war to repress the worst violence".[45]

3. The last step is dedicated to the rehabilitation of ontology.[46] Derrida points out that there is no absolute being, which can be conceived of as independent from the existent.[47] Consequently, there can be no ethics that does not include the thinking of the being,[48] because every ethics is based upon the recognition of the other.[49] It is of great importance to Derrida, that the being is not of higher value than the existent, since it can only exist in it and through it, which leads to the linguistic character of the being and to the fact, that language and thinking are only possible within the framework of the being.[50] Since Levinas, however, postulates "the difference between Being and the existent", but "at the same time as it stifles it"[51], his thinking is based on a difference he cannot assess: "War, perhaps, is no longer even conceivable as negativity."[52]

What can we conclude from this passage through the essay *Violence and Metaphysics*?

1. Derrida opposes bad metaphysics, which identifies the infinite over-hastily with God and, thus, draws it down into the sphere of linguistics.[53] While arguing like this, Derrida reveals a certain proximity to "negative theology"[54], the latter allegedly being, however, still too close to the classical discourse and too little 'contemptuous'.

2. Ethics reacts on the facticity of human existence, which goes along with a certain egoity:

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45 Derrida, Writing, 130.

46 Derrida, Writing, 140.

47 Derrida, Writing, 136: "Being, since it *is nothing* outside the existent, a theme which Levinas had commented upon so well previously, could in no way *precede* the existent … Being is but the *Being-of* this existent, and does not exist outside it as a foreign power, or as a hostile or neutral impersonal element."

48 Derrida, Writing, 141: "Ethico-metaphysical transcendence therefore presupposes ontological transcendence."

49 Derrida, Writing, 137: "Not only is the thought of Being not ethical violence, but it seems that no ethics – in Levinas´s sense – can be opened without it. Thought – or at least the precomprehension of Being – *conditions* ... the *recognition* of the essence of the existent (for example someone, existent as other, as other self, etc.). It conditions the *respect* for the other *as what it is*: other. Without this acknowledgment, which is not a knowledge … no ethics would be possible."

50 Derrida, Writing, 143.

51 Derrida, Writing, 144.

52 Derrida, Writing, 144.

53 Derrida, Writing, 136.

54 Derrida, Writing, 116; 146.

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The ego recognizes the world and other subjects as others: "I am not the world and I am not the other, both are strange to me." At the same time, the ego is open towards the world and the other, which results in the need of facing them. This facing is always an act of violence. Existence is, thus, necessarily violent, making ethics the human (speech)reaction to the pre-ethical, transcendental violence. As a consequence, there will never be a status of absolute non-violence within the earthly economy, but only a containment of violent acts. But this does not mean, Derrida opposes peace, cannot see any sense in it or wouldn't long for it and write for it. His own attempt to make peace possible can, on the one hand, be detected in his pointing at inconsistencies in traditional metaphysical thinking patterns, which even Levinas was still attached (especially in linguistic terms before *Autrement qu'être – Otherwise than Being*) due to the gesture of disengagement. On the other hand, Derrida – by means of the metaphor of trace and above all arche-writing – tries to think a pre-original *"différance"*, that at least does not make the mistake of suppressing the not wanted and, therefore, being captivated by an irrational violence. This, however, is rather an issue of grammatology, parts of which will be in the center of attention in the following.

3. Violence of the letter (Claude Lévi-Strauss)

Of Grammatology is generally divided into two parts. In the fist part (1–93) Derrida describes his "science of writing" (4; 43), which was not possible in logocentrism, because writing was regarded as secondary compared to spoken language. The far longer second part (95–316) offers first of all an examination of Jean-Jacques Rousseau, especially of his essay *Essai sur l'origine des langues – Essay on the Origin of Language.* As transition and connecting link Derrida takes an analysis of one chapter from *Tristes tropiques* by Claude Lévi-Strauss, the (ethnographic) father of structuralism. First and foremost, this link receives its importance from the fact, that Derrida examines structuralism by Lévi-Strauss and distances himself from it,[55] and, secondly, from the systematically connecting function for both parts of Grammatology stemming from these explanations. After having introduced his programmatic critic on occidental logocentrism and having exercised the same especially in the treatment of Ferdinand de Saussure's language theory, Derrida in the second part – again with regard to language theory – turns his attention to structuralism and its reference to Rousseau.[56] With it, Derrida works through two prominent discourses of his time and, thus, makes his own position clear, which differs eminently from Saussure's, Lévi-Strauss' or Rousseau's, while still taking over ideas worth thinking about from them.

As has been explained, Derrida rejects the in his eyes idealistic assumption of the existence of time-transcending ideas, which are always and unaltered available to the

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[55] Derrida, Of Grammatology, 105: "At once conserving and annulling inherited conceptual oppositions, this thought, like Saussure´s, stand on a borderline: sometimes within an un-criticized conceptually, sometimes putting a strain on the boundaries, and working toward deconstruction."

[56] Cp. Derrida, Of Grammatology, 105.

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subject of recognition. At the same time, however, he realizes that the occidental thinking is marked by structures which are not reflected upon by the same, but which are to the core characteristic of it. One of these suppressed structures is the opposition between primary language and secondary writing. It is in analogy to this opposition that the separation of culture and nature works, in which the natural state is a cultural fiction without any real existence. Derrida carves this out in the treatment of Rousseau, after having made clear by an intense lecture of a small chapter in *Tristes tropiques* by Lévi-Strauss that Derrida confronts himself with the risks of the term of writing. Lévi-Strauss assumes that writing is the origin of violence and is essentially made for the oppression and exploitation of man. When Derrida deals with this reproach he makes clear that he – contrary to the positions criticized by himself – does not suppress or exclude what first seems to contradict his own train of thoughts. So, after having advocated for a preference of writing over voice in the first part of grammatology, Derrida begins the second part of his book by pointing out the risks of the conventionally secondary term of writing with Lévi-Strauss, which – according to Derrida – leads to the necessity of the development of a new writing-term, which does not pass on the metaphysical hierarchy of the spoken word over the merely representing writing of the same. A real science of writing has to be aware of the fact, that this science itself – by an act of newly arranged hierarchy – is not simply the solution to all problems, but that it bears risks if applied too superficially. These risks have to be discovered and made transparent to avoid their making mischief in the mode of suppressed things in the underground.

Lévi-Strauss reflects about the system of exploitation of writing, because the chief of his Nambikwara-tribe behaved in an important scene as if he was as knowledgeable in writing as the ethnographer often to be seen with his notebooks. Lévi-Strauss interprets this scene by means of Marxist theory[57] as "man´s exploitation by man"[58], while critically analyzing his own role as an ethnographer and arguing again in a naive way. The ethnographer feels guilty for having brought writing and, thus, "aggression coming *from without*"[59] and he dreams of the "purity of an innocent language"[60] of 'animally satisfied' primitive people up to his arrival.[61] In a complicated lecture of *Tristes tropiques* and its predecessors Derrida states clearly, that though the Nambikwara have not been able to write in the traditional sense of the word, they have made distinctions which have to be interpreted in a mode of writing. It was, e.g. a tradition among them

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[57] Derrida, Of Grammatology, 119: "In Tristes Tropiques, Levi-Strauss is aware of proposing a Marxist theory of writing."

[58] Derrida, Of Grammatology, 121.

[59] Derrida, Of Grammatology, 119.

[60] Derrida, Of Grammatology, 120. Ibid., 134: "Two motifs in the concluding lines: on the one hand, as with Rousseau, the theme of a necessary or rather fatal degradation, as the very form of progress; on the other hand, nostalgia for what preceded this degradation, an affective impulse towards the islets of resistance, the small communities that have provisionally protected themselves from corruption."

[61] Derrida, Of Grammatology, 117. Cp. ibid., 112: "An accident occurring, in his view, upon a terrain of innocence, in a 'state of culture' whose natural goodness had not yet been degraded."

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to not pronounce names. Since a young girl wanted to take revenge on a playmate, the ethnographer still learnt of a name for the first time and from this time on it was – according to his own account (despite of pricks of conscience)[62] – very easy to play the children off against each other and to find out about their actually secret names. Derrida interprets the possibility of giving out or keeping silent about names as an analogon of writing,[63] because writing is violent in that way that it makes it impossible to differentiate between naming and calling due to its lack of context:[64]

"This last violence is all the more complex in its structure because it refers at the same time to the two inferior levels of arche-violence and of law. In effect, it reveals the first nomination which was already an expropriation, but it denudes also that which since then functioned as the proper, the so-called proper, substitute of the deferred proper, *perceived* by the *social* and *moral consciousness* as the proper, the reassuring seal of self-identity, the secret."[65]

From these thought it becomes evident that Derrida demonstrates to Lévi-Strauss with the latter's own ethnographical material, that the Nambikwara were no non-violent primitive people which have later been culturally alienated by writing introduced by the ethnographer and have consequently become violent. Hence, Derrida explains the inconsistency of Lévi-Strauss' argumentation and rejects both, his differentiation between culture and nature and their Marxist interpretation. For himself Derrida concludes from his treatment of Lévi-Strauss, that even the pre-ethical sphere of the arche-writing is violent, since already here there shows a difference which later affects ethics itself. However, ethics can only be fully justified if one stays aware of the pre-ethical violence and does not suppress it, because otherwise every mode of justification would be based on opaque axioms.

"In other words, if writing is to be related to violence, writing appears well before writing in the narrow sense; already in the difference or the arche-writing that opens speech itself."[66]

By means of these reflections, Derrida saves his new science of writing, which opposes phono- and logocentrism from the same naivety that he reproaches Lévi-Strauss and Rousseau for with regard to their concept of nature and violence.

4. Prospect

In a very impressive way Derrida describes a pre-ethical sphere in 1967, from which ethics itself has to be designed. With it, even the pre-ethical sphere is characterized by differences which are violent and which – if suppressed – can evolve to physi-

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62 Derrida, Of Grammatology, 113: "It is the anthropologist who violates a virginal space".

63 Derrida, Of Grammatology, 108: "From the moment that the proper name is erased in a system, there is writing".

64 Derrida, Of Grammatology, 110f.

65 Derrida, Of Grammatology, 112.

66 Derrida, Of Grammatology, 128.

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cal violence. At the close of the depiction of Derrida's position, three further ideas are to show to what extent those considerations can be productive to think ahead.

1. Man cannot steal away from his responsibility: He has to take over responsibility and he cannot hold anyone else accountable for rules and laws. In that sense, one also has to relativize laws recognized in religions. Furthermore, these laws have to be examined regarding their universal validity: Do they have to or can they be valid for all man?

2. If ethics is the interpretation with sole responsibility of that which lies before man in the mode of difference and which remains hidden, then human rights are contingent in their concrete wording, but not disputable in their general justifiability. Thus, there is – according to Derrida – no time-transcendent nature of man, but every single man is so much a unique individual that he has the right to live – maybe even the duty. Ethics, therefore, is the necessary reaction of man to his precarious existence, in which he has to act and to behave towards himself. Consequently, there is a possibility to negotiate about the specific rights in discourse without the possibility of doing away with discourse itself. If, however, there is no alternative to discourse, then there exists a not inconsiderable guideline with regards to the content of human rights, since these must not stand against the enabling of discourse, but, what is more, have to enable all man to potentially participate in that discourse.

3. The differentiation between pre-ethicak violence and the absolute Other, that is the absolute Transcendent, who is addressed as God in biblical tradition, this differentiation could be helpful to purify the experience of God. In a first reflex, believers attribute to God to both hurt and heal (cp. Hos 6,1). At this point of paradox-precarious experience of God it might be necessary to differentiate between pre-ethical conditions of existence of human life and the otherworldly God. Human life is – especially with its confinement to death – characterized by an obvious ambiguity, which in Christian-biblical hope, firstly, is embraced by the benevolent goodness of the Creator (Gen 1), secondly, has a guideline for contemporary daily life in Gods commandments (Deut 4) and, thirdly, does not recognize death as the end of God's love to his creatures (1Cor 15).

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II.

Juridical Principles

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Constitution and Natural Law[1]

Christian Hillgruber

1. Introduction

For constitutional jurists of our time, natural law appears to be (no longer) a theme, that is a trend without a distinctive legal-positive current being held responsible for it. True legal positivists are seldom to be found. Rather, there is much more a wide spread pragmatism in everyday contact with the effective constitutional law, referring the question of its source, its intellectual origin and its philosophical foundation which refers to the basic disciplines and, therefore, believing not to have to further care about these aspects in its interpretation and use.

That was, with the emergence of the Constitution, completely different. After the experience of the legally nihilistic National Socialist dictatorship, which had trigged a "crisis of law"[2], many German jurists and prominent teachers of constitutional law held a "renewal of the law" and thinking about the law for unavoidable, and the search for an idea of law which could act as a vehicle for this renewal led to a "return to natural law",[3] and indeed to such an extent that a complete "Renaissance" of (the thinking on) natural law can here in fact be spoken of.[4] Therefore, it is not surprising that in the proceedings of the Parliamentary Council it came to a general, intensive debate on natural law.[5]

2. The discussion on the anchoring of the fundamental rights in natural law in the Parliamentary Council

The conducted debate in the Parliamentary Council on art. 1 GG as a whole and especially on the question of a finally acceptable judgment on the pre-state status of

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[1] This article was previously published in Internationale Katholische Zeitschrift *Communio*. Nr. 39. März April 2010, S. 167-177. Translation by Neil O'Donnell.

[2] *A. Arndt*, Die Krise des Rechts, in: Die Wandlung 3 (1948), pp. 421-440.

[3] *O. Veit*, Der geistesgeschichtliche Standort des Naturrechts, Merkur 1 (1947), pp. 390-405; reprinted in: *W. Maihofer* (ed.), Naturrecht oder Rechtspositivismus, 1966, pp. 33-51, 33.

[4] Davon legen die in *W. Maihofer* (fn. 3) abgedruckten Beiträge beredtes Zeugnis ab.

[5] The argument regarding "natural" parental rights and the question whether parents then can decide which schools their children should attend on the basis on their confessional character—an argument which would have well-nigh bid farewell to the Constitution, cannot here be entered into in great detail. Rather, cf. *F. Ossenbühl*, Das elterliche Erziehungsrecht im Sinne des Grundgesetzes, 1981, p. 23 ff. Just as little can it be discussed here whether portal to the moral law in art. 2, para. 1 GG makes recourse to natural law: see v. Mangoldt/Klein/ders., GG, Kommentar, 5. Aufl. 2005, Art. 2 Abs. 1 Rn. 36 ff., in which a memory "of the human rights tradition" is spotted and therefore sees a connection made to the declaration of art. 1, para. 2 GG. (Rn. 41).

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human rights circled around the question of a natural-legal anchoring of basic rights. The deputy Süsterhenn had demanded, for the CDU-CSU faction, "stable basic rights, anchored in natural law, and not merely in an ever-changing majority".[6] In the Committee for Basic Issues, deputies Heus and Schmid both spoke against the inclusion of any declarations or declamations with confessional character in the Constitution. "It is indeed practically necessary to write down a catalogue of those basic rights which are the binding laws for the courts and which the individual citizen can invokein order to concretely enforce his legal entitlement or, by the same token, to protect himself from the intrusion of the state into his personal sphere of freedom."[7] This necessity arose from the intention of making these basic rights directly applicable law. "General legal propositions of pre-sonstitutional nature are of no use for the legal practice. A more precise constitutional description, thus, seems to be indispensable", deputy Zinn declared soberly.[8] The chairman von Mangoldt repeated the *communis opinio* in the Committee for Basic Issues (*Der Ausschuss für Grundsatzfragen*), while he named as its (the Committee's) main taskthe somewhat intangible natural-legal propositions, and how "to concretize, to conceive more clearly, to make more precise, what we wish to protect."[9]

Deputy Dr. Bergsträsser added to the deliberation the thought whether indeed not it would be desirable "to formulate and to determine" the theoretical "that is to say, the natural-legal foundations of basic rights", which could be accomplished "within the framework of an especial preamble to these basic rights." [10]

In the fourth meeting of the Committee for Basic Issues on 23rd of September 1948, deputies Bergsträsser, Zinn and von Mangoldt recommended a proposal for four primary articles of basic rights. The first article was phrased in the following way: "The dignity of human beings is based upon eternal laws, which are by nature immanent to everyone. The German people recognize them as the foundation of all human community. Therefore these basic laws are guaranteed, binding legislation, administration and the administration of justice also in the federal states as directly applicable law."[11]

Bergsträsser outlined that the correspondants came to the conviction that "it would indeed be correct to place at the forefront of the basic rights some sentences to make clear concisely the meaning and basis of basic rights. We have attempted that with our

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[6] 2. Sitzung des Plenums vom 8.9.1948, abgedr. in: Bundestag/Bundesarchiv (Hrsg.), Der Parlamentarische Rat 9, 1996, Dok. Nr. 2, pp. 18-69, 56.

[7] Schmid, 2. Sitzung des Ausschusses für Grundsatzfragen vom 16.9.1948, in: Der Parlamentarische Rat 5/I, 1993, Dok. Nr. 2, pp. 3-14, p. 10.

[8] *Zinn*, 3. Sitzung des Ausschusses für Grundsatzfragen vom 21.9.1948, in: Der Parlamentarische Rat 5/I, 1993, Dok. Nr. 4, pp. 28-61, p. 34.

[9] 3. Sitzung des Ausschusses für Grundsatzfragen vom 21.9.1948, in: Der Parlamentarische Rat 5/I, 1993, Dok. Nr. 4, pp. 28-61, 41.

[10] Katalog der Grundrechte, Anregungen von Dr. *Bergsträsser* als Berichterstatter, 21.9.1948, in: Der Parlamentarische Rat 5/I, 1993, pp. 15-27, 15.

[11] In: Der Parlamentarische Rat 5/I (1993), p. 62 m. Fn. 3.

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formulation of art. 1., which we recommend to you."[12] Chairman von Mangoldt added that the filers of the report would have had the wish to give art. 1. a shape "with which it can be built on natural law. It is only that natural law appeared to us in its individual lines still too ill defined than it could have been left with the simple citation of natural law propositions. The propositions of natural law were hence recorded in the articles of basic rights following art. 1., to which para. 3. refers, and brought into the necessary form for the direct application of law. This relegation sets for the interpretation—and it is important to make this clear—that the following basic rights are based upon the substratum of natural law and the judicature can draw on this substratum of natural law through its interpretation". It is hardly possible to ensure all basic rights an unalterable character. Art 1. gives the legislator who alters the Constitution the possibility, on the basis of the reference to natural law, to align basic rights to the conditions and necessities of time.[13]

The manner of recourse to natural law remained contested in the Committee, even if the matter itself was not. Deputy Zinn showed that the Universal Declaration of Human Rights and the Virginia Bill of Rights spoke of man who by nature was entitled to certain rights.[14] Deputy Schmid pleaded for an historical understanding of natural law; this meant to explain that, "In this sphere of historical development, we Germans are not willing to live beneath a standard of freedom which guarantees human beings such and such freedoms which do not pertain from the state."[15] For the time being, the formulation was agreed upon, that: "The dignity of human beings is protected by the state order. It is founded in eternal laws, which the German people recognize as the basis of all human community. Therefore these basic laws are guaranteed, binding legislation, stewardship and the administration of justice also in the federal states as absolutely pertaining law."[16] The critic Richard Thomas[17] brought about a further revision of the

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[12] 4. Sitzung des Ausschusses für Grundsatzfragen vom 23.9.1948, in: Der Parlamentarische Rat 5/I, 1993, Dok. Nr. 5, pp. 62-87, 63.

[13] 4. Sitzung des Ausschusses für Grundsatzfragen vom 23.9.1948, in: Der Parlamentarische Rat 5/I, 1993, Dok. Nr. 5, pp. 62-87, 64; siehe auch *dens.*, ebd., p. 68.

[14] 4. Sitzung des Ausschusses für Grundsatzfragen vom 23.9.1948, in: Der Parlamentarische Rat 5/I, 1993, Dok. Nr. 5, p. 62-87, 69.

[15] 4. Sitzung des Ausschusses für Grundsatzfragen vom 23.9.1948, in: Der Parlamentarische Rat 5/I, 1993, Dok. Nr. 5, p. 62-87, 67.

[16] 4. Sitzung des Ausschusses für Grundsatzfragen vom 23.9.1948, in: Der Parlamentarische Rat 5/I, 1993, Dok. Nr. 5, pp. 62-87, 75. Der Antrag von CDU/CSU und DP, to add the words in line 2 "given by God" (see the Protokoll der Unionsfraktionssitzung vom 5.10.1948, printed in: Die CDU/CSU im Parlamentarischen Rat. Sitzungsprotokolle der Unionsfraktion, 1981, Dok. Nr. 10, p. 52; Abg. *Süsterhenn*, 6. Sitzung des Plenums vom 20.10.1948, in: Der Parlamentarische Rat 9, 1996, Dok. Nr. 6, p. 185, failed in the Main Committee in the second reading on 18.1.1949 (42. Sitzung, Verhandlungen des Hauptausschusses, 1948/49, S. 529-544, 531) – even with a barely thinking majority (11 to 10 votes) – the rejection

[17] Its "critical appraisal" printed in Der Parlamentarische Rat 5/I, 1993, pp. 361-369. *Thoma* recommended, the striking out of the second and third line of art. 1, because it is materially incorrect, that is, "the philosophers and the theologians must endeavor to answer the question where individual dignity is founded which we attribute to everything that has a human face. The lawgiver cannot provide this

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formulation. A formulation was suggested which followed the preamble of the draft of the General Declaration of Human Rights of the United Nations,[18] that: "Along with human dignity and as one of the foundations for its enduring respect those same and inalienable rights to freedom and human rights are guaranteed, which form the basis for freedom, justice and peace in the world. The German people recognize them as one of the foundations of the order of the constitutional state of all freedom and peace-loving peoples".[19] After further wrestling with an appropriate formulation in which there was consensus,[20] there was already concluded in the General Drafting Committee[21] and in the Fifth Committee[22] a well-nigh word-identical formulation, applicable to art. 1. (para. 2) GG (*Grundgesetz für die Bundesrepublik Deutschland*, the German Constitution), which then found the approval of the main committee[23] and the Plenum.[24] Art. 1, para 2 GG pins together the guarantee of human dignity of para. 1 with the directive of absolute validity of basic rights in para. 3. As a "bridge to basic rights"[25] art. 1, para. 2. desires to explain where "subsequent" basic rights come from and how they are associated with human dignity. As a consequence of the recognition of human dignity and the basis of basic rights, those "uninjurable and inalienable human rights" form, whose validity the German people recognize for themselves.[26] "Only he who recognizes hu-

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answer and in any case human dignity is not founded "in eternal laws", rather vice-versa: human rights are to be deduced from human dignity." (ibid., p. 362).

[18] "In the consideration that the regard of the indwelling dignity of all members of the human family, as well as same and inalienable rights, forms the basis of freedom, equality and peace in the world", printed in Der Parlamentarische Rat 5/II, 1993, S. 592. The draft is printed in: Der Parlamentarische Rat 5/I, 1993, p. 220 ff.

[19] Deputy v. Mangoldt, 22. Sitzung des Ausschusses für Grundsatzfragen vom 18.11.1948, in: Der Parlamentarische Rat 5/II (1993), S. 584, 592. The alternative to the last line: "The German people recognize it as the basis of all human society"; ibid., p. 593.

[20] See the Protokoll der 32. Sitzung des Ausschusses für Grundsatzfragen vom 11.01.1949, in: Der Parlamentarische Rat 5/II (1993), pp. 910-918; Protokoll der 42. Sitzung des Hauptausschusses vom 18.1.1949, printed. in: Parlamentarischer Rat, Verhandlungen des Hauptausschusses (1948/49), pp. 529-531.

[21] Response from 25.1.1949 and suggestion for formulation in: Der Parlamentarische Rat 7, 1995, pp. 202-204.

[22] Suggestion for the fifth committee for the third reading of the Constitution in the main committee in: Der Parlamentarische Rat 7 (1995), p. 339, 340.

[23] It was solely this in the framework of the fourth reading of the draft of the Constitution in the 57th meetting of the main committee on 5.5.1949 (in: Parlamentarischer Rat, Verhandlungen des Hauptausschusses (1948/49), p. 743) on the request of deputy Zinn in art. 1, para. 2 the word "as" was added before the word "basis".

[24] 9. Sitzung des Plenums vom 6.5.1949, in: Der Parlamentarische Rat 9, 1996, p. 429, 447.

[25] Abg. V. Mangoldt, 32. Sitzung des Ausschusses für Grundsatzfragen vom 11.01.1949, in: Der Parlamentarische Rat 5/II, 1993, p. 910, 913; ähnlich Abg. Schmid, 42. Sitzung des Hauptausschusses vom 18.1.1949, in: Parlamentarischer Rat, Verhandlungen des Hauptauschusses (1948/49), p. 529.

[26] The here discarded declaration implies "that we as Germans have subjectively decided to recognize it, that means to make it valid for the future. […] It is […] a belief for us and not the recognition of an objective fact of existence in other countries." (Deputy Bergsträsser, 22. Sitzung des Ausschusses für Grundsatzfragen vom 18.11.1948, in: Der Parlamentarische Rat 5/II, 1993, p. 592).

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man rights can respect human dignity for the long haul".[27] In order to come to an effective insurance of these rights, the "old inalienable human rights and rights to freedom"[28] must be made positive, "reformulated for our time", and be transposed into concrete guarantees of basic rights.

3. The positive-legal meaning of the recourses to pre-state human rights in art. 1, para. 2 GG

Thus there was a general consensus in the Parliamentary Council that positive-legal basic rights which are to be guaranteed are based on pre-state human rights, that is, on rights which are due to man by nature and are inalienable; rights which the state does not bestow, rather which are there in advance, and which he can only recognize,[29] but neither create nor abrogate. An explicit affirmation particular to *Christian* natural law, such as that which the CDU/CSU and DP had hoped to achieve, could not be brought through. [30] Nevertheless, the idea of pre-state rights, inherent to human beings, provides that they can be represented in an Enlightenment-secular form; in a viable, common basis.[31] The German people as the givers of the Constitution in art. 1 para. 2 GG after the unjust rule of the National Socialists explains the connection to the idea of pre-state and universal human rights and therefore links it in substance to the natural-legal, European-Atlantic tradition of human rights. [32] The natural rights, ascribed to human beings, were not seen as simply immutable, rather they are also to have a inviolable core.

In any event, natural law did not lend itself to the prevailing assessment, as a "catalogue of legal obligations".[33] It must, in order that it—and this was the stated aim after

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[27] See Deputy v. Mangoldt, 22. Sitzung des Ausschusses für Grundsatzfragen vom 18.11.1948, in: Der Parlamentarische Rat 5/II; 1993, p. 584, 593 f. Siehe auch den Abg. *Eberhard*, ebd., p. 600: "There are these eternal, inalienable rights to freedom and human of para. 2 and we transpose them in our own time".

[28] Deputy v. Mangoldt, 22. Sitzung des Ausschusses für Grundsatzfragen vom 18.11.1948, in: Der Parlamentarische Rat 5/II (1993), p. 584, 594.

[29] Schmid had already indicated it as a question in the 2nd meeting of the Plenum of the Parliamentary Council on 8. 9. 1948 in his report on the task given by the Parliamentary Council in respect of the exploratory work and drafts (in: Der Parlamentarische Rat 9, 1996, Dok. Nr. 2, pp. 18-69, 38) "not only of theoretical, but of eminent practical meaning […] whether these basic rights should be considered rights which a the state has bestowed or as pre-state rights, as rights, which the state already encounters when it emerges, and which it merely guarantees and must regard".

[30] See the citation in fn. 16.

[31] See Bergsträsser, 3. Sitzung des Ausschusses für Grundsatzfragen vom 21.9.1948, in: Der Parlamentarische Rat 5/I, 1993, Dok. Nr. 4, pp. 28-61, 29: "These pre-state rights can be traced to two different sources. One is the natural right of the Middle Ages, which goes back to Aristotle; the other is the modern natural law of the Enlightenment. Both sources interview and correspond to themselves in many respects".

[32] See. *C. Starck*, in: v. Mangoldt/Klein/ders., GG, Kommentar, 5. Aufl. 2005, Art. 1 Abs. 2 Rn. 126 f., 131 f. m.w.N.

[33] According to *Heuss*, 4. Sitzung des Ausschusses für Grundsatzfragen vom 23.9.1948, in: Der Parlamentarische Rat 5/I, 1993, Dok. Nr. 5, pp. 62-87, 72.

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the experience of its most flagrant disregard under the National Socialist regime—here and now again be allowed to come into effect, and first be "translated" into a positive law. Basic rights pertain as positive law "independent from particular religious or philosophical beliefs";[34] they cannot in consideration of this hence—in difference to misunderstood natural law—in their application and—in times of necessity, enforced—efficacy be put into question.

With human rights as their ideal pre-state origins, basic rights are to materially remain permanently and inseparably united. Therefore this unity should be maintained, through the fact that pre-state human rights, underlying basic rights, attract attention in their interpretation with the idea of law immanent to them, without human rights themselves assuming the character of positively valid constitutional law.[35]

Such a pre-positive foundation stone of basic rights is laid, upon which they are based and with which they are permanently united. This has far-reaching consequences.

Indeed natural law is "not, on its own terms, a part of positive law, rather it belongs in the regions of legal ethics, to the criticism and perhaps delegitimation of positive law and the impetus to change and improve this law".[36] But the constitution, with the affirmation of art. 1, para. 2, demolished the bridge between (natural-legal) human rights and (positively valid) basic rights, and therefore has "taken in something pre-positively existing into positive law".[37] The universal validity of "uninjurable and unchangeable human rights" is pre-determined. "Subsequent" fundamental rights may not hence, despite their positive-legal autonomy, be separated from their natural-legal foundation of human rights, nor in their interpretative further development may they break loose from the context of justification in which they stand. It is exactly such a "decupling" which could lead to a misinterpretation of the Constitution, which the fathers and mothers of the Constitution from the beginning wanted to oppose. The idea of human rights, the basic understanding of man as someone who is befitting of rights should hence—positive and legally binding!—remain the permanently valid central idea, which is to be respected in the interpretation of the Constitution. An interpretation of basic rights which might contravene this idea of human rights can therefore also be falsified with regard to constitutional law.

This does not therefore exclude an interpretative adaption and a change of meaning of basic rights against the background of new challenges and dangers to freedom, because, according to the prevailing wisdom in the Parliamentary Council, natural law

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[34] According BVerfGE 88, 203, 252 on the right to life as "the most elementary and inalienable right that emanates from the dignity of man".

[35] See deputy v. Mangoldt, 4. Sitzung des Ausschusses für Grundsatzfragen vom 23.09.1948, in: Der Parlamentarische Rat 5/I (1993), p. 62, 68. In as much as it is applicable, see *K.-P. Sommermann*, Völkerrechtlich garantierte Menschenrechte als Maßstab der Verfassungskonkretisierung – Die Menschenrechtsfreundlichkeit des Grundgesetzes –, AöR 114 (1989), pp. 391-422, 407: "The character of the legal propisition of art. 1 para. 2 GG does not lie in the constitutionalization of additional rights".

[36] *E.-W. Böckenförde*, Bleibt die Menschenwürde unantastbar, in: Blätter für deutsche und internationale Politik, 2004, S. 1216, 1223.

[37] Ebd.

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itself is not mutable, but it is capable of development and, therefore, to a certain extent, historically contingent. Therefore a certain scope of variation for possible interpretations always remains at any time, but the persisting core of which, the normative basis, remains undisturbed. Immutable is the idea of universal rights, befitting human beings by nature, while individual human rights and their contents can alter, up to and in respect of human dignity as their Heideggerian "for-the-sake-of" indispensible core. The natural-legal basic substance, immanent in human rights, must also retain the basic rights corresponding to them permanently as a positive-legal meaning. This follows from art. 1, para 2.

4. Removing the guarantee of human dignity from its pre-positive foundation?

The eminent meaning of the fact that positive constitutional law has, with the provision of art. 1, para. 2, *in itself* consciously and willing taken on a foundation of a pre-positive kind can be clarified in the argument about the new interpretation of art. 1, para. 2 submitted by Matthais Herdegen, that is, the guarantee of human dignity. Herdegen understands the guarantee of human dignity as "a purely constitutional concept", which he visibly wishes to liberate from the chains of any link to natural law: "The prevailing idea in the Parliamentary Council, that the Constitution, with the guarantee of human dignity, would transfer in a "declaratory" way into positive law a right which is superordinated over the State and Constitution, still has considerable suggestive power. […] For the constitutional consideration are nevertheless the (inviolable) anchoring in the text of the Constitution and the exegesis of human dignity as a concept of positive law alone decisive".[38] Ernst-Wolfgang Böckenförde has sharply criticized this attempt: "The guarantee of human dignity as a legal concept is so left alone, detached from and cut-out of the link with the intellectual content in front of it which the Parliamentary Council had in mind […] What is to be said here strays into the 'background of the history of ideas' which is reported knowledgeably, but without normative relevance. The fundamental norm of the Constitutional forfeits the supporting pivot".[39]

In fact, there is a threat in removing the guarantee of human dignity from its pre-positive foundation, that is, losing its meaning.[40] Because exactly for the sake of the regard and protection of inviolable human dignity (art. 1, para. 1), out of the given affirmation of the idea of human rights ("therefore") in art. 1, para. 2 results, what human dignity in any case in its inviolable core must normatively mean is the legal subjectivity of every human being and his being provisioned with a minimum stock of

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[38] in: Maunz/Dürig, Grundgesetz, Kommentar (Stand: Oktober 2009), Art. 1 Abs. 1 (Stand: Februar 2005) Rn. 17.

[39] Bleibt die Menschenwürde unantastbar?,in: Blätter für deutsche und internationale Politik, 2004, S. 1216, 1218.

[40] Richtig *E.-W. Böckenförde*, Bleibt die Menschenwürde unantastbar, in: Blätter für deutsche und internationale Politik, 2004, p. 1216, 1223: "The reference to the pre-legal basis of the guarantee of human dignity is nothing other than a necessary part of the material establishing of art. 1, para. 1 GG as positive right".

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fundamental rights (the right to life, right to basic freedom and equality, art 2, 3).[41] Out of the pre-state dignity befitting man—not only mankind, but also every (single) human being—corresponding legal rights for him are deduced, which in the form of subjective state-court basic rights find their legal-positive recognition.[42]

Whoever loses sight of this context may be somewhat inclined, taking into account the supposed requirements of the temporal circumstances, to advocate for a "graduated protection of human dignity in the continuity of the development", for a variable quality of the demand of dignity and protection of early forms of human life on the one hand, and born human beings on the other.[43] It is exactly with such an unequal distribution of elementary legal positions, however, that the idea of human rights, which the German people affirm in art. 1, para. 2, would become misunderstood and mistaken, and hence the absolute guarantee of the positive-legal guarantee of human dignity of the Constitution, the idea, that without exception *all* human beings "by nature" have the same moral status and, hence, also the same human rights.

5. Forecast

With the stabilization of the constitutional order its pre-positive foundation has, since the 60s, stepped into the background.[44] Natural law has disappeared behind the curtain of positive law.[45] At the beginning of the 21st century it might become necessary to defend capricious misinterpretations of basic rights, to bring out the Constitution yet again and install it as a central idea which enables a certain orientation and direction.

For the sake of the safeguarding of the integrity of the Constitution, its pre-positive foundation must be adhered to and, out of this, the interpretive unfolding of its meaning ensue.[46] The acknowledgment of art. 1, para. 2 is itself one of the inalterable "policies of art. 1" in the sense of the kind present in art. 79, para. 3[47] and therefore of enduring,

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[41] See further, *C. Hillgruber*, Das Menschenbild des Grundgesetzes und seine Anfechtungen im aktuellen Bioethik-Diskurs, in: *G. Seubold* (Hrsg.), Humantechnologie und Menschenbild, 2006, p. 87, 92-95.

[42] *C. Enders*, Die Menschenwürde in der Verfassungsordnung, 1997, p. 415.

[43] According to *M. Herdegen*, in: Maunz/Dürig, Grundgesetz, Kommentar, Art. 1 Abs. 1 Rn. 65 ff.

[44] *W. Geiger*, Die Abkehr vom Rechtspositivismus in der Rechtsprechung der Nachkriegszeit 1945-1963, in: *A. Rauscher* (Hrsg.), Katholizismus, Rechtsethik und Demokratiediskussion 1945-1963, 1981, p. 59 ff.

[45] The image of the retreat of natural law behind "the curtain of positive law" was created by H. Rommen, Die ewige Wiederkehr des Naturrechts, ²1947, p. 259.

[46] Also according to *J. Zajadło*, Überwindung des Rechtspositivismus als Grundwert des Grundgesetzes. Die verfassungsrechtliche Aktualität des Naturrechtsproblems, in: Der Staat 26 (1987), pp. 207-230.

[47] On the substance of the guarantee—with some differences in emphasis—compare further with BVerfGE 84, 90, 120 f.; 94, 49, 102 f.; *C. Starck*, in: v. Mangoldt/Klein/Starck, Bd. 1, 5. Aufl., 2006, Art. 1 Abs. 2, Rn. 132; *W. Höfling*, in: Sachs (Hrsg.), Grundgesetz, Kommentar, 5. Aufl. 2009, Art. 1 Rn. 68-71; *H. Dreier*, in: ders. (Hrsg.), Grundgesetz, Kommentar, Bd. II, ²2006, Art. 79 III Rn. 31. Eingehend *S.E. Schulz*, Änderungsfeste Grundrechte, 2007, pp, 127-148.

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indissoluble legal-positive (!) validity. [48] To guarantee it is the task of the Federal Constitutional Court as the "Shepherds of the Constitution". There must therefore, as deputy Süsterhenn had already demanded in the proceedings of the Parliamentary Council and utilized the Federal Constitutional Court for himself as an authority, "be the right to check whether the content of a law corresponds to the spirit and the natural-legal basis of the Constitution, founded on human rights, failing that, in the light of art. 1. para 2, contravening the interpretive, pertinent basic right.

Without a doubt the task of the understanding of extrapositive *Sollenssätze* is demanding, and linked to the danger of slipping into merely subjective certainties. But on the one hand natural law (Christian and secular) is in and for itself no hotchpotch of merely subjective values, rather a rich treasury of rationality (rational law!), and, on the other hand, the dependability of the interpretation of positive law is no less parlous. The supposed legal discipline of method proves itself to be chimerical. Objective constitutional law sees itself consigned to the open society of subjective and also professional interpreters of the Constitution, which recognizes no binding canon of ways of interpretation. In the same way and to the same extent here exists the only all too frequently realized danger, that that which should hold objectively becomes deformed into the subjective through arbitrary the interpretative access of anyone at all. The dizzying multiplicity of the methodic access and, so too, the acquired findings of interpretation, become tolerable only through this, that *one* interpretation, namely the one of the Federal Constitutional Court, is declared to be ultimately binding and authoritative. These procedural rules alone care for a certain measure of consistency in the practical handling of positive constitutional law. Therein, however, the reference to human rights founded on natural-law in art 1, para 2 also has a share.

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[48] With the so guaranteed "eternity" of the self-commitment to inalienable and inviolable human rights the Constitutional stands in the natural-legal European-Atlantic tradition of constitutionalism. Besides that, the Fathers of the American as well as the French constitution saw the unlimited power, capable of altering the constitution as understandable as the eternal connection to natural law, in particular the inalienable rights of human, as limited. See *Jefferson* und *Sieyes* bei *H. Dreier*, Gilt das Grundgesetz ewig, 2009, p. 62 m Fn. 145 f.

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Europe and Rights: Taking Dialogue Seriously[1]

Marta Cartabia

Introduction – the new millennium: a constitutional era for the European Union?

Despite the failure of the ambitious project of the European Constitutional Treaty and the difficult path towards the ratification of the Treaty of Lisbon, the new millennium has indeed heralded a new constitutional era for the European Union. Some relevant constitutional changes are taking place in the first decade of the 21st century, and most of them concern fundamental rights. Since the approval of the Charter, fundamental rights have taken a place of honour in the European agenda – as the setting up[2] of the European Union Agency for Fundamental Rights in Vienna proves. Moreover, the Charter has brought fresh constitutional fuel to the European Court of Justice's engine. It seems that the availability of a written catalogue of fundamental rights encourages the Court of Justice to act as a federal constitutional court.[3] In fact, a new phase of judicial activism has begun in the European Court of Justice, a phase focussed on the protection of fundamental rights. Whereas the European Union is not having its most auspicious moment as regards its political cohesion, the Europe of judges and rights is flourishing. As had been predicted,[4] a *Grundrechtsgemeinschaft* is quickly developing.

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[1] This article was previously published in European Constitutional Law Review, 5: 5–31, 2009.

[2] The European Union Agency for Fundamental Rights was established by Council Regulation (EC) No. 186/2007 of 15 Feb. 2007. On this point see A. von Bogdandy, 'The European Union as Situation, Executive, and Promoter of the International Law of Cultural Diversity – Elements of a Beautiful Friendship', Jean Monnet Working Paper 13/07, in http://www.jeanmonnetprogram.org/papers/07/071301.pdf visited 23 Jan. 2009.

[3] Most scholars think that the ECJ acts as a constitutional courts at least in some cases, although they not always support the proposal of transforming the ECJ into a special judge deciding only constitutional issues: O. Due, 'A Constitutional court for the European Communities', and F.G. Jacobs, 'Is the Court of Justice of the European Communities a Constitutional court?', in D. Curtin, D. O'Keeffe (eds.), *Constitutional Adjudication in European Community and National Law* (Butterworth, Ireland 1992), p. 2 and p. 25; B. Vesterdorf, 'A Constitutional Court for the EU', 4 *International Journal of Constitutional Law* (2006), p. 607. *See* however L. Favoreu, 'Les Constitutions nationales face au droit européen', 28 *Revue française de droit constitutionnel* (1996), p. 699 who affirms that at present the ECJ cannot be considered a constitutional court, because it still lacks of too many important elements, such as a veritable Constitution of the EU, an impartial appointment of judges and many others.

[4] A. von Bogdandy, 'The European Union as a Human Right Organization?', 37 *Common Market Law Review* (2000), p. 1308. Soon after the solemn proclamation of the Charter of Rights by the European Union in Nice on 7th Dec. 2000, Armin von Bogdandy sensed the first symptoms of an evolution destined to change the features of the European integration, from an *economic* community towards a *Grundrechtsgemeinschaft,* a community of fundamental rights. As the author had predicted, the Charter of Fundamental Rights actually marked a new era in the European integration, displaying all its seductive power. Later the author changed his thesis, as can be read in the paper above mentioned in n. 1.

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In a certain sense this evolution is *déjà-vu*: many other stages in the history of the European integration have been marked by the weakness of the political process and by the activism of the judicial branch. After all, it is quite common that political failures leave room for judicial activism. So, it is no wonder that since the political path to a fully-fledged European Constitution was closed, the European Court of Justice is again in the centre of the constitutional arena.

What is more distinctive of the new wave of judicial constitutional activism is an intense activity in fields related to fundamental rights. In this domain the member states display both a common background and different traditions at the same time: social rights, family law, state and religion – just to mention some examples – are fields where the 27 member states have different legal regulations. All this considered, the European Charter of Fundamental Rights put in the hands of the Court brings about many benefits but also some risks, the most obvious one being that of centralisation and homogenisation.

In danger is the pluralistic[5] nature of the European Constitution, the 'contrapunctual'[6] elements of the constitutional equilibrium, the principle of constitutional tolerance[7] and the mutual nourishment between the national and the European constitutions.[8]

A fundamental antidote to the risk of judicial standardisation in the field of fundamental rights is a lively judicial dialogue among the constitutional courts in Europe by means of the preliminary ruling. This is at present the most effective tool available in the European Union to allow the national constitutional traditions to be conveyed before the European Court of Justice, especially in cases involving human rights.

That is the reason why this paper intends to insist once again on the wellknown issue of the judicial dialogue[9] in the European Union. The paper recalls and briefly analyses some leading decisions of recent case-law of the European Court of Justice on human rights in order to appreciate the dramatic evolution of the European constitu-

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5 On pluralism as the contemporary model of relationship in the EU *see* N. MacCormick, *Questioning Sovreignty: Law, State and Nation in the European Commonwealth* (Oxford, Oxford University Press 1999), p. 120 and the rich debate triggered by this essay.

6 Recalling a famous definition by M. Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N. Walker (ed.), *Sovereignty in Transition* (Oxford, Hart Publishing 2003), p. 501.

7 The reference is to those authors who emphasise the pluralistic nature of the European Constitution, such as J.H.H. Weiler, who is the father of the idea of *constitutional tolerance. See: The Constitution of Europe* (Cambridge, Cambridge University Press 1999), at p. 238 et seq.

8 I. Pernice, 'Multilevel Constitutionalism in the European Union', 27 European Law Review (2002), p. 511 et seq.

9 Whereas the legal literature on the judicial dialogue is almost boundless, it is worth noting that some scholars criticize the idea of a judicial dialogue in itself, contending that dialogue is a common practice within the political institutions, but is almost impossible among courts and judges. See B. De Witte, 'The Closest Thing to a Constitutional Conversation in Europe: The Semi-permanent Treaty Revision Process', in P. Beaumont, C. Lyons, N. Walker (eds.), Convergence and Divergence in European Public Law (Oxford, Hart Publishing 2002).

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tional balance in the field of fundamental rights since the approval of the Charter. It is not so relevant to record how many times the Charter of Rights has been explicitly quoted in the European Court's decisions: although for some years the Court was reluctant to quote the Charter,[10] its influence on the case-law of the Court of Justice greatly exceeds the formal references and it can be appreciated by observing the fundamental *rights in action*, i.e., in the practical application of judicial cases. Keeping in mind the dramatic changes that are occurring in the protection of fundamental rights in the European Union, the persistent refusal of many constitutional courts to enter into direct judicial dialogue with the European Court of Justice lacks justification. The European constitutional balance urges a plural constitutional dialogue: a strong and daring European Court of fundamental rights needs to be surrounded by similar strong and daring interlocutors at national level. A step needs to be taken from both sides to favour an encounter among the actors of the European constitutional drama: the national Constitutional Courts should abandon their reticence to address directly the European Court; the latter, for its part, should do its best to encourage the judicial dialogue, which would in the first place be in its own interest.

Signs of constitutional activism in the case-law of the European Court of Justice on fundamental rights

Although the Charter approved in 2000 does not represent the first form of protection of fundamental rights in the European Union, but on the contrary is integrated in a process established back in the 1960s and consolidated over time, it is undoubtedly a turning point, considering the quality and quantity of the Court of Justice's interventions on fundamental rights. Some feared that the Charter would chill the creativity of the European Court of Justice, but the result seems to be exactly the opposite. Facts show that the Charter is strengthening rather than di-minishing the interpretative and creative ability of the European Court.

A rich list of decisions regarding human rights corroborates this hypothesis. Below are some of the most distinguished examples.

The Tanja Kreil *case*

The starting point of the new dynasty of constitutional cases can be considered the *Tanja Kreil* decision in 2000,[11] a sentence pronounced before the approval of the Charter, but in the midst of the mood of constitutional euphoria that pervaded the European Union in those years. It is not necessary to recapitulate in detail such a famous case, which has been discussed by many, but suffice to remember that all in all it presented

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[10] The first decision where the European Court of Justice quotes the Charter is decision 27 June 2006, Case C-540/03, *Parliament* v. *Council* where the Court refers to the directives regarding the reunion of family, which in turn mentions as a premise the Charter of Rights. After that case the ECJ arguments refer to the Charter without hesitation.

[11] ECJ 11 Jan. 2000, Case C-285/98, *Tanja Kreil.*

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the Court of Justice with a constitutional conflict between a provision of the German Constitution, Article 12 of the *Grundgesetz*, which forbade women to carry out roles in the army that implied the use of arms, and a basic principle of Community law, notably the principle of non-discrimination on the basis of sex. Without beating about the bush, the Court of Justice states that the Community principle of non-discrimination 'precludes the application of national provisions, such as those of German law, which impose a general exclusion of women from military posts involving the use of arms and which allow them access only to medical and military music services.' Without insisting explicitly on the constitutional rank of the relevant German norms, the Court of Justice concludes by demanding a constitutional revision on the part of Germany, pointing out an irredeemable conflict between the Community law and the national Constitution. So, while the Court of Justice up until then had prevented the flaring-up of conflict between national Constitutions and Community principles,[12] in the *Kreil* case there was no hesitation in obliging the Germans to come into line with the European principles by revising their Constitution. That is precisely the reason why *Tanja Kreil* can be considered as the forerunner of the new line of decisions of the European Court on human rights.

The *Schmidberger* and *Omega* cases

From another viewpoint, important signs of novelty can be seen in some decisions regarding conflicts between the fundamental economic freedom and human rights.

Critics of the Court of Justice have often expressed suspicion about the authenticity of the Community's guarantee of fundamental rights. It has been repeatedly highlighted that the Court of Justice has exploited the rhetoric of human rights, aiming not so much at the protection of some basic values in themselves, as rather at strengthening economic integration.[13] In fact, for a long time, the Community protection of fundamental rights was highly conditioned by the general objectives of European economic integration and so first and foremost by the common market. Until very recently, the Court of Justice has shown great deference for the economic freedoms of the common market: each time it has been necessary to set a balance between them and other fundamental rights. Indeed, the Court of Justice has never dealt with either fundamental freedoms nor fundamental rights as absolute values and consequently has always been careful to keep a balance between the reasons for economic freedom and those for fundamental rights. However, in this complex balance, economic freedoms have often had the upper hand.

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[12] Suffice to recall the well-known decisions of the ECJ concerning the Irish Constitution: ECJ 28 Nov. 1989, Case C-379/87, *Groener*, on the protection of the Gaelic language and ECJ 4 Oct. 1991, Case C-159/90, *Grogan*, on the right to life and abortion.

[13] J. Coppel – A. O'Neill, 'The European Court of Justice: Taking Rights Seriously?', 29 *Common Market Law Review* (1992), p. 669.

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And so, that explains why the *Schmidberger* case of 2003[14] was enthusiastically welcomed by many scholars and commentators. In that decision, the Court of Justice, called upon to resolve a controversy between a basic freedom of the market – in that case the free movement of goods – and some fundamental rights – the freedom of assembly and the freedom of speech – caused by a demonstration by an environmental association that blocked the Brenner motorway for 30 hours, surprisingly gave prevalence to the latter, in a balancing decision in which, for once, civil rights prevailed over economic interests.

Even more astonishing, in many respects, was the *Omega* decision in 2004.[15]

Also in this case the Court of Justice had to face a conflict between an economic freedom protected by the Treaty, specifically the free movement of services and to a lesser extent the free movement of goods, and the protection of fundamental rights, which in this specific case regarded human dignity in relation to a commercial service of entertainment offering games that simulate murders using toy laser guns.

The case could have been solved on different grounds, but the Court did want to use the discourse of fundamental rights by affirming that human dignity is not only one of the basic values of the German Constitution, but it is also part of the values of the European system. The Court of Justice did want to stress deliberately the commitment on the part of the European Union towards the respect for human dignity. When one reads the *Omega* decision, it is difficult not to perceive the subtle influence of the Charter of Fundamental Rights that opens precisely with the claim that the safeguarding of human dignity is an inviolable right. The efforts of the Court of Justice did not go unobserved.

So in *Omega*, as in *Schmidberger*, fundamental rights prevailed over economic freedoms and justified the important restrictions placed on them.

K.B., Richards *and* Tadao Maruko *cases*

From another point of view, it can be seen that in more recent years the Court of Justice tends to widen the scope of community fundamental rights, going beyond the limits of the European Union competences that the doctrine of *incorporation* would permit. This tendency is clearly visible in some cases regarding the rights of transsexuals: *K.B.*[16] and *Richards*.[17] Both cases originate in Great Britain, where at the time of the events a peculiar legal situation was in force, which on the one hand permitted a change of sex, it even being covered by the national health service; on the other, however, it did not allow the change of sex to be recorded in the registry office, preventing the transsexual from enjoying the status reserved to the person of the sex to which

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14 ECJ 12 June 2003, Case C-112/00, *Schmidberger*. On this issue M. Avbelj, 'European Court of Justice and the Question of Value Choices', http://www.jeanmonnetprogram.org/papers/04/ 040601.pdf visited 25 Jan. 2009.

15 ECJ 14 Oct. 2004, Case C-36/02, *Omega*.

16 ECJ 7 Jan. 2004, Case C- 117/01, *K.B.*

17 ECJ 26 April 2006, Case C-423/04, *Richards*.

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she/he belonged after the operation. In the cases brought to the attention of the Court of Justice, the impossibility of registering the change of sex prevented the plaintiff from entering into marriage and thus from enjoying the survivor's pension, in one case, and from being able to retire at 60 – the age for women's retirement – in the second case. In both cases British law was judged incompatible with the principles of non-discrimination on the basis of sex and the United Kingdom, on several occasions censured by the Court of Luxemburg as well as by the Court of Strasbourg because it bans all corrections of personal data recorded at birth in the case of sex change, ended up adapting its own legislation to meet the European principles on non-discrimination.

An interesting aspect regarding this case-law is that in these cases the fundamental community rights impinge upon the regime of the British civil status, a subject certainly far from the Union's competence. The Court of Justice was asked to answer a question concerning the principle of non-discrimination on the basis of sex in the entitlement to survivor's pension and the definition of retirement age, but its decision ends up dealing with a matter that the member states did certainly not intend to transfer to the Community institutions, namely the legal status of transsexuals and the rules that govern the civil register.

As a matter of fact, in *K.B.* and *Richards* the European Court of Justice broadens the doctrine of *incorporation*. It is not necessary to insist here on this wellknown doctrine.[18] Suffice to recall that up until now the area of application of fundamental rights, apart from being applied to the acts of the Community institutions, was also extended to the acts of the member states that cross the field of European law, and this happens in two main hypotheses: when the States' acts constitute an application of community law – the Wachauf line[19] – and when the State act is an exception to one of the fundamental freedoms of the internal market – the ERT line.[20]

Now the *K.B.* and *Richards* cases obviously do not fall into either hypothesis. Censured British legislation does not constitute either rules of implementation or of execution of community acts; nor does it constitute an exception to the fundamental economic freedoms. As the Court of Justice states unequivocally, British legislation on the registering of personal data does not directly jeopardize a right protected by Community law – the right to the survivor's pension, but it has a discriminatory impact on one of the conditions necessary to the entitlement thereof.

It is too soon to say if a new 'spin-off' of the doctrine of *incorporation* has been heralded. However it is clear that in cases involving the non-discrimination principle, the European fundamental rights tend to break into the national legal orders, well be-

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18 The first and fundamental essay about incorporation is J.H.H. Weiler, 'The European Court at a Croassroads: Community Human Rights and Member States Action', in F. Capotorti et al. (eds.), *Du droit international au droit de l'integration. Liber amicorum Pierre Pescatore* (Baden-Baden, Nomos 1987) p. 821 and on the recent evolutions of the incorporation principle *see* B. De Witte, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights', in P. Alston (ed.), *The EU and Human Rights* (Oxford, Oxford University Press 1999) p. 873.

19 ECJ 13 July 1989, Case 5/88, *Wachauf.*

20 ECJ 18 June 1991, Case 260/89, Elliniki Radiophonia Tielorassi ERT.

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yond the limits of incorporation. This trend is evident for example in *Tadao Maruko*,[21] a decision that asks the German legislation on same-sex partnership to be amended in order to grant the partners the same rights as spouses, at least as far as the right to pension is concerned. In many respects, this decision oversteps the boundaries between the national protection of fundamental rights and the European one. By consequence the *Bundesverfassungsgericht* as well as other German judges has reacted to the European Court decision, refusing to apply its interpretation.[22]

If this trend were to continue, the impact of Community law on the fundamental rights guaranteed by the national Constitutions would be dramatically broadened, toppling the limits to jurisdiction that were so carefully established in the Charter of Fundamental Rights, Article 51 and Article 53, according to the consolidated doctrine of incorporation. The risk involved in developing a fully-fledged incorporation in Europe modelled on the American experience is to trigger sharp constitutional conflicts with some member states and to homogenise European constitutional richness and variety into a single constitutional monologue.

Cases on terrorism

The Community institutions have often been accused of using different standards of protection of fundamental rights, depending on the nature of the question under review: generally speaking, the European Court of Justice seems to be much more demanding towards the member states (and even more so towards third-party States or States that are candidates for membership) and indulgent regarding the acts of the Community's institutions. In fact, the European Court of Justice case-law on fundamental rights is dotted with statements of principle but has rarely admitted a violation of rights on the part of the acts of the Community institutions, while it has more often ascertained violations on the part of the member states.

If we keep this context in mind, the importance of some cases on terrorism is unmistakeable. The decisions on terrorism regard some European Union Council regulations which, in executing UN resolutions, entail significant restrictions on people and associations that are reputed to be connected to terrorist networks. In all these cases, a number of violations of fundamental rights was claimed by the plaintiffs, including the violation of the right to property, the right to defence and the right to effective judicial remedy. The complaints originate from the fact that the lists of terrorists (or presumed terrorists) are compiled without permitting the subjects to explain their own reasons and thus without permitting them to refute the proof gathered against them.

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21 ECJ 1 April 2008, C-267/06, *Tadao Maruko*, dealing with same-sex marriage and the right to the survivor's pension.

22 *BVerf G*, 6 May 2008, decision 2 BvR 1830/06. It has been argued that the Constitutional Courts of the new members of the EU are more reluctant to comply with the creative interpretations of the ECJ. *See* the interesting analysis W. Sadurski, 'Solange, chapter 3: Constitutional Courts in Central Europe – Democracy – European Union', *EUI Working Papers Law*, n° 2006/40 in http: //cadmus.eui.eu/dspace /bitstream/1814/6420/1/LAW-2006-40.pdf visited 15 Jan. 2009.

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The CFI faced this problematic area in several cases, such as *Yusuf* and *Kadi*,[23] *Ayadi* and *Hassan*[24] and in the *Modjahedines*[25] case providing different responses.

The first group of decisions caused some criticism, because it ended up sacrificing completely the plaintiffs' fundamental rights.

Starting with the *Modjahedines* case, the European judges appear more 'rights-oriented': in *Modjahedines,* the European Court declares the decision made by the European Union Council to be void for violation of fundamental rights such as the right to defence and the right to an effective judicial remedy. The Court relies on the fact that the inclusion of the plaintiffs in the list of terrorists was not done directly by the UN bodies but, on the contrary, by the European institutions, so that the *Organisation des Modjahedines* was harmed by virtue of a discretional choice of the European institutions.[26] More recently, in *Kadi*,[27] the European Court of Justice reversed a previous decision of the Court of First Instance and annulled some European Union Council regulations imposing restrictive measures against certain persons and entities associated with Usama Bin Laden, the Al-Qaeda network and the Taliban, for violation of fundamental rights – namely the right of defence – even though the European regulations had been issued in execution of UN resolutions.

The choices made by the Community's judges are certainly very courageous. Not only did the Court use the sanction of annulment of the contested acts, something that happens very rarely; but, of no lesser importance, the Community judges tested their capacity to be rigorous in the guarantee of rights on one of the prickliest terrains, given that the seriousness of the international situation tends to mitigate sensitivity to the rights of suspect terrorists and generates a greater propensity towards the need for security rather that towards that for justice and freedom.[28]

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[23] CFI 21 Sept. 2005, Case T-306/01, *Yusuf*; CFI 21 Sept. 2005, Case T-315/01, *Kadi*. For a deep analysis and criticism of these decisions *see* P. Eeckhout, 'Community Terrorism Listing, Fundamental Rights, and UN Security Council resolutions. In Search of the Right Fit', 3 *EuConst* (2007), p. 183 and C. Eckes, 'Judicial review of European Anti-Terrorism Measures – The *Yusuf* and *Kadi* Judgements of the Court of First Instance', 14 *European Law Journal* (2008), p. 74. *See also* a criticism to the content of *jus cogens* shaped by the CFI in C. Tomuschat, 'Note on Kadi', 43 *Common Market Law Review* (2005), p. 537.

[24] CFI 12 June 2006, Case T-253/02, Ayadi; CFI 12 June 2006, Case T-49/04, *Hassan*.

[25] CFI 12 Dec. 2006, Case T-228/02, Organisation des Modjahedines du peuple d'Iran.

[26] UN Security Council Resolution of 28 Sept. 2001, 1373 (2001). Council Decision 2 May 2002, 2002/334/CE and Council Decision 17 June 2002, 2002/460/CE both containing the name of the plaintiffs in the list of the suspected terrorists.

[27] ECJ (Grand Chamber) 3 Sept. 2008, Case C-402/05P and C-415/05P, *Kadi and Al Barakaat.*

[28] A thorough analysis of this case in the light of the relationship of the EU in the global context can be read in G. De Burca, 'The European Court of Justice and the International Legal Order after *Kadi*', *Jean Monnet Working Paper* 01/09, in http://www.jeanmonnetprogram.org/papers/ 09/090101.pdf at p. 21 et seq.

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A panoramic overview

If we consider the comprehensive result of this line of cases on fundamental rights, we cannot help remarking that something new has taken place in the European case-law since 2000. This panoramic overview of the recent case-law of the European Court of Justice on fundamental rights could continue *ad infinitum*, illustrating for example the consistent group of decisions regarding European citizenship or again illustrating the synergies which have over time been created with the protection of human rights guaranteed by the Court in Strasbourg and many others.[29]

Undoubtedly something is changing in the approach of the Court of Justice towards fundamental rights since 2000. Whoever observes at close quarters the European Court of Justice case-law today would answer affirmatively the challenging question posed many years ago: 'the European Court of Justice: taking rights seriously?' Today many decisions issued by the Community judges take fundamental rights extremely seriously. Since the approval of the Charter, plaintiffs and their lawyers use human rights more and more often as crucial legal arguments in the proceedings before the European court and these do not fail to speak the language of fundamental rights. Human rights, which in the past often seemed to be invoked as a mere rhetorical device, begin to affect the merits of the decisions of the European courts. In this development one cannot help but notice the powerful effect of the Charter of Fundamental Rights and the new 'visibility' of fundamental rights, which was precisely one of the purposes that the Charter intended to reach. Even though it still lacks an official legal status, the Charter has important spin-off judicial effects.

So, how can one not applaud a Court that shows it can occasionally sacrifice the needs of the economic freedoms in the face of human dignity, as happened in the *Omega* case? How can one not admire the courage of a Court that stikes the organisation of the *Modjahedines* or *Kadi* from the list of terrorists in the name of their right to defence?

For sure, the European Court of Justice shows itself to be strongly committed towards a specific selection of rights – in particular towards the 'new rights' which are developing on the ground of non-discrimination and self-determination principles – whereas its jurisprudence concerning other rights – and especially social rights – is generally considered as a disappointing one.[30] However, all things considered, after the approval of the Charter, the feared effects of freezing and paralysing jurisdictional activism on the subject of fundamental rights did not occur; on the contrary, the result

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[29] For a more complete analysis *see* M. Cartabia (ed.), *I diritti in azione* (Bologna, Il Mulino 2007). The problem is raised in L.B. and J.H.R, 'Editorial. The Relative Autonomy of the EU Human Rights Standard', 4 *EuConst* (2008), p. 199.

[30] *See* for example L. Azoulai, 'Le rôle constitutionnel de la Cour de Justice des Communautés européennes tel qu'il se degage de sa jurisprudence', 44 *Revue Trimestrielle de Droit Européen* (2008), p. 29, who emphasizes the constitutional role of the ECJ although criticizing its jurisprudence on social rights, in particular after decision 18 Dec. 2007, case C-341/05, *Laval* and decision 11 Dec. 2007, case C-438/3005, *Viking*.

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is the strengthening of the Court of Justice as a *Court of Rights*. It is probably for this reason that so many commentators now tend to define the European Court as a constitutional court.[31] Today, several years after the approval of the Charter of Fundamental Rights, we can say without any shadow of a doubt that human rights are even more solidly in the hands of the Court of Justice and that the authority of this Court is becoming increasingly stronger.

The Charter and the Court: legitimising effects, hermeneutical effects

The Charter of Fundamental Rights seems to have strengthened the position of the Court of Justice from two aspects: on the one hand it has produced a *legitimising effect* and on the other a *hermeneutical effect.*

The Charter filled the void of written provisions on fundamental rights that had made the initial case-law of the European Court of Justice so sparing. The reference to fundamental rights provided in Article 6 in the TEU had not completely recovered the European Union from its initial weakness. The approval of the Charter offers a solid ground for the judicial protection of fundamental rights, indeed.[32]

Certainly, there is something paradoxical in the fact that the Charter is producing a legitimising effect on the Court although it has not (yet) any legal effect,[33] but is in fact merely a political statement. However, the fact that since immediately after its proclamation the Charter of Fundamental Rights has been invoked and applied by many national judges, including many national constitutional courts, as well as appearing regularly in the decisions of the Court of First Instance and in the Opinions of the Advocates-General, has created an aura of legality around the document, explaining the potential of legitimisation that it has produced also as regards the Court of justice.

Moreover, the Commission, the European Parliament and the Fundamental Rights Agency regularly refer to the Charter *as if* it were a legally binding document.

Even more striking are the hermeneutical effects of the Charter of Fundamental Rights.

Generally speaking every legal written text should serve to limit room for interpretation on the part of judges. This, at least, is the concept that has been spread by the multi-secular tradition of civil law countries since the French revolution. The legal systems in continental Europe, for right or for wrong, have been inspired by the idea

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[31] See supra n. 2.

[32] Previously, the role of the Court of Justice as guarantor of rights was undermined by the lack of a text able to reflect, for better or for worse, the constitutional identity shared in the European Community. M. Rosenfeld, 'Comparing constitutional review by the European Court of Justice and the U.S. Supreme Court', 4 *International Journal of Constitutional Law* (2006), p. 618.

[33] The Charter will be provided of legal effects if the Treaty of Lisbon enters into force, because it contains an amendment of Art. 6 of the TEU, which reads: 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of 7 December 2000, as adapted on [... 2007], which shall have the same legal value as the Treaties.'

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that judges are the '*bouches de la loi*'[34] and that their mission is to say what the written law provides, and to apply it to the specific cases brought before them. And yet, the Charter does not seem to have limited the creativity of the Court of Justice but rather seems to have produced quite the opposite result.

This paradoxical effect can be explained under several respects.

First and foremost, it needs to be considered that the goal of reducing the role of judicial power by means of the written law has not been achieved, not even in the national systems that follow the tradition of civil law. History has extensively shown that jurisdictional activity cannot be reduced to the mechanical application of the law in the form of judicial syllogism, and in recent years the role of judges is becoming all the more relevant, in particular in fields related to fundamental rights.[35]

Moreover, it needs to be considered that the Charter of Fundamental Rights operates in a 'multi-level' system, where it is placed alongside many other 'bills of rights', such as the 27 national Constitutions, the European Convention of Human Rights, a wide range of unwritten constitutional principles elaborated by all the high courts that deal with human rights and especially by the Courts in Luxembourg and Strasbourg. As is well-known, in the systems of common law[36]judges enjoy a wide discretionary power for the simple fact that in order to solve a case or controversy they can take into account many different sources of law. In fact, one of the main reasons that explains the extent of the discretionary power of judges in the systems of common law is the possibility that they have the opportunity to refer to a multiplicity of competing sources of law in exercising *judicial review*. The habit of judges to recall foreign law and international law in cases involving fundamental rights adds further options to their discretionary power.

Lastly, it must also be considered that the text of the Charter is, so to speak, loosely formulated. The language of the Charter is very general and by consequence it does not provide strict guidelines for its interpreters. In order to find a satisfactory compromise for all the member states, the Charter uses a very broad wording, limiting itself to codifying principles and basic values which are generally shared, postponing the more controversial issues to a more detailed legal regulation or to the discretionary power of judges. Let us consider some of the provisions of the Charter: 'Human dignity is inviolable. It must be respected and protected', 'Everyone has the right to life', 'Everyone has the right to his or her own physical and mental integrity', 'Everyone has the right to freedom and security', 'Everyone has the right to respect for his or her own private and

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[34] For a critical historical overview of this principle, *see* K.M. Schönfeld, 'Rex, Lex, Judex', 4 *European Constitutional Law Review* (2008), p. 274.

[35] For the Italian experience *see* E. Lamarque, 'L'attuazione giudiziaria dei diritti costituzionali', *Quaderni costituzionali* (2008), p. 266, who shows the creation of an impressive number of new fundamental rights by means of judicial decisions stating on requests of compensations for damages.

[36] *See* in particular on this point M. Rosenfeld, 'Constitutional adjudication in Europe and in the United States: paradoxes and contrasts', 2 *International Journal of Constitutional Law* (2004), p. 633 at p. 646.

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family life'. Faced with such a text, all the interpretative options lie wide open and the discretionary power of the interpreter plays a most important part.

For all these reasons, far from paralysing jurisdictional creativity, the introduction of the Charter of Fundamental Rights is further increasing the power of the Community judges, who have always been a vital engine for the development of European integration.

The risk of 'judicial colonialism'...

As does every relevant change, the new trend in the European Court of Justice case-law entails both advantages and disadvantages. In particular, the judicial activism in the field of fundamental rights brings about new assets but also some concern for the constitutional equilibrium between the European Union and the member states, and – more importantly – for the survival of the diverse historical traditions entrenched in the national constitutions, which are part and parcel of the European identity. I do not want to insist on the risk of the *gouvernement des juges*, although it is clearly implied in the present phase of European integration. I would rather draw the attention to a different concern that I would call, with some intentional emphasis, '*judicial colonialism*'.

It could be easily predicted that the approval of the Charter of Fundamental Rights would produce a centralising effect, gradually drawing the protection of human rights to the European level and at the same time sterilising the protection guaranteed by the national Constitutions and breaking the limits of jurisdiction in which the action of the Community institutions should be carried out.[37] In this centralising movement, the national constitutional traditions risk to be extinguished.

Cases like *K.B.*, *Richards*, and *Tadao Maruko* are unquestionable examples of the invasion of the Community's protection of fundamental rights into areas where the responsibility should lie with the national Constitutions. Article 51 of the Charter and the principles of incorporation[38]limit the European judicial review on national acts only to cases where 'the member states are implementing Union law'. In those cases the member states were not implementing EU law. All this considered, why should the Court of Justice be involved in the violations of transsexuals' rights in the British system? The problem was under control; in particular it was under the supervision of the British courts and the Strasbourg Court.[39] Cases like *K.B., Richards* and *Tadao Maruko* widen the scope of the European Court of Justice judicial review on states' legislation well beyond the limits of the incorporation. Besides this, as the *Kreil* case shows, this

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[37] A. von Bogdandy, 'The European Union as a Human Rights Organization?', *supra* n. 3, at p. 1316-1318. *See also* on this point A.C. Pereira-Menaut, 'A Plea for a compound *res publica europea*: proposal for increasing constitutionalism without increasing statism', in *Tulane European and Civil Law Forum* (2003), p. 75 at p. 97-98.

[38] *See supra* n. 17.

[39] After all, the European Court of Human Rights of Strasbourg in *Goodwin* v. *United Kingdom*, 11 July 2002, 28957/1995 had already issued a judgment against the United Kingdom for its legislation on the transsexuals.

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expansion can also impinge upon the national constitutions. The Charter was conceived with a limited scope, addressing essentially the Community institutions and the national institutions only when they execute Community law. Nonetheless, the Charter tends to be treated as if it were to overcome the national constitutions. As has been pointed out,[40] one of the most difficult tasks is to explain that the Charter was not intended to take the place of national constitutions.

The expansion of the scope of fundamental Community rights is not only a matter of jurisdiction – the role of the Court of Justice that takes over responsibilities of the national Courts – but also a tricky question on the substance of the protection of fundamental rights, because it could happen that the Community's 'version' of some rights does not correspond entirely to that of one or more member states: after all, the European Union endorses an individualistic/libertarian interpretation, whereas many national constitutions are oriented to a personalistic/dignitarian conception of fundamental rights.[41] As has been recently pointed out, the European Union talk on fundamental rights has put the individual in the centre, but it is a self-centred individual;[42] whereas for example, the Italian Constitution is inspired by the second line of thought, starting with its Article 2: 'The Republic recognizes and guarantees the rights of each human being considered both as an individual and within the intermediate social bodies where his/her personality flourishes.' The expansion of the Community's protection of rights may end up having an impact on those fields where the national particularity is unquestionable.

The fact that cases like *K.B.*, *Richards*, *Kreil* and others have generally been supported by public opinion and commentators must not cloud the transformation that is occurring in the relationships between the Community's system and the national constitutional systems in the protection of fundamental rights. By endorsing such developments one must be aware that they leave themselves open to being used in controversial cases, where the divergence between the national constitutions and the European principles can be more striking.[43] Questions which are ethically controversial in the field of fundamental rights, albeit regarding problems common to every human being, have received and still receive different answers in different countries. The questions that concern the coexistence of different cultures – and first and foremost those related to the freedom of religion – concern everyone and arise in every social group, and yet they

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[40] F.G. Jacobs, European Convention of Human Rights, 'The EU Charter on fundamental Rights and the European Court of Justice', in http://www.ecln.net/elements/conferences/book_berlin/ jacobs.pdf visited 29 Jan. 2009.

[41] On the interpretation of these two lines *see* M.A. Glendon, 'Human Rights at the Dawn of the Third Millennium', in L. Antonini (ed.), *Il traffico dei diritti insaziabili* (Cosenza, Rubbettino 2007), p. 45.

[42] J.H.H. Weiler, Europe – Nous coalisons des Etats, nous n'unissons pas des hommes, forthcoming

[43] *See* on this point the critique to the multilevel constitutionalism – because of the fact that it hides the conflict between legal systems – by M. Luciani, *Costituzionalismo irenico e costituzionalismo polemico,* in http://www.associazionedeicostituzionalisti.it/materiali/anticipazioni/costituzio_nalismo_irenico/index.html visited 29 Jan. 2009, p. 25.

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have found different answers in the course of history and even today are dealt with according to particular traditions in each of the European systems.[44]

Most cases brought before the European Court of Justice concern vulnerable subjects such as women and migrant workers and understandably the Court wants to accomplish its own constitutional mission towards them. However, in most member states of the European Union, problems related to sexual orientation, same-sex marriage, abortion, bioethics issues, immigration and the like, mark deep cultural and political cleavages and are usually dealt with very carefully in order to find balanced solutions that reconcile the different points of view at stake. The European Court of Justice has taken over its own 'judicial policy' in favour of women, immigrants, homosexuals, transsexuals and in general of all the vulnerable subjects. The Court does not even hesitate to impose dramatic changes in the member states' policies and legislation. The result is that diverse cultures and traditions on these subjects are receding to give room to the European constitutional standard fostered by the European Court of Justice.

The practical effects of the Charter of Fundamental Rights as interpreted by judges are supported by a widespread legal thought that fosters the development of common European values – a '*jus commune europeum*'.[45] This implies the idea that the whole continent can be unified around universally shared values and that unification flows from the judges' pens.[46] While the political and economical European Union is going through a phase of stagnation, the Europe of judges and rights looks vigorous and dynamic. The success of the Europe of judges and rights is at least partly due to the opinion that the European – and more generally – the international institutions seem to be located at a more suitable level for the protection of fundamental rights. Fundamental rights are pulled out of the local boundaries, because they have a universal core: human dignity. That is why the protection of fundamental rights seems to fit better in the international scene rather than in national or local communities. The multicultural societies are in the middle of the dramatic and urgent quest for unity and for a common ground of values for all cultures. The most common and shared opinion is that human rights can provide an answer to this quest. Given the universal nature of fundamental rights, European law and international law are taking the place that used to be occupied by natural law, since they imply the idea of a core of values and rights common to all human beings.

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[44] *See* the analysis of J.H.H. Weiler, *Un'Europa cristiana* (Milano, Rizzoli 2003), showing the different relationship in Europe between the public power and religion.

[45] We can consider the origin of this line of thought to be I. Pernice, 'Multilevel Constitutionalism in the European Union', quoted *supra* n. 7, p. 511. In Italy *see* at least G. Silvestri, 'Verso uno ius comune europeo dei diritti fondamentali', *Quaderni costituzionali (*2006), p. 7; A. Pizzorusso, *Il patrimonio costituzionale europeo* (Bologna, Il Mulino 2002); V. Onida, 'Armonia tra diversi e problemi aperti', *Quaderni costituzionali (*2002) p. 549.

[46] For insight on the American debate about the aristocratic and paternalistic character of judgemade law *see* A. Gutmann (ed.), *A Matter of Interpretation* (Princeton, Princeton University Press 1997) in particular the Comment to Justice A. Scalia by M.A. Glendon, p. 95.

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We must not, however, forget the ambivalent nature of fundamental rights. In the struggle for fundamental rights there is a longing for *universality* that justifies the need to go beyond the boundaries of the national legal systems; but there is also a *historical dimension* in which the traditions and deepest conscience of each people is reflected, of which the national constitutional charters are one of the salient expressions. Rooted in the value of human dignity, the idea of fundamental rights necessarily contains a *universal dimension*. Embedded in the historical, religious, moral, linguistic and political peculiarities of each people, such rights are fed by particularity and pluralism.[47]

The attraction to a European protection of human rights risks sacrificing the national historical and cultural traditions that characterise the pluralistic nature of Europe. Even more serious: what happens if one of the fundamental rights protected at the European and international level belongs only to one or some specific traditions or cultures and does not reflect any common shared value? Who will guarantee that the European and the international institutions will stick to the protection of the common fundamental rights and are not tempted to impose a particular interpretation of them as if it were universal?

The position of the Court of Justice is crucial and extremely delicate. Its pronouncements on the subject of fundamental rights tend to establish *the* standard that must be respected throughout the 27 countries of the Union.[48] Once a fundamental right enters the jurisdiction of the Court of Justice it becomes a European fundamental right. The decisions taken by the Court of Justice are binding in all the member states even if the case originated in a particular legal system.

Herein lies the risk of 'judicial colonialism' in the field of fundamental rights. As history has shown us, colonialism often claims to promote progress and civilisation, but on more than one occasion pre-existing cultural and historical patrimonies have been sacrificed in the name of a specific culture, although more progressive. Fostering fundamental rights is indeed a clear sign of progress and civilization. But, what about the native cultures and traditions of the European peoples? And how can a society be able to welcome and respect the cultures of immigrant peoples if it proves to be unable to take care of its own historical patrimony and diversity?

As has been highlighted, the very nature of the European Union is that of a pluralistic, tolerant, multiple, 'contra-punctual' legal order,[49] where a plurality of voices tends to harmonisation. Should the European Union move towards a uniform standard in the field of fundamental rights, trampling on the plurality of national constitutional traditions, then it would betray its own ontological structure.

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47 P.G. Carozza, 'Uses and misuses of comparative law in international human rights', 74 *Notre Dame Law Review* (1998), p. 1235.

48 This effect is clearly grasped in S. Panunzio, *I diritti fondamentali e le Corti in Europa* (Napoli, Jovene 2005), p. 58.

49 *See supra* nn. 4, 5, 6.

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... and its antidote: a common basic experience

This risk needs to be faced with an effective antidote. It is difficult to elaborate the complete recipe of it, but some of its components can already be singled out. Here I would like to highlight two essential elements. First, every new fundamental right should be recognised only if is part of a *common basic experience* throughout the whole European continent; second, the common experience cannot be defined in a dogmatic style, in abstracts formulas or written principles. Fundamental rights are living concepts that can only emerge from the live *encounter* among different peoples, each one having its own tradition, history and culture. The method should not be deductive, but rather inductive and it requires a bottom-up dynamic. Indeed, the common basic rights of the European Union have been identified and codified in the Charter of Fundamental Rights. Nevertheless, the meaning of those rights is constantly being reshaped in order to cope with new social problems and new judicial cases. Social life is dynamic and history never stops. So, whenever written rights impact real issues, their content tends to broaden and sometimes 'new fundamental rights' are deducted as spin-offs of the older rights. In recent years, several new rights have been carved out from privacy and from antidiscrimination clauses, for example.

This evolution is in some way inescapable. Moreover it is commendable under many respects. Nonetheless, in a composite *polis* such as the European Union it also discloses some downsides. As a matter of fact, in the European context, every new right is a potential cause of tension with the multiple constitutional traditions of the European countries. In order to prevent the extinction of the existing constitutional traditions, the number of fundamental rights should not be excessively widened and, what is more relevant, every 'new fundamental right' should dovetail with the living experience[50] of European peoples.

To this purpose we should look beyond the texts. Constitutional and legal documents on fundamental rights very often repeat similar formulas, in many different countries in and outside Europe. However, historical, cultural and social contexts change, so that different peoples have a different experience of the same fundamental rights. That is why similar legal concepts – such as human dignity, equality, freedom, etc. – can assume different meanings in different contexts. Diversity in the field of fundamental rights cannot easily be divined from texts. It is rather a matter of experience.

So the farther away we get from the core of fundamental rights, the greater the historical and cultural divergence between the various juridical systems may be. This is the reason why the proliferation of 'fundamental rights' may impair the constitutional balance of the whole Union. The *jus commune europeum* or, if you like, the 'common

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50 The idea of legal *experience* can be read in G. Capograssi, *Analisi dell'esperienza commune* (Milano, Giuffré 1975) and in the same line of thought P. Grossi, *Società, diritto, stato: un recupero per il diritto* (Milano, Giuffré 2006), who draws the attention to the historical and cultural character of the law, beyond legal positivism.

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constitutional traditions' are undoubtedly a reality recognisable around a consolidated and limited nucleus of values, while the category becomes more uncertain and shaky the farther one strays from that essential nucleus of common values. Great care must be taken when recognising 'new fundamental rights' at European level. The wider the scope of activity of a human rights institution is, the closer it should stick to the common basic experience of the peoples falling within its jurisdiction. Many new social needs and desires can be answered by means of legislative measures, taken at the national or supranational level, rather than by means of new fundamental rights. After all, the primary task of the Courts is to guarantee the existing fundamental rights rather than create new ones.

But here a crucial question arises: how can the common rights be recognised? Or, if you want, how can we draw a distinction between common European basic rights and further rights belonging to a specific culture or to a particular group? This question is a crucial one, in order to ensure to all human persons all the fundamental rights that they deserve as human beings, without imposing on anybody any political or cultural preference under the name of fundamental rights.

Here I would like only to make a methodological remark. The common core of different cultures and traditions stems from the encounter among living subjects able to express them. No centralised institution can take the place of the European peoples, nor can it act on behalf of them. The active participation of the bearers of the different traditions is unavoidable. Comparing legal and judicial texts is necessary, but not enough, because the living meaning of fundamental rights develops within the experience of each people. The comparative method is to be completed by the active participation of all the stakeholders.

The commitment to universal fundamental rights does not require the homogenisation of the existing diversities, but – on the contrary – requires that they be taken extremely seriously. Universality does not imply erasing differences, but it results from the encounter between them. After all, human rights relate to human beings, not to humanity.[51] So they can only be recognised in the historical experience of peoples. That is why all the subjects that can express a specific tradition should be active parts of the European constitutional construction: social groups, legislators, judges, public authorities. In a certain sense, the European motto could read 'unity *from living* diversity'.

The role of judiciary: reasons for intensifying the constitutional conversations on fundamental rights

The method outlined above involves many different kinds of agents. Democratic institutions, agencies, NGOs, all sorts of social subjects are required to become effective agents of a living culture of fundamental rights in Europe. Still a distinguished task rests on judges.

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[51] P.G. Carozza, 'Human Dignity and Judicial Interpretation of Human Rights', 19 *The European Journal of International Law* (2008), p. 931.

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As far as the judiciary is concerned, the destiny of the national cultural traditions in Europe is in the first place entrusted to the constitutional courts, which express the voice of the national constitutions. They are the privileged interpreters of the national constitutions, they are *viva vox constitutionis.*[52] The European Court of Justice bases its work on the voices and traditions that make themselves heard, and if one voice is missing, the cultural patrimony of the whole of Europe is diminished. Only if the constitutional courts are able to interpret and proudly express the peculiarities of their own constitutional traditions will the Court of Justice be able to identify the 'common constitutional traditions' and the common core of European fundamental rights. On the other hand, the Court of Justice is to show great respect for all the national constitutional traditions when interpreting and applying the principles of the European Union Charter of Fundamental Rights.

The European legal system provides a procedural tool that can greatly help this difficult enterprise: the preliminary ruling ex Article 234 EC.

The Italian Constitutional Court has recently taken a step worth noting: in decision n. 103 of 2008[53] the Court has used the preliminary ruling for the first time ever. This decision shows a new co-operative attitude of the Constitutional Court towards the European Court of Justice, an attitude which overrules decision n. 536 of 1995, when the Court refused, even from a theoretical point of view, to enter into direct dialogue with the European judges. For years the Italian Constitutional Court has urged the lower courts to use the preliminary ruling while excluding itself from the European judicial dialogue. The official reason for the exclusion was that a Constitutional Court plays functions that are not jurisdictional in nature, and therefore the Constitutional Court cannot be qualified as a judge for the purpose of Article 234 EC. The new trend started in 2008 overrules these general principles. However, the overruling should not be overemphasised. In decision n. 103 of 2008 the Constitutional Court has opened the dialogue within a specific kind of proceedings, the so-called 'direct proceedings' concerning the division of competences between state and regions. The Court draws a clear distinction between the 'direct proceedings' and the 'indirect proceedings' for the purposes of the preliminary rulings of Article 234 TEC. Most commentators[54] share the idea that the Constitutional Court wants to limit the use of the preliminary ruling only in 'direct proceedings', whereas in 'indirect proceedings' it should be for the lower courts to ask for the European Court's interpretations. Should the Constitutional Court follow this restrictive interpretation, then the judicial dialogue with the European Court would not be likely to touch the most sensitive issues of constitutional law. As a matter

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52 V. Onida and B. Randazzo (eds.), *Viva vox constitutionis,* annual series since 2002 (Milano, Giuffré).

53 All the Italian Constitutional Court's decisions can be found at www.cortecostituzionale.it and www.giurcost.org visited 29 Jan. 2009.

54 This interpretation is endorsed for example by M. Dani, 'Tracking Judicial Dialogue – The Scope for preliminary Rulings from the Italian Constitutional Court', *Jean Monnet Working Paper* 10/ 08, in http://www.jeanmonnetprogram.org/papers/08/081001.pdf visited 15 Jan. 2009.

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of fact, in 'direct proceedings' the Court does not usually deal with fundamental rights, but only with matters of competences. That is why at present it is hardly predictable whether Italy will abandon its traditional reluctance to contribute to the European construction of fundamental rights. To be true, most of the national constitutional courts maintain a haughty contempt towards the European Court of Justice: they refuse to enter into direct dialogue; in particular they refuse to use the preliminary ruling provided by Article 234 EC (and Article 35 EU). In fact, up to now, only the British House of Lords, the Belgian *Cour d'arbitrage* and the Austrian *Verfassungsgericht* have referred to the European Court of Justice by means of preliminary rulings.[55] The Polish Constitutional Tribunal has accepted[56] the possibility of addressing the European Court, but has not yet used it in practice. All the other constitutional courts keep strictly silent on the European stage. Usually, the national constitutional courts accept the informal influence of the European Court of Justice's jurisprudence, but they distrust the formal judicial dialogue through the preliminary ruling.[57]

As has been said, the rights talk in the European Union system is becoming more and more relevant and the participation of the national constitutional courts more urgent. Both the national constitutional systems and the European constitutional systems could pay too high a price if their courts shut themselves out of the European constitutional dialogue, the former being deprived of the possibility to express themselves in the European arena, and the latter losing one or more of their contributions.

In this light we need to consider that the preliminary ruling could be a valid tool in bringing traditions, experience, reasoning and different points of view before the Court of Justice on the part of the national constitutional courts. In short, it is the simplest way to keep pluralism alive within the European constitution. Although following the wording of Article 234, the preliminary ruling is conceived as a duty and an obligation for the supreme courts, it is, in fact, above all a *great opportunity* for them. It is shortsighted to refuse the preliminary ruling for fear of losing freedom, sovereignty and independence. The bright side is that the preliminary ruling is a great chance for national judges to take part in the building up of the European constitution. If the constitutional courts refuse direct dialogue with the European Court of Justice, they miss the opportunity to have any influence on the European decisions. Indeed, the European Court of Justice is open to take into account all the national constitutional traditions coming from the member states. But these traditions need to be introduced before it. Otherwise how could the European Court be aware of a particular constitutional principle? In a way a constitutional court using the preliminary ruling could be considered as a qualified '*amicus curiae*' of the Court, bringing arguments useful for the decision.

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[55] *See* the annual reports of the European Court of Justice available at http://curia.europa.eu/en/instit/presentationfr/index.htm visited 29 Jan. 2009.

[56] Polish Constitutional Tribunal 11 May 2005, K 18/04. par. 18.

[57] A critique to the informal relations among European courts as a part of a more general critique to the pluralist model of relationship in the European Union comes from J. Baquero Cruz, 'The Legacy of Maastricht Urteil and the Pluralist Movement', 14 *European Law Journal* (2008), p. 389 at p. 414.

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The specific mission of the constitutional courts does not only imply the defence of the constitutional values when they are attacked, but also to promote them as a necessary part of the construction of Europe.

Moreover, the European Court of Justice would gain greater authority if it had the opportunity to benefit from the rich constitutional experience of the national constitutional courts. As has been pointed out in an interesting comparison between the US Supreme Court and the Luxemburg Court,[58] whereas the Supreme Court 'has the benefit of the many judicial decisions by low federal courts and/or state courts on constitutional issues it must decide upon', the European Court of Justice, by contrast, 'cannot count on the experience of the other courts', because it does not decide on appeal. This comment is very important insofar as it highlights that one of the main advantages of the common law system is that it is based on an inductive, incremental and empirical process where the Supreme Court decides after a number of previous decisions by lower courts. This is all the more important in constitutional adjudication, where delicate choices of value are often at stake. It is of crucial importance for the European Court of Justice to take into serious consideration the different solutions offered by other national courts before settling delicate and sometimes politically explosive constitutional issues. Although the European Court of Justice, compared with the US Supreme Court, decides without the experience of the lower courts,[59] the preliminary ruling could heal at least in part the deficit of experience. The preliminary ruling could serve the purpose of presenting rich and diverse points of view before the European Court. One of its functions could be precisely to bring experience to the European Court, linking its judgments to concrete cases pending before the national tribunals.

Some constitutional courts seem to have sensed that an historic task is incumbent on them. It is indeed certain that the *Conseil constitutionnel* has understood this, as shown in its decision on the European Constitutional Treaty,[60] where it endorsed some interpretations of the Treaty on the subject of linguistic minorities and religious freedom which deliberately wanted to stretch the meaning of the text so as to ensure that the application of the principles would conform with the French tradition. It is not by mere chance that recently the *Conseil* has wanted to speak explicitly of the 'French constitutional identity' in its decision on the subject of copyright royalties.[61] With these decisions regarding its relationship with the European Union, the *Conseil* shows how it is able to propose the French constitutional tradition as an interpretative hypothesis for the European constitutional principles and place itself as an authoritative, strong inter-

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58 M. Rosenfeld, 'Comparing constitutional review by the European Court of Justice and the U.S. Supreme Court', quoted *supra* at n. 35, p. 628.

59 Ibid., p. 629-630.

60 Decision 19 Nov. 2004, n. 2004-505 DC, Traité établissant une Constitution pour l'Europe.

61 Decision 27 July 2006, n. 2006-540 DC, Considérant 19 : « la transposition d'une directive ne saurait aller à l'encontre d'une règle ou d'un principe inhérent à l'identité constitutionnelle de la France, sauf à ce que le constituant y ait consenti »

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locutor for the Court of Justice in Luxembourg, called upon to bring to life common constitutional values.

The *Conseil constitutionnel* seems to foresee the risk that the particular features of the national constitution dissolve into the work of harmonisation carried out by the Court of Justice. The antidote that can and must be activated to contrast the germs of a potential risk of constitutional homogenisation is in the hands of the national constitutional judges, if they are able to convey the constitutional tradition of their own legal order to the central institutions for the common good of the whole society. Otherwise, the constitutional courts are condemned to accept a cultural homogenisation established by the strongest voices, or to fight a sterile battle of defence, entrenched behind national sovereignty. The remedy is not isolation in sovereignty, but participation.

It is on this backdrop that we have to assess the need to rethink the choices made by the constitutional courts on the preliminary ruling. At stake is not only the correct application of a procedural tool, but rather more significantly it is the opportunity for the national constitutions to have a voice in Europe; the use of the preliminary ruling could have a constructive value in the European constitutional foundation.

Taking dialogue seriously: the role of the European Court of Justice

As has been insisted on in the previous pages, the very nature of the European constitution or – might I even dare to say – the very nature of Europe itself, requires a lively participation of all the plurality of voices, traditions and historical experiences which altogether are part and parcel of the European identity. It is not only in the interest of a particular national tradition that the constitutional conversation on the European values and fundamental rights is to be kept alive. It is also of vital importance for the European Union to encourage and support the participation of all its components, in order to be faithful to its own origin and structure. As has been argued:

> Europe's basic Constitutional Architecture […] was noble and original, fashioned in accordance with Schumann's astute step by step approach in a remarkable consensual multilogue among Europe's courts, high and low. This collaborative judicial-political exercise was not only procedural expedient, it was a reflection of Europe's substantive *Grundnorm* and its most striking contribution to transnational statecraft: the principle of Constitutional Tolerance.[62]

This is the reason why the European Court of Justice cannot afford to allow the constitutional conversation to flag. It is vital for its own mission to do its best to keep the 'multilogue' alive.

So, if we consider the decisions of the European Court on their merits, there is no doubt that in general, the Court shows deference and respect towards the constitutional traditions of the member states present in the judicial process. Cases like *Omega* and

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62 J.H.H. Weiler, 'The essential (and would-be essential) jurisprudence of the European Court of Justice: lights and shadows too', in I. Pernice, J. Kokott, C. Saunders (eds.), *The Future of the European Judicial System in a Comparative Perspektive* (Baden-Baden, Nomos 2006), p. 117.

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Schmidberger show that the European Court has taken the German and the Austrian constitutional traditions very seriously. However, one question needs to be answered. What about the other constitutional traditions? Are we sure that all the voices have been expressed before the Court so that the final decision really takes into account the entire common background of the European countries? Are we sure, for example, that the meaning given by the European Court of Justice to human dignity in *Omega* is really shared by the European member states other than Germany? Or does it reflect the specific sensitivity of the German constitution? If the European Court wants to be the Court of the *European citizens,* it should be very careful not to issue decisions which are too nationally oriented, i.e., decisions that elevate to the rank of fundamental human rights a particular interpretation of a basic value, accorded in a specific country due to its history and tradition.

I have already insisted that there is no justification for the national constitutional courts' behaviour of remaining aloof from the European constitutional multilogue. I would like here to argue that also the European Court of Justice bears part of the responsibility for the national constitutional courts' silence for two main reasons.

First, it is not just the national courts' fault that the European judicial multilogue has been developed mainly among the lower courts and the European Court of Justice to the exclusion of the supreme and constitutional courts. The *Simmenthal doctrine* has given great importance to the lower courts, and has induced the higher courts – in particular the constitutional courts – to stay removed from European legal evolution. It is true, as has been said, that the European constitutional architecture was not fashioned by the European Court of Justice alone, but by all the European courts, the national courts included. It is true that

> the European Court has historically been quite attentive to position itself as *primus inter pares* [… and] to fashion its doctrines so as to empower national courts as its principal and indispensable interlocutors.[63]

However, this is particularly true for the lower courts. It is the lower courts that have taken advantage of the European Court doctrines, even to the detriment of the national supreme and constitutional courts. Doctrines like supremacy, direct effect, indirect effect and many others are powerful tools for the judicial activity of lower courts, which have been freed by the European Court from the narrow role of *bouches de la loi* and elevated to a constitutional mission. The result is a sort of marginalisation of the constitutional courts from the European constitutional laboratory. It was probably necessary at the beginning of European integration to give the lower courts the main responsibility of enforcing European law; however one could pose the question as to whether is it still necessary at the present stage, focused on the fundamental rights talk, to continue to treat the lower courts as the most qualified actors of the judicial architecture of the European Union. Doctrines like direct and indirect effect could easily be

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63 J.H.H. Weiler, 'The essential (and would-be essential) jurisprudence of the European Court of Justice: lights and shadows too', quoted *supra* at n. 6, p. 121.

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interpreted so as to involve also the supreme and constitutional courts, instead of banning them.

Second, if we consider the style and the form of the decisions of the European Court of Justice, more than one doubt arises regarding its attitude towards the national constitutional courts and towards their participation in the European adventure. As was said in a sharp critique of the European Court: 'the style of judicial decisions is outmoded, does not reflect the dialogical nature of European Constitutionalism, and is not a basis for confidence building European constitutional relations between the European Court and its national constitutional counterparts.'[64] The problem with the style of the European Court of Justice decisions is not only aesthetic in nature. After all, one of the specific characteristic of the European system is that the more relevant constitutional steps in the European development depended upon the co-operation of the European and national institutions. Trust and mutual confidence between the European Court and the national Courts are the bases of the whole European Constitution. That is why, when the European Court takes decisions on fundamental rights which often involve the most important, delicate and controversial constitutional issues, 'it is critical that such decisions emanate from a tribunal which is capable, and seen to be capable of comprehending the constitutional sensibilities of the member states at issue and communicating that comprehension to its national counterparts.'[65] The problem is not only that the European Court takes into account the national constitutional peculiarities, but also that it *shows* it has considered and discussed those peculiarities. In the European Court decisions the national court which applied for the preliminary ruling looks for feedback to its arguments and deserves such feedback. Why, otherwise, should a national court spend time and effort working out its own national constitutional tradition for the benefit of the European institutions if they do not show they attach any weight to such work? The first reason why the European Court of Justice should – as Joseph Weiler suggests – abandon its Cartesian style of judgments and move to a more discursive and conversational style, typical of the common law countries, is precisely to encourage the constitutional dialogue with the national supreme and constitutional courts.

There is a second, and perhaps more relevant reason for such a move. This reason is a direct consequence of a recent, important and widespread evolution in constitutional judicial review. Although the main purpose of the judicial review was at the origin and still is to decide on the *validity* of normative acts, nowadays the judicial activity is more and more focused on *interpretation*. It is quite rare that a constitutional court decides for annulment or declares the invalidity of a piece of legislation. In most cases, the constitutional courts try to accommodate cases and controversies by means of interpretation. This is true both at national and European level. In all the legal systems the core of the judicial activity is shifting to interpretation, and judges are required to be well-equipped in *ars interpretandi* even more then in *ars decidendi*. At the national

64 J.H.H. Weiler, 'Epilogue: The Judicial Après Nice', in G. De Burca and J.H.H. Weiler (eds.), *The European Court of Justice* (Oxford, Oxford University Press 2001), p. 219.

65 J.H.H. Weiler, ' Epilogue: The Judicial Après Nice', quoted *supra* at n. 63, p. 221.

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level it is sufficient to consider the importance attached to the so-called '*interpretazione conforme a Costituzione*' or '*verfassungskonforme Gesetzauslegung*' in Italy and Germany as a way of solving all sorts of clashes among different legal acts;[66] at the European level suffice it to notice that it is probably not by mere chance that the preliminary ruling of Article 234 of the TEC is by and large more used for interpretative questions, rather than for challenging the validity of the Community acts. No doubt that hermeneutics is the fundamental tool of relationship between different levels of legislation and, by consequence, between different types of courts.

The most recent trend in judicial activity shows that conflictual remedies leave room for harmonising remedies. This is true in general, but it is particularly true when constitutional issues are at stake, such as in cases involving fundamental rights. Constitutional principles are worded in such a loose and general way that is it difficult even to imagine a direct clash between a national Constitutional *provision* and a European one. On the other hand, it is not so difficult to imagine a conflict of *interpretation* of such provisions between different courts. That is to say that problems do not arise from the texts, generally speaking; more often they arise from the interpretation of the texts in judicial cases.

That is why the European Court, especially when acting as a constitutional court or a court of fundamental rights, should seriously consider moving away from the old-style telegraphic judgments, although this style is endowed with important virtues: it not time-consuming for the judge who writes the decision of the Court and for the translators and, moreover, it can facilitate the compromise among different points of view, easily leading the Court towards its final decision. However important these practical reasons may be, more relevant is that the European Court needs to be engaged in a continuous conversation with its national counterparts, especially in constitutional cases involving fundamental rights.

The historical changes that are occurring in the European Union and that involve the very basis of European society require a new attitude on the part of all the actors.[67] In the present constitutional era of the European Union, 'taking dialogue seriously' is an imperative for both the European and the national constitutional courts. Most of the

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[66] *See* D. Schefold, 'L'interpretazione conforme a costituzione', in http://www.associazione deicostituzionalisti.it/materiali/convegni/aic200610/schefold.html visited 29 Jan. 2009 www.associazio nedeicostituzionalisti.it; M. Luciani, 'Le funzioni sistemiche della Corte costituzionale oggi e l'interpretazione 'conforme a', *Il foro amministrativo T.A.R.* (2007), p. 87. The new model of dynamic interpretation is spread in many legal order, in particular in the filed of human rights. In the UK for example it is required by the Human Rights Act of 1998. *See* on this point for example M. Arden, 'The Changing Judicial Role: Human Rights Community Law and the Intention of Parliament', 67 *Cambridge Law Journal* (2008), p. 487 at p. 494 et seq.

[67] As has been noticed, a pluralist model has taken the place of the old fashioned hierarchical pattern in the relationship between the European and the national legal systems. In this context the judicial dialogue and the use of preliminary rulings at the constitutional level is all the more imperative. *See* F. Giorgi and N. Triart, 'National Judges, Community Judges: Invitation to a Journey through the Looking-Glass – On the Need for Jurisdictions to Rethink the Inter-systemic Relations beyond the Hierarchical Principle', 14 *European Law Journal* (2008), p. 693 at p. 714 et seq.

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national constitutional courts as gatekeepers of the national constitutions still show quite a distrustful attitude towards the European legal system. This defensive attitude is of scanty use at the present stage of European integration; if they want to take seriously their role of custodians of the national constitutional traditions they should take a pro-active style of relationship with the European court, so that all the different voices are included in the European polyphonic choir. The European Court for its part could and should do much more to encourage the dialogue with the supreme and constitutional courts, starting with a re-styling of its decisions and a re-shaping of the direct effect doctrines, so as to include the constitutional courts as qualified judges of the European system.

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What makes a Right a Human Right? The Philosophy of Human Rights

Christian Erk

Undoubtedly, the idea of rights and especially human rights is pervasive these days. According to some, the discourse of human rights has acquired 'in recent times […] the status of an ethical lingua franca'[1]; others hold that 'there are few mechanisms available other than human rights to function as a global ethical foundation'[2], consider it the 'dominant morality of our time, […] a truly global morality'[3] or even call it 'the world's first universal ideology'[4]. The worldwide acceptance of the idea of human rights is also reflected by the fact that all of the almost 200 states in the world have acknowledged the existence of human rights – either in their constitutions and/or by means of ratification of one or more of the relevant treaties, declarations or covenants of international law. Today, hardly any state would dare – at least not publicly – to question the very idea of human rights. Consequently, there is scarcely any statement with regard to social and political life that is not affirmed using the term rights: 'these days it is usually not long before a problem is expressed as a human rights issue'[5]. To cut a long story short: we live in an age of (human) rights.

But the mere existence and continuous ratification of international human rights instruments does not allow for the conclusion that there is a universal concept of human rights. Upon closer look, a regrettable lack of theory becomes obvious. Although the idea of universal human rights is being increasingly accepted, explicated and refined in the realm of international law, there is no universally shared theoretical foundation of such rights: 'the morality of human rights is not well understood'[6]. While it is undoubtedly true that there is something deeply attractive about the idea of human rights, attractiveness alone cannot be a sustainable foundation for the ever-growing catalogue of alleged human rights. If one looks at the foundation of the concept of human rights, one soon has to realise that – as Griffin puts it – the term human right has become 'seri-

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[1] John Tasioulas, 'The Moral Reality of Human Rights' in Thomas Pogge (ed), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (OUP, Oxford 2007) 75.

[2] David C. Thomasma, 'Evolving Bioethics and International Human Rights' in David D. Weisstub, Guillermo Díaz Pintos (eds), *Autonomy and Human Rights in Health Care. An International Perspective* (Springer, Dordrecht 2008) 13.

[3] Michael J. Perry, Toward a Theory of Human Rights: Religion, Law, Courts (CUP, Cambridge 2007) 4.

[4] David Weissbrodt, 'Human rights: a historical perspective' in Peter Davies (ed), *Human Rights* (Routledge, London & New York 1988) 1. Also cf. Manfred Nowak, *Einführung in das Menschenrechtssystem* (Neuer Wissenschaftlicher Verlag, Wien und Graz 2002) 13.

[5] Andrew Clapham, *Human Rights: A Very Short Introduction* (OUP, Oxford 2007) 1.

[6] Perry (n 3) 4.

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ously debased'[7] and that 'there are few criteria for determining when the term is used correctly and when incorrectly'[8].

The reason for this grievance is the fact that human rights are 'the rights of lawyers, not the rights of philosophers'[9]. Hence, it is not surprising that the major human rights documents signed by the international community during the past fifty years do not address underlying philosophical issues and are not concerned with identifying the normative foundation of human rights. In fact, 'there is very little moral philosophy written into the documents that constitute the framework for the United Nations human rights regime'[10]. In consequence of this unfortunate lack the realm of human rights seems to be rather theory-free. That this description is not a cynical phantasm, but indeed a true description of reality, can be gathered from the experiences of Jacques Maritain, a French theologian and philosopher who headed the French delegation at the UNESCO meetings in Mexico City during November and December 1947:

> During one of the meetings of the French National Commission of UNESCO at which the Rights of Man were being discussed, someone was astonished that certain proponents of violently opposed ideologies had agreed on the draft of a list of rights. Yes, they replied, we agree on these rights, providing we are not asked why. With the 'why', the dispute begins. The subject of the Rights of Man provides us with an eminent example of the situation that I tried to describe in an address to the second international conference of UNESCO[11], from which I take the liberty of quoting a few passages. 'How,' I asked, 'is an agreement conceivable among men assembled for the purpose of jointly accomplishing a task dealing with the future of the mind, who come from the four corners of the earth and who belong not only to different cultures and civilizations, but to different spiritual families and opposing schools of thought? Since the aim of the UNESCO is a practical aim, agreement among its members can be spontaneously achieved by virtue not of common speculative notions, but of common practical no-

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[7] James Griffin, 'First Steps in an Account of Human Rights' (2001) 9 European Journal of Philosophy 306, 306.

[8] James Griffin, *On Human Rights* (OUP, Oxford 2008) 14. Also cf. Griffin (n 8) 2: 'When during the seventeenth and eighteenth centuries the theological content of the idea was abandoned, nothing was put in its place. The term was left with so few criteria for determining when it is used correctly, and when incorrectly, that we often have only a tenuous, and sometimes plainly inadequate, grasp on what is at issue. Its indeterminateness of sense is not something characteristic of ethical terms in general; it is a problem specifically […] with the term 'human right'.'

[9] James W. Nickel, *Making Sense of Human Rights* (2nd edn Blackwell Publishing, Oxford 2007) 7. And, even if philosophers attend to the concept of human rights, they 'in the manner of magicians, pull rights out of nowhere' (Griffin (n7) 306).

[10] Donald J. Puchala, 'The Ethics of Globalism' The ACUN'S 1995 John W. Holmes Memorial Lecture: Reports and Papers, No. 3. Academic Council on the United Nations System, 1995. www.acuns.org/researchli/johnholmes accessed 4 August 2011.

[11] This conference took place in Mexico City on November 6th, 1947.

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tions; not on the affirmation of the same conception of the world, man, and knowledge, but on the affirmation of the same set of convictions concerning action.[12]

The Universal Declaration of Human Rights was and is not a declaration about common intellectual and philosophical conceptions and ideas, but a pragmatic achievement. The drafting parties agreed on a common and – given the differing views – necessarily theory-free denominator of practical principles. The philosophical underpinnings were sketched only vaguely by putting down on paper that people are born free and equal in dignity and concluding that they have equal and inalienable rights. Why this is so, why human beings are only born, but not conceived free and equal in dignity, and how dignity is the source of rights, nobody really knows. Men, mutually opposed in their theoretical views, came to a pragmatic agreement of what constituted a list of human rights. Maritain's experience that international human rights documents in some sense bypass philosophical debate by simply and pragmatically establishing a set of positive legal norms is corroborated by Freeman who states that 'there is no adequate theory of human rights, and there is a need for greater theoretical rigor'[13]. One cannot help but call this lack of theory a serious deficit – one, which has not been overcome to date.

Why is this deficit problematic? First of all, it hinders concerted action. Whenever actions have to be suited to the word and concrete human rights instruments have to be implemented, having a clear theoretical foundation of human rights becomes unavoidable. The theoretical foundation of human rights is not something that everyone can have his own opinion about as long as one aims for the same rights. In the end, it is the justification and specification, which determines a specific human right's actual meaning and content. It is very likely that the almost insurmountable difficulties in bringing the human rights talk and declarations to life are due to their deficiencies and differences in justification and specification. The second and much more detrimental problem is that 'rights without reasons are vulnerable to denial and abuse'[14]. Without a sound philosophical foundation of human rights, there is no end to the catalogue of human rights and we end up with 'an unruly proliferation of incompatible or often just incredible rights claims'[15]. Given the fact that such a foundation is missing, all kinds of human rights have mushroomed up 'uncontrollably'[16] over the last decades: from peace, help in the event of a natural disaster and comprehensive sexual education to euthanasia, globalisation and killing an unborn child based on a woman's right to choose, virtually everything is conceptualised as a human right – the result being an indiscriminate, dubious and quite possibly an irresponsible inflation or hypertrophy of

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12 Jacques Maritain, *Man and the State* (Catholic University of America Press, Washington DC 1998) 77.

13 Michael Freeman, 'The Philosophical Foundations of Human Rights' (1994) 16 Human Rights Quarterly 491, 494.

14 Freeman (n 13) 493.

15 Tasioulas (n 1) 75.

16 James Griffin, 'Discrepancies Between the Best Philosophical Account of Human Rights and the International Law of Human Rights' (2001) 101 Proceedings of the Aristotelian Society 1, 2.

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human rights. But: Do we indeed have all these rights? If so, why do we have them? If not, why not? These questions cannot be answered without reference to a theory of human rights, which explicates their foundation. Unfortunately, there is no such philosophical theory.

This article is meant to cure this deficit by enquiring into the philosophical foundation of the concept of human rights and offering a theory of human rights. An obvious starting point for doing so is to focus on the elements of the concept of human rights, namely 'human' and 'right'. A theory of human rights has to be explained with reference to what we mean by 'human *rights'* and what we mean by '*human* rights' (i.e. what is so special about human beings that it warrants granting them such rights). Accordingly, it is my firm opinion that any complete account and justification of the general idea of human rights has to comprise the following two components:

1. The concept of human rights used by this account, whereas this concept has to explained with reference to
   - what we mean by 'human *rights'* and
   - what we mean by '*human* rights', i.e. what is so special about the human being that we grant him rights.
2. The content of the account, i.e. which human rights are singled out for protection.

In what follows, I shall be mainly concerned with explicating what we are to understand by rights and what is so special about human beings that we grant them the special class of human rights. I shall, however, only touch upon the second component of a theory if human rights and I leave this task for some future article.

The Concept of 'Rights'

'[L]est we miss the obvious, human rights are rights'.[17] Without understanding the philosophy of rights, there can be no theory of human rights. The first and fundamental question a theory of human rights has to address is the following: What does the term 'rights' signify? This article will, therefore, start with an analysis of the concept of 'rights'. This task has been alleviated by the work of Wesley N. Hohfeld whose analytical scheme has become 'by far the most widely accepted analysis of the logical structure of rights, and […] is used by the majority of contemporary rights theorists'[18]. Hohfeld[19] (1913) distinguishes four subclasses ('instances') of rights: the claim-right,

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[17] Nickel (2007: 9)

[18] Leif Wenar, 'The Analysis of Rights' in Matthew Kramer, Claire Grant, Ben Colburn, Antony Hatzistavrou, *The Legacy of H. L. A. Hart* (OUP, Oxford 2008) 253.

[19] Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale Law Journal 16. Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 Yale Law Journal 710.

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the liberty, the power and the immunity. This formal distinction between the instances of rights is of paramount importance in any rights-related discussion.

Claim-Rights

As Dunne & Wheeler state, the idea of a claim-right (originally called '*right stricto sensu'* by Hohfeld) rests on and 'has embodied two foundational claims. First, that there is an identifiable subject who has entitlements; and secondly, that to possess a right presupposes the existence of a duty-bearer against whom the right is claimed.'[20] Thus, having a claim-right is to be owed a duty[21] by another or others. If A has a claim-right that B give him a certain item, then this claim entails that B has the duty to give A this item. A claim-right, therefore, is a 'right of recipience'[22]. This pairing can be expressed in a more formal way as:

A has a claim-right that B should φ[23] iff[24] B has a duty to A to φ.

Thus, having a claim-right equals being owed a corresponding duty by another person or persons. This implies that the attribution of claim-rights is meaningless without the possibility of a correlative duty resting somewhere. A Hohfeldian claim-right must thus be specified 'by reference to the actions of the people who bear the correlative duties – rather than to the actions of the people who hold the rights'[25]. When it comes to claim-rights, 'right' and 'duty' are just different names for the same relation, depending on the point of view. Without a duty, there is no claim-right (although there can be a duty without a correlative claim-right).

Liberty-Rights

In contrast, a liberty-right[26] is a 'right of action'[27]. This means that if the subject-matter of one's right is one's own act(s), forbearance(s) or omission(s), that right can-

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20 Tim Dunne, Nicholas J. Wheeler, 'Introduction' in Tim Dunne, Nicholas J. Wheeler (eds), *Human Rights in Global Politics* (CUP, Cambridge 1999) 3.

21 Essentially, a duty is a behavioural constraint: A duty-bearer is not free to act or behave as he pleases; rather, his liberty is constrained by his duty to φ. To say that B has a duty to φ against A is to say that B does not have a choice as to how he should behave towards A. Being under a duty to φ is not having a liberty-right to φ; a duty is the absence of a liberty-right. Although there is more to be said about the concept of duty, this cannot be done within the scope of this article. For more on the concept of duty cf. Christian Erk, *Health, Rights and Dignity: Philosophical Reflections on an Alleged Human Right* (ontos Verlag, Frankfurt, Paris, Lancaster, New Brunswick 2011) 152ff.

22 David Daiches Raphael, 'Human Rights, Old and New' in David Daiches Raphael (ed), *Political Theory and the Rights of Man* (Macmillan, London 1967) 56.

23 Where φ ('phi') is the behavioural content of the claim-right and stands for a description signifying some behaviour but can also refer to the occurrence of certain states of affairs.

24 i.e. if and only if.

25 Mathew H. Kramer, 'Rights Without Trimmings' in Mathew H. Kramer, Nigel E. Simmonds, Hillel Steiner (eds), *A Debate Over Rights: Philosophical Enquiries* (Clarendon Press, Oxford 1998) 13.

26 The liberty-right is sometimes also referred to as privilege (according to the original Hohfeldian notation), license, or permission.

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not be a claim-right, but only a liberty-right.[28] As such, a liberty-right states, what its bearer does not have a duty not to do and gives him a choice (i.e. the liberty) to either φ or not to φ; liberty-rights are the things one may do without being prevented by a duty to the contrary. Having such right 'is to be free of a duty to the contrary'[29]. Liberty-rights 'consist of those actions one is not prohibited from performing'[30]. Expressed more formally:

A has a liberty-right to φ iff A has no duty not to φ.

Although not wrong, the problem with this formulation is that it is coined in the language of a two-term rights talk. Consequently, it forgets the second party necessary for a complete three-term rights talk and is thus underdetermined. But this deficiency can be easily remedied if we remember that a duty is always owed to somebody. The moral significance of A's having a privilege thus is that A is not under a duty toward B to refrain from φ; A's behaviour is not being constrained by a claim-right of B with respect to φ. As a consequence, liberties are paired with no-claims: A's having a privilege, i.e. a no-duty towards B, implies B's having a no-claim towards A. This aspect is emphasised by Finnis' definition of a liberty-right:

> A has a liberty (relative to B) to φ, if and only if B has no-claim-right ('a no-right') that A should not φ. […] A has a liberty (relative to B) not to φ, if and only if B has no-claim-right ('a no-right') that A should φ.[31]

For example: If A has no duty to vacuum-clean B's flat, i.e. if B has no claim-right towards A obliging A to vacuum-clean B's flat, A is at liberty and has the liberty-right to not vacuum-clean. However, while liberty-rights provide protection for an individual's actions, it would be wrong to conclude that B's having no claim to A's not φ-ing necessarily means that B has no liberty-right (i.e. has a duty not) to prevent A's φ-ing. A's privilege does not entail the duty on the part of anyone to not interfere with A's action with respect to φ. This can also be illustrated by example of the rules of soccer: each team is at liberty to score, i.e. under no duty not to score, but no team is under a duty to let the other team actually do so. On the contrary, each team has the liberty-right to prevent this from happening. Another example illustrating the concept of a liberty-right would be to consider a billionaire and a beggar: both have a liberty-right to buy an Aston Martin or to holiday in a luxury resort in the Swiss mountains, although only one of them will actually be able to do so. These examples highlight the crucial difference between liberty-rights and claim-rights: liberty rights are concerned with the right-holder himself, i.e. what he is entitled to do or not to do; claim-rights with what others are obliged to do or not to do with respect to the right holder. Claim-rights are

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[27] Raphael (n 22) 56.

[28] This, strictly speaking, is also true for a power-right (see below).

[29] Peter Jones, *Rights* (Macmillan Press, London 1994) 17.

[30] Andrew Fagan, 'Human Rights' in The Internet Encyclopedia of Philosophy, 2006. www.iep.utm.edu/h/hum-rts.htm accessed 3 August 2011.

[31] John Finnis, *Natural Law and Natural Rights* (2nd edn OUP, Oxford 1982) 199.

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specified by reference to the actions of the people who bear the correlative duties, liberty-rights by reference to the actions of the people who hold the rights. In other words, claim-rights are correlative to duties and liberties are limited by duties.

Power-Rights

Having a power-right is the 'ability to cause by an act of one's own, an alteration in a person's rights, either one's own rights or those of another person, or both'[32]. An agent's power-right can therefore make another person or himself have, cease or alter a liberty-right or a claim-right (and thereby create, change and if necessary enforce or abolish a duty). A democratic parliament enacting a new tax law is a classic example of exercising a power-right, since the parliament imposes on the citizens the duty to pay the kind and amount of taxes that have been enacted. Furthermore, powers can also put somebody in a position to not only be able to alter first-order, but also second-order incidents. A chain of command, as e.g. found in the military, would be an example of such a power. A higher-ranking officer has the power to relieve a lower-ranking one from his duties and thereby annul the powers of the latter. Cruft explains this as follows:

> X holds a power if and only if X holds the ability to create or to remove some claim, duty or privilege (a claim, duty or privilege which might be held by X himself or herself, or by someone else), or X holds the ability to create or to remove some power, liability, disability, or immunity (a power, liability, disability or immunity which might be held by X himself or herself, or by someone else).[33]

Immunity-Rights

In contrast to having a power, 'for X to have an immunity against Y is for Y to lack a power as regards X'[34]. An immunity-right protects from the power of others to alter one's rights or duties. If there are inalienable rights then we all lack power against ourselves and thus have immunities with respect to these rights. An immunity-right can be said to exist if the rights-holder is not liable to have his rights-status changed (e.g. by means of a prohibition to exercise an existing power-right or by means of a prohibition to actually create power-rights) by the action of another person utilising a power-right. In the style of the above mentioned definition of a power-right this can be expressed more formally as follows:

> A has an immunity-right (relative to B's φ-ing) iff B has no power-right (i.e. a disability) to create or to remove some claim, duty or privilege (a claim, duty or privilege which might be held by A himself or herself, or by someone else), or iff B has no

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[32] Judith Jarvis Thomson, *The Realm of Rights* (Harvard University Press, Cambridge (Mass.) 1990) 57.

[33] Rowan Cruft, 'Rights: Beyond Interest Theory and Will Theory?' (2004) 23 Law and Philosophy 347, 351.

[34] Thomson (n 32) 59.

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power-right (i.e. a disability) to create or to remove some power, liability, disability, or immunity (a power, liability, disability or immunity which might be held by B himself or herself, or by someone else).

Molecular or Cluster-Rights

Although all assertions or ascriptions of rights can be understood in terms of these four Hohfeldian instances, i.e. can be reduced without remainder to ascriptions of one of these categories, it would be wrong to suppose that every right must exist in one and only one pure Hohfeldian. As reality shows, many rights assertions are covered by a number of these instances at the same time. The right to freedom of movement, for instance, is a liberty (I am under no duty not to move and thus free to move), a power-right (to alter my legal status as a citizen) as well as an immunity (against anyone trying to introduce laws hindering my travelling). Consequently, we have to add a fifth instance: the 'molecular right'[35] or 'cluster-right'[36], which is a combination of two or more of the four basic (or as Wenar calls them 'atomic'[37]) Hohfeldian incidents of rights.

Further Analytical Characteristics of Rights

Obviously, the content of rights can vary a great deal. These further properties, not covered by the Hohfeldian scheme of analysis, have been captured by the following further distinctions:

- The first distinction is between active and passive rights, i.e. rights to do things and rights to have things done for or to one. Active rights allow the right-bearer to take a certain action or behave in a certain way, whereas passive rights oblige another party or parties. According to this classification, the liberty and the power are active rights, which the right-bearer exercises, in contrast to the claim and the immunity which are passive rights enjoyed by the right-bearer.

- A second distinction answers the question, 'Against whom is a right held?'. This distinction is one between 'rights in personam' and 'rights in rem', whereby in personam rights are held exclusively against some specifically identified duty-bearer, i.e. a specific person or persons, and the latter against no one in particular, but people at large; the term 'in rem' does not denote the subject of the right, but the compass: 'it denotes that the right in question

35 Leif Wenar, 'The Nature of Rights' (2005) 33 Philosophy and Public Affairs 223, 225.

36 Thomson (n 32).

37 Wenar (n 36) 225.

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avails against persons generally; and not that the right in question is a right over a thing'.[38]

- A third distinction discerns 'individual rights' and 'group rights' (or collective rights). Group rights are held by a group rather than severally by its members, whereas individual rights – as the term implies – are held by a single individual.

- A forth distinction, which is only applicable to the class of claim-rights is the one between positive[39] and negative rights, where a positive claim-right corresponds to a positive duty and a negative claim-right to a negative duty. The former requires the respective agent's performance and the latter the agent's forbearance: 'A claim-right is always either, positively, a right to be given something (or assisted in a certain way) by someone else, or negatively, a right not to be interfered with or dealt with or treated in a certain way, by someone else.'[40] According to this distinction, negative claim-rights imply a duty to non-interference or 'negative action'[41]. They give the claim-right-holder the right to keep something, which he already possesses, whereas positive claim-rights as claims to something (e.g. good, service, result) imply a duty to undertake a specific positive action and give the claim-right-holder a right to something he does not yet possess or to enable him.

What makes a Right a *Human* Right?

In the previous sections, we carved out what makes a human *right*. But what makes a right *human*? This is the question this chapter is meant to answer. Our enquiry could start, for example, with the right not to be murdered. As intuition and experience tells us, this right has both legal and non-legal sources; it is usually assigned by a legal system, but would exist even if no legal system would establish it. There is something about this right 'even all governments together cannot legislate [...] out of existence'[42] and no custom can deny. The fact that there is something that goes beyond the realm of legal as well as customary rights, has been understood and recorded since the earliest history of mankind – and this something is usually called moral right. When speaking about rights we should, therefore, not only bear in mind that there are claim-rights,

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38 John Austin, 'Lectures on Jurisprudence or The Philosophy of Positive Law: Volume 1' (5th edn John Murray, London 1885) 370. In order to avoid this confusion, Hohfeld calls in personam rights 'paucital rights' and in rem rights 'multital rights' (Hohfeld (n 19) 718).

39 The term 'positive' is not to be confused with the term 'positive' in 'positive law'. Whereas the former is meant to express that the corresponding duty is one of commission (and therefore contrary to negative rights, which are about duties of forbearance), the latter signifies codified law as contrasted with conventional or moral law.

40 Finnis (n 31) 200.

41 Jones (n 29) 15.

42 Thomas Pogge, 'Recognized and Violated by International Law: The Human Rights of the Global Poor' (2005) 18 Leiden Journal of International Law 717, 718.

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liberty-rights, immunity-rights, power-rights and cluster-rights but also that we can distinguish between in moral, legal and customary rights. The best path towards gaining an understanding of the concept of *moral* rights and of its conceptual differences with respect to both legal and customary rights is to ask why we have rights, i.e. to enquire into the sources of rights and duties.

Legal, Conventional and Moral Rights

On an abstract level, rights and duties can either be conventional, i.e. formed by customs, agreement or compact, non-conventional, i.e. formed by authoritarian decree, or pre-conventional, i.e. independent of agreement or authority. Furthermore, the same right or duty can either be positive, i.e. existent only because of some form of legislation or codification, or pre-positive, i.e. existent independent of and prior to any legislation. Following these initial distinctions allows us to distinguish between the following – as far as I can tell: exhaustive – three categories of rights. As we shall see, although all three categories of rights and duties can have the same content (e.g. the right to not be murdered), there is a difference in the way they are constituted and validated – a difference which results in an opportunity for logical prioritisation.

- **Positive (= legal) rights and duties**

  These rights are called 'positive' because they derive from the laws of the society and have been posited by human will institutionalized in some form of government – whose power is usually limited to a certain geographical area. A positive right or duty cannot be said to exist prior to its inclusion in a legal code, i.e. its existence, validity and applicability is dependent upon codification by some form of legislature. Furthermore, positive rights and duties are necessarily backed by some form of jurisdiction in relation with institutionalised penal or rectifying actions for non-compliance.

  Positive rights can either be conventional (e.g. democratic positive law), i.e. emanating from social conventional efforts or non-conventional (e.g. the positive law of a tyrant not requiring any conventional agreement, but rather the capacity to enforce it). Positive law and its derivative rights is authoritarian law, i.e. imposed from the top – with varying degrees of consent from the bottom. The rationale for its existence is political and thus contingent upon the balance of power within a state. It could thus be enacted and enforced by a powerful minority against the will of a less powerful majority, by a powerful majority against the common will of less powerful minorities or, in an ideal case, by complete societal consent.

  Based on these comments, it is easy to see that all legal rights are positive rights; therefore, both expressions can be used synonymously. Because of their positive nature, positive rights and duties are culturally and politically relative because they are contingent upon local laws, customs or beliefs.

- **Pre-positive conventional rights and duties**

  The category of pre-positive conventional rights is congruent with what are commonly called customary rights. They are aspects of local customs, based on

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widespread acceptance and reciprocity and thus rooted in shared behavioural patterns. This means that they are necessarily conventional in nature. In contrast to the authoritarian positive law, customary law can be described as bottom-up law.

As far as their existence and validity is concerned, they are pre-positive, i.e. not dependent on inclusion in a society's legal code. Positive law acknowledges the existence of customary rights and duties and generally accepts them if they are repeated for a long time ('*longa consuetudo'*) and if they have acquired the force of tacit and common consent ('*opinio juris'*).

Given their combined pre-positive and conventional nature, customary rights are – just as legal ones – also culturally and politically relative. Given their relativity, I am inclined to call customary rights the weak form of pre-positive rights and duties.

- **Pre-positive pre-conventional rights and duties**

This category is equal to the one of moral rights and duties. Pre-positive pre-conventional rights and duties exist independently of any legal code and are not contingent upon the laws of a society nor rooted in or constituted by a set of rules of a given society – which sets them apart from mere positive rights. They exist, regardless of their reproduction in positive law. Rather, positive law or social institutions, which fail to protect them, are defective. Conversely, this means that positive law is required to protect and promote them. Furthermore, pre-positive pre-conventional rights are not the result of customs, agreement or compacts, – which makes them distinct from pre-positive conventional rights. They exist, regardless of their reproduction in customary law.

We could say that moral rights and duties are not only pre-positive, but also pre-conventional and therefore logically prior to customary rights. Because they are not posited and not conventional, they lack the relativity inherent to the two categories of rights above and can also be said to constitute the strong form of pre-positive rights.

However, if moral rights and duties do not gain their power from a legal code or from being conventional in nature, they need another source of validation. This source is that they are being derived from moral reasons or better: a moral theory.

In a nutshell, a moral right can be understood as a right, 'which is not the product of community legislation or social practice, which persists even in the face of contrary legislation or practice, and which prescribes the boundary beyond which neither individuals nor the community may go in pursuit of their overall ends'[43].

These findings can be summarised in the following matrix (cf. Figure 1):

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43 Raymon G. Frey, *Interests and Rights: The Case Against Animals* (Clarendon Press, Oxford 1980) 7.

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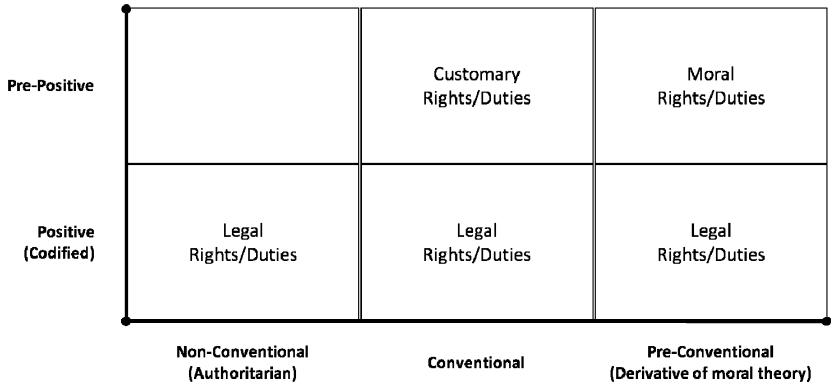

Figure 1: Categories of Rights and Duties

These finding put us in a position to establish the following ranking: pre-positive pre-conventional rights are prior to pre-positive conventional rights, which are prior to positive rights. Or in a more comprehensible version: moral rights are prior to customary rights, which are prior to legal rights. Or in the most comprehensible version: moral rights override all other categories of rights. They are necessarily universal. Given this universality, both customary as well as legal rights should ideally be mere expressions of pre-positive law.

The Analytics of Moral Rights

Having established the existence of moral rights, the next question we have to deal with is whether we can apply the Hohfeldian analytical framework as introduced above to this category of rights as well or whether we have to make some modifications to it. For, a weakness of this scheme is that it has been developed aimed at incorporating legal rights and duties.

Some writers (such as Thomson) have suggested adopting the Hohfeldian incidents for moral rights as well.[44] But as Jones[45] has shown, the Hohfeldian typology, though applicable, is less central to the concept of a moral right than it is for a legal right – at least if considered in its wholeness. This can be easily seen in the case of power-rights: although I might have the freedom to enter into promises (which is a liberty-right), I certainly do not have the power to establish that promises do not have to be kept in general. This would be contrary to the pre-positive and pre-conventional nature of moral rights and duties. Consequently, it would be true to state that when it comes to moral rights everyone has an immunity-right, since no one is in a position to change someone's moral position. It is a characteristic of moral rights that they are inaccessible

44 Thomson (n 32) 74.
45 Jones (n 29) 47f.

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to changes by either authoritarian or conventional human will. Powers and immunities can be derivative of moral rights, but a power-right cannot introduce, change or annul a moral right or duty.

In order to keep things simple and avoid confusion, I propose to exclude both power- and immunity-rights, i.e. 'second-order' incidents, from the category of moral rights and duties. Where there is no general power over one's moral rights/duties, there is no need for a general immunity-right. For the purpose of this thesis, moral rights/duties are instances of either claim-rights or liberty-rights, i.e. 'first-order' incidents of rights (whereas their further characteristics, as outlined above, are valid as well). This is also in line with Dworkin[46] who differentiates between moral rights 'in a weak sense' and moral rights 'in a strong sense': a moral right in the weak sense would be what has been described above as a liberty-right, a moral right in the strong sense is a claim-right, which imposes duties on others.

If moral rights cannot be 'second-order', but only 'first-order' incidents, this leaves three options for a philosophical understanding of moral rights: a moral right can either be

1. a moral claim-right (which necessarily implies a corresponding duty):
   A has a moral claim-right that B should φ if and only if B has a moral duty to A to φ,
2. a moral liberty-right:
   A has a moral liberty-right to φ if and only if A has no moral duty not to φ, or
3. a moral molecular right/cluster-right, i.e. a combination of a moral claim-right and a moral liberty-right

We also know that rights can be divided into active and passive, rights in personam and rights in rem, individual and group rights as well as positive and negative rights. To recapitulate briefly: the classes of active (A has a right to φ) and passive rights (A has a right that B φ) correspond to the distinction between liberty-right and claim-right; liberty-rights are active rights and claim-rights are passive rights. Rights in personam are held against a specific person or persons, while rights in rem are held against people at large. The distinction between individual rights and group rights answers the question of who actually holds rights: an individual right is held by an individual, group rights are held by a group rather than by its members severally.[47] Negative rights imply a negative duty to non-interference or forbearance on the part of the duty-bearer (negative action), positive rights as claims to be given something or assisted in a certain way obligate the duty-bearer to undertake a specific positive action. Given the necessity of a duty-bearer, negative and positive rights can only be claim-rights. If we apply these distinctions to the three options for a philosophical understanding of human rights listed above, we are led to think that there are – in theory – four moral claim-rights

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[46] Ronald Dworkin, *Taking Rights Seriously* (Gerald Duckworth, London 1977) 188ff.

[47] The distinction between individual and group rights is of no further interest for the purpose of this article.

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(moral positive claim-right in rem, moral negative claim-right in rem, moral positive claim-right in personam and moral negative claim-right in personam), two moral liberty-rights (moral liberty-right in rem, moral liberty-right in personam) and one moral cluster-right. But this does not correspond with reality and overestimates the possibilities we have in conceptualising moral rights.

For, the distinction between rights in rem and rights in personam has certain implications for the definition of a right as positive or negative or as Salmond formulates it: 'is closely connected with that between positive and negative rights'.[48] The connection between rights in rem/rights in personam and positive rights/negative rights basically is that 'the duties which correlate with rights in rem are always negative: that is to say they are duties to forbear or abstain'[49]. Therefore, conceptually speaking, there is no such thing as a positive claim-right in rem. That claim-rights in rem can only be negative is an almost necessary consequence of the nature of a right in rem. As has been said, rights in rem are universally claimable and held against persons universally. Now, if rights in rem involved positive duties, then every such duty would either set the whole world in motion or involve universal liability for non-compliance. This would be absurd because overly demanding – especially in a world with scarce resources as the one we live in. Thus, a claim-right in rem is always negative, i.e. the only corresponding duty of a claim-right in rem is the negative duty resting upon all men not to interfere with the right: rights 'available against all other persons, can be nothing more than a right to be left alone by those persons […] The only duties, therefore, that can be of general incidence are negative.'[50] A claim-right in rem can only constitute a duty requiring forbearance or omissions on the duty-bearer's part; or put differently: positive claim-rights can only be in personam while negative claim-rights can either be in rem or in personam.

This line of reasoning, however, might not be a completely convincing attempt to disprove the conceptual possibility of positive claim-rights in rem. We should, therefore, take this thought one step further and ask whether there are moral positive claim-rights at all; if there is no such thing as a moral positive claim-right, then neither are there moral positive claim-rights in rem nor in personam. In trying to find an answer to this question, it is interesting to note that while there is unanimity concerning the existence of negative moral claim-rights, there is considerable disagreement with regard to the validity of ascriptions of moral positive claim-rights. Some, such as Cranston or Pogge[51], hold that moral and human (and thus moral) rights cannot ground positive duties, but only impose negative duties. Cranston holds that the ascription of positive

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48 John W. Salmond, *Jurisprudence* (6th edn Sweet and Maxwell, London 1920) 203. Given the fact that the positive/negative distinction can only apply to claim-rights, this implication and connection only concerns claim-rights.

49 Austin (n 38) 371.

50 Salmond (n 48) 203.

51 Maurice Cranston, 'Are There Any Human Rights?' (1983) 112 Daedalus 1, 12. Pogge (n 42) 720.

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rights leads to a reduction of moral rights to 'the status of ideals'[52] and that their realisation is not possible: 'for a government to enforce them, it would need to have access to great wealth, wealth that most governments of the world have no means of acquiring'[53]. Pogge[54] furthermore holds that many of the states of affairs that lead philosophers and politicians to argue for positive duties of assistance are in fact the result of severe violations of negative duties. As it seems, the concept of moral positive claim-rights is either theoretically unsound or not needed, since an adherence to the prescriptions of moral negative claim-rights would do the trick. In my opinion, there can be – conceptually speaking – no moral positive claim-rights, be it in rem or in personam.[55] The main argument against the existence of moral positive claim-rights is that they clash with many critical moral negative claim-rights, especially the right to freedom and property. This argument has been expressed well by Griffin who – although basically arguing for welfare rights – states:

> Welfare rights would require substantial transfers of goods. […] But there is the familiar point that, by and large, goods do not appear on the scene like manna from heaven. For the most part, there is no wealth to transfer, unless it has first been created. It therefore comes into the world already owned. And it comes into the world, to some extent, because it can be owned. To put it in a rough, intuitive way, there is something odd, even at times morally wrong, in ignoring ownership.[56]

At their very bottom, moral positive claim-rights imply that one has an undeniable right to take from or to be given by another that which is not his and which one has not earned; they are rights of recipience. But what is claimed is not lying around like manna from heaven, but resources, which are necessarily already owned. Understood like this, moral positive claim-rights are a positive form of property right – the right to be given some form of resources and thus property. However, they are not only a form of a positive property right, but also presuppose the notion of private property; for, if everything were common, such a right would be utterly unnecessary. The right to be given something by somebody else only makes sense if the counterpart has dominion over the 'something' in question, i.e. is in a position to give it. If there were no private property, no one would have the power to give the claimant what he has a moral positive claim-right to, since everything would be owned by no one. Now, the institution of private property only makes sense if there is such a thing as a moral negative claim-right with respect to property. Understood like this, every moral positive claim-right presupposes a right not to be deprived of one's property. But, if this is so we are stuck

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[52] Cranston (n 51) 12.

[53] Cranston (n 51) 13.

[54] Pogge (n 42). Thomas Pogge, 'World Poverty and Human Rights' (2005) 19 Ethics and International Affairs 1. Thomas Pogge, 'Severe Poverty as a Violation of Negative Duties (Reply to the Critics)' (2005) 19 Ethics and International Affairs 55.

[55] For a lengthy treatment of this question and a more detailed account of my position on this cf. Erk (n 21) 183-207.

[56] James Griffin, 'Welfare Rights' (2000) 4 The Journal of Ethics 27, 37.

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with an unsolvable conundrum: if A has the right to enjoy his property and B has the right to some share of A's property, which claim should be given priority? Regardless of one's choice, one always violates the rights of somebody else. This leaves only two options: one has to either abandon the moral negative claim-right to freedom, which includes the free use of one's property or the concept of private property altogether, or one has to give up the idea that there is such a thing as a moral positive claim-right. The first option is not a viable one: firstly, there has been a long philosophical tradition asserting the existence of a moral negative claim-right to freedom and property; and secondly, such a negative right can be easily derived from the account of moral rights/duties offered below. This only leaves the second option. There is something at odds with the whole idea of moral positive claim-rights, i.e. the moral claim that I should be given something without having done anything to deserve it. Arguing for moral positive claim-rights would be defending involuntary charity. Unless there are strong arguments for the existence of moral positive claim-rights, we should therefore abandon the notion that such moral rights exist.

In consequence, moral claim-rights are always negative in nature. They protect people against being treated in certain ways, but do not entitle them to the support of others – although there is an exception to the rule, namely in cases of extreme necessity[57]. Generally, positive rights do not exist as pre-positive and pre-conventional rights; but they can exist as conventional and/or positive (in the sense of legal) rights. This means they do not exist, until they have been agreed to exist, promised, contracted, enacted (i.e. arise from voluntary and free actions, transactions or commitments), arise as remedy for a former rights violation ('restitutio', i.e. an act of commutative justice) or come into existence as the result of special relations or situations (e.g. an infant has undertaken no voluntary or free act in order to being conceived and borne, but shares in the same positive rights as any other member of the family and – on a higher level – the community he is part of). It should be emphasised that defending this view is not to advocate, speak in favour of or be motivated by a spirit of stinginess. Stating that there are no moral positive claim-rights is just saying that there cannot be a moral right to be given something, nothing more and nothing less. However, this position does not and cannot establish in any way that there is no such thing as a moral positive duty, i.e. a duty to help and give something to somebody (sometimes also called 'duty of charity'). It only establishes that such a duty would have to be an imperfect one, i.e. one with no claim-right corresponding to it, and that such a duty cannot be rooted in or the result of a moral positive claim-right.

Human Rights and Duties as a Special Class of Moral Rights and Duties

So far, we have only been speaking about legal, conventional and moral rights. But this article is not about legal, conventional or moral rights, but human rights. So, how do human rights fit into this triad of rights? What does the addition of 'human' to

[57] cf. Erk (n 21) 195ff.

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'rights' signify? What kind of right is a human right? Is it a legal, conventional or moral right?

When we think about human rights, what comes to our mind first might be the United Nation's Human Rights Declaration or the European Convention on Human Rights (ECHR). Therefore, human rights are often taken to be legal rights. However, as Fagan rightly points out, equating human rights with legal rights would be 'philosophically naïve'[58]. As is commonly agreed upon in the philosophical and political community, human rights are rather thought of as a subclass of moral rights: 'human rights are a form of moral rights'.[59] As such, they are independent from convention and legal confirmation and 'exist independently of acceptance or enactment as law'[60]. They establish values that positive and conventional law should adhere to and limits beyond which they cannot go. But, the moral nature of human rights does not exclude, of course, the possibility of codification. Human rights can also be positive or conventional rights where they are buttressed by positive or conventional law – but their existence is not dependent on their acknowledgement by law, government or society. Rather, they serve as a yardstick for and as an ideal by which any codified or conventional right should orientate itself. Having a human right then means that this human right ought to be recognised or at least protected by positive or conventional law as well; not doing so means committing a moral wrong: 'The space protected by human rights is what it is right that people should enjoy.'[61] So, human rights are a special class of the moral rights of human beings (although they are not the only moral rights that exist). All human rights are moral rights of human beings, but not all moral rights of human beings are human rights.[62]

Human Rights and Human Dignity

So far, it has been established what rights are and what distinguishes moral from both customary and legal rights. It has also been established that moral rights are grounded in and justified by a moral theory. The special class of human rights is usually justified with reference to a moral status theory, i.e. a moral theory that holds that 'human beings have attributes that make it fitting to ascribe certain rights to them, and

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58 Fagan (n 30).

59 Maurice Cranston, *What Are Human Rights?* (Bodley Head, London 1973) 21. In the same fashion, Nickel and Orend state that human rights are 'characterized as moral rights' (Nickel (n 9) 46) and 'high priority moral rights' (Brian Orend, *Human Rights: Concept and Context* (Broadview Press, Petersburg, Ontario 2002) 67). Also cf. Sen (Amartya Sen, *Development as Freedom* (OUP, Oxford 2001) 229): 'It is best to see human rights as a set of ethical claims, *which must not be identified with* legislated legal rights.'

60 Nickel (n 9) 45.

61 R. J. Vincent, *Human Rights and International Relations* (CUP, Cambridge 1986) 11.

62 If human rights are a special class of the moral rights of human beings, this means that there are moral rights, which are not of human beings. Animal rights are moral rights, but not moral rights of human beings.

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make respect for these rights appropriate'[63]. The attribute that makes it fitting to ascribe human rights to human beings is usually taken to be human dignity. Therefore, we are in a position to sharpen our account of human rights developed above; human rights are that special class of the moral rights of human beings which is justified with reference to the dignity of human beings.[64]

The Foundation of Human Rights in Human Dignity

The concept of 'dignity' is the normative and philosophical linchpin of justifying human rights. This relation between human rights and human dignity is also confirmed by Gewirth: 'The relations between human dignity and human rights are many and complex, but one relation is primary: human rights are based upon or derivative from human dignity. It is because humans have dignity that they have human rights.'[65] Without reference to human dignity, one cannot gain an adequate understanding of human rights: 'Dignity is the ground of rights, not a synonym for rights.'[66] Sulmasy goes on to emphasise the close relation between human rights and human dignity: 'to speak clearly of human rights, one must have a clear conception of human dignity. The intimate relationship between these two concepts can be stated simply: People do not have dignity because they have rights; they have rights because they have dignity. […] Dignity is prior to rights. […] All human rights depend upon the concept of human dignity.'[67]

Yet, although more than 60 international conventions and human rights documents invoke the concept of 'human dignity' to justify the rights asserted in them, they neither explicitly define the meaning or content of nor justify the term 'human dignity'.[68] Jacobson corroborates this observation. He remarks that although an evaluation of the history of the drafting of the UDHR based on contemporaneous documents and accounts allows for the conclusion that dignity was a standard applied throughout the process of debating and writing each of the Declaration's thirty articles, 'it is less clear that the drafters ever engaged in a discussion about the meaning of dignity itself'[69]. Therefore, although almost everyone gives at least lip service to the ideal of human

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63 Leif Wenar, 'Rights' in The Stanford Encyclopedia of Philosophy, 9 July 2007 http://plato.stanford.edu/entries/rights accessed 3 August 2011.

64 This necessitates the conclusion that not all moral rights held by human beings are necessarily human rights, but only those, which actually arise from human dignity, since there may be moral rights of human beings, which may be grounded differently.

65 Alan Gewirth, 'Human Dignity as the Basis for Rights' in Michael J. Meyer, William A. Parent (eds), *The Constitution of Rights: Human Dignity and American Values* (Cornell University Press, Ithaca and London 1992) 10.

66 Daniel P. Sulmasy, 'Human Dignity and Human Worth' in Jeff Malpas, Norelle Lickiss (eds), *Human Perspectives on Human Dignity: A Conversation* (Springer, Dordrecht 2007) 10.

67 Sulmasy (n 66) 25.

68 Cf. Doron Shultziner, 'Human Dignity – Functions and Meanings' (2003) 3 Global Jurist Topics 1 as well as Jonathan Mann, 'Dignity and Health: The UDHR's Revolutionary First Article' (1998) 3 Health and Human Rights 31.

69 Nora Jacobson, 'Dignity and health: A Review' (2007) 64 Social Science & Medicine 292, 295.

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dignity, the foundations for that principle are seldom explicated. The concept of dignity appears in a wide variety of guises, many of which seem to be at odds with each other. As it seems, the justificatory mechanism for our human rights is a philosophical terra incognita whose meaning is 'left to intuitive understanding, conditioned in large measure by cultural factors'[70]. Unfortunately, this renders the concept of human dignity and, in consequence, human rights arbitrary and useless. In order to save the idea of human rights one has to, therefore, offer a philosophical account of human dignity.

Understanding Human Dignity

So, what is human dignity and how are human rights and human dignity related to each other? Dignity is not something accessible to empirical measurements or something like an organ, which can be discovered in our body. Furthermore, it is 'not a distinct property or quality, like a body's color, or an organ's function'[71]. Rather, it refers to a property or properties, which 'cause one to excel, and thus elicit or merit respect from others'[72] and by which one is considered worthy, honourable or estimable. It thus implies and connotes terms such as worthiness for honour or esteem, elevation, excellence and distinction. It is a special kind of value, an exalted value, even an excellence of value. Value as opposed to disvalue indicates positive importance, whereby the term 'importance' designates 'that quality or characteristic of a thing that makes it not neutral and, lifting it out of neutrality, provides the ground of meaningful motivation'[73]. In the same fashion, Kass states that dignity conveys 'a special standing for the beings that possess or display it […] something elevated, something deserving of respect'[74]. To make a long story short: Human dignity refers to those properties of man, which lift him out of neutrality; it is a term of distinction – both with respect to the rest or creation as to his fellow men. Attaching human rights to the high value, which is the dignity of human beings, is to envelope the dignity in a protective capsule; but it also means that the exalted value of the dignity of human beings enveloped into a right is so important that it trumps other values.

Which excellences or elevations are at the heart of human dignity and give their bearers special worth and standing as well as human rights? What is it that makes human beings worthy of our respect? Throughout history, we can find different perspectives on why man is lifted out of neutrality:

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[70] Oscar Schachter, 'Human Dignity as a Normative Concept' (1983) 77 The American Journal of International Law 848, 849.

[71] Patrick Lee, Robert P. George, 'The Nature and Basis of Human Dignity' in The President's Council on Bioethics (ed), *Human Dignity and Bioethics. Essays Commissioned by the President's Council on Bioethics* (The President's Council on Bioethics, Washington DC 2008) 409f.

[72] Lee, George (n 71) 410.

[73] Josef Seifert, *What is Life? The Originality, Irreducibility and Value of Life* (Rodopi, Amsterdam and Atlanta 1997) 95.

[74] Leon R. Kass, 'Defending Human Dignity' in The President's Council on Bioethics (ed), *Human Dignity and Bioethics. Essays Commissioned by the President's Council on Bioethics* (The President's Council on Bioethics, Washington DC 2008) 308.

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- In his 'De Officiis' Cicero writes: 'Atque etiam, si considerare volumus, quae sit in natura excellentia et dignitas, intellegemus, quam sit turpe diffluere luxuria et delicate ac molliter vivere, quamque honestum parce, continenter, severe, sobrie.'[75] For Cicero, dignity is based on one's excellence as a human being.
- In his 'Leviathan', Thomas Hobbes defined dignity in a very different way: 'The value or worth of a man is, as of all other things, his price; that is to say, so much as would be given for the use of his power, and therefore is not absolute, but a thing dependent on the need and judgement of another. […]. The public worth of a man, which is the value set on him by the Commonwealth, is that which men commonly call dignity.'[76] (Hobbes, 1991: 63 (chapter 10)) For Hobbes dignity is the value one has to others; therefore, it is dependent on an external valuation and subject to the market price.
- A third view of dignity is presented by Immanuel Kant: 'Das aber, was die Bedingung ausmacht, unter der allein etwas Zweck an sich selbst sein kann, hat nicht bloß einen relativen Werth, d.i. einen Preis, sondern einen innern Werth, d.i. Würde'.[77] For Kant, dignity is inherent to man and not dependent on external valuation or one's degree of human excellence. Dignity in this sense cannot be gained, lost and/or regained – one just has it.

These three historical uses of the word 'dignity' are illustrative of the three senses or facets according to which dignity is generally understood in axiology and moral philosophy. In principle, the dignity of human beings can be divided into inherent or intrinsic, inflorescent as well as attributed/bestowed dignity[78]:

- **Intrinsic/ontological dignity:**
  By this kind of dignity we mean the 'value that human beings have simply by virtue of the fact that they are human beings'[79]. This kind of dignity can be discovered, but not generated. It signifies a human being's respect-worthiness which is independent from our subjective preferences: 'the value called 'dignity' is an intrinsic preciousness and goodness of a being that is in no way dependent

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75 Cicero, De Officiis, Liber 1, 106. This translates as: If we wish to reflect on the excellence and dignity of our nature, we shall realize how dishonorable it is to sink into luxury and to live a dainty and soft lifestyle, but how honorable to live thriftily, strictly, with self-restraint, and soberly.

76 Thomas Hobbes, *Leviathan* (CUP, Cambridge 1991) 63 (chapter 10).

77 Immanuel Kant, 'Grundlegung zur Metaphysik der Sitten (1785)' in *Akademieausgabe von Immanuel Kants Gesammelten Werken*, Band 4, http://www.korpora.org/Kant/verzeichnisse-gesamt.html accessed 3 August 2011, Ak 435. This translates as: That which constitutes the condition under which alone something can be an end in itself has not merely a relative worth, i.e. a price, but has intrinsic worth, ie dignity.

78 Cf. Erk (n 21) 236ff.

79 Daniel P. Sulmasy, 'Dignity and Bioethics. History, Theory, and Selected Applications' in The President's Council on Bioethics (ed), *Human Dignity and Bioethics. Essays Commissioned by the President's Council on Bioethics* (The President's Council on Bioethics, Washington DC 2008) 473.

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on our subjective likes or dislikes'[80]. While some things may be lifted out of the neutral only subjectively – insofar as they e.g. please or displease us or are agreeable or disagreeable to us – others may not and are objectively lifted out of the neutral 'by an objective in-dwelling positive importance'[81]. As I have argued elsewhere[82], this objective in-dwelling positive importance can only consist in every human being's being a person, i.e. in being an individual substance of a rational nature. This is the only criterion which meets the requirement that this aspect of dignity is to be intrinsic. Human beings possess this kind of dignity not only when they function as a person, but by virtue of being one. Therefore, ontological dignity is grounded in the substantial being of a man and its potencies, and not only their actualisation. When it comes to the ontological dignity of a person, this value is not contingent on age, consciousness, illness or our subjective inclinations. It is unconditional. It is the substantial being of a man, which grounds his personhood and thus his ontological dignity; consequently, ontological dignity is always had by all human beings. It is an inherent endowment of every human being.

- **Inflorescent dignity:**

  Sometimes, dignity is also used to refer to a state of virtue or 'to individuals who are flourishing as human beings – living lives that are consistent with and expressive of the intrinsic dignity of the human'[83]. On the one hand, this flourishing lies in the conscious actualisation of the person's capabilities; as such it is based on the actualisation of the potential of the rationality, which is characteristic for persons[84]. This aspect can, therefore, be called the dignity of awakened personhood or the dignity of actual rational consciousness. In contrast to the first source of human dignity and human rights, this second source can be lost in case of e.g. coma; it can, therefore, not be considered inalienable. On the other hand, inflorescent dignity consists in what can be called acquired dignity and which is all about the way a person utilises his (awakened) personhood. As such it does not automatically belong to persons, but has to be conquered through morally good conduct; in consequence, it is not inalienable and can be lost, too.

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[80] Josef Seifert, 'The right to life and the fourfold root of human dignity' in Juan de dios Vial Correa, Elio Sgreccia (eds), *The Nature and Dignity of the Human Person as the Foundation of the Right to Life. The Challenges of the Contemporary Cultural Context. Proceedings of the VIIIth Assembly of the Pontifical Academy for Life (Vatican City, 25-27 February 2002)* (Libreria Editrice Vaticana, Vatican City 2002).

[81] Seifert (n 73) 96.

[82] Erk (n 21) 237ff.

[83] Sulmasy (n 79) 473.

[84] This potential mainly consists in eg self-awareness (reflexivity, distinguishing between self and something), reason (rationality in the sense of thinking, communication, intelligent cognition as well as cognition of truth, consciousness and self-knowledge (which is the basis for self-awareness)), freedom, affectivity and religiousness.

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- **Bestowed/attributed dignity:**
  This kind of dignity refers to the value 'that human beings confer upon others by acts of attribution'[85]; it comprises dignity resulting from social roles and functions (e.g. the dignity of a judge). It is a created, conventional and subjective form of value. The Hobbesian version of dignity is attributed. However, bestowed dignity also comprises dignity resulting from gifts not attributed by man, such as natural gifts (e.g. beauty, intelligence, genius or charm, strength of character) or gifts attributed by God (e.g. dignity of a religious office, grace).
  Attributed dignity is not inalienable and there are innumerable degrees of attributed dignity according to the respective talents, roles, functions etc. it is based on. Not only can it vary within a society, but also between societies, which might attribute different amounts of social dignity to persons such as judges or teachers, for example.

Sometimes, two of the three categories mentioned above, namely inflorescent and bestowed/attributed dignity, are subsumed under the category contingent dignity. Following this logic, Wildfeuer[86] only distinguishes between intrinsic and contingent dignity. Seifert[87], on the other hand, does not reduce but expand the scheme introduced above and distinguishes four kinds or roots of human dignity: inherent/ontological dignity, dignity of actual rational consciousness, acquired dignity and bestowed/attributed dignity. There are thus at least three classification systems, which see the dignity of human beings as either two-, three- or four-dimensional. Although these approaches of categorisation seem to be contradictory, since they imply different numbers of categories of human rights, I nevertheless suggest looking at them as complementary. Sulmasy's three-dimensional approach explicates the two-dimensional approach and Seifert's four-dimensional system explicates both the two-dimensional and three-dimensional approaches.[88] Combining these findings, the concept of human dignity can be graphically depicted as follows (cf. Figure 2):

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[85] Sulmasy (n 79) 473.

[86] Armin G. Wildfeuer, 'Menschenwürde – Leerformel oder unverzichtbarer Gedanke?' in Manfred Nicht, Armin G. Wildfeuer (eds), *Person – Menschenwürde – Menschenrechte im Disput* (LIT Verlag, Münster, Hamburg, London 2002) 31.

[87] Josef Seifert, 'Die vierfache Quelle der Menschenwürde als Fundament der Menschenrechte' in Burkhardt Ziemske, Theo Langheid, Heinrich Wilms, Görg Haverkate (eds), *Staatsphilosophie und Rechtspolitik. Festschrift für Martin Kriele zum 65. Geburtstag* (C. H. Beck'sche Verlagsbuchhandlung, München 1997). Josef Seifert, 'Dimensionen und Quellen der Menschenwürde' in Walter Schweidler, Herbert A. Neumann, Eugen Brysch (eds), *Menschenleben – Menschenwürde. Interdisziplinäres Symposium zur Bioethik* (LIT Verlag, Hamburg, München, London 2003).

[88] There are almost as many classifications of sources and aspects of dignity as there are philosophers dealing with this topic. Although virtually all of them share a category, which has to do with intrinsic dignity, almost all of them understand inherent dignity as actualised, which is contrary to what Sulmasy or Seifert have in mind. So, despite sharing the same terminology, the content of the terms they use sometimes changes. Therefore, one has to exert special caution when comparing different approaches with regard to a classification of human dignity.

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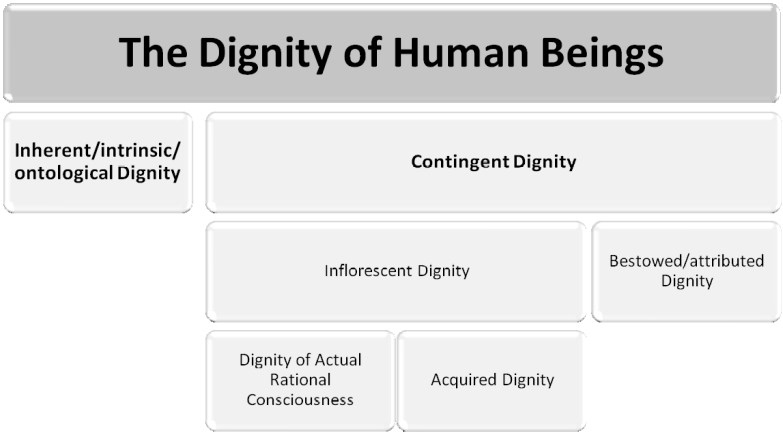

Figure 2: The Dignity of Human Beings – A Classification Scheme

When speaking about the dignity of human beings, we can, therefore, speak of inherent, inflorescent as well as attributed/bestowed dignity, whereby the aspect of inflorescent dignity can be subdivided into dignity of actual rational consciousness and acquired dignity.

Observantia-Respect: The Mediator between Dignity and Human Rights

Any complete account of human rights must consist of and be responsive to all four dimensions of the dignity of human beings. But how can the dignity of human beings actually ground human rights? How do we get from statements about dignity to the ascription of human rights? We have heard that dignity is essentially a non-neutral, positive and exalted value that indicates positive importance. As such, it asks us to respond to it adequately:

> Whether one chooses or rejects something which is agreeable, but is indifferent from the point of view of value, depends upon one's own pleasure. Whether one does or does not eat an excellent meal is up to oneself. But the positive value calls for an affirmation, and the negative value for a refusal on our part. Confronted with these, the way in which one should behave is not left to one's arbitrary pleasure; instead it should be the subject of preoccupation and the right response should be given, for interest in and adequate responses on our part are due to values.[89]

Our response to the value of human dignity is not left to our arbitrary pleasure, but exerts a sublime demand and duty on us, namely to accord some valuing form of moral recognition to its bearer. The moral recognition required to be accorded to the bearers of dignity is respect: as has been said above, dignity is something deserving of respect.

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[89] Dietrich von Hildebrand, *Fundamental Moral Attitudes*, translated from German by Alice von Hildebrand (Longmans, Green and Co., New York 1950) chapter I.

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The dignity of human beings demands and warrants respect from others or to be more precise, the dignity of human beings is that by which human beings exact or demand respect from one another. Therefore, the key to bridging the dignity of human beings and human rights is respect. There is a value represented in human beings that entitles them to respect and that must be respected; this value is the four-dimensional dignity of human beings. If we have a close look at the relationship between the dignity of human beings and human rights, we can state that the dignity of human beings does not directly give rise to human rights. Rather, it is respect for the dignity of human beings, which does the trick. Respect, therefore, is the mediating factor between the dignity of human beings and their human rights. Human rights are the moral rights, which human beings have because they are entitled to have their dignity respected by others (who in turn have the duty to take their hats off to, i.e. respect, the dignity of other human beings). Human rights are, therefore, derivative of this basic human right. However, as long as we do not know what to understand by respect, we do not know how the dignity of human beings can ground human rights and what respect for the dignity of human beings can actually demand from us.

Respect (stemming from the Latin verb 'respicere', which can be translated with 'to look (back) at', but also 'to regard' or 'to consider') is not only an attitude or feeling (such as esteem or deference), but much more a behaviour, which is expressed by a proper regard for or recognition of something, i.e. which is expressed in and by action. Feinberg[90] has identified three distinct aspects, which have been associated with the term 'respect':

- Firstly, there is the 'Respekt' aspect of respect, which Feinberg defines as an 'uneasy and watchful attitude that has 'the element of fear' in it'[91]. As Dillon[92] points out, 'its objects are dangerous things or things with power over the subject'. Examples of 'Respekt' are the respect a surfer has for a 25-metre high wave or the attitude one has towards everything dangerous that one has to deal with in general. 'Respekt' is not to be mistaken for fear (which might be a result of it); it is rather the awareness of the graveness of an action or situation and might be said to lift our attention.
- The second aspect of respect according to Feinberg is 'observantia', which involves regarding an object or being of value 'as making a rightful claim on our conduct, as deserving moral consideration in its own right'[93]. Observantia is respect in a practical sense, which guides our actions and requires us to behave in a certain kind of way.

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90 Joel Feinberg, 'Some Conjectures on the Concept of Respect' (1973) 4 Journal of Social Philosophy 1.

91 Feinberg (n 90) 1.

92 Robin S. Dillon, 'Respect' in The Stanford Encyclopedia of Philosophy, 14 December 2009 plato.stanford.edu/entries/respect accessed 3 August 2011.

93 Dillon (n 92).

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- 'Reverentia', the third aspect of respect, is 'the special feeling of profound awe and respect we have in the presence of something extraordinary or sublime, a feeling that both humbles and uplifts us'[94]. Reverentia is a distinctive positive feeling of deference that one has in the presence of something he considers having exalted value.

If we think about Feinberg's three aspects of respect, we will soon see that reverentia and 'Respekt' are two sides of the same coin: both are feelings of respect, the former positive and uplifting, the latter rather negative and associated with fear. Observantia, on the other hand, is more than a feeling: it is motivating and calls for meaningful behaviour. So, when we say that the dignity of human beings necessitates or demands respect, we can only mean that it demands observantia, i.e. that it has to be respected by certain forms of behaviour, because it cannot be demanded of us to feel reverentia or 'Respekt'. There can be no demand to experience a feeling, but there can be a demand to behave in a certain way – even if such behaviour would be contrary to our feelings. When thinking about respect for the dignity of human beings, we have to bear in mind that what we are thinking about is observantia-respect.

Their dignity entitles human beings to demand observantia-respect from all other human beings. But the observantia-respect, which can be demanded on the basis of the dignity of human beings, is not the right to *equal* concern and respect. Rather, it is the right to individual respect according to the dignity of the human being in question; it is the right to be given what is due to one because of one's dignity – if one lacks the second, third or/and fourth dimension of human dignity, one cannot expect observantia-respect for what is not there. There is a common equal basis of observantia-respect, which can be demanded by every human being, but beyond which the observantia-respect that can be demanded differs from human being to human being. Given this foundational right of respect, human beings can never be without rights. Having said this, human beings are in a position to make a claim on the conduct and behaviour of others towards them. What does and can the duty to observantia-respect the dignity of human beings comprise? Basically, to observantia-respect the dignity of another human being requires others to turn toward it and to behave affirmatively, i.e. to give it appropriate consideration and recognition by deliberating about one's behaviour. It thus involves the duty to appropriately weigh the respective human being's value in one's deliberations about how to behave and then to behave accordingly. Therefore, the basic right the dignity of human beings grants the respective human beings is to have their dignity respected. The mere fact that a human being possesses such exalted value entitles him to having his dignity observantia-respected by others and obliges others to observantia-respect his dignity.

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[94] Dillon (n 92).

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What Forms of Human Rights are there?

Where does this leave us? As has been established in the previous chapter, the fact that human beings possess dignity gives them the human right to have their dignity observantia-respected. This finding, however, begs the question of the nature of this human right. What kind of moral right is the human right to have one's dignity respected? As a special class of moral rights, a human right can come in one or more of the following forms:

1. Passive right: Moral claim-right/duty
   a. Moral negative claim-right in rem
      A moral claim-right not to be interfered with or dealt with or treated in a certain way with the corresponding duty resting with everybody
   b. Moral negative claim-right in personam
      A moral claim-right not to be interfered with or dealt with or treated in a certain way with the corresponding duty resting with a specifically identified person or group
2. Active right: Moral liberty-right
   a. Moral liberty-right in rem
      A moral no-duty with the corresponding no-claim-right resting with everybody
   b. Moral liberty-right in personam
      A moral no-duty with the corresponding no-claim-right resting with a specifi cally identified person or group
3. Moral cluster-right
   A combination of one or more of the above-mentioned moral claim-rights and moral liberty-rights

The first question we could try to answer is whether the human right to have one's dignity observantia-respected is a passive or an active right. The answer is rather simple: if observantia-respecting something requires us to behave in a certain way and if dignity grants its possessor the right to observantia-respect, then such a right is not a right, which is concerned with what the possessor of the dignity which is to be observantia-respected is allowed to do; rather, it is concerned with the action and behaviour of others. Consequently, it is a passive right, which obliges others. However, the human right to observantia-respect cannot be a liberty-right, i.e. a right to take a certain action or behave in a certain way. One the one hand, it does not make sense to speak of a moral liberty-right to have one's dignity respected. An active right is a right to do something; having one's dignity respected, however, does not exactly amount to doing something, but the opposite. On the other hand, if we interpret the human right to respect as an active moral liberty-right, one would have a liberty-right to respect the dignity of others – which would mean nothing else than saying that one is free from the duty to respect the dignity of others. However, such a statement would be contrary to the idea of dignity. Observantia-respect for dignity can be demanded, it is everybody's duty to observantia-respect the dignity of others. Therefore, no one is free to observantia-respect the dignity of others, since everybody is obliged to do so. Consequently, no one has an active moral liberty-right to respect. While it is true that one is free to do

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what one does not have a duty not to do, we are just not free when it comes to observantia-respecting the dignity of others.

This means that the dignity of human beings (or to be more precise: observantia-respect for the dignity of human beings) can only ground passive negative human rights or a human cluster-right:

1. Passive right: Moral claim-right/duty
   a. Moral negative claim-right in rem
      A moral claim-right not to be interfered with or dealt with or treated in a cer tain way with the corresponding duty resting with everybody
   b. Moral negative claim-right in personam
      A moral claim-right not to be interfered with or dealt with or treated in a cer tain way with the corresponding duty resting with a specifically identified per son or group
2. Moral cluster-right

But we can go a step further: cluster-rights have been introduced as a combination of two or more of the four basic Hohfeldian incidents of rights. Cluster- or molecular rights, therefore, are a combination of claim-rights, liberty-rights, immunity-rights and power-rights. Since we have excluded the latter two Hohfeldian instances from our discussion of moral and human rights, moral molecular rights can only be a combination of moral claim-rights and moral liberty-rights, since these are the only remaining pure Hohfeldian forms of moral rights. However, if we look at the list just presented, we will see that such a combination is no longer possible. If observantia-respect for the dignity of human beings can only ground moral and human claim-rights, it does not make sense to maintain the class of moral cluster-rights. The latter can thus also be eliminated from our list. The final list of human and moral rights, which can be derived from the dignity of human beings comprises only two items and looks as follows:

1. Passive right: Moral claim-right/duty
   a. Moral negative claim-right in rem
      A moral claim-right not to be interfered with or dealt with or treated in a cer tain way with the corresponding duty resting with everybody
   b. Moral negative claim-right in personam
      A moral claim-right not to be interfered with or dealt with or treated in a cer tain way with the corresponding duty resting with a specifically identified per son or group

By a process of philosophical deliberation and elimination, our initial list of seven conceptually possible classes of moral rights has been narrowed down to two classes. Observantia-respect for the four dimensions of the dignity of human beings can ground the following forms of human rights (cf. Figure 3):

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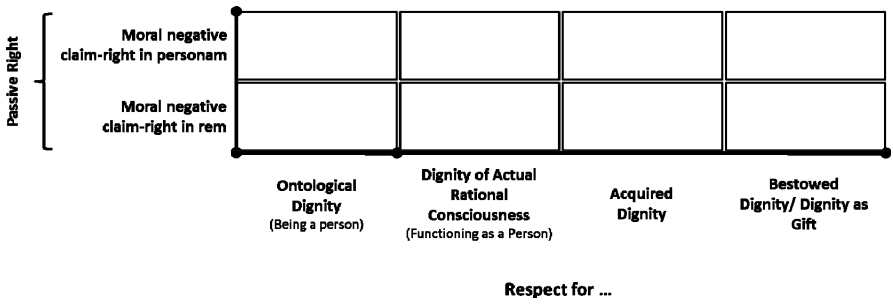

Figure 3: Forms of Human Rights Arising from Respect for the Dignity of Human Beings

Proposing that human rights can only come as a passive negative moral right in rem and/or in personam, however, is not to say that our originally established list of seven classes of moral rights is wrong. It is only to say that grounding human rights in human dignity limits the actual number of possible classes to two. If one takes the dignity of human beings to be the justification for human rights, one has to dispel the idea that any of the four dimensions of dignity can ground every moral right and content oneself with the fact that such a justification can only be used to ground passive negative moral rights. In short, if there is such a thing as a human right to health justified by reference to the dignity of human beings, this right can only be a passive and negative claim-right in rem or in personam.

Human Rights: Strict versus Non-Strict

However, virtually no philosopher, politician and contemporary thinker applies the term 'human rights' in the way I suggest. Rather, they use it in a more strict sense to imply those moral rights of human beings to which all human beings are entitled, i.e. which are equal, inalienable and universal. Understood like this, human rights constitute the minimal standard of and for human behaviour, i.e. the least every human being can demand. Human rights are 'concerned with avoiding the terrible rather than with achieving the best'[95]. They aim at protecting minimally good lives for all human beings and are thus about the 'lower limits on tolerable human conduct'[96], rather than 'great aspirations and exalted ideals, saintly restraint and heroic fortitude and awesome beauties that enrich life'[97]. As such minimal standards, they furthermore leave room for cultural and institutional accommodation and peculiarities. In order to align this article's understanding of human rights with the common one, we have to introduce the distinction between human rights in a strict or narrow sense and human rights in a non-

95 James W. Nickel, 'Human Rights' in The Stanford Encyclopedia of Philosophy, 29 July 2006 plato.stanford.edu/entries/rights-human accessed 3 August 2011.

96 Henry Shue, *Basic rights: subsistence, affluence, and U.S. foreign policy* (2nd edn Princeton University Press, Princeton 1996) xi.

97 Shue (n 96) xi.

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strict or broader sense. In a non-strict sense, human rights are those moral rights, which can only be possessed by human beings, which are grounded in the dignity of human beings, but which do not necessarily have to be possessed by all human beings of all times. In contrast and as has been adumbrated, human rights in a strict sense are those moral rights, which can only be possessed by human beings, which are grounded in the dignity of human beings and which are possessed by all human beings of all times – equally, inalienably and universally. As the account of human rights introduced in this article has been justified by reference to the status theory, which takes the dignity of human beings as the property, that makes it fitting to ascribe certain moral rights to human beings, we have to render the distinction introduced above more precisely. The dignity of human beings can be divided into contingent dignity as well as inherent or intrinsic dignity. Whereas the latter dimension of dignity is universal and inalienable, the former dimension (which comprises the three dimensions 'dignity of actual rational consciousness', 'acquired dignity' and 'bestowed dignity') depends on capabilities, properties or behaviours, which some human beings might have or exhibit while others might not. Human rights in their strict sense can, therefore, only arise from observantia-respect for the inherent, i.e. ontological dignity of all human beings. Consequently, contingent dignity is the foundation for human rights in their non-strict sense. Summing up these findings, we can draw up the following tree of moral and human rights (cf. Figure 4):

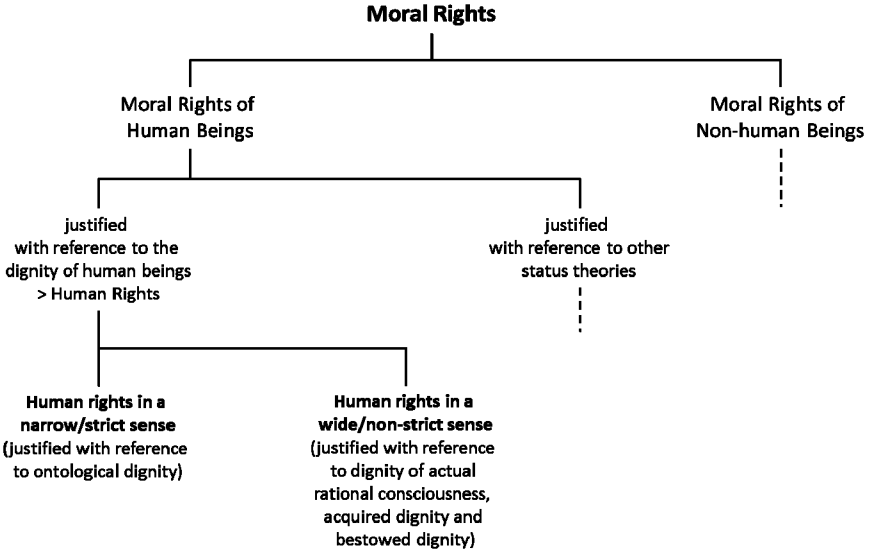

Figure 4: The Classification of Moral Rights

This has certain implications for what has been established so far. Over the course of the preceding pages, it was argued that there are no moral positive claim-rights and

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that observantia-respect for the dignity of human beings can only ground passive negative claim-rights in rem and/or personam. Consequently, the initial list of seven possible forms of moral rights was reduced to two moral rights, which can serve as human rights grounded in dignity. This chapter, on the other hand, argued that we have to narrow our understanding of human rights to its strict sense, i.e. that sense, which sees human rights as inalienable, universal and equally held by all human beings. Understood like this, such human rights can only be justified with reference to the ontological dignity of human beings, since the other dimensions of dignity do not exhibit universality or inalienability (cf. Figure 5).

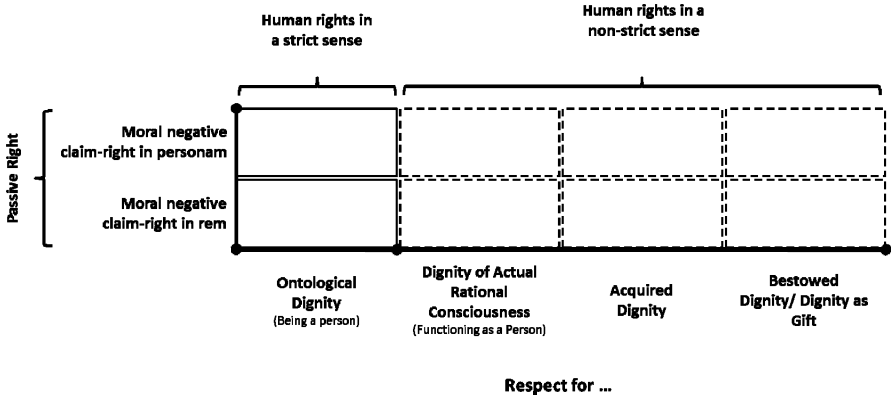

Figure 5: Human Rights in a Strict Sense and the Dignity of Human Beings

What does this mean for the argument of this article? Well, it simply means that if we want there to be such a thing as an unalienable, inherent and universal human right, such right can only be a passive negative claim-right grounded in the ontological dignity of human beings.

Concluding Remarks

The preceding pages have been devoted to developing a philosophical foundation to the concept of human rights, a theory of human rights. This theory is based on the insight that when it comes to human rights, we know that human rights are rights. But they are not just any rights. They are neither positive nor pre-positive conventional rights, but pre-positive pre-conventional and thus moral rights. However, they are also not just any moral rights. They are a special class of moral rights, namely the moral rights of human beings which are grounded in the dignity of human beings. The dignity of human beings makes it fitting to ascribe certain moral rights to them and respectful treatment of these rights appropriate. Human rights are and must be validated by reference to the dignity of human beings. Therefore, human rights have three characteristics: they are moral rights, they are the moral rights of human beings and they are those

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moral rights of human beings, which are validated by reference to the dignity of human beings.

The dignity of human beings refers to a property or properties by which man is considered worthy, honourable or estimable and which lifts man out of neutrality – both with respect to the rest of creation as well as to his fellow men. Man is and can be lifted out of neutrality by four forms of dignity:

- Ontological dignity (being a person)
- Inflorescent dignity
- Dignity of actual rational consciousness (functioning as a person)
- Acquired dignity
- Bestowed dignity/Dignity as gift

As an exalted value, the dignity of human beings exerts a sublime demand and entitles their possessors, i.e. gives them the moral and human right, to have their dignity observantia-respected. This is how the dignity of human beings grounds human rights: qua possessing dignity, human beings have the human right to have their dignity observantia-respected. Doing so requires other human beings to behave affirmatively, i.e. to give appropriate consideration and recognition in deliberating about their behaviour. It involves the duty to weigh the respective human being's value appropriately in deliberations about how to behave and to behave accordingly.

According to this account of human dignity, one can distinguish between human rights in a strict sense and human rights in a non-strict sense. Human rights in a strict sense are only those moral rights of human beings, which are universal and inalienable; in a non-strict sense they are those human rights, which are not necessarily equally held by all human beings and which can be lost. Consequently, only ontological dignity – but not the other three dimensions of dignity (contingent dignity) – can be used to justify human rights understood in a strict sense. When speaking of human rights in a strict sense one can only mean passive negative rights justified with reference to ontological dignity.

I have tried to present not only elements of a human rights theory, but a consistent account of what makes a right a human right and how. The theory of human rights presented above takes an important premise underlying international law seriously, namely that human rights are something inherent to human beings and grounded in dignity. If we subscribe to these premises, the human rights mentioned in international law can only be human rights in a strict sense and can, therefore, only be grounded in the ontological dignity of human beings, i.e. their personhood. A human right must not a fancy brand which is meant to give some right special moral importance but should rather be treated as a concept with philosophical rigour. The theory outlined above is a helpful instrument in doing so and is capable of overcoming the problems caused by the regrettable lack of human rights theory. Hopefully, it can be of use in and enrich the human rights discourse and practice.

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Law in the World of Values

Marko Trajkovic

Introduction

How can legal norm and values influence the change of behavior? This is the question that can be expected, because human existence without values, in its very core, cannot be considered. Human existence, without values, would be like animal survival and not like free Christian life. For these reasons we can say that there cannot be legal issues without values considered.

Man and his life remain a pure organic process if we exclude values. Thus, Max Weber and Leo Strauss point to our relation towards values as indispensable. It is actually about Weber's insisting on the role which values play in the social science.[1] Looking at it from the ontological point of view, the existence of man without values is impossible. If law was cleared of values it would be crippled in its human core.

In case man really didn't take part in realization of values he would not be in position to realize his humanity. Man's deeds would have all the marks of unquenchable longing for the establishing the relation between our reality and values only in case of the realization of values. This would refer to law as well, which is also the value product of the human spirit. Therefore it is necessary to divert attention to the axiological surface of law and then to the legal system as a whole. If values were excluded from the legal system, as the creation of the human spirit, as a reason for its existence, law would turn into a pure formal and legal way of existence with the legal norm. Since the realization of law lies in the very construction of law, it is necessary to establish the place of law in the world of values.

The best way to recognize a man is to know what kind of future he is creating. His creation of future is based on values. The formulation of legal norm is also a way of forming future, the future of nations, not of a person. Thus, the extent to which legal norm has influence on future can be unforeseeable. That's why it is so important to incorporate values into legal norm. Values are moved into the center of life. They cause lasting belief.

Values stand for standards which rule our behaviors. They help us measure and judge situations we face in life. At the same time values have function of motivation, which is expressed as our striving towards achieving values.[2]

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[1] L. Strauss, *Prirodno pravo i istorija,* the original title *Natural Right and History*, Beograd, 1997, 36.

[2] For example, we strive to be honest.

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The World of Values

Thus, if we look at the etymology, the word Value comes from the Greek word *TIME* which means value, and the Latin word *VALEO* which means strong, healthy, good. In English for the concept of value the word *VALUE* is used, in German the word *WERT* is used. As the word we use in everyday speech it conveys the meaning of something that is good, true, beautiful, just.

The world of values is not apart from our reality for it is the purpose of all that exists. Perhaps it is more appropriate to say that it is about the demand to embrace values into our reality. In this case value is not related to fiction, to something made up, but it is related to something real. Besides, the very purpose is directed towards something which shows values. According to Nicolai Hartmann, one can strive towards almost all moral values. Almost all values can be realized, but one should be careful.

Hermann Lotze developed the same idea as for the purpose of values. He believes that the power of the origin is in faith. Thereby Lotze accepted theological idealism. According to the theological idealism the value which is the base of all is in God. Thus, the reality of our world and the reality of law are subordinate to values personified by God. Their relevance is absolute for the opposite would be impossible. Values have absolute not partial meaning. It is impossible to think of values which would have partial meaning and importance.[3]

The Phenomenological Axiology, within which we single out Max Scheler, insisted on values which are given within our reality, and are therefore empirically available. These values are not only empirically available but are also set inside the value ontologism. Therefore Scheler highlighted the eternity of values and is named absolutist when talking about value. Actually, the eternity of values points to the absolute order of values which has the origin in God. All existing values are established on the value of timeless spirit and the world of values which lies ahead.[4]

Still Scheler believes that moral values posses the tone of the imperative. The necessity of the values as the imperative appears in the beings that are godless enough and are not in accordance with values but are often quite the opposite, also this refers to the world which as a necessity and with no difference produces truth and lie, good and evil, beautiful and ugly, simply what is valuable and what is not valuable.[5] The norm finds its grounds in values and not in obedience. If we don't want norm to become arbitrary command then it has to rely on values.[6] Therefore the values are always the simplest qualities which set the meaning of norms and law.[7]

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[3] H. Lotze, *Mikrokosmos*, I, II, III, Leipzig, 1923.

[4] M. Scheler, *Fromalismus in der Ethik und die materiale Wertethik,* 3 aufl., Haale 1927, 94.

[5] Ibid., 74.

[6] M. Scheler, *Fromalismus in der Ethik und die materiale Wertethik*., 188-189.

[7] Ibid., 272.

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The Absolute Character of Values and their Hierarchy

The absolute character of values is shown in the man himself. Since we notice in him the arithmetical laws which don't depend on him, we find the values as well.[8] Being self-sacrificing is always value, although from the point of view of human logic it is not always wise to be self-sacrificing. Not to act in accordance with this value is always shameful, even when one's mind signals that it is better to be selfish. The same goes for honesty. The value in its basis is not certain to be carried out but what is certain is that if it is not carried out it is not in accordance with the value. Thus, values are not only valid but also exist. Their existence is independent of the real beings. Therefore they can be neither created nor destroyed by man. Should man create them he would be in position to destroy them.[9] They are also independent of what must be, because they are given and not ordered. Value are not some kind of force, that is why the responsibility of man towards values is even more prominent, particularly when we are talking about the logic of the heart offered by Christianity in the establishing of values.

The logic of the heart offers freedom in relation to accepting and refusing values and love in relation to wrong choices. This is to be expected, for all the values that are established in the independent being, in God.

In the world of values there is a hierarchy of higher and lower values. This hierarchy is such that every value on the scale can be understood by certain spiritual acts. According to Max Scheler there are hedonistic values, seen as what is comfortable and what is uncomfortable. There are also vital values as a pair of noble and rude. There are also spiritual values where we can find esthetic values as beautiful and ugly. There are also values such as just and unjust and finally there is a value of pure truth. Scheler claims that these values are worthy of sacrificing the vital values. On the very top of the value scale there are values of the holy and sacred and what is not holy. [10]

Nicolai Hartmann also formed his scale of values which exists in the empire of values. But in the case of Hartmann's scale, values sway between subordination and dominance. In this unique line of values there are values of goods. Then there are values of comfort – what is comfortable. There are also vital values – what is useful for life; there are also moral values – good, and esthetic values – beautiful. There are also cognitive values – truth.[11] He embraces moral, esthetic and cognitive values in one notion of spiritual values. In the empire of values, values of goods have basis in vital values. There is no such a thing that is called good by itself. It becomes good for somebody. This is not limited to man only.

Hartman points to man's attitude towards values, for man knows what many of his vital goods are only when they are taken away from him. This particularly refers to his

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[8] Ibid., 279.
[9] Ibid., 268.
[10] Ibid., 125-129.
[11] N. Hartmann, *Estetika*, the original title *Ästhetik*, Beograd, 1979, 390-392.

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everyday needs. It is completely logical that this attitude leads to another saying that man's tragic is the tragic of the hungry man sitting in front of the full table and not holding his hand because he doesn't see what lies in front of him. The real world is full in its wealth and the real life is imbued with values and where we reach for it miracles and beauties appear.[12] He also claims that vital values exist independent of our knowledge. The treasure of hard coal exists even before man gets to know about that and starts using it.[13] If man was creating values they would be prone to failure and wouldn't be absolute.

At the same time he accepts the notion of the value of the state of things which is formed by the phenomenologists. Actually that notion is involved in the wider concept of the value of goods. Otherwise, according to Hartmann, it wouldn't be possible to find both the value of happiness and the value of power in the value of goods.[14]

Hartmann points to the relation between values of goods and moral values. It is relevant for considering the place of law in the world of values. In his opinion all moral values have base in the value of goods and in such a way that each moral value has as an assumption certain goods. He explains this by giving the example through which he inquires differences between working of the honest man and working of the thief in relation to someone else's goods not supervised by anyone. He finds the difference in respect towards someone else's valuable goods. If the goods have no value, nobody will wish for it. If the property has no value, then there is no difference between action of the honest man and the thief. The trouble is that the importance of the moral value doesn't depend on the value of property because the highest moral value can be lifted over the slightest value of goods.[15]

There are moral values that can be developed through upbringing. They can also be commanded because they have to be carried out. Among these values we can find: diligence, stability, love for order, self-restraint, self-discipline, and to a certain degree reliability, loyalty and sense for equity.[16]

In all work and actions, including the legal works, values of goods and moral value are involved. But they don't overlap. The purpose of any action is not the moral value, it is the value of goods or to be precise the value of the state of things. Further on, moral value appears on the backs of the act.[17]

Hartmann's way of seeing the moral values is very close to Christian understanding of values. According to that understanding man is the carrier of the moral values because only man is left with freedom to be good or evil.[18] That kind of man's behavior

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12 N. Hartmann, *Ethik*, Berlin-Leipzig 1935, 5.
13 N. Hartmann, *Estetika*, the original title *Ästhetik*, Beograd, 1979, 392.
14 Ibid., 394.
15 Ibid., 398-399.
16 Ibid., 401-402.
17 Ibid., 400.
18 Ibid.

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can be marked as valuable and moral but can't be forced out of man.[19] He accepts the main massages of Christianity saying that the man who acts out of wishing for his own values doesn't attain them. His actions are directed towards the value of the state of things and not towards moral values. If the action is directed towards the development of his own value, that is the direct way to self-satisfaction and Pharisee. According to him it is dangerous to strive towards moral values directly because in that case their essence can turn into its very opposite. In his opinion we shouldn't strive towards them, generally speaking. As an example, Hartmann gives the case of happiness which very often cannot be realized despite our longing. One can realize all values except for purity. Purity, as well as youth, beauty, innocence can only be lost.[20] Arthur Schopenhauer agrees with this opinion. Schopenhauer believes that showing the selfish motives in some action reduces the moral value of the action. Actually the criterion for morally valuable action is in the absence of the egotistical motives.[21] At the same time, the indifference towards values leads towards the crime out of indifference.[22]

Values do not Differ Nearly as Much as it Appears

According to Max Scheler, man doesn't create values, by finding himself in various practical relations with the world of objective facts. Rather he finds himself in relation towards values. According to him, we have rights to claim that what is relative and limited is only human knowledge of values, and not values themselves. As for the diversity of value-moral convictions, he claims that there is one common thing, and diversity only refers to the form which depends on the development of human consciousness and human experience.

For example, we can loath the fact that once there was human sacrifice to God, to celebrate victory over the enemy, or to win the love of Gods in front of some danger. Still, today we consider normal for a man to physically sacrifice himself for the common goal or value, such as state or social idea.

Universalists, Max Scheler and Nicolai Hartmann warns us that it should be critically inquired whether the cases mentioned by relativists (in their favor) really are about the same activities in the ethical sense and the same objects? We are aware of the fact that for the ethical character of the activity it is important to know the motives for the activity. One physical activity can have different moral characteristics depending on the motives and then different moral value. However, if we approach the actions of the primitive people we are shocked by (using the aforementioned conviction), and on the grounds of which we often conclude about the opposition between their way of thinking and modern way of thinking, we'll see that their motives are not contrary to ours.

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[19] Ibid., 397.

[20] N. Hartmann, *Estetika*, the original title *Ästhetik*, Beograd, 1979, 400-402.

[21] A. Schopenhauer, *Dva osnovna problema etike*, the original title *Die beiden Grundprobleme der Ethik*, Novi Sad, 2003, 276.

[22] H. Broch, *Pisma o Nemačkoj, 1945-1949*, the original title *Briefe über Deutscland 1945-1949*, Novi Sad, 1994, 52.

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So, for example, when we look at the killing of the old in some primitive nomadic tribes, it is certain that they didn't kill out of hate or cruelty. The motive for killing in these primitive tribes belongs to the same group of feelings because of which we today feel as our obligation to take care of the old and to try to cure them. We can also be questioned: Isn't it cruel to let man or a woman suffer for a long, long time because of their age or sickness? Can you watch your parents or relatives shiver in the cold, useless, old and not come to a thought to end their unhappiness out of pity?[23]

When we critically inquire the object of action, we can claim that it is actually different, though the relativists consider it unique. So they don't have any right to claim that the same objects suffer totally opposite actions.

For example, if some primitive tribes consider proper to leave their sick people to their faith, and we today think that it is an obligation to try to cure them, then we should know that the primitive people think of the sick person as someone who is possessed by an evil spirit, and thereby dangerous for the environment. So the reason for their action towards sick people lies not in the moral consciousness which is totally opposite to ours, but in incorrect intellectual notions.

Eventually, the given examples show that relativists should take into account the circumstances, the level of development, conditions, before they give the thesis of the opposition of the moral consciousness of the people from old times and different social structures. In the totally different existential conditions, physically the same actions are no longer morally the same. Thus, they don't deserve the same moral characteristics.

The critical analysis of the given examples, not only opposes the thesis about the opposition in moral consciousness, but it also gives grounds for considering the possibility of the common, universal elements of moral consciousness. What could be these elements? First, it is a formally-structural element. That is to say, it is the universal existence of the normative layer in human consciousness. To be more concrete, this is universal differentiation between permitted and not permitted actions, between good and bad, between those we should do and those we must not do. What we are obliged to do, what makes something good or bad is usually relative, depending on the level of development, and particularly on the social-economic conditions. What is universal is the existence of duty and the very difference between good and bad.

Really, where can we find people, or some tribe which doesn't value and doesn't look for bravery, sticking to your words, respect for the ancestors, which doesn't blame the killing of tribesman out of greed?

Where can we find the people or a tribe which have no grace, no sense of justice?

It is quite another issue whether the mentioned tribe or a group of people has reached the level of development where they feel obliged to apply their basic moral norms to the relation towards the other groups? We already know that man didn't feel morally obliged (in the times of primitive society) towards the members of other groups. The process of widening the moral obligations is slow. Still we can say that universal values are given to man when he is born. In future, reasons for having basic

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[23] E. Wedtermarck, *Ursprung und Entwicklung der Moralbergriffe*, Leipzig, 1907, 326.

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moral norms (such as do not kill, do not steal, do not tell lies when witness) as imperative, as something to be achieved by power or pressure, may disappear. But if the reasons disappear it will mean that people and the conditions have improved, developed, that norms have become reality. It will mean that we are approaching the Heavenly Kingdom.

The Legal Norm

What we mean by legal norm is the logical, binding formulation of values. The norm is not precious on its own. Rather when it expresses values. It has to be the logical formulation of values. The norm expresses and realizes the demand of values. The issue is what principles animate a person when he respects legal norms? Are these value principles, lucrative motives, or is it the fear of punishment?

Thus, according to the conception of legal positivism, legal norm includes only two basic elements, disposition and sanction. The positivists highlight that the norm expresses certain demand. It does so through its element-through disposition. Disposition by itself stands for the element of the norm directed towards man. That is expressed through the command of behavior. What is the basis of the command? This is a very relevant issue because the command directed towards certain behavior expresses the behavior and changes it. This begs the question: in what direction goes human behavior? It is considered that legal norm should not exist without disposition. Can the legal norm exist without values?

I believe that when disposition and sanction are considered as elements by itself, they represent relevant ingredients of the legal norm. But when they are considered in relation towards values, they represent technical elements which should express values, or in case of sanction, protect them.

The legal norm highlights some ideal aim or value. Even the state itself should be interested in the primary realization of this legal norm, that is to say, value. The primary realization should come willingly. And that should happen after the disposition, that should reflect values, motivates our consciousness and conscience and thereby redirects our will towards realization of values.

This primary realization of the disposition is based on:

1. The direct autonomy of will, if the norm is made by our free will, so we consider it ours and act in accordance with its disposition – *I make the norm, and I accept it and realize it*.

2. The indirect autonomy of will, if the norm is made by someone else's will and we attach our moral and value acceptance, so though it springs from other person's will we accept it as ours – *I don't make the norm, but I accept it and I realize it.*

3. Fulfilled heteronomy, if the norm is made by someone else's will, we don't attach our moral-value acceptance but we carry it out anyway for different reasons – *I don't make it, I don't approve of it, but I carry it out*. This aspect of the primary fulfillment of the legal norm is already value problematic. Simply, in comparison to the other two ways of fulfillment, this third introduces possible nonvalue motives for the

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fulfillment of the disposition. These can be lucrative motives, fear of sanctions, and so on and so forth.

As long as it lasts, in these given possibilities, primary fulfillment of the disposition, man in no way causes the sanction of the legal norm. The sanction is caused by:

1. If the norm is created by man's will and he didn't confirm it or he didn't carry it out by the act of creating or later in moral and value way so he caused sanction;

2. If the norm is created by someone else's will, a man doesn't give his moral and value acceptance and by breaking it he causes sanction.

If the sanction is applied and there is a forced carrying out, we have the secondary following the legal rule.

This begs the questions:

1. Can one entire legal system be based on the primary realization of the disposition? What would be the grounds for the realization?

2. Can the legal system be based on the fear of the secondary realization of the disposition, on the sanction?

To the first question positivism gives the answer that the existence of the legal system, which is based on the primary fulfillment of the disposition, is not possible. Why? The reason is simple, positivism doesn't accept and doesn't care for basic values of the Christianity. It actually doesn't believe in value nature of man. It is fulfilled in the idea of submissiveness, and doesn't question the motives. The only motive in submissiveness is fear. An answer that would be even simpler is that power doesn't believe in the legal norms without values. But the state power wants the unconditional respect anyway. The state power doesn't believe that citizens will respect it willingly.

As for the second question, positivism shows respect towards the idea of the preserving of the legal system which is based exclusively on the secondary fulfillment of the disposition. But again, the motive for this is not value or the protection of value, but fear of political unrest and disturbing the political security, therefore the fear of overthrowing a government.

Undoubtedly, positivists know about Ihering's thought that the law which has power through the whip would be helpless without the whip. Still they are aware of the fact and it doesn't concern them that the secondary fulfillment of the disposition, that is to say, forced fulfillment is above willing fulfillment. They conclude mistakenly that if law wants to be law, it has to have certain amount of efficiency. Actually it is otherwise. If law wants to be law it has to achieve certain amount of values.

The Place of Law in the World of Values

The world of values is the origin of law. The place of law is determined by its purpose which is achieved only by the moral upbringing and the development of the moral values. In the world of values law stands for the instrument for protection of the values of goods, because law itself is based on the autonomous moral values which are above the law.

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The place of law in the world of values can be established particularly by determining the concept of legal norm. That can be accomplished by having in mind the concept of the legality of law as the value moment of the legal phenomenon.[24] Thereby it can be shown how establishing the place of law in the world of values belongs to the pre legal issues.

The world of values stands for the assumption of the existence and the development of law. That world gives the meaning and the purpose to the entire law, that is to say, all its elements. Values as the origin of law are not pure total, or the simple collection of elements, but the whole.[25] Actually, everything that exists has value content, so that is the case with law as well. This means that the categories of value orientation can be applied to everything that exists.

The positivists are striving to define law as the notion independent of values. But even then in the holistic mesh of circumstances law gets the value content. If the legal norm is logical and binding formulation of values then we can conclude that law is based on value determinations. Only when the values are established they can be expressed in the legal norm which then becomes the formulation of values. In accordance with this, Emil Lask believes that the existence of legal norms can be deducted from the system of abstract formulas of values.[26] Thus, by defining the system of values we can define the place of law in it. Actually, it would be good if the over empirical values could be turned into the independent life forces.[27] This can be achieved by introducing values into the process of creation and application of law. Thereby, value can become truly beneficial through law. Law can get the transcendental position.[28]

Legal norm always serves values. Legal norm is particularly precious when it expresses original values. We emphasize this for the very importance of the acceptance of some legal norm for its contents in the conscience of those who are legally obliged. In that case legal norm can be explained only morally, only through its binding effect on human conscience (however, it shouldn't be claimed that law and moral are the same). Even then nobody could deny its necessity in reality where it gets the binding legal power, if we really care about the binding character of the legal norm.[29]

But the legal norm is not self-sufficient. Man, as a human being is also necessary. It is too often that man looks for mediators in trying to find and realize values. Since he, in his reality, can't reach values directly, the legal norm can become the mediator and the sign for man's achieving values. Thereby law becomes the bridge connecting values and concrete behavior. It actually shows the content of values and suggests the

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[24] N. Hartmann, *Estetika*, the originale title *Ästhetik*, 433.

[25] Ibid.

[26] E. Lask, *Filozofija prava i kraći spisi*, the original title *GesammelteSchriften*, Band I, Beograd, 2005, 26.

[27] Ibid., 22.

[28] Ibid., 26.

[29] A. Kaufmann, *Pravo i razumevanje prava*, the original title *Recht und Rechtsverstenehen*, Beograd-Valjevo, 1998, 200.

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form of the ideal behavior, but not as something absolute but in the role of the mediator for expressing true values.

Finally, valuing refers to the world of law. The laws of valuing are absolutely obvious, like geometrical laws. Therefore law can be seen as a place where values can be discovered and accepted. Also we can talk about the value aspect of law. It represents the degree of sensitivity of law towards values, as well as the degree of realization of values in law or by means of law.

The Place of Law in the World of the Christian Values

There is the question: Can law squeeze out Christian values?

According to Bendetto Croce, Christianity was the biggest revolution in the history of people. All the other revolutions are nothing compared to it.[30] It must also be mentioned that positive law's looking for values has to count on the prepolitical and ethical convictions of the religious community.[31] According to Pope Benedetto XVI, constitution by itself doesn't form morality.[32]

According to Christianity the kingdom of values above us reaches to us according to God's will. Values are real quality of God's thought. So, turning the above empirical values into the real live force stands for the embodiment of values into realities. Thereby bridging the gap between values and realities happens. So, out of value we can deduce legal values and then the justification of the existence of the legal norms. The reason for this is the fact that the main purpose of law is its position and realization in the kingdom of values.

Christian values stand for certain guarantee that law doesn't become only the command of power. In case law is only the command of power, what is not explained is how power is obligated through law. Law is above the state and state law has its meaning in values, and not in state obligation towards its own law. We attach meaning to law only if it springs from values. Pope John Paul II also believes that democracy without values simply turns into the open or fake totalitarianism.[33]

Thus values have duty to subordinate the power of law to itself. The power of Christian values should rule and not the power of the positive law. Otherwise, there is a suspicion towards the law and then the rebellion against the law. So, law can't annul the values. Law is only the minimum of the Christian values given by God. Does man live according to the norms only out of fear of sanctions? The words of St. Thomas Aquinas prove to be true, that law is made for the evil and the wicked and there are punishments defined by law.

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[30] M. Pera, *Zašto se moramo zvati hrišćani*, the originale title *Perché dobbiamo dirci Cristiani*, Beograd, 2010, 52.

[31] J. Habermas, J. Ratzinger, *Dijalektika sekularizacije*, the originale title *Dialektik der Säkularisierung*, Beograd, 2006, 19.

[32] Ibid., 90.

[33] Ibid., 50.

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We'll define the place of law in the world of Christian values by asking the question what is the basis for the binding power of the legal norm? Is it possible for the legal norm to be the foundation of law by itself? So, for the foundation of the binding power of the legal norm we have to have something steadier. That would be Christian values. They reflect the relation towards the realization of humanity. And they are doing it in a more convincing way than law. It is the sincere care for every person.

Law as Means for Realization of Values and Non Values

Value, as an axiological face of law refers to the aim of law. As soon as we name values as norms, the statement leads us to its realization.[34] In this case this is about realization of values by means of law.

Since law represents the objective carrier of values, they can be realized in our reality. This value aspect of law directs the decision towards values as the quality. This can be achieved through legal-ethical judgment which chooses the path in the emptiness of the positivism and nihilism.

Every legal system which tends to be persuasive and obliging has to find its place in the world of values. Every turning away from that search is harmful for law. The suspicion towards the legal system and even the rejection of the legal system appears when law is no longer the picture of values but the expression of someone's self-will.[35]

In Gustav Radbruch's opinion law is man's project, but as such can be comprehended only through his ideas which can only be a value. Law can be understood only in terms of behavior related to values, therefore the true existence of law blind to values is impossible.[36] Value is according to Radbruch material for the idea and to be precise for the legal idea. Thus, the notion of law is the notion of a reality related to values, of a reality with the purpose to serve the value.[37] Values have creative power and serve as the eternal standards of behavior and are in position to give the binding power to the legal norms.[38]

As opposed to that where law would be nothing but the leader's command, the obligations of leader himself through law would remain inexplicable.[39] In the war of people's interests in which one's interests, eternal search for material comfort and fame are overwhelming, the aim of law will not be reached, for what is missing is the wish for values that would end the discord.

Thus, so as to reach its aim law has to become impersonal, related to objective values rather than to the interests of the person or a group which governs. To build the value mentality should be done through law containing objective values. However, it happens too often that instead of building value mentality the interplay between values

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[34] E. Lask, *Filozofija prava i kraći spisi*, the original title *GesammelteSchriften*, 74.
[35] J. Ratzinger-Benedetto XVI, *Europa, I suoi fondamenti oggi e domani*, Città dell Vaticano 2004.
[36] G. Radbruch, *Filozofija prava*, the original title *Rechtsphilosophie*, Beograd, 1980, 14-15.
[37] Ibid., 44.
[38] B, Reich, C. Adcook, *Values, Attitudes and Behaviour Change*, Methuen, London, 1976.
[39] G. Radbruch, *Pravni i drugi aforizmi*, the original title *Aphirismen zur Rechtweisheit*, 7.

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and law happens, which has non values and totalitarianism on its side. In this case value is seen as legislative servant and law becomes the parasite and it won't be long-lasting.

In law, the illusion of values which accompanies the lack of sense of values often appears, and has the character of not recognizing values and is always purely negative. According to Hartmann, man's organ for values has similarities with sense for colors, music, mathematics, which is not common to all people. Therefore there are people who have small capacity for understanding and differentiating in these fields and those who are very good at it having the heightened sense for it.[40] This is the attitude which Hartmann has reminds us of: the legend about the devil who wished to be good with no talent for goodness. So the devil with no talent but sticking to the rules tried to be good. Surely, the attempt failed for there are no rules for goodness and beauty and talent proves to be not only necessary but indispensable.[41] Arthur Schopenhauer holds the similar opinion because you can't learn to be virtuous as you can't learn to be genius. The notion is for it the futile thing as for the art, and it can be used only as means. It would be weird if we expected that our moral systems and ethics create brave, noble people and saints, and our esthetics create poets and musicians.[42]

However, it is a slightly different case with the ability to recognize values in comparison to understanding esthetic values and mathematics. In its basic form the talent for values is present in all people and thereby to introduce values into the world. There are individuals with bad keenness of sight for values but still able to recognize them. The history showed that it would be dangerous to highlight the concept of talent for values, for this could bring about huge evils which are excused by the lack of talent.

In this spirit, ignorance as the source of evil brought about awful crimes, and that is the secret of the devil, the absence of wish to recognize and realize goodness. It shows that evil is not the lack of something, but something alive, spiritual, perverted and corrupt. It is the frightening reality. It is the mysterious and horrible reality.[43] Thus, the devil does recognize the values, but as an enemy he resists them .Very often man does the exactly same thing, which makes him the inveterate liar, very skillful craftsman who doesn't choose means so as to darken the values.

In scholastic terms we can call this *ignorantia affecta,* ignorance as pretence or not wanting to know. This means that truly honest people are so few.[44] Schopenhauer has this attitude while looking into three major motives of man's actions. First, that is egoism-wanting the entire good for himself and it is endless. Then it is malice-wishing

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[40] N. Hartmann, *Osnovne crte jedne metafizike spoznaje*, the originale title *Grundzüge einer Metaphysik der Erkenntnis*, Zagreb 1976, 570.

[41] Ђ.М. Бородаé, *Теологические истоки категорического императива И. Канта*, in: Этика Канта и современост, Рига, Авотс, 1989, 178-195.

[42] A. Schopenhauer, *Svet kao volja i predstava*, the original title *Die Welt als Wille und Vorstellung* , Novi Sad, 1981, 245.

[43] J. Ratzinger, V. Messori, *Razgovor o vjeri*, the original title *Raporto sulla fede*, Split 2001, 128.

[44] A. Schopenhauer, *Dva osnovna problema etike*, the original title *Die beiden Grundprobleme der Ethik*, 276.

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others evil and it reaches utter cruelty. And finally: Pity-wishing good for others and it reaches kindness and generosity.[45]

It is very important in law to realize that goodness is always the direction towards higher value, and evil the direction towards lower value.[46] So the law can become one of the ways for the values as ideal powers[47] to push into our reality. That other energy that values need can be found in law which can deal with the resistance of the real towards values. Legal norm, as a command, must be directed only towards values, so as to emerge out of the ocean or a large swamp of facts.[48]

To reject using the value judgment in law leads to the strictly factual description of the obvious actions as seen in the concentration camps. Everyone who avoids using value judgments intentionally covers his higher knowledge and thereby realizes intellectual dishonesty. The exclusiveness of the legal positivism represents the scientific and moral violation of the obligation open expression and the bitter satire.[49] Then we can justify actions in this way: I've done this, says my memory, it's not possible that I've done this, says my pride and in the end memory deteriorates.[50] Thereby we certainly reach agreeing to non values because of its conviction that law is law and positivism destroyed legal class because of its laws with self-will and criminal contents. At the same time positivism is not able to explain by its own power the meaning of laws.[51]

So Legal Positivism, which insists on the rejection of values, brings itself into danger of historical objectivity. That stops us from calling a spade a spade and it brings into danger the kind of objectivity which calls for previous assessment, that is to say, the objectivity of interpretation.[52] This attitude of legal positivism, free from values, leads directly to legislation and the legal actions of the totalitarian regimes. This could be completely possible if we accept the existence of law without values. If law doesn't contain values it will be devoid of judging the social phenomenon and it won't be able to differentiate between authentic and fake, higher and lower, true religion and false religion, between real leader and a charlatan, between knowledge and something scholarly or sophism, between virtue and vice, between moral sensitivity and moral dullness, between art and trash, between vitality and degeneration, etc.[53]

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[45] Ibid., 283.

[46] N. Hartmann, *Ethik*, 2 Aufl, Berlin 1935, Kap. 30, b.

[47] N. Hartmann, *Kleinere Schriften*, Berlin 1955, 293.

[48] L. Strauss, *Prirodno pravo i istorija,* the original title *Natural Right and History*, 37.

[49] L. Strauss, *Prirodno pravo i istorija,* the original title *Natural Right and History* , 45.

[50] F. Nietzsche, *Jenseits von Gut und Böse*, in H. Broch, *Pisma o Nemačkoj 1945-1949*, the original title *Briefe über Deutschland 1945-1949*, 132.

[51] G. Radbruch, *Pravni i drugi aforizmi*, the original title *Aphorismen zur Rechtweisheit*, 18.

[52] L. Strauss, *Prirodno pravo i istorija*, the original title *Natural Right and History*, 51.

[53] Ibid., 53.

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Conclusion

The philosophy of values stands for the philosophy without a flaw and it is an answer to the ideology of evil[54] which awaits a man in the same way as a devil lurking to attack man's moral balance.[55] This leads to a conclusion that the philosophy of values had to be a barrier from the ideology of evil. That is what Radbruch realized during his experience before Damask.[56]

The world of values stands above us and in front of us and as such it is the base for development of kindness in law and man. At the same time we are left with freedom to accept or reject values and also the consequences of our choice. Thus, the realization of values can't be left to God alone.

The value character of an event, act or a person can be objectively true. In general, objectively true claims are possible in all objective values – in morality, ethics, law.

For example, a lie, murder, genocide, are all objectively and value wrong. This isn't only because we think that they are wrong. Unfortunately, often judgments of value vagueness are right. Actually, this is about the claim that there is no right answer to some difficult case. These claims are not desirable as far as the practical directness of law is concerned, which should guarantee the existence of value differences.

The existence of the objectively given values is obvious even in the existence of the value cultural diversity which is present because of the responsibility and the care God has in his generosity. We can prove this by the fact that no matter how we claim that we are skeptics we will never say that values have something to do with terrorism, racial discrimination, genocide. Despite the cultural differences, which are the reason for our often not wanting to inquire into the values, we totally agree about these issues, without doubt.

The issue of finding the place of law in the world of values is pre-legal issue. Thereby the world of values is becoming the assumption of the existence and development of law. Legal norm then becomes the formulation of values. Legal norm is not precious in itself, but only if it expresses fundamental values. Legal norm has to be the logical formulation, that is to say, it has to deliver the contents of value correctly and appropriately. As an expression of the value dimension legal norm obtains the binding power. Keeping in mind the legal norm defined in such a way, nobody can deny its necessity in reality. Law then expresses the contents of value and proposes the model of the ideal behavior. The fact that values have creating power is thus proved to be true.

Where is the place of law in the world of values? Law has to be filled with values and at the same time has to protect values from attacks. Legal norm has to express values, although values are so richer than the norm can express by words. Value is what determinates legal norm which is based on values. Every attempt to explain law on its own, to leave values to some philosophical field of exploration proved to be futile. The

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54 J. Pawel II, *Pamięć i tożsamość*, Città dell Vaticano-Milano 2005.

55 J. Ratzinger, V. Messori, *Razgovor o vjeri*, the original title *Raporto sulla fede*, 128.

56 A. Kaufmann, *Uvod v filozofijo prava*, the original title *Einführung in Rechtsphilosophie und Rechtstheorie der Gegenwart*, Ljubljana 1998, 122.

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theory of law, which leaves out values, has a flaw which is expressed in human suffering and pain. There is no existence of law and man without values, which demand of us *bene vivere et bene operari*.[57] We can sacrifice everything for values but not the value itself. What is left? Values and life remembered for striving towards values. Everything else is not worth remembering.

[57] B. Häring, *Das Gesetz Crhisti I*, Münich-Freiburg 1967.

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Economics, Politics, and Natural Law

Philip J. Harold

Contemporary English-language theorists have used the natural law theory of St. Thomas Aquinas as a basis for a theory of moral action.[1] This paper will show on the contrary that natural law cannot be turned into a moral theory because it includes a politics of the common good, while moral theories deal instead with economic questions which are always divisive. The resolution of economic issues can only take place within a politics that is not understood exclusively in economic terms. First, the differences will be sketched between the two components of practical questions, the economic and the political, and then it will be argued that Aquinas's explication of natural law respects the transcendence of the common good, accommodates pluralism on economic questions, and respects individual dignity vis-à-vis the claims of the community.

Economics and Politics

According to the classical definition of economic exchange, self-interested parties enter into a contract voluntarily and both benefit from the transaction.[2] But even according to this model, there must be something deeper than self-interest, and the good of the other person must in some way also be good for me too. After all, if we were not at all interested in benefiting our partner in exchange, we could defraud them and reap an easy benefit. Fraud must of course be prohibited in order for the whole economy to function, and in the long-term this is good for me individually too. Thinking along these lines, the liberal theorists base their political thought on the concept of long-term self-interest. When John Locke, for example, asks why man will part with natural freedom, he answers that it is because "the enjoyment of the property he has in this state is very unsafe, very unsecure. This makes him willing to quit a condition, which, however free, is full of fears and continual dangers." He concludes that "[t]he great and chief end, therefore, of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property."[3] Political unity becomes a kind of

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[1] E.g. Germain Grisez, Joseph Boyle, and John Finnis, "Practical Principles, Oral Truth, and Ultimate Ends," *American Journal of Jurisprudence*, 32 (1987), 99-151. Also Cf. John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford: Oxford University Press, 1998), 79. Finnis admits there that he is constructing a moral theory which does not exist in Aquinas. The best critique of the Finnis-Grisez new natural law theory is Russell Hittinger, *A Critique of the New Natural Law Theory* (Notre Dame, Ind.: University of Notre Dame Press, 1987).

[2] "Adam Smith's key insight was that both parties to an exchange can benefit and that, *so long as cooperation is strictly voluntary*, no exchange will take place unless both parties do benefit." Milton Friedman and Rose Friedman, *Free to Choose: A Personal Statement* (New York: Houghton Mifflin Harcourt), xv.

[3] John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), 350.

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economic transaction, a "social contract" where individuals realize greater benefits over the long term. Systematic thinking about interests in this way defines the very concept of morality; moral thinking considers how my individual action affects all of society considered as a conceptualizable system of reciprocal actions, as an economy.[4]

The problem is that relying on long-term self-interest is an insufficient basis for economy.[5] A sustainable economy – a *Volkswirtschaft* and not merely one-off transactions – only works if on some level our neighbor's good is our good, if we identify with the people around us and wish them well. This kind of general identification is enabled by *politics*, in the widest sense of the word.[6] A functioning economy is only possible when there is a prior political solidarity.

By focusing on moral and economic questions, liberal theorists often fail to come to terms with the nature of politics and political leadership. Before there can be a question of imagining how it is that I benefit from my connection with the larger political order, that political order must already be in existence. The question of how I am better off as a member of a society cannot be posed in the abstract: I am already socialized as a part of a society; I always already owe a debt of loyalty to the political order that has created me.[7] The communitarian critique of liberalism runs along these lines.[8] Before we can run a cost/benefit analysis of our membership in a political order in order to

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[4] The categorical imperative of Kant is the classic form of this approach.

[5] As J.L. Mackie says, "[T]he rational calculation of long-term self-interest is not sufficient in itself (necessarily) to lead men to make mutually beneficial agreements, or once made, to keep them," even when "combined in the Hobbesian solution with a coercive device." J.L. Mackie, *Ethics: Inventing Right and Wrong* (New York: Penguin, 1990), 119-20, 124.

[6] The terms "politics" and "economics" are used here in the sense given by Betrand de Jouvenel: "[E]conomics is concerned with the use of resources on the spot, politics with adding to them." Politics is a "technique for increasing the human energies at our disposal by rallying other men's wills to our cause." Betrand de Jouvenel, *Sovereignty: An Inquiry into the Political Good*, trans. J.F. Huntington (Indianapolis: Liberty Fund, 1997), 20, 21. The term "economy" as it is used here is also influenced by the work of Jacques Derrida. Cf. e.g. Jacques Derrida, *Margins of Philosophy*, trans. Alan Bass (Chicago: University of Chicago Press, 1982), 216-19.

[7] Considering whether to break out of prison and escape an unjust death sentence, Socrates imagines talking to the laws of Athens, which say to him, "[S]ince you were brought into the world and nurtured and educated by us, can you deny in the first place that you are our child and slave, as your fathers were before you? And if this is true you are not on equal terms with us; nor can you think that you have a right to do to us what we are doing to you." Plato, *Crito* 50e.

[8] Cf. Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982). Rainer Forst refers to the "communitarian fallacy" of Sandel, which denies the impossibility of a deontological level from the fact of the intersubjective constitution of the self. Rainer Forst, *Contexts of Justice: Political Philosophy beyond Liberalism and Communitarianism*, trans. John M. M. Farrell (Berkeley: University of California Press, 2002), 231. The problem with Forst's Kantian liberalism is the reduction of morality to economic thinking. Morality comes from recognizing that we live in and from an economy, according to Forst: "The central point is only that the 'foundation' of morality is not the concern for one's own good life or even concern for realizing a vision of the good, but rather a concern for others within the space of what is reciprocally and generally owed (which does not exclude the possibility of supererogatory acts)." Rainer Forst, *The Right to Justification* (New York: Columbia University Press, 2012), 34. This view is responsible for liberalism's inability to deal with the common good, which is irreducible to economy.

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then reaffirm our loyalty to it "rationally," that order and our loyalty to it has to exist in the first place. While the economic question concerns what exactly is to our advantage, the political question concerns who exactly it is that constitutes the "our" in the first place.

The promise of economic benefit is simply unable to produce the kind of loyalty required of a political order. Thinking in terms of advantage, even long-term advantage, will always lead to an impasse: there will always be disagreement on what should be weighed and considered to be cost and benefit, and hence on how the economy should be structured. "So strong is this propensity of mankind to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts," writes James Madison. "But the most common and durable source of factions has been the various and unequal distribution of property."[9] Realistically, these struggles cannot be solved in advance. Thinking about them in the abstract produces no resolution.[10] As Madison points out, the division of labor produces different classes of people who have different perspectives, and though this is the source of dissention or "faction," it is not something we should ever think we could eliminate. Political questions about how to structure the economy will always be contentious.[11]

It is tempting to define politics itself as conflict over "who gets what, when, and how."[12] But politics is not originally about conflict, but rather the creation and maintenance of the social bond. Here one must look beyond economic policies, always rife with disagreement, to rhetoric.

"We are all Americans." "We must unite together beyond partisan differences." This way of speaking is outside of mimetic competition. It includes everyone. But it is also basically meaningless: there is no specific content to it, and nothing follows from it. It is therefore easy to dismiss as rhetorical flourishes, ornaments merely for effect or propaganda. Hard-headed positivist social scientists usually do think of it as a tool for pushing a certain agenda. Undoubtedly manipulation occurs all the time: "We are all Americans, *so we need to reject those who would oppose the proposed legislation*." "We must unite together beyond partisan differences, *and this means advancing this particular agenda*." But as soon as a political statement has meaning, it is taking a

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[9] Federalist #10, available at http://www.constitution.org/fed/federa10.htm (Accessed 10/3/2012).

[10] For example, we could try to just applying the principle of the market – free exchange – when fashioning a democratic political system in which everyone an equal voice and the system most people freely choose wins out. But of course unless everyone agrees unanimously there are going to be some people who will be forced to go along with what everyone else chooses, and even more importantly the disproportionate suffering of the minority may not count as suffering at all, undermining completely the claims we might make about this system being a result of free choice and redounding to everyone's benefit.

[11] This is the case even when one adopts the posture of giving a neutral description of the social bond, which as Patrick Riordan suggests, must of necessity always also be advocacy. Patrick Riordan, *A Politics of the Common Good* (Dublin: Institute of Public Administration, 1996), 102.

[12] Harold D. Lasswell, *Politics: Who Gets What, When, How* (Cleveland: Meridian, 1958).

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stand on the way the economy should be organized and is thus locked in a cycle of conflict, since there will always be those who see things differently.

In order for there to even be political conflict there first has to be a political order which includes the very parties who are fighting. However much we disagree, we do agree that we belong to a country and we wish what is good for our country. Our fates are intertwined together in a common order, the nature of which cannot be explained in terms of raw economic meaning, i.e. who gets what, when, and how, since that is always contested. Nuts-and-bolts policy questions are naturally extremely important, but being inherently divisive one set of answers to them simply cannot form the basis for a political order. Such a foundation is instead expressed by and evoked through symbolism, such as the strictly meaningless phrases which do nothing but recognize a community of responsibility between the parties, the very possibility of communicating and sharing meaning, without yet having any specific economic meaning.

Symbols that express and inspire a patriotic love of country do not mean anything specific, but are more important than they appear in a positivistic worldview. The political art involves building up a community of mutual responsibility and trust, and this involves the creation of a symbolic language which can express it. Two-and-a-half centuries ago the symbols "George Washington," "Bill of Rights," "Bald Eagle," "Stars and Stripes," and "Fourth of July" did not exist, and neither did the United States of America. There cannot be one without the other; creating a political order entails creating the symbolism to express and evoke the whole and its governing principles, e.g. justice, liberty, equality under the law.

Thinking about the political order as an economy leads us inevitably to downgrade this symbolic language and these general principles, considering them to be propaganda or ideology.[13] This is not to say that we should never flesh out what e.g. liberty and equality mean concretely, but rather that we should not mistake our ideas for the principles themselves. The common good transcends our ideas and reactions, and cannot be enlisted in the struggle between different economic interests.

In a remarkable essay on ancient Chinese political thought, J.G.A. Pocock has brought out a tension in Confucian political theory, which saw society as properly governed by a code of rituals. Participating in ritual is like being a part of a dance – there is an order and harmony to a dance without it meaning something as speech does. Without ritual government must rule by decree, using words which have meaning and are backed up by specific punishments. And "[w]here there are words there will be disagreement; where there are categories there will be opposition."[14] But it would be foolish to oppose a "government by ritual" to a "government of words"; both are necessary and unable to be contrasted and played off of one another as if they were competitors in providing the principle of rule. To think this way is already to think in terms of

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[13] Lasswell does both, analyzing symbolism for example exclusively in terms of propaganda, i.e. as a mechanism used by elites to control the masses. He does have one brief mention of "ideology" that would not be propaganda, and his turn of phrase is interesting: "Happy indeed is that nation that has no thought of itself." Lasswell, 31.

[14] J.G.A. Pocock, *Politics, Language, and Time* (Chicago: University of Chicago Press, 1971), 58.

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economy, where what matters is to get the right moral principles, so as to apply them in shaping society. Pocock in fact identifies two heresies to the traditional Confucian view which do exactly this: the anarchist Taoists who drew the conclusion that, since the communal order cannot be expressed in words, words and government must be bad; and the totalitarian Legalists who drew the Hobbesian conclusion that the will of the ruler must determine the meaning of words.

To think of politics in terms of economy means to think in terms of contrary principles, as if politics were a problem that could be solved in advance by picking the right principle and then enforcing it. But the recognition of the symbolism essential to creation of political order does not offer us just another principle having moral and political content which would be in competition with other principles. Rather, there is something here that is outside of competition, a solidarity that includes everyone in the entire society. An awareness of this brings us to the limits of economic thought. Economic and moral thinking is necessary, but it is not exclusive. It is limited, but it is not in competition with political thought. Economics is limited by politics and not by force, as that would be to form a new economy between two opposed principles.

We might think here of the difference between having a merely economic relationship with my butcher, which would change when a competitor offers a lower price, and a relationship of friendship. An economic relationship depends upon tallying the costs and benefits one is accruing, but imposing this framework upon a friendship would be to destroy it. The two types of relationship are not in competition with each other, it is not an either-or. Friendship transcends an economic relationship. While it is outside of economy, it is not opposed to it as its contrary, as if the more friendship there was, the less of an economic relationship there would be. In fact the reverse is true; the more people are friends with each other the more potential there is for a well-functioning economy from the social trust built up as a result.[15]

The Common Good Orientation of Law

An exclusively economic understanding of the basis of the social order is inevitably zero-sum. When principles and symbols are contrasted with each other in a system where the meaning comes from the play of differences, asserting the value of one thing means diminishing or excluding its competition. Persecution is inevitable for an exclusively economic perspective on politics: if ideology is at the heart of the social order, it is in competition and conflict with rival ideologies which it must combat and persecute in order to maintain itself. If we are bound together in society through an ideology or a set of "ultimate ends" we supposedly choose, then a threat to those principles is a threat to our whole social order, something of course we could never approach with rational

[15] Cf. Francis Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (New York: The Free Press, 1995).

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detachment.[16] To make the social bond ideological is to succumb to irrationality. "We live as did the ancients when their world was not yet disenchanted of its gods and demons, only we live in a different sense," says Max Weber. "Fate, and certainly not 'science,' holds sway over these gods and their struggles."[17]

The alternative is a political understanding that is not exclusively economic, making room for the symbolic in reflecting and evoking social order. The foundation of the social order will be in this case the *common good.* According to St. Thomas Aquinas, law is oriented towards the common good. The key to understanding the nature of law for Aquinas is neither force nor even its purpose in making men good; as Jean Porter states, Aquinas "emphasizes the character of law as a norm of reason that is oriented toward the common good…. Aquinas is the first scholastic to link legislative authority explicitly to the common good."[18] While ideologies provide justifications for the use of force and for persecutions, the common good is unable to be captured in an intellectual frame. It does not form an economic program but a political symbolism, evocative and unable to be exhausted in a system of thought.

In Question 90 of the *Summa*, "On the Essence of Law," Aquinas asks four questions, beginning with "Whether law is something pertaining to reason?" The weight of this question is easy to feel in contemporary times; we cannot automatically assume that the laws passed by regimes today for example have to do with reason. We might say with Marx that law is a reflection and a tool of the domination of the elites over the lower classes. We might agree with Burke and say that law is an accretion of the past which should be built up over centuries of tradition and not rationally designed. Or we could say with Adam Smith that the laws of competitive desire and self-interest should regulate human behavior in order to produce good results without the use of reason. According to Aquinas of course law does pertain to reason. Law is neither the mere whim of the ruler nor an unconscious or unintended process. Human beings can have awareness of their end; animals do not and so lack reason. Law is consciously shaped to direct men towards this end, so law gains its rationality from this end. This end is called the "common good."

Aquinas defines "common good" narrowly, however. He rejects the view, for instance, that law is directed to the good of all *and* to the private good of an individual. Law in its proper sense is only a matter of politics, and the administration of lower-level communities, even though they may further the common good in their own way, do not rise to the level of constituting a "common good." The term is reserved for the entire political order; it cannot be said even of large social groupings with leaders who make decisions for the whole that they have a common good, nor is there strictly speak-

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16 In the case of American foreign policy this is masterfully illustrated by Christopher Layne, *The Peace of Illusions: American Grand Strategy from 1940 to the Present* (Ithaca: Cornell University Press, 2006), 118-133.

17 Max Weber, "Science as a Vocation," in *From Max Weber: Essays in Sociology*, trans. and ed. H.H. Gerth and C. Wright Mills (New York: Oxford University Press, 1946), 148.

18 Jean Porter, "The Common Good in Thomas Aquinas," in Dennis P. McCann and Patrick D. Miller, *In Search of the Common Good* (New York: T & T Clark, 2005), 109.

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ing a common good of a family, a corporation, or a union, but only of the all-encompassing political unit. The common good is common and not restricted to the good of certain types of people, certain families or voluntary associations.

Et ideo omnis lex ad bonum commune ordinatur – law is "ordained" to the common good. Law does not produce the common good, but the reverse; it is the common good which is responsible for the good order that is present in laws. We produce laws as a result of lawmaking, like building a house results in a house. But laws are not the means we utilize to produce an end result, a system of relations that functions smoothly, that cannot be called the "common good" precisely because the common good is not a product. We do not manufacture it but rather are oriented by it. It is not technical knowledge that we have, but a dynamic whole of which we form a part: we do not possess the key to the common good, rather *it has us*. We are oriented towards it, but we did not create it nor can we possess it.

The common good is the end to which human rationality is directed when fashioning laws. Jean Porter has pointed to a fundamental paradox here in Aquinas's work. On the one hand, Aquinas often refers to the common good, and it plays a central role in his understanding of politics, public authority, and law. On the other hand, Aquinas does not develop a *theory* of the common good.[19] But could we develop such a theory if we decided to, working out for example the rational principles of justice? Anglo-American political philosophy has been dominated over the last four decades by just such a project, John Rawls's contractual political theory. Is this type of project the fleshing out of political philosophy which Aquinas could have done in principle, but just failed to do? Or instead is it from the outset not a viable proposition?

Two Components of Natural Law

The natural law is divided into two parts, however: the first common principles, which are the same in all men, and the derived norms which are not valid everywhere. The first principles begin with "good is to be done and evil avoided," with the others being based on that. All societies have the first principles in common; the common element of all common goods, so to speak. They are therefore vague principles like "to live in society," "to shun ignorance," "to avoid offending those with whom one has to live," which are glittering generalities without any specific economic content. This is the common good as political rhetoric presents it. They transcend economy and are truly *common*, shared by everyone; while we can fail to live up to the natural law and be confused about the proper conclusions to draw from it in concrete situations, we are still always seeking what we think is good under the aspect of goodness. No society would ever be based on the idea that injustice is a good thing; rather, injustice where it exists is always rationalized somehow. Thus it is not the case that some people are on the "side" of the natural law while others oppose it; everyone is already on the "side" of

[19] Jean Porter, "Classical Voices: Introduction," in *In Search of the Common Good*, 92.

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the natural law.[20] The natural law does not take sides, and we all live under its first principles. Here there is not yet a division of labor, not yet the articulation of society where different people have different functions. But unlike the "original position" of John Rawls, Aquinas does not use this as the basis for creating a moral theory that would define specific economic principles of justice.[21] In fact, this is impossible on Aquinas's view, since the specific conclusions that are made from the first principles have to be based on empirical evidence. As conditions change, the effect of actions on the common good changes, and therefore "there is neither the same truth and rectitude among all men" for these "proper or peculiar conclusions of the practical reason."[22] Thus Aquinas is able to explain how the common good of the greater social whole can be foundational for law, unchangeable with all societies respecting it, while at the same time appreciate the historicity and contingency of the common good as manifested in different social orders. A healthy pluralism and pragmatism on economic questions is combined with the necessary transcendence of the good in politics.

For moral theories, by contrast, what matters is how "good" is defined and who has the power to control what it means in practice. These are already economic questions. But for natural law the good transcends any definition of it; what is good cannot be controlled by one group or be the property of a social faction. The common good of a social order includes everyone, or to put it differently, human beings are political animals, and not just economic beings who fight for their survival over and against others. The distinguishing feature of political rhetoric was as we saw its ability to appeal to the common good in this inclusive way, expressing and evoking non-competitive solidarity, viz. friendship and social trust, the basis for any economic order.

This reading of Aquinas enables us to address an issue raised by Matthew Kempshall in his magisterial book *The Common Good in Late Medieval Political Thought*. He notes that Aquinas is always careful where necessary "to draw back from making each human being completely subordinate to the whole community."[23] He portrays Aquinas as drawing from different models of the common good and therefore able to "modify the language of whole and part" in order to ensure that the individual is not swallowed up by the community. This is, after all, what a focus on virtue might seem to logically lead:

> Aquinas's preference for a moral definition of the good of the political community necessarily affects the way in which his political thought has been interpreted. The more moral goodness is stressed, the more the common good of the political community is said to include the individual human being and the more the reservation of a private sphere of activity for the individual effectively disappears. For Aquinas, any virtuous

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[20] The natural law is in infants and the damned, as Aquinas says in the very first article on the natural law. *Summa Theologica* I-II q. 94 a. 1.

[21] It is significant that Rawls's approach shifts from the crafting of an economic moral theory (in *A Theory of Justice*) towards a consideration of political rhetoric (in *Political Liberalism*).

[22] *Summa Theologica* I-II q. 94 a. 4.

[23] M.S. Kempshall, *The Common Good in Late Medieval Political Thought* (Oxford: Clarendon Press, 1999), 129.

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> action, even if it ostensibly affects only the person who performs it, still affects 'another person' in the sense of the whole community of which that individual constitutes a part.[24]

Everything we do or do not do, after all, ultimately affects everyone else.[25] Our actions have consequences that ripple out far beyond what we intend. When economic thinking considers virtue, it can easily become stifling. The response of liberal theorists is to block off the private space of individual freedom. The mark of a free, liberal order are individual rights limiting government and granting people the ability to live according to their whims in certain matters. The fact that the unintended consequences for others of our actions and omissions are not entirely knowable, as well as the fact that any standard we would apply to judge them would be disputed, justifies us throwing up our hands and ceasing to speak as if the common good were any better than individual goods.[26]

This "solution" is one-sided. It falls into error when the idea of the priority of "the right" and a pluralism of values is taken to deny the very idea of "common good." The liberalism that makes this move reveals itself to be trapped in economic thinking. It takes the current political order for granted, its questioning never leaves the horizon of economy, and it views politics in economic terms, i.e. as something that would limit or shape the functioning of economy by force, opposing it as a contrary. But the relationship of politics and economics, the primary and the special principles of practical reason, is rather *non-competitive*. Together the two do not form another economy. As Kempshall brings out, and we have explained here in terms of the difference between economics and politics, Aquinas's preferred conceptualization of the common good is the *duplex ordo*, the double ordering of an internal good or formal cause, and a dynamic external good or final cause. The internal, economic ordering is better named the "common benefit," and it might be better, greater, more superior than the individual

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[24] Kempshall, 128.

[25] Here one thinks of *Wickard* v. *Filburn*, a famous United States Supreme Court case which gave an expansive reading to the federal government's power to regulate interstate commerce: the defendant was a farmer who grew wheat in excess of the federal allotment and had to pay the penalty for excess production even though he did not sell it, with the rationale being that otherwise he would have to purchase the extra wheat he needed for his animals, affecting the demand for the commodity, its price, and ultimately commerce between the states.

[26] E.g. Isaiah Berlin, *Liberty*, ed. Henry Hardy (Oxford: Oxford University Press, 2002).

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good, according to Aquinas, but it is not "more perfect."[27] Though political prudence considers all actions, all the virtues are covered under the natural law, and the common good is the same as the individual good; however, the community does not end up stifling the individual because this political level must be an appeal to human freedom. There is political order only where there is free assent. The greater the virtue, the greater the solidarity and the more a political order is made possible, but this cannot be accomplished through force. In economy the individual good can be placed above the common benefit as necessary, and in politics the individual can never be subsumed by the community, as the appeal is always to individual freedom in creating the social bond.

[27] Kempshall, 100-1, 115.

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III.

Human Dignity

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Human Dignity: An undefined idea?

In search of the concept's many facets through the path of history and philosophy

Lorenza Violini and Maria Maddalena Giungi[1]

"What is man, that you keep him in mind? The son of man, that you take him into account?"

(Psalms 8:5)

Part I: inherent dignity and its facets

1. Introductory remarks.

The present paper deals with the concept of human dignity and with the fundamental question it raises in our pluralistic societies. We examine whether if it is still possible to identify a common understanding of inherent dignity or if we should agree with the scholars who consider it an empty idea.[2]

Since dignity is strictly connected with human rights, we may start our investigation by considering three fundamental charters: *the Declaration of the Rights of Man and of the Citizen* (French Revolution, 1789), the *Declaration of Independence* (American Revolution,1776), and *the Universal Declaration on Human Rights* (U.N.O. Declaration, 1948).

The Declaration of the Rights of Man and of the Citizen (1789) contends that "men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good"[3]. According to Hannah Arendt, the French Declaration was a turning point in history because it meant that man rather than God's command or hierarchies of historical custom should be the source of human law. "Man himself was their [the Rights of Man's] source as well as their ultimate goal."[4] Because they were seen as "inalienable", no higher authority was needed; being in themselves the higher authority, the whole legal system was supposed to rest on them and on the sovereignty of the citizens' own decisions. At the same time, however, this source of government was the

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[1] L. Violini wrote "First Part: The inherent dignity and its facets". M. Maddalena Giungi "Second Part: Three current readings of human dignity".

[2] C. McCrudden, Human *dignity and judicial interpretation of human rights*, in European Journal of International Law, 2008, 19 (4), pp. 655-724; against the skeptical position see P. Carozza, *Human Dignity in Costitutional Adjudication*, in T. Ginsburg and R. Dixon, Research Handbook in comparative constitutional law, Edward Elgar 2011, pp. 459-472.

[3] Declaration of the Rights of Man and of the Citizen (1789), Art. 1.

[4] H. Arendt, *The Origins of Totalitarianism*, Andre Deutsch,1986, p. 277 ss.

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people of a particular territory, who could exercise sovereignty not individually but collectively. Therefore, it became clear that the so-called inalienable rights of man could only find their guarantees in the collective rights of the people to sovereign self-government[5].

In a different perspective, the *American Declaration of Independence* 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, that among these are Life, Liberty and the pursuit of Happiness*"*[6]. Here the centrality of man and also of his/her inalienable rights emerge, but this human being is understood as deeply connected with his/her Creator because he/she is created in His own image.

The Universal Declaration of Human Rights (1948) assumes both these perspectives by introducing a new juridical concept, the concept of human dignity: the Preamble of the Declaration opens with the statement that "the recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".

Comparing these three documents, human dignity seems, at first glance, only a recent addition to human rights discourse, an addition made out of the concern that freedom and equality were insufficient to guarantee justice and peace in the world. This insight was deeply rooted in the drafters' understanding of the U.N. Declaration: they faced the tragedies of totalitarianism and war, and they were well aware of the fact that mankind needed something more consistent and fundamental than a simple list of rights. Mankind needed a clear statement with solid moral roots to be recognized by all the civilized states, a common basis to reconstruct a more human universal society.

Despite the high moral inspiration that underlies the idea of human dignity, the concept itself needs to be continuously understood and clarified in our changing cultural world. Its complexity is undeniable as revealed by its historical, philosophical and legal roots[7].

In this paper, we will examine some of the many historical and philosophical perspectives of dignity through their connections with dignity's legal aspects. For the sake of simplicity, we will reduce the complexity of the concept to two facets that reflects

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[5] Cf. B. Cotter, Hannah Arendt and "the Right to Have Rights", in Anthony F. Lang & John Williams (ed.), Hannah Arendt and International Relations: Readings Across the Lines, Palgrave Macmillan, 2005, pp. 95-112; Jeffrey C. Isaac, A New Guarantee on Earth: Hannah Arendt on Human Dignity and the Politics of Human Rights, The American Political Science Review Vol. 90, No. 1 (Mar., 1996), pp. 61-73.

[6] The American Declaration of Independence (1776), Preamble.

[7] "Since the mid-twentieth century, the idea of human dignity has emerged as the single most widely recognized and invoked basis upon which to ground the idea of human rights. Simultaneously dignity is also used as an exceptionally widespread tool in legal discourse which concerns the content and scope of specific rights. It has become a pervasive part of the fabric of constitutional law worldwide". P. Carozza, *Human dignity in constitutional adjudication*, in Tom Ginsburg and Rosalind Dixon, Eds., *Research Handbook in Comparative Constitutional* Law, Edward Elgar publishing Ltd, 2011, pp. 459 - 471; N. Rao, *Three concepts of dignity in constitutional law*, Notre Dame Law Review, Vol. 86, n. 1, 2011, pp. 183-271.

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the two main sides of the human person, who is in himself both an *individuum* and a network of relations[8]. Legal cases, philosophical texts, and even historical perspectives, show that dignity as well endows an express facet, related to the equal belonging of each person to the human family, and an implied facet, rooted in his nature. As we will see, different understandings of the human person affect the legal understanding of dignity as well as the protection of rights in our contemporary legal discourse.

2. The dual facets of dignity in the historical origins of the concept.

The two facets of dignity mentioned above may be identified in the very origins of the idea of human dignity in the western culture that dates back to the Roman legal tradition. Accordingly, only persons with a particular status were worthy of *dignitas*. The Latin term means the position of a person as belonging to a specific social group. It was well defined in its characteristics and specifically referred to a distinct group of people[9].

In the same era, though, Cicero and the Stoics made reference to the dignity of human beings as human beings, irrespective of a legal definition of the status. In other words, this understanding of *dignitas* did not depend on any particular legal status in the community but rather on the fact that a human being was born free (not as a slave), and was rational. For this reason, nature and not legal power was considered the basis for human dignity[10].

Since its beginning, the Christian tradition[11] developed this second understanding of dignity, by extending it to every person according to St. Paul assumption: "For as many of you as have been baptized in Christ, have put on Christ. There is neither Jew nor Greek: there is neither bond nor free: there is neither male nor female. For you are all one in Christ Jesus" (Galatians 3:27-28; cf. 1 Corinthians 12:13). Once again, not the legal system but rather nature is here considered the origin of the dignity of men and his/her rights.

As modern times approached, the French revolution imported both the ideas of liberty and equality into the conception of rights, as it is stated in *The Declaration of the*

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[8] M. Cartabia, *The Age of "New Rights"*, http://www.nyustraus.org/pubs/0910/docs/Cartabia.pdf.

[9] It is still possible to find traces of that idea of dignity as *status* in international law, where States and ambassadors enjoy a "particular" status due to their specific diplomatic role bound to the sovereignty of the State. An interesting current perspective which connects human dignity and *status* is present in J. Waldron, *Dignity, Rank and Rights*, Oxford University Press, 2012.

[10] For a complete historical overview of human dignity see, U. Vincenti, *Diritti e Dignità Umana*, Laterza, 2009. See also, O. Sensen, *Human Dignity in historical perspective: The contemporary and traditional paradigms*, European Journal of Political Theory January 2011 vol. 10, no., pp. 1 71-91; G. Kateb, *Human Dignity*, Harvard University Press, 2011; D. Kretzmer, E. Klein, *The Concept of Human Dignity in Human Rights Discourse*, Kluwer Law International, 2002.

[11] Cf. M. Novak, *The Judeo-Christian Foundation of Human Dignity*, Journal of Markets & Morality 1, n. 2 (October 1998), 107-121; R. Spaeman, *Personen. Versuche über den Unterschied zwischen "etwas" und "jemand"*, Klett-Cotta, Stuttgart 1996; É. Gilson, *El Espíritu de la Filosofia Medieval*, Ediciones Rialp, 2004, pp. 177-212.

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Rights of Man and of the Citizen (1989). The French ideas of liberty and equality were in some way a new understanding of the two facets of dignity even though dignity was not explicitly mentioned[12]. The Declaration understands liberty as man's freedom from every social and political restriction (implied facet)[13] and equality as related to the equal legal value of every member of the community (express facet)[14].

It was not until the important cultural transition from the 19th to the 20th century that equality became something more than a legal concept. The general public opinion, at that time, started to perceive the state's obligation toward its citizens as wider than the protection of their individual liberties; the state's commitments were extended to guarantee an equal distribution of economic resources to different strata of society and weaker social groups. As a result of this shift new sets of rights were created (i.e. social rights which address situations of social weakness by requiring the state to provide services to ensure not only formal but also material equality) and old sets of rights extended (i.e. political rights, which ensure people's ability to participate in the civil and political life of the state without discrimination or repression)[15].

The path of rights, from a liberal state to a social state, was not without difficulties and impediments. In the 20th century, the entire world was subjected to two World Wars, several totalitarianisms and to the use of nuclear weapons. These dramatic events revealed that disregard for rights and liberties was one of the main dangers for peace and the people's welfare. As a result, after the war, the United Nations General Assembly drafted the Universal Declaration of Human Rights in 1948. The aim of the Declaration was to reformulate fundamental rights in light of a principle of human dignity. This is expressed in the Declaration's first article: "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". Mary Ann Glendon states that at the very end of the drafting process, and without much discussion, the Commissioners made a statement about the basis of human rights in the Preamble. As a consequence of this fundamental agreement, the word "dignity" appears in many key points of the

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12 See J. Habermas, *The Concept of Human Dignity and the Realistic Utopia of Human Rights*, Metaphilosophy, Vol. 41, No. 4, July 2010m pp. 465 – 480.

13 The evidence of this new perspective was expressed in the *Declaration of Human and Civic Rights* of 26 August 1789, art. 4: "Liberty consists in being able to do anything that does not harm others: thus, the exercise of the natural rights of every man has no bounds other than those that ensure to the other members of society the enjoyment of these same rights. These bounds may be determined only by Law".

14 The French Declaration marked the rise of the Liberal State from the ashes of the Absolutist State. Customary laws were no longer the basis of social order. Instead, written laws, made by parliaments, replaced them. Indeed, in France the new written law became the main actor of the legal order. Medieval customary law had to be made to suit the generality and abstract criteria that characterized parliament's written law an expression of equality among its citizens. The characteristics of generality and abstractness of the written law in Revolutionary France ensured the separation between State and society and wide spheres of individual liberty, which the legal system had to recognize and protect. Cf. P. Grossi, *Mitologie giuridiche della modernità*, Giuffrè, 2001.

15 Cf. G. Bognetti, La Divisione dei Poteri. Saggio di Diritto Comparato, Giuffrè, 2001.

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Declaration so that many scholars believe it represents the Declaration's ultimate value[16]. It is worth noting that in the Declaration itself the concept of dignity encompasses both the individual status of the person and his claim to be recognized as an equal member of the human family as a whole[17].

3. Making widespread the use of the concept from international to constitutional law.

In emphasizing the weight of Universal Declaration on Human Rights within the international legal order, Christopher McCrudden states that: "the Universal Declaration on Human Rights was pivotal in popularizing the use of dignity or human dignity in human rights discourse. In the following years dignity became a commonplace in legal texts which provide human rights protections"[18]. After the Second World War, between 1945 and 1950, three nations, which had an important role as liable of war's horrors, incorporated dignity in their new constitutions[19]. The dignity language became prominent in the 70's due to the fall of the dictatorships in Greece, Spain and Portugal and in the early 90's as a result of the fall of the Berlin Wall and of the transition to democracy in Central and Eastern Europe"[20]. The German constitution and its interpretation by the German Court deeply influenced the drafting of these constitutions; a such influence became also apparent beyond Central and Eastern Europe playing an important role in the drafting of the new post-apartheid South African constitution and of Israel's Basic Law on Human Dignity. Moreover, if we consider the International level, dignity is now regularly integrated in human rights charters, both general and specific.[21] Therefore, McCrudden concludes that "Dignity's appearance strongly suggests a remarkable degree of convergence on the perception of it as central organizing principle"[22].

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16 See M. A. Glendon, A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights, Random House 2001.

17 "Eschewing-in its quest for universality – explicit reliance on Divine inspiration or on Natural Rights, the Declaration provided the idea of human rights with a universally acceptable foundation, an ur principle, human dignity"; L. Henkin, *Human Rights: Ideology and Aspiration, Reality and Prospect*, in Samantha Power and Graham Allison (eds.), *Realizing Human Rights: Moving from Inspiration to Impact*, St. Martin's Press, New York 2000, Ch. 1. See also on the concept of equality: E.W. Böckenförde, *Geschichte der Rechts- und Staatsphilosophie. Antike und Mittelalter*, Tübingen: Mohr Siebeck, 2002.

18 McCrudden, Human dignity and judicial interpretation of human rights, in European Journal of International Law , 2008, 19 (4), p. 655.

19 In 1946 Japan, in 1948 Italy, and in 1949 West Germany incorporated dignity into their constitutional documents.

20 McCrudden, *Supra* note 18, p. 673.

21 See the preamble of the Slavery Convention of 1956, which refers to the UN Charter's, the International Labour Organization (ILO) Conventions, the International Covenants on Civil and Political rights, on Economic Social and Cultural Rights and on the Elimination of All Forms of Racial Discrimination (1966).

22 McCrudden, *Supra* note 18, p. 671.

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Dignity has also come to be used widely in judicial interpretation and the application of human rights texts in many different ways and meanings. In *Dawood v. Minister of Home Affairs*, a South African Constitutional Court decision, this attitude of constitutional jurisprudence on dignity is described in this way: "Human dignity […] informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. […] Dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour."[23]

4. Clarifying the meaning of human dignity through philosophy and legal cases: an introduction to the metaphysical argument.

The different legal understandings of dignity, which the decision quoted above clearly identified, were deeply influenced, throughout history, by diverse philosophical views of what it means to be a human being.

A prime example of this phenomenon is the evolution of capital punishment in Ancient Israel under the conception that man is made in the image of God. This understanding of human being derived its normative meanings from that statement: "Whoever sheds the blood of man by man shall his blood be shed, for in God's image did He make man" (Genesis 9: 1-8). This verse expresses a paradox: on one hand, it is referred to the supreme worth of man and the sanctity of his life, and on the other hand it justifies the death penalty.

The early rabbinic exegesis resolved the paradox of the quoted biblical passage concluding that "the death penalty is not to be applied, for every damage inflicted upon the divine image (i.e., murder) cannot justify additional damage to that image (by capital punishment)."[24]

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[23] *Dawood and Another v Minister of Home Affairs and Others ; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* (CCT35/99) [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837 (7 June 2000).

[24] "In the past the question of image had specific legal consequences, for instance as to the way the State had to execute criminals; in ancient Israel, for example, murders were executed in a manner such that serious damage was not inflicted upon the victim's body. We can consider some examples: the Tannaim replaced the Biblical capital punishment of burning with internal burning whereby a flaming wick was thrown into the mouth of the convict […] likewise, the biblical punishment of stoning that crushes the convict's body was changed to the convict being pushed from a limited height (twice the height of a male person); thereby again limiting the corporal damage inflicted". Cf. Loberbaum, *Blood and Image of God: on the sanctity of life in biblical and early rabbinic law, myth, and ritual*, in D.

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This idea that man is made in the image of God and therefore capital punishment is something that can destroy his image, in some way survives today in the attitude of many western countries that consider death penalty against human dignity and so abolish it by law. In other countries many court cases have struck down the death penalty without waiting for legislative decision. In 1991 the Canadian Supreme Court wrote: "If corporal punishment, lobotomy and castration are no longer acceptable and contravene section 12 then the death penalty cannot be considered to be anything other than cruel and unusual punishment. It is the supreme indignity to the individual, the ultimate corporal punishment, the final and complete lobotomy and the absolute and irrevocable castration. As the ultimate desecration of human dignity, the imposition of the death penalty in Canada is a clear violation of the protection afforded by section 12 of the Charter. Capital punishment is *per se* cruel and unusual".[25] The Hungarian Constitutional Court stated a similar argument in a decision in 1990.[26] The judges considered that capital punishment imposes a limitation of the essential content of the fundamental rights to life and human dignity. The Court stressed the relationship between the right to life and dignity and the absolute nature of these two rights taken together as a source of all rights[27].

The "*imago dei*" argument[28], which is an example of a metaphysical understanding of dignity, is not only important to show the connections among law, philosophy and anthropology (that we will explore in the next paragraphs), but also to reveal the two

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Kretzmer and E. Klein (edited by), *The Concept of Human Dignity in Human Rights Discourse*, The Hague London -New York, Kluwer Law International, 2002, pp. 55-85.

[25] *Kindler v. Canada (Minister of Justice),* [1991] 2 S.C.R. 779; On November 15, 1983, Joseph Kindler was found guilty in the state of Pennsylvania of first degree murder, conspiracy to commit murder and kidnapping. Following his conviction, the jury recommended the death penalty. Before the sentence was imposed, Kindler escaped prison and fled to Canada. In April 1985, Kindler was arrested in Quebec and was charged with offences under the Immigration Act and the Criminal Code.

In July 1985, the United States made a request for the extradition of Kindler pursuant to the Extradition Treaty between Canada and the United States of America. The extradition judge allowed the extradition application and committed Kindler to custody. Kindler's application for habeas corpus to review the extradition judge's decision was dismissed. The Minister of Justice then ordered Kindler's extradition pursuant to s. 25 of the Extradition Act without seeking assurances from the U.S. that the death penalty would not be imposed. The Trial Division and the Court of Appeal of the Federal Court dismissed applications by Kindler to review the Minister's decision.

[26] Hungarian Constitutional Court, (23/1990), (X.31).

[27] The same idea is present in the South African jurisprudence when the 6th June 1995, the Constitutional Court declared the death penalty to be incompatible with the prohibition of "cruel, inhuman or degrading treatment or punishment" under the country's interim constitution (*Makwanyane and Mcbunu v. The State*, paragraphs 95, 146). Eight of the eleven judges also found that the death penalty violated the right to life. The judgment had the effect of abolishing the death penalty for murder. *State v. Makwanyane and Mcbunu*, 1995 (6) BLCR 665 (CC).

[28] For an interesting refection on imago day argument see J. Waldron, *Human Rights in Judaeo-Christian Thought*, 2009, in http://www.law.nyu.edu/ecm_dlv4/groups/public/@nyu_law_website_news_media/documents/documents/ecm_pro_063948.pdf; *The Image of God: Rights, Reason, and Order* (November 30, 2010). NYU School of Law, Public Law Research Paper No. 10-85. Available at SSRN: http://ssrn.com/abstract=1718054.

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facets of human dignity. The biblical paradox, that we have analyzed above, expresses on one hand the implied facet of dignity, that means man as such has an undeniable worth and his life is sacred and inviolable; on the other hand, it expresses the Bible verse from Genesis, justifying the death penalty, is related to the express facet of dignity; in other words man's undeniable worth is preserved by the community life codified through the legal system.

5. *Philosophy and case law: the humanistic perspective. The rise of autonomy of man and its undeniable limits.*

In an attempt to identify the source of human dignity, the humanists (i.e. Grotius) established man as the sole creature endowed with reason, liberty and free will. In The *Truth of the Christian Religion*, Grotius's most important book on religion, published after *The Law of War and Peace*, he demonstrates his persistence in the tradition of Renaissance and Christian Humanism by stating: "The almighty […] created […] Man […] endowed with liberty of action"[29]. "Man is endowed with excellency of understanding, and liberty to choose what is morally good and evil"[30]. At the same time he starts to underline the separation between man's and God's power giving more weight to men's capacities ("Dominion was given to men over his action" [31]).

This concept of human dignity, as a synthesis of reason and liberty, grounds the central existential claim of modernity: man's autonomy, the right to self-determine his life, the right of privacy and the duty of the State to not interfere with the free expression of man's will. A similar idea appears in the *Prolegomena* of *De Iure Belli ac Pacis*[32]. Here Grotius lays, by his famous expression "*etiamsi daremus*", the starting point of a new "secular and modern"[33] understanding of natural law. In other words, according to his perspective, we achieve the principles that lead our actions (ethical life) and our social life (political and juridical life) by virtue of our nature, that is rational, ("the mother of rights is human nature"[34]) rather than under our dependence, as creature, on God: "What we have been saying would have a degree of validity even if we were to grant [*etiamsi daremus*] that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to him"[35]. "[…]The law of nature is a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or

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[29] Hugo Grotius, *The Truth of Christian Religion: in Six Books*, printed in English for Rich, Roystone, Bookseller to His Most Sacred Majesty, at Angel in Amen Corner, London 1680, vol. I, sec.VII, pp. 15-16.

[30] *Ibi,* vol. II, sec. X, p. 62.

[31] *Ibi,* vol. I, sec. XXIII, p. 44.

[32] H. Grotius, *De Iure Belli ac Pacis libri tres,* trans. W.K. Kelsey, Oxford University Press, 1925.

[33] J. Finnis, *Natural Law Natural Rights*, Oxford University Press*,* 2011, p. 43.

[34] Grotius, *supra* note 32, par. 16.

[35] *Ibi*, par. 11.

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enjoined"[36]. Therefore, even if God is not still completely eliminated in Grotius's view on man, however he strongly affirms that "autonomy of human action is not entirely managed by the will of God because not even God can change the binding nature of natural law"[37].

We can find a similar meaning of human dignity, as expression of individual autonomy, in many decisions of the US Supreme Court on abortion. In American law, the Supreme Court has afforded constitutional protection to a range of personal decisions relating to marriage, procreation, contraception, abortion and family relationships among others. Yet these decisions, being grounded in privacy, protect individual freedom from an undue state's interference but grant very poor attention to the link between this personal decision and the community life.[38]

For instance, in the case *Thornburgh v. American College of Obstetricians and Gynecologists* (1986)[39]. Justice Blackmun's opinion emphasized women's rights by arguing: "Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision – with the guidance of her physician and within the limits specified in Roe – whether to end her pregnancy. A woman's right to make that choice freely is fundamental."

An analogous idea of individual autonomy is identifiable in another case *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992)[40], which challenged the constitutionality of several Pennsylvania State limitations regarding abortion, the Supreme Court of the United States' plurality opinion upheld the constitutional right to have an abortion but lowered the standard for analyzing restrictions of that right, invalidating one regulation – spousal consent – but upholding the others (24 hours waiting before performing the abortion, consent of the parents for teenagers). The Court stated: "Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, childrearing and education. These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the XVth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of universe and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood, were they formed under compulsion of the State […]".

Despite the fact that, from the American point of view, rights can be exercised mainly according to the values that the single person has recognized, case law never

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[36] *Ibi,* I, i, x, pars 1.

[37] J. Miller, *Hugo Grotius*, The Stanford Encyclopedia of Philosophy (Fall 2011 Edition), Edward N. Zalta (ed.), http://plato.stanford.edu/archives/fall2011/entries/grotius. See also, S.J.B. Elshtain, *Sovereignty: God, State and Self*, Basic Books, New York (NY) 2008.

[38] E.J. Eberle, Dignity and Liberty: Constitutional Visions in Germany and the United States, Praeger, 2002, p. 125 e ss.

[39] Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986).

[40] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

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considered individual autonomy as absolute. Even in the in *Roe v. Wade*[41] decision, the most liberal expression of the right of woman to have an abortion, overturning a Texas interpretation of abortion law and making abortion legal in the United States, judges admitted that some types of limitation may legally be placed by law to that right as a matter of measure and not of quality. The Court wrote: "Most of these courts have agreed that the right of privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant."

As we have seen, even when the most extreme importance is given to the autonomy as the deepest source of human dignity[42], community values remain present confirming the idea that human dignity keeps is complexity and it is never unilaterally definable.

6. Kant's definition of human dignity and the Aviation Security Act case.

Kant granted to the idea of human dignity its "current canonical expression"[43]. As a general point of reference, when we look for a secular, temporal justification of the basis of human dignity, independent of any metaphysical justification, we can ascertain that dignity is understood as a value which is vested in each individual human being: "The dignity of man in the sense of absolute value of self-legislation and of the position in the kingdom of ends (the earlier understanding of the Groundwork)[44], refers, just as dignity of man in the sense of "End-in Oneself-ness" (the later understanding of the Doctrine of Virtue)[45], exclusively to the inner obligation by the moral law. This obligation only encompasses the core of the inner moral "acting" or obligation and is prior to all external freedom to act to which politics and law are restricted, according to Kant's liberal Enlightenment philosophy"[46].

Accepting this understanding of dignity, mainly as implied dignity, it seems that Kant's humanism precludes embracing any ideology that can reduce man to a means in order to fulfill the ends of a collective community. Kant's target is the utilitarian view which makes the man slave of external determination (state, community, other men, […]). According to this perspective every men is expendable for the sake of the major

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41 Roe *v. Wade*, 410 U.S. 113 (1973).

42 See L. Violini, A. Osti, Le linee di demarcazione della vita umana, in M. Cartabia (edited by), I diritti in azione, Il mulino 2007, pp. pp. 185-238; Violini, Bioetica e laicità, in A. Pace (edited by), Problemi pratici della laicità agli inizi del secolo XXI (Atti del XXII Convegno nazionale dell'Associazione Italiana dei Costituzionalisti, Napoli, 26-27 ottobre 2007), Padova, Cedam, 2008, pp. 221-274.

43 Habermas, *Supra* note 12, p. 465.

44 I. Kant, *Groundwork of the Metaphysics of Morals*, M. Gregor (Editor) and C. M. Korsgaard (Introduction), Cambridge University Press. April 28, 1998.

45 Kant, *The Metaphysics of Morals*, M. J. Gregor (Editor) and R. J. Sullivan (Introduction), Cambridge University Press, May 31, 1996.

46 D. Von der Pfordten, *On the Dignity of Man in Kant, Philosophy*, 84, 2009, p. 371 e ss.

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utility. Therefore, it follows that the intrinsic value of a person is secondary, if it is compared to the consequences of his actions. Kant intends to reestablish the centrality of man as such, who is free from all kinds of external determinations and who can give law to himself in virtue of his reason. So, man has an intrinsic value which makes him irreducible to every end (in this view we can recognize echoes of Grotius's conception of dignity). This understanding of human dignity, that is mainly referred to the dignity of the individual, doesn't exclude the express facet of dignity, that means its relational character. The Kantian categorical imperative, points out how men have to treat each other (not as means but as ends) by universalizing the value of men as such ("act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end"[47]). In this way it seems that Kant deduces the basis of a community life (express facet) from the fundamental value of the absolute worth of human being (implied facet).

We can still find this "unmistakable echo of Kant's categorical imperative"[48] in a case decided by the Federal Constitutional Court of Germany[49]. In 2006, the court's first senate expressed that the *Aviation Security Act* (*Luftsicherheitsgesetz*) was incompatible with the Basic Law and hence invalid. Previously, in January 2003, a mentally confused sport pilot threatened to crash his plane into a skyscraper of the city of Frankfurt am Main, provoking the approbation by the German parliament of the *Aviation Security Act* which allowed German military forces to legally intercept aircraft. The Act established that in order to prevent a severe incident, the armed forces should be authorized to compel aircrafts out of German airspace, to force down aircrafts and to threaten the use of force by firing aircrafts, was only permissible if the respective aircraft was intended to be used as a weapon against human lives. Under Section 13 of the Aviation Security Act the defense minister can command to shoot down a civilian aircraft if "in the circumstances, it can be assumed" that the aircraft was to be used against human life. Immediately after that *The Aviation Security Act* came into effect in 2005, it was challenged by four lawyers, a patent attorney, and a flight captain, who successfully lodged a constitutional complaint against it.

This case involved the following fundamental questions: "whether the law can empower an official to lawfully sacrifice the lives of innocent people for the presumptive sake of the public's safety; whether the state can legally decide upon the life of those in the plane; whether there is a constitutional duty for the state to protect its citizens, which, in turn, may require such a power; whether the death of those innocent citizens in the aircraft can be justified with the presumptive rescue of those on the ground, which otherwise would have to die, if the hijacked airplane were to be allowed to hit its

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47 See *Supra* note 44.

48 *Supra* note 42.

49 BVerfGE 115, 118, 1 BvR 357/05, 15 February 2006.

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target; indeed whether the state, in a case of emergency, is allowed to weigh the lives of those in the plane against those in the target areas"[50].

According to the Court, the section 14 of the *Air-transport Security Act* showed no respect for the well-being of the innocent people on the airplane and though it is incompatible with Article 1 of the Basic Law, which says that "human dignity is inviolable". The legislature, effectively, decided to sacrifice the passengers' lives in the name of the public safety, if the aircraft becomes a weapon. Such a legal treatment handles the people on the aircraft as part of it rather than considering their constitutional status of individuals, bearers of dignity and of inalienable rights. In other worlds, "when the law takes their death – the death of innocent passengers – into account as unavoidable damage for the benefit of other objectives, it transforms persons into things and delegalizes them. In this way the state denies the protection of the law to those who, as passengers in the aircraft, ought to be protected. Doing this, the Court reasoned, the law denies to those on board the value the constitution attributes to every human being"[51].

Jeremy Waldron described this case as a "clear example of the legal use of the Kantian conception of dignity as a simple conception of human worth precluding tradeoffs" [52]. This idea is very clear in the following court's argument: "[…] the assessment that the persons who are on board a plane that is intended to be used against other people's lives within the meaning of § 14.3 of *the Aviation Security Act* are doomed anyway cannot remove its nature of an infringement of their right to dignity from the killing of innocent people in a situation that is desperate for them which an operation performed pursuant to this provisions as a general rule involves. Human life and human dignity enjoy the same constitutional protection regardless of the duration of the physical existence of the individual human being. Whoever denies this or calls this into question denies those who, such as the victims of a hijacking, are in a desperate situation that offers no alternative to them, precisely the respect which is due to them for the sake of their human dignity."[53]

In conclusion, Kant's conception of human dignity is connected to the idea of an inner, unconditional and incomparable value of human being. At the same time is deeply egalitarian in its characterization of dignity as something that belongs to all human beings[54].

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[50] See O. Lepsius, Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-terrorism Provision in the New Air-transport Security Act, German Law Journal, Vol. 07, No. 09, 2006, p. 763.

[51] *Ibi,* p. 767.

[52] J. Waldron, *Dignity, Rank, and Rights: The 2009 Tanner Lectures at UC Berkley*, Public Law Research Paper No. 09-50. Available at SSRN: http://ssrn.com/abstract=1461220.

[53] Bundesverfassungsgericht, Feb. 15, 2006, 115 BVefGE 118, http://www.bverfg.de/entscheidungen/rs20060215_1bvr035705en.html.

[54] Cf. M. Rosen, *Dignity its history and meaning*, Harvard University Press, 2012, pp. 19-31; M. Sandel, *On Justice*, Penguin, 2010 pp. 103-139.

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7. Kant and his critics: the rise of the skeptical understanding of human dignity.

Kant's philosophy, though it seems very attractive and practicable in constitutional jurisprudence, offering a strong concept of human dignity and an apparently simple application of it, has been severely criticized by succeeding generations of philosophers.

The Kantian idea of human dignity, as absolute worthiness of a human being, appeared abstract and incoherent, so that Arthur Schopenhauer, in *The basis of morality* (1837), wrote: "[…] this expression 'Human Dignity', once it was uttered by Kant, became the shibboleth of all perplexed and empty-headed moralists. For behind that imposing formula they concealed their lack, not to say, of a real ethical basis, but of any basis at all which was possessed of an intelligible meaning; supposing cleverly enough that their readers would be so pleased to see themselves invested with such a 'dignity' that they would be quite satisfied"[55].

The later generation of philosophers understood that the man, who Kant and later Hegel and their followers described, was an "unencumbered self"[56], namely a man free from determinations deriving from the historical and social transformations. According to this view, Karl Marx, denouncing the use of the phrase "dignity of man" by another German socialist, affirmed that the reference to human dignity is a "refuge from history in morality"[57].

From an analysis of these perspectives emerges a discontent related to the absoluteness of human dignity's historically situated and determined connection with social life. This understanding of dignity seemed not to consider its connection with social life that is historical situated and determined. Therefore, it seems that if the two facets of dignity (its express and implied facets) are separated and one of them were to override the other one (Kant stressed the implied facet), the integral understanding of what is a man and what is his inherent dignity is compromised as we can find in Friedrich Nietzsche: "every human being […] only has dignity in so far as he is a tool of the genius, consciously or unconsciously; from this we may immediately deduce the ethical conclusion, that man in himself, the absolute man possesses neither dignity, not rights, nor duties; only as a wholly determined being serving unconscious purposes can man excuse his existence"[58]. Here we are confronted with the opposite side of Kant's view ("every human being … only has a dignity in so far as he is a tool of the genius") and dignity is only an external negative determination attributed to man.

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55 A. Schopenhauer, translated with an introduction and notes by A.B. Bullock (2005). *The Basis of Morality* (Mineola, N.Y: Dover Publications), Part II, Critique of Kant's Basis of Ethics.

56 M. Sandel, *The Procedural Republic and the Unencumbered Self*, Political Theory Vol. 12, No. 1 (Feb., 1984), pp. 81-96.

57 K. Marx, *Moralizing Criticism and Critical Morality, A Contribution to German Cultural History Contra Karl Heinzen*, Deutsche-Brüsseler-Zeitung Nos.86,87,90,92 and 94; October 28 and 31; November 11, 18 and 25, 1847.

58 F. Nietzsche, *On the Genealogy of Morality, "The Greek State"*, K Ansell-Pearson and Carol Diethe (eds),176 at 185 (CUP, 1994).

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All the thinkers quoted above are considered the dark side of the western philosophy. Their criticisms, even if they showed a side of the truth, lead to the disintegration of the concept of human dignity. Today, we can find a similar nihilist attitude toward the current legal use of human dignity. More precisely, though many emphasize the fundamental value of human dignity for the protection of rights, others have a more critical position as to the possibility of identifying a proper meaning of the concept. E. Kretzmer and D. Klein in the foreword of their book stated: "while the concept of human dignity now plays a central role in the law of human rights there is surprisingly little agreement on what the concept actually means"[59]. The Swiss theologian Dietrich Ritschl doesn't consider human dignity a legal concept nor strictly speaking, an ethical concept; he assumes that "derivations from broad concepts in theological and philosophical ethics as well as in jurisprudence present special difficulties"[60]. According to Ruth Macklin, "dignity is also a useless concept in medical ethics and it can be eliminated without any loss of content"[61]. Steven Pinker, writing against the *Report on Human Dignity* issued by the Presidential Council on Bioethics in 2008, stated: "So is dignity a useless concept? Almost. The word does have an identifiable sense, which gives it a claim, though a limited one, on our moral consideration"[62].

Consequently, at present, we can identify, in the most recent legal literature, two opposite attitudes towards human dignity. The first one considers dignity a basis for an international "*ius commune"*[63] of human rights that is present across different countries and jurisdictions, bearing a substantial moral meaning[64]. According to those scholars "dignity as a common basis in the human rights context is an attractive idea because it shows that different jurisdictions share a sense of what dignity requires, and this enables a dialogue to take place between judges in interpretation of human rights norms, based on shared assumptions"[65].

The second one, which is *ex multis* Christopher McCrudden's perspective, refuses to accept human dignity as a universal value, since it would be impossible to identify a common conception of human dignity in any particular jurisdiction or transnationally[66].

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59 D. Kretzmer, E. Klein (eds.), *The concept of human dignity in human right discourse*, Kluwer Law International, The Hague, the Netherlands, 2002, p. vi.

60 Dietrich Ritschl, *Can Ethical Maxims be Derived from Theological Concepts of Human Dignity?*, in D. Kretzmer, E. Klein (eds.), *The concept of human dignity in human right discourse*, Kluwer Law International, The Hague, the Netherlands, 2002, pp.87-98.

61 Ruth Macklin, *Dignity is a useless concept*, British Medical Journal 2003.

62 Steven Pinker, *The Stupidity of Dignity*, New Republic 28 may 2008.

63 "[…] the concept of human dignity, in virtue of its purchase on universality, serves as a common currency of transnational judicial dialogue and borrowing in matters of human rights"; in P. Carozza, *Human Dignity and Judicial Interpretation of Human Rights: A Reply*, The European Journal of International Law Vol. 19 no. 5, 2008, p. 932. See also, ID. *My Friend Is a Stranger: The Death Penalty and the Global Ius Commune of Human Rights*, Texas Law review, vol. 81, 2003, pp. 1079-1082.

64 J. Habermas, *supra* note 12.

65 McCrudden, *supra* note 18, p. 695.

66 "The concept of human dignity plays an important role in the development of human rights adjudication, not in providing an agreed content to human rights but in contributing to particular methods of

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We can still note how the nihilist view about the legal use of human dignity stigmatizes its reliance on a particular community with its own values rooted in the history. Following this trend human dignity wastes its strength within the plurality of existing cultures. Conversely, scholars, who understand human dignity as a basis of human rights, emphasize the universal character of the concept: could this two side of the coin (implied and express facet) be reunited?

8. *Human dignity as a collective fundamental value: between Aristotle and communitarianism* [67].

While humanist, Kant and his contemporary followers[68] have a very individualistic approach to human dignity (underlining the implied facet of dignity), a further approach to the concept especially stresses the boundaries between dignity and community according to Aristotle's ideas that men has a social nature[69] and his pursuit of virtue, that is individual excellence, can make a real political community. At the present, according to Henry, it is the communitarianism[70] that emphasizes dignity con-

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human rights interpretation and adjudication"; See McCrudden, *supra* note 18; "Dignity cannot create a synthesis of goods that essentially represent different things, further different goals, and reflect different values and conceptions of the good life"; See also N. Rao, *Three concepts of dignity in constitutional law*, Notre Dame Law Review, Vol. 86, n. 1, pp. 183-271, 2011; McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, Oxford Journal of Legal Studies, Vol. 20 n. 4, 2000, pp. 499-532.

67 L. M. Henry, *The Jurisprudence of Dignity*, University of Pennsylvania Law Review, Vol. 160, pp. 169-233.

68 One of the most famous Kant's contemporary followers is John Rawls. He believes that the "history of moral philosophy culminates in Kant and more or less comes to an end in the Kantian-inspired moral philosophy that Rawls's own work exemplifies. His interpretation of Kant in the *Lectures on the history of moral philosophy*, based on a close and sympathetic reading, sheds light on Rawls's considered judgment about the extent to which liberalism's moral foundations are secured by reason. […] he emphasizes the centrality to Kant's philosophy of 'the fact of reason.' This is the fact that, as reasonable beings, we are conscious of the moral law as the supremely authoritative and regulative law for us and in our ordinary moral thought and judgment we recognize it as such." P. Berkowitz, *The Ambiguities of Rawls's Influence*, Perspective on Politics, Vol. 4, N.1, March 2006. Rawls was also the main target of communitarianism criticisms, in particular because of his description of the original position as an 'Archimedean point', an understanding of men individualistic and abstract. See J. Rawls, *A theory of justice, revised edition,* Cambridge: Harvard University Press, 1999; Rawls, *Kantian constructivism in moral theory*, Journal of Philosophy, 77 (9), 1980, 515–72; Rawls, *Lectures on the history of moral philosophy,* ed. Barbara Herman. Cambridge: Harvard University Press, 2000.

69 "[...] the city belongs among the things that exist by nature, and […] man is by nature a political animal" (1252b30-1253a3); Aristotle, *The Politics*, translated and with an introduction by Carnes Lord. Chicago: University of Chicago Press, 1984, p. 37.

70 Modern-day communitarianism began in Anglo-American academia as a critical reaction to John Rawls' landmark book *A Theory of Justice*. However, these critics of liberal theory never did identify themselves with the communitarian movement (the communitarian label was pinned on them by others, usually critics), much less offer a grand communitarian theory as a systematic alternative to liberalism. The core arguments meant to contrast with liberalism's devaluation of community recur in the works of four theorists such as Alasdair MacIntyre, Michael Sandel, Charles Taylor and Michael Walzer. We can, therefore, distinguish between claims of three sorts: methodological claims about the importance of tradition and social context for moral and political reasoning, ontological or metaphysical claims about

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ceived as a "collective virtue", underlining Aristotelian social nature of man. "Accordingly, dignity as collective virtue is expressed when people behave and are treated in ways worthy of humans, not beasts"[71].

Following Henry's quotation, we may gather that treating a person inhumanly is wrong not only for the consequence it has on that individual (implied facet), but also for the effects it has on the community (express facet). "For example, critics of torture seek to prohibit the practice not simply because it violates the autonomy of the tortured individuals and subjects them to extreme pain and suffering, but also because torture is anathema to civilized societies bound by law. When society treats people in ways that are inhumane, or when people engage in activities that are de-humanizing, dignity as a collective diminishes"[72].

As we showed above, there are several perspectives on dignity rooted in the very essence of the human being as an individual (implied facet). On the contrary, when individuals engage in undignified conduct, their acts may threaten dignity as a collective virtue (express facet). Consider the famous French dwarf-tossing case. In that case, "the French *Conseil d'État* granted police power to prevent any public activities that failed to respect human dignity. Accordingly, two municipalities banned the spectacle of dwarf-tossing in local clubs. Manuel Wackenheim, one of the dwarfs, challenged the ban by arguing that he freely participated in the activity, was paid, and that the ban would result in his un-employment. The *Conseil d'État* ruled that using humans as projectiles was degrading to all members of society because it violated an overriding sense of human dignity" [73].

The dwarf-tossing case shows that dignity is also a collective virtue which can defeat arguments in favor of the primacy of autonomy and at the same time it can limit individual liberties (in this case the liberty of self-determination) for the good of society. The Court affirmed: "[…] that the authority holding the municipal police power has jurisdiction to adopt any measure to prevent a breach of public order; that respect for the dignity of the human person is one of the elements of public order; that the authority holding the police power may, even in the absence of special local circumstances, ban a show which undermines respect for the dignity of the human person.

"[…] that the dwarf-tossing show […] leads to using as a missile a physically handicapped person who is presented as such; that, by its very object, such a show

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the social nature of the self, and normative claims about the value of community. Cf. S. Avineri, , DE-A. Shalit, (eds), *Communitarianism and Individualism*, Oxford: Clarendon Press, 1992; B. Bell. *Communitarianism and Its Critics*, Oxford: Clarendon Press, 1993; ID., "Communitarianism", *The Stanford Encyclopedia of Philosophy (Spring 2012 Edition)*, Edward N. Zalta (ed.), http://plato.stanford.edu/archives/spr2012/entries/communitarianism; A. Berten, , P. da Silveira, and H. Pourtois, (eds), *Liberaux et Communautariens*, PUF, 1997.

71 Henry, *Supra* note 67, p. 221.

72 *Ibidem.* See also Waldron, *supra* note 8 and M. Rosen, *Replies to Jeremy Waldron: Dignity, Rank and Rights Tanner Lectures, Berkeley*, April 21-23, 2009, in http://scholar.harvard.edu/files/replies_to_jeremy_waldron_0.pdf.

73 Henry, *Supra* note 67, p. 222.

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undermines the dignity of the human person; that hence the authority holding the municipal police power may ban it, even in the absence of particular local circumstances, and even where protective measures are in place to ensure the safety of the person concerned and this person lends himself willingly and for reward to this activity"[74].

So, for instance, we can find a similar attitude of the court in the Peep Shows case according to which the German Federal Administrative Tribunal stated: "this violation of dignity is not excluded or justified by the fact that the woman performing in a peep show acts voluntarily. Human dignity is an objective, indisposable value, the respect of which the individual cannot waive validly"[75].

Therefore following Henry's perspective we could conclude that in both these cases the community defines dignity as a value shared by the whole community and which the community has to protect[76]. "This is consistent with the communitarian view that moral judgment depends on the actual beliefs, practices, and institutions that create communities at specific times and places. Prohibited conduct considered offensive and degrading in one society might not be in another"[77].

Even though many scholars[78] defined the dwarf tossing case and the peep shows case as examples of a paternalistic use of human dignity which allows the state, as the

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[74] *Conseil d'État statuant au contentieux*, n.143578, lecture du 27 octobre 1995, in http://www.utexas.edu/law/academics/centers/transnational/work_new/french/case.php?id=1024. The mayor of the small French town of Morsang-sur-Orge prohibited dwarf tossing. The case went through the appeal chain of administrative courts to the *Conseil d'État*, which found that an administrative authority could legally prohibit dwarf tossing on grounds that the activity did not respect human dignity and was thus contrary to public order. The question raised legal questions as to what was admissible as a motive for an administrative authority to ban an activity for motives of public order, especially as the C*onseil* did not want to include "public morality" in public order. The ruling was taken by the full assembly and not a smaller panel—proof of the difficulty of the question. The *Conseil* ruled similarly in another case between an entertainment company and the city of Aix-en-Provence.

The UN High Commissioner on Human Rights judged on September 27, 2002, that the decision was not discriminatory with respect to dwarfs. It ruled the ban on dwarf tossing was not abusive, but necessary to protect public order, including considerations of human dignity.

Nevertheless, dwarf tossing is not prohibited outright in France. The *Conseil d'État* decided that a public authority could use gross infringement on human dignity as a motive of public order to cancel a spectacle, and that dwarf tossing constituted such a gross infringement. However, it is up to individual authorities to make specific decisions regarding prohibition.

[75] 1981 BVerwGE 64, 274 (Federal Administrative Court).

[76] "The German legal system […] has been largely shaped by ordinary legislation at the *Bund* and the *Länder* levels. However, the contribution made by the *Grundgesetz*, as interpreted and enforced by the Constitutional Court, in directing, correcting, and streamlining this legislation, has been considerable and it is a contribution which has been greatly influenced by the concept of human dignity. The concept is stated in the first sentence of Article 1 of the *Grundgesetz* and is held to posit a *Grundwert*, a basic value, supreme within the system (Dürig)". G. Bognetti, *The Concept of Human Dignity in European and U.S. Constitutionalism*, in G. Nolte (Ed.), *European and U.S. constitutionalis*m, Council of Europe Publishing, 2005, p. 81. See also E. J. Eberle, *Dignity and Liberty, Constitutional visions in Germany and the United States*, Praeger, 2002.

[77] *Ibidem*.

[78] See C. McCrudden, *Human dignity and judicial interpretation of human rights*, in European Journal of International Law, 2008, 19 (4), pp. 655-724; J. Waldron, *Dignity, Rights and Responsabilities*,

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representative of community and of its values, to limit the liberty of man who freely chooses to have a degrading conduct towards himself, we can also see in these cases the dual nature of human dignity at work in its fullest sense. It means that though acknowledging the dwarf's right to self-sustainment within the doctrine of autonomy, the Court nevertheless used the collective facet of dignity to check what had become an unbridled exercise of a right. We could, accordingly, speculate whether using only the implied facet of dignity as self-determination and autonomy may break the link between individual (implied facet) and the community (express facet). The effect of this separation seems to leave men as a monads among other monads. Conversely, as dwarf tossing case pointed out, the individual, as member of a community, shares, within the community, values which instantiate the idea of common good, or *ordre public*[79]. Therefore, it seems that we can't take human dignity seriously unless we don't consider both side of the coin.

9. From Hobbes to the rediscovery of natural law.

The consequence of an overrated attention to the individual facet of human dignity is well illustrated in Thomas Hobbes' political philosophy[80]. According to him, man in the state of nature have a liberty right to preserve themselves which is called "the right of nature". For the first time in the history of political philosophy Hobbes uses the concept of *ius* (right) with the meaning and the function of a subjective right: right is a claim, i.e. the right of someone to something that he can claim. The right of nature, indeed, "is the liberty each man hath to use his own power as he will himself for the preservation of his own nature; that is to say, of his own life; and consequently, of doing anything which, in his own judgement and reason, he shall conceive to be the aptest means thereunto"[81]. Therefore, Hobbes offers to us a perspective according to which man is selfish and so he is concerned for what is good for himself. It is obvious that the consequence of this individualistic view is a "state of war" among man, fighting each other in the name of their individual claims. However, on one hand, man can overcome the state of nature, that is a state of war, in virtue of their highest concern for self-preservation: "the imperative of self-preservation would therefore yield a subsidi-

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43 Arizona State Law Journal, p. 1107 ss. (2011); A. Hennette-Vauchez, *A Human Dignitas? The Contemporary Principle of Human Dignity as a Mere Reappraisal of an Ancient Legal Concept* (July 2008), EUI Working Papers LAW No. 2008/18. Available at SSRN: http://ssrn.com/abstract=1303427 or http://dx.doi.org/10.2139/ssrn.1303427; L.R. Barroso, *Here, there, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse*, Boston College International & Comparative Law Review, Vol. XXXV Spring 2012 No. 2, pp. 331-394; G. Gemma, Liberal-Democratic Constitutionalism and Imposed Dignity, Ragion Pratica, n.1, 2012, pp. 129-142; V. Pacillo, *The «Reverse of Dignity» and the Dignity of Law*, Ragion Pratica, n.1, 2012, pp. 143-160.

79 R. George, *Making Man Moral*, Clarendon Press, 1993.

80 M. Rhonheimer, La filosofia politica di Thomas Hobbes. Coerenza e contraddizioni di un paradigma, Armando, 1997.

81 T. Hobbes, *Leviathan*, a critical edition by G.A.J. Rogers, Karl Sschuhmann, Thoemmes Continuum, 2003, 2 v.

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ary imperative, to seek peace with everyone else on terms that everyone could accept"[82]. On the other hand, as MacCormick said: "Any peace agreement […] would itself be precarious if there were no force to back it up. So the agreement would have to contain some provisions that would make it enforceable. This could be done if the 'social contract' instituted a sovereign to whom (or to which – it might be an assembly of persons, not an individual) everybody transferred all their "natural right" to use force. In return they would have to accept the protection, but also the burden, of law imposed and enforced by this sovereign"[83]. Therefore "enacted law, in the Hobbesian picture, is the only standard of objective justice available to humans among themselves. There can be no independent criteria of justice whereby to criticize laws for failing in justice"[84]. A further consequence of this perspective regards "dignity". Hobbes stated, indeed: "To the sovereign therefore it belonged also to give titles of honour, and to appoint what order of place and dignity each man shall hold, and what signs of respect in public or private meetings they shall give to one another"[85].

In light of these assumptions, we could argue that human dignity is simply created by the State that entitles man of dignity (the express facet of dignity). However, we also should ask ourselves if we have reasons to think, conversely, that human dignity is something inherent to human nature (the implied facet of dignity) which the state cannot create but only recognize.

If we consider the European Court of Human Rights jurisprudence on bioethical issues like abortion and the beginning of life, we can see that a ultimate answer about what is the role of the state and whether there is a hard core of rights forbidding the state from interfering is not so clearly identifiable. In the case *Vo v. France* (2004)[86], a doctor was responsible for the death of Mrs. Vo's child in utero for an error due to homonymy. His conduct was not classified by the Court of Cassation as an unintentional homicide because a fetus is not considered a person under the French criminal law. Therefore, Mrs. Vo applied to the ECtHR, maintaining that France failed to comply with article 2 of the Convention (right to life) that gives protection to "everyone". The Court did not find a violation of art. 2 of the Convention and in deciding the case, the Grand Chamber evaded the controversial issue of whether the fetus is a person for purposes of article 2 ECHR (right to life) and deferred to national legislation the decision, invoking the *margin of appreciation*. The Judges stated that it is up to the state to decide also what kind of sanction should be given in order to protect life, in the case that it decides to protect it. We can see different approach of the Court in another case *A,B, and C v. Ireland* (2010)[87]. In this case the three applicants went to the United Kingdom to have an abortion because Irish legislation does not consent to it unless the

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[82] N. MacCormick, *Institutions of Law*, Oxford University Press, 2009, pp. 192-193.
[83] *Ibidem*.
[84] *Ibidem*.
[85] T. Hobbes, *Supra note* 82.
[86] European Court of Human Rights *Vo v. France*, n. 53924/00, 8 July 2004.
[87] European Court of Human Rights *A, B and C v. Ireland*, n. 25579/05, 16 December 2010.

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life of the women is at stake. In consideration of C's position (she had been undergoing chemotherapy for cancer for 3 years and when she discovered the pregnancy the cancer went into remission), Ireland was condemned for violation of article 8 (right to respect for private and family life) ECHR. Therefore if the Court invoked the margin of appreciation as regards applicant A and applicant B in favor of the choice of the legislator, with respect to C's case it didn't.

As we can see, matters that involve the beginning of life and the dignity of the unborn are really problematic and the Court tends to leave the question concerning the dignity of the fetus open. Sometimes it allow the state to make this decision, sometimes it does not. Are questions like when life starts or whether the fetus has a dignity really solved by legal instruments like the margin of appreciation or the doctrine of consensus?

The cases quoted above show that there is something lacking in State's determinations, something that slips away any kind of ultimate definition. This is the reason that leaded, after the Second World War, to a revival of interest of natural law in opposition to the view that the State creates of rights according to which the express facet of dignity becomes absolute and loses its link with the real essence of human being (implied facet). This is also the reason why human dignity was recognized as the basis of the Universal Declaration of Human Rights. There was a general agreement on the fact that it was not the state's power to be the source of right. This implied rethinking about the existence of natural law against pure positivism. As H.L.A. Hart observed in 1961[88]: "Indeed, the continued reassertion of some form of natural law doctrine is due in part to the fact that its appeal is independent of both divine and human authority, and to the fact that despite a terminology with much metaphysics, which few could now accept, it contains certain elementary terms of importance for the understanding of both morality and law. These we shall endeavor to disentangle from their metaphysical setting and restate here in simpler terms". Even if Hart doesn't clearly recognize, along his work, the existence of objective moral values, and he doesn't reject the legal positivism at all, he identifies one possible natural right: "the equal right to be free"[89]. However, objective moral truths remained in his thought mere facts which are hostage of change (historical, social changes): "the core of moral values are rooted in fairly banal facts about physical nature and our world, facts that both law and morality reflect"[90].

John Finnis developed the connection between natural law and fundamental rights and reestablished the concept of dignity as inherent. According to Hart's account, the main interest of mankind is the human survival and the freedom of choice. Therefore the legislator has the duty to preserve citizens by protecting their rights as expression of

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[88] H.L.A. Hart, Essays on Bentham. Studies in Jurisprudence and Political Theory, Clarendon Press, Oxford, 1982.

[89] Hart, *Are there natural rights*, in J. Waldron (eds.), *Theories of Rights*, Oxford University Press, Oxford, 1984.

[90] G. Byrne, *Taking the Minimum Content Seriously: Hart's Liberalism and Moral Values* (May 7, 2012). Available at SSRN: http://ssrn.com/abstract=2053148 or http://dx.doi.org/10.2139/ssrn.2053148.

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individual choice. Finnis stated: "the core of the notion of right is neither individual choice nor individual benefits but basic or fundamental individual needs: in my terminology, basic aspects of human flourishing"[91]. The natural law theorist pointed out that basic aspects of human flourishing are the core of rights. These basic aspects inherent to human nature and therefore something that belongs to every human beings. They are not the result of a pure reflection on what is human nature but we become aware of them by acting in our daily life. Every day we try to fulfill our integral human flourishing by pursuing basic human goods like life, knowledge, play, aesthetic experience, sociability (friendship), practical reasonableness, and religion. Therefore the conception of dignity is here connected with the integral human flourishing (human nature), that is both individual and collective. The drafters of U.N. declaration were aware of this peculiarity of natural law view. They understood that human rights were based on the unalienable nature of human being that is individual and social, in other words that fundamental rights are based on human dignity.

Part II: Three current readings on dignity

1. Introduction

In the mid-twentieth century, the western world sustained two world wars, totalitarianism horrors, and the use and abuse of weapons of mass destruction such as the atomic bomb. Moreover, the Cold War, between the powers of the western world – led by the United States and its NATO allies – and the Communist world – led by the Soviet Union and its satellite states and allies – was beginning. In the midst of all this, the *Universal Declaration of Human Rights* was written as a *manifesto* of the human person's fundamental rights, rights which were so deeply disregarded during World War II[92]. The Declaration was written with a distinctive perspective of dignity[93] recogniz-

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91 Could we say that rights are derived directly from these basic aspects of human nature? Finnis is persuaded that positive law is the product of man's technique as such. Due to its nature, law is the result of *determinationes* (specifications or concretizations) from moral principles (natural law). The legislator creates different schemes (*determinationes*) in order to instantiate a basic human good and he has to choose among them. So every scheme doesn't fully fulfill a particular human good but it is only a limited opportunity of its instantiation. Then the potentiality of natural law theory is its incapacity to be wholly determined by law. J. Finnis, *Natural Law and Natural Rights*, Oxford University Press, 2011, p. 205. See also Finnis, *Philosophy of Law*, Oxford University Press 2011; R. P. George, *In defence of Natural Law*, Oxford University Press 2004; A. Somoncini, L. Violini, P. Carozza, M. Cartabia, *Elementary experience and law*, Fondazione per la Sussidiarietà 2012; M.M. Giungi, *Robert P. George e la New Natural Law Theory: una nuova rotta per il concetto di legge naturale* (II), in Neoscolastica, n.3, 2011, pp. 497-516.

92 As Neil MacCormic stated: «Fidelity to the rule of law is one condition for the protection of liberty against unwarranted incursions by agencies of government. Insistence on the charter of Rechtssat or law-state is a way of stipulating that the force of the state must always and only be deployed under general rules that can be interpreted quite strictly and in universalistic ways that preclude unjust discriminations. But this does not itself seem enough. General Rules can confer extremely wide discretion on particular officials – a case in point is the law under which Hitler was granted the power to rule by decree in Gemany after 1934. Examples of abusive grants of broad discretionary powers abound in

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able in many key points of the text, especially in the preamble, as we already showed in the first part of this article. According to Henkin, the Declaration provided the idea of human rights with a universally acceptable foundation and principle: "human dignity."[94] By recognizing this principle, the European doctrine considered the human rights experience in a new light and reformulated the rights theory. Nevertheless, even if the San Francisco declaration was a central instrument for spreading the use of such a concept, identifying human dignity as a ground for rights is not without difficulties[95]. Today, "the use of human dignity does not offer a universal ground for legal thought, and it does not seem useful to the judges in order to solve a controversy; the meaning of dignity is context specific, and varies significantly from jurisdiction to jurisdiction and (often) over time within particular jurisdictions. Moreover, it seems that "dignity" is becoming a commonplace term in the legal texts providing for human rights protections in many jurisdictions. It is used frequently in judicial decisions; for example, to justify the removal of restrictions on abortion in the United States, to impose limitations on dwarf throwing in France, to overturn laws prohibiting sodomy in South Africa, and to consider physician-assisted suicide in Europe"[96]. As the French philosopher Jacque

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other states both in Europe and beyond it, though few as egregious as that of the Nazi terror. […] Taken by itself the rule of law , albeit essential, seems likely to be some context insufficient to protect against evil doing by agencies of the state. It is a real virtue but, taken on its own, a formal one. Perhaps we need also some substantive limits as well as purely formal limits to state power? Recognition of fundamental tights is one candidate for providing such limits. It is one which has gained great contemporary prestige as result of various international instruments and national constitutional safeguards adopted in aftermath of the World War of 1939 to 1945, and devised in response to the horrors revealed by that period of human history». N. MacCormick, *Institutions of Law*, Oxford University Press, 2009, pp. 190-191.

93 See Mary Ann Glendon :«The idea of human dignity got a fresh look, however in May 1945 when the first photographs from the concentration camps appeared, and the world began to come to terms with the atrocities committed in the course of the National Socialist extermination program. That program, we now know, began with forced sterilization measures modeled on those promoted by the American eugenics movement. It proceeded in stages—from sterilization to killing the mentally ill, then to "impaired" inmates of concentration camps, and finally to mass killings of those inmates. When the full horrors implicit in the idea of "life unworthy to live" (Lebensunwertesleben) came to light, the concept of the dignity of human life began to receive serious attention from opinion shapers.[…] The concept of human dignity became the hermeneutical key of constitutions like the German Basic Law of 1949, which opens with the statement that: "The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority"». M.A. Glendon, *The Bearable Lightness of Dignity*, 2011, http://www.firstthings.com/article/2011/04/the-bearable-lightness-of-dignity.

94 Louis Henkin, *Religion, Religions, and Human Right*s, The Journal of Religious Ethics, Vol. 26, No. 2 (Fall, 1998), pp. 229-239.

95 According to M. A. Glendon: «Among the proponents of these hopeful new charters, however, there was already a certain uneasiness about whether the concept of human dignity could really do all work it was expected to do. For one thing, dignity was nowhere defined in these documents. Rather, as Adam Shulman has pointed out, the statesman who drafted them seem to have used the word as "a placeholder for whatever it is about human beings that entitles them to basic human rights and freedoms"». M. A. Glendon, *The Bearable Lightness of Dignity*, 2011.

96 C. McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*. European Journal of International Law, Forthcoming; Oxford Legal Studies Research Paper No. 24/2008. Available at SSRN: http://ssrn.com/abstract=1162024; see also M.A. Glendon, *Supra* note 93; G. Bognetti, *The*

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Maritain noted in 1949, the Declaration needed some ultimate value "whereon those rights depend and in terms of which they are integrated by mutual limitations"[97]. Accordingly, Mary A. Glendon concluded "that value, explicitly set forth in the Declaration, is human dignity. But as time went on, it has become painfully apparent that dignity possess no more immunity to hijacking than any other concept"[98].

The opening line of Preamble of the Universal declaration of Human Rights invokes the "inherent dignity" of human beings. However, "no account was given about what constitutes this inherent dignity; any account would have proven controversial. But there was consensus on the claim that all members of the human family have inherent dignity and human rights are grounded in that dignity"[99]. Otherwise, "there is more than one way to make use of the idea of human dignity in developing a theory of human rights"[100].

This paper intends to consider three current readings on human dignity in order to show different sides of the contemporary debate about it. We will introduce the interpretations of three famous scholars who are working on human dignity from both legal and philosophical perspectives.

First of all, we will examine Habermas' perspective on dignity as a unifying concept in the historical and continuing development of human rights. He rejects "the idea of a philosophical derivation of the substantive content of human rights in favor of an approach that stresses the equal right of everyone to participate in the political determination of a full set of rights"[101]. Habermas uses the concept of human dignity to link different concrete struggles for human rights. That is, "the specific meaning of human dignity, and so the need for particular human rights, only becomes apparent the violation of dignity in particular cases, as experienced by, for instance, marginalized classes, disparaged and discriminated against minorities, illegal immigrants, asylum seekers, and so forth"[102].

Secondly, I will consider also Jeremy Waldron's view, in which dignity is rooted in the law. As he stated: "Dignity is a "constructive idea, with a foundational and explicative function like utility"[103]. So dignity doesn't need to be treated in the first instance

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Concept of Human Dignity in European and U.S. Constitutionalism, in G. Nolte (Ed.), *European and U.S. constitutionalis*m, Council of Europe Publishing, 2005, p. 81. See also E. J. Eberle, *Dignity and Liberty, Constitutional visions in Germany and the United States*, Praeger, 2002.

97 J. Maritain, in UNESCO (ed.), *Human Rights: Comments and Interpretations*, Allan Wingate, 1949, pp. 9-17.

98 M.A. Glendon, International Law: Foundations of Human Rights. The Unfinished Business, in Michael A. Scaperlanda, Teresa Stanton Collett (Ed.), Recovering Self-Evident Truths: Catholic Perspectives on American Law, CUA Press, 2007, p. 330.

99 N. Wolterstorff, *Justice: Rights and Wrongs*, Princeton University Press, 2010, pp. 311-322.

100 Cf. J. Flynn, *Human Rights, Humanitarianism, and the Politics of Human Digni*ty. APSA 2011 Annual Meeting Paper. Available at SSRN: http://ssrn.com/abstract=1899837.

101 *Ibi,* p. 13.

102 *Ibi,* pp. 11-12.

103 J. Waldron, *Dignity, Rank and Rights*, Oxford University Press, 2012, p. 82.

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as a moral idea but it should be seen as a juridical one. "The phrase 'human dignity' – indeed – is related to the recognition that all human beings share a high-ranking legal, political and moral status"[104]. As we will see, this juridical understanding of human dignity is explicative of all those cases in which human beings are degraded and humiliated by torture.

Finally, I will face Robert George and Patrick Lee's argument, who worked on inherent dignity concept. "They assume that the sanctity of life view is often accompanied by a set of claims about human dignity, namely, that human beings possess essential, underived, or intrinsic dignity. That is, they possess dignity, or excellence, in virtue of the kind of being they are; and this essential dignity can be used summarily to express why it is impermissible, for example intentionally to kill human beings"[105]. Robert George's approach to human dignity embraces a natural law theory perspective and shows an intimate connection between the inherent nature of every human being and human rights. In particular, I will compare this view on human dignity with the interpretation of dignity offered by the European Court of Justice in the case *Brüstle v. Greenpeace* (2011).

The aim of this article is to answer whether inherent dignity is excluded from the juridical and political view of human rights. We will examine whether Habermas and Waldron's views are compatible with or in contrast to George and Lee's view, and what effect this has on the Declaration of Human Right's assertion of inherent dignity. Each reflection on dignity will be examined within the context of a legal case since it is within legal reasoning that the fruit of human dignity, i.e. human rights, is protected. In the first part of this article we have showed the dual identity of inherent dignity: dignity is in the same time individual (implied facet) and also a network of relations with other human beings (express facet). In this second part we will face the concept of inherent dignity trying to answer to the question whether this inherent dignity, that is both implied and express, is a political, a legal concept or something beyond these two understandings.

2. Jürgen Habermas: a political conception of human rights.

Jürgen Habermas defends the thesis that "an intimate, if initially only implicit, conceptual connection between human rights and dignity has existed from the very beginning"[106]. However, we find that a juridical use of dignity began only as a result of the human rights declarations of the XVIII century. Following this assumption, Habermas is persuaded that "human rights have always been the product of resistance to

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104 M. Rosen, *Replies to Jeremy Waldron: Dignity, Rank and Rights, Tanner Lectures*, Berkeley, April 21-23, 2009, in http://scholar.harvard.edu/michaelrosen/files/replies_to_jeremy_waldron.pdf.

105 C. O. Tollefsen, *Capital Punishment, Sanctity of Life, and Human Dignity*, September 16th, 2011, in http://www.thepublicdiscourse.com/2011/09/3985/.

106 According to Habermas the appeal to human rights feeds off the outrage of the humiliated at the violation or their human dignity. See J. Habermas, *The Concept of Human Dignity and the Realistic Utopia of Human Rights*. Metaphilosophy 41 (4), 2010, pp. 464-480.

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despotism, oppression, and humiliation"[107]. Let us think, for instance, of the history of the abolition of slavery. Thanks to the achievement of the individual rights that the American and French revolutions promoted, the insight into the inhumane conditions in which slaves lived caused a few states to forbid the slave trade and afterwards all to abolish slavery itself. Accordingly, it is understandable why the German philosopher is convinced that only social and political struggles make such violations of human dignity evident[108]: "The features of human dignity specified and actualized in this way can then lead both to a more complete exhaustion of existing civil rights and to the discovery and construction of new ones"[109]. Habermas, indeed, uses the concept of human dignity to link these concrete struggles for human rights[110].

The intimate relation between human rights and human dignity shows the distinguishing factor of dignity: its moral content. Dignity is outlined within the context of human rights in order to actualize the moral values of the egalitarian universalism into positive law. In this perspective human dignity becomes the key that explains the moral and juridical ambivalence embedded in human rights. Therefore "human rights are in actuality the result of the synthesis between rationally justified morality, founded on the Kantian individual conscience, and the positive law that served absolutist rulers and traditional assemblies of estates as an instrument for constructing the institutions of the modern state and a market"[111]. In other words, the idea of human dignity appears "the conceptual hinge that connects the morality of equal respect for everyone with positive law and democratic lawmaking in such a way that their interplay could give rise to a political order founded upon human rights"[112]. So that, this concept has a "mediating function in the shift of perspective from moral duties to legal claims"[113].

However, there is another fundamental conceptual element of dignity: the idea of dignity as a "social honor that belongs to the world of hierarchically ordered traditional societies"[114]. When this specific understanding of dignity, as the status that a men or a group are entitled to by the community, is universalized, it loses the characteristics of a corporative ethos by extending the connotation of a self-respect that depends on an equal social recognition to all persons. So, this advancement of the concept of dignity,

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107 *Ibi*, p. 466.

108 "Increasing the protection of human rights within nation-states or pushing the global spread of human rights beyond national boundaries has never been possible without social movements and political struggles, without courageous resistance to oppression and degradation". *Ibi,* p. 476

109 *Ibi,* p. 468.

110 Cf. J. Flynn, *Supra* note 100.

111 Habermas' most extensive remarks on human rights are found in J. Habermas, *Kant's Idea of Perpetual Peace*: At 200 Years' Historical Remove, in Id., *The Inclusion of Other: Studies in Political Theory*, MIT Press, 2001; Id., *The Postnational Constellation: Political Essays*, MIT Press, 2001; Id., *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, MIT Press, 1996; see also Flynn, *Habermas on Human Rights: Law, Morality, and Intercultural Dialogue*, Social Theory and Practice, Vol. 29, N. 3 (July 2003), pp. 431-457.

112 Habermas, *Supra* note 106, p. 469.

113 *Ibi,* p. 471.

114 *Ibi,* p. 472.

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on one hand, preserves the feature which connects it with the status of a member of an organized community on space and in time; on the other hand, this status must be equal for everybody. Following, then, the path of this concept, it is notable that the fundamental function of the concept of human dignity is transferring "the content of a morality of equal respect for everyone to the status order of citizens who derive their self-respect from the fact that they are recognized by all other citizens as subjects of equal actionable rights"[115]. Therefore, the concept of dignity doesn't appear as a mere generalization of the "status – dependent dignities" belonging to particular honorific function and social group. But this meaning of human dignity, which depends from the social recognition, has to be connected to the idea of democratic citizenship: only the members of a political community based on the constitution are able to protect and guarantee equal rights and dignity to everybody[116].

This understanding of human dignity as the status of citizens which includes the individual in the social and political community might be seen in the concept of human dignity in racial discrimination cases. In particular, in the notion that the law should not be responsible for disadvantageous and subordinated positions of different social groups. In the case *Heart of Atlanta Motel, Inc. v. United States* (1964), regarding the Atlanta Motel's refusal to rent rooms to black patrons in direct violation of the Civil Rights Act, justice Goldberg stated that "The primary purpose of the Civil Rights Act of 1964, however, as the Court recognizes, and as I would underscore, is the vindication of human dignity, and not mere economics. The Senate Commerce Committee made this quite clear: The primary purpose of ... [the Civil Rights Act], then, is to solve this problem, the deprivation of personal dignity that surely accompanies denials of equal access to public establishments. Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color"[117]. This case, as did *Law v. Canada* (Minister of Employment and Immigration 1999)[118] or *President of Republic of South Africa v. Hugo* (1997)[119], declared racial discrimination illegal and promoted formal equality and inclusion in a democratic society.

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115 *Ibidem*.

116 "As a modern legal concept, human dignity is associated with the status that citizens assume in the self-created political order. As addressees, citizens can come to enjoy the rights that protect their human dignity only by first uniting as authors of the democratic undertaking of establishing and maintaining a political order based on human rights"; *ibi,* p. 473.

117 *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241 (1964). This important case represented an immediate challenge to the *Civil Rights Act* of 1964, the landmark piece of civil rights legislation which represented the first comprehensive act by Congress on civil rights and race relations since the *Civil Rights Act* of 1875. For much of the 100 years preceding 1964, race relations in the United States had been dominated by segregation, a system of racial separation which, while in name providing for "separate but equal" treatment of both white and black Americans, in truth perpetuated inferior accommodation, services, and treatment for black Americans.

118 Law v. Canada (Minister of Employment and Immigration), [1999] 1 S. C. R. 497.

119 President of Republic of South Africa v. Hugo 1996 (4) SA 1012 (D).

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In light of this argument, which is the role of the inherent dignity invoked by the Universal Declaration? Habermas argues that the ideas of inherent dignity and natural law do not juridical but only moral value and he pretends that the conception of dignity as connected to the status of citizens is more suitable. In other words, human dignity fulfills its juridical function when "human rights are most clearly represented by basic rights legally institutionalized within constitutional democracies, since such basic rights are the only rights that fully realize both the legal and the moral sides of the concept of human rights"[120] as determinated by human dignity. Beyond this level, human dignity and therefore human rights "remain only a weak force in international law and still await institutionalization within the framework of a cosmopolitan order that is only now beginning to take shape"[121]. So, "in contrast to standard derivations of the content of human rights from a core idea such as human dignity" a political theory of human rights, as Habermas suggested, "captures the active component of human dignity by making it central to its account of moral and political constructivism of the content of human rights"[122].

3. Jeremy Waldron the extendibility of dignity as a status.

According to Jeremy Waldron, if we consider European and regional jurisprudence, the connection between human dignity and the right to life is not so simple and constant. On the contrary, it seems almost impossible to find a common approach in the jurisprudential use of human dignity, especially when we consider cases regarding ethical issues. Therefore, he suggests we change perspective and search for "a way in which the law protects a deeper dignity, one that is more pervasive, and more intimately connected with the true nature of law"[123].

To this end he argues that our basic duty to respect and sustain human life is not really connected to dignity: "The preciousness or sacredness of human life is not really a dignitarian idea" [124]. In his view, "dignity is a sort of status-concept: it has to do with

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120 Flynn, Habermas on Human Rights: Law, Morality, and Intercultural Dialogue, p. 435.

121 Habermas, Kant's Idea of Perpetual Peace, p. 192.

122 Flynn, *Supra* note 100, pp. 13-14.

123 J. Waldron, *How law protects dignity?*, (2012). New York University Public Law and Legal Theory Working Papers, Paper 317, http://lsr.nellco.org/nyu_plltwp/317, p. 1.

124 *Ibi*, p. 5. Waldron argue that there are "absolute worth" account and there are "ranking status" accounts. He favors the second. The sort of conception that he is developing in his works presents dignity as a rank or status that a person may occupy in society, display in his bearing and self-presentation, and exhibit in his speech and action. Dignitary provisions, as he understand them, are particularly important for those who are completely at the mercy of others. His view doesn't preclude the independent operation of a principle of sacred value of all human life. He believe that we should give an account of how human dignity applies to infants and to profoundly disabled. For this reason, his own view is that this concern should not necessarily shift us away from a conception that involves the active exercise of a legally defined status. It can be addressed by the sort of structure that John Locke introduced into his theory of natural rights, when he said of the rank of equality that applies to all humans in virtue of their rationality: "Children, I confess, are not born in this full state of equality, though they are born to it." Like heirs to an aristocratic title, their present status looks to a rank that they will

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the standing (perhaps the formal legal standing or perhaps, more informally, the moral presence) that the person has in a society and in her dealing with others"[125]. In other words: "Dignity is the status of a person predicated on the fact that she is recognized as having the ability to control and regulate her actions in accordance with her own apprehension of norms and reasons that apply to her; it assumes she is capable of giving and entitled to give an account of herself (and of the way in which she is regulating her actions and organizing her life), an account that others are to pay attention to; and it means finally that she has the wherewithal to demand that her agency and her presence among us as a human being be taken seriously and accommodated into the lives of others, in others' attitudes and actions towards her, and in social life generally"[126]. Therefore, dignity corresponds to the juridical concept of status extended to all persons and is considered as a standard of legislaion.

Undoubtedly, the meaning of dignity that Waldron offers us is related to a controversial use of this concept. He intends to propose an understanding of "dignity" as status rather than as a fundamental value: "the respect which a person can exact as a human being from every other man, and that respect is no longer simply the quivering awe excited in a person by his own moral capacity but a genuine making room for another on a basis of a sure footed equality and acting toward another as though he or she too were one of the ultimate ends to be taken into account"[127].

We might better understand Waldron's idea of dignity as status if we consider that "rules against degradation and outrages upon personal dignity are sometimes used to vindicate the human interest in elementary aspects of adult self-presentation (care of self, taking care of elemental physical needs), and to protect against forms of humiliation which impinge on this interest". This idea, we mean the idea of being recognized and treated as being capable of self-control, is connected to the idea of dignity as status. Let us consider, for instance, within the profuse ECHR jurisprudence regarding violations of article 3 of the European Convention of Human Rights, the case *Tekin v. Turkey* (2001).

Mr. Tekin applied to the Commission on 14 July 1993. He alleged that he had been ill-treated while being held in detention at gendarmerie headquarters in Derinsu and Derik from 15–19 February 1993 and that this event had not been adequately investigated by the State authorities. He relied on Articles 2, 3, 5 § 1, 6 § 1, 10, 13, 14 and 18 of the Convention. According to the court decision the conditions in which Mr. Tekin had been held and the manner in which he must have been treated to leave wounds and bruises on his body amounted to inhuman and degrading treatment in violation of Article 3. The court "recalls that, in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct dimin-

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occupy (or are destiny to occupy); but it does not require us to invent a different sort of dignity for them in the meantime. See also J. Waldron, *Dignity, Rank and Rights*, Oxford University Press, 2012.

125 *Ibi*, p. 2.

126 *Ibi*, pp. 2-3.

127 *Ibidem.*

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ishes human dignity and it is in principle an infringement of the right set forth in Article 3." In other words, humiliated, outraged and tortured people are in a subordinated and disadvantageous status compared to other human beings. They are deprived of the respect that is due to them by virtue of equality principle.[128]

May we find here traces of the idea of inherent dignity? Not yet. According to Waldron dignity has not to be treated as a moral idea but as a juridical one. Dignity is not inherent to the nature of human being but to the nature of law which treats everybody as bearer of equal status before the law. Therefore, its violation is especially visible when this status that entitles every person of dignity is disregarded generating deep inequalities.

4. Robert George and Patrick Lee: The nature and basis of human dignity.

In 2008, Robert P. George, one of the most important natural law theorists, participated in drafting the report of Council on Bioethics by writing, with Patrick Lee, the article "The Nature and Basis of Human Dignity"[129]. The article is a reflection about the concept of "inherent dignity" as the main meaning of dignity, as opposed to the meaning related to the concept of privacy and self-determination assigned it by the U.S. jurisprudence on abortion, artificial fertilization and euthanasia. In the article, Robert George argues that "all human beings have a special type of dignity which is the basis for the obligation all of us have not to kill them, the obligation to take their well-being into account when we act, and even the obligation to treat them as we would have them treat us, and indeed, that all human beings are equal in fundamental dignity". Therefore, he offers us arguments to oppose the position that only some human beings, because of their possession of certain characteristics in addition to their humanity (for example, an immediately exercisable capacity for self-consciousness, or for rational deliberation), have full moral worth. We would like to connect this perspective with Bö ckenfö rde's reflection on the concept of person. He argues that the current concept of a person serves the function of distinguishing human life from personal life and of understanding personality – that is, being a person – as a narrower concept than the concept of a human being. Not every human life, but only one with certain characteristics and distinguished qualities can be the life of a person and can consequently be called a person. The concept of person in this way is used to limit what is protected by the law which respects human dignity: neither every men, nor every stage of human life participate of human dignity[130].

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128 "It seems that in domestic and international jurisprudence it is possible identify a common judgment about cases of tortures, a sort of universal condemn, I would almost venture to say that there is a ius commune regarding these matters". P. Carozza, *Human Dignity and Judicial Interpretation of Human Rights: A Reply*. European Journal of International Law, Vol. 19, p. 931, 2008; Notre Dame Legal Studies Paper No. 09-14. Available at SSRN: http://ssrn.com/abstract=1393744.

129 R.P. George, P. Lee, *The Nature and Basis of Human Dignity*, Ratio Juris, Vol. 21 N. 2, June 2008, pp. 173-193.

130 E.W. Böckenförde, *Dignità umana e bioetica*, Morcelliana, 2009.

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Instead, according to George, being a person derives from the kind of substantial entity one is, a substantial entity with a rational nature, consistent with the Boethius definition ("*persona est rationalis naturae individua substantia*"). Possession of full moral worth follows upon being a certain type of entity or substance, namely, a substance with a rational nature, despite the fact that some persons (substances with rational nature) have a greater intelligence, or are morally superior (exercise their power for free choice in an ethically more excellent way) than others. In other words, possession of full moral worth follows upon being a person (a distinct substance with a rational nature) even though persons are unequal in many respects (intellectually, morally, etc.). Since basic rights are grounded in being a certain type of substance, it follows that having such a substantial nature qualifies one as having full moral worth, basic rights, and equal personal dignity. Therefore, human beings are intrinsically valuable as subjects of rights at all times that they exist; that is, they do not come to be at one point, and acquire moral worth or value as a subject of rights only at some later time. From this substantial interpretation of human dignity which derives from Jewish-Christian *imago dei* tradition – in other words, from the idea that human being is created in the image of God and consequently has an inherent human dignity not reducible to the manifestation of their own capacities – it follows that embryos and fetuses are also subject to rights and deserve the full moral respect from individuals and from the political community. It also follows that a human being remains a person, and a being with intrinsic dignity and a subject of rights, for as long as he or she lives: there are no sub-personal human beings. Indeed, according to George, embryo-destructive research, abortion, and euthanasia involve killing innocent human beings in violation of their moral right to life and to the protection of the law. This meaning of dignity includes all human beings, regardless of age, size, stage of development, or immediately exercisable capacities.

Robert George's interpretation offers a fundamental qualification to the concept of human dignity, which he relates especially to the right to life and which he reconstructs in opposition to the conception of dignity, characterizing American jurisprudence, as expression of freedom of choice and of privacy. However, if we consider that this intrinsic value of a human person continues over the different stages of his own development, we may turn to the most recent jurisprudence of Luxemburg Court[131]. The European Court of Justice ruled on October 18, 2011 in an important decision in the case C-34/10 *Oliver Brüstle v. Greenpeace e.V.* to limit embryonic stem cell patents in Europe. The German Federal Court of Justice decided to refer several questions, regarding the quarrel between Brüstle and Greenpeace, to the European Court of Justice for a preliminary ruling. The more controversial issue was whether the technical teaching of Brüstle's patent was excluded from patentability under § 2 II 1 No. 3, of the *German Patent Act*, according to which: "Patents shall not be granted in respect of the uses of

131 L. Violini, Il divieto di brevettabilità di parti del corpo umano: un uso specifico e non inutile del concetto di dignità umana, in Quaderni costituzionali, 1/2012, pp. 145-148.

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human embryos for industrial or commercial purposes." The answer to this question depended on the interpretation that should be given to Article 6 (2) (c) of the *EU Biotechnology Directive* 98/44/EC, which states: "Inventions shall be considered unpatentable where their commercial exploitation would be contrary to public order or morality […] in particular uses of human embryos for industrial or commercial purposes […] shall be considered unpatentable." [132]

The first question that the *Bundesgerichtshof* asked the European Court of Justice regarded the interpretation of the term "human embryos" because the EU Directive itself, as the primary legal source, does not offer a definition of the term "human embryo." So, the Court pointed out that: "The lack of a uniform definition of the concept of human embryo would create a risk for the authors of certain biotechnological inventions being tempted to seek their patentability in the Member States which have the narrowest concept of human embryo and are accordingly the most liberal as regards possible patentability, because those inventions would not be patentable in the other Member States." Thus, it affirmed that "the context and aim of the Directive show that the European Union legislature intended to exclude any possibility of patentability where respect for human dignity could thereby be affected. It follows, in the view of the Court, that the concept of 'human embryo' must be understood in a wide sense". Therefore, the Court considers that "any human ovum must, as soon as fertilized, be regarded as a 'human embryo' if that fertilization is such as to commence the process of development of a human being". Moreover, "[…] a non-fertilized human ovum into which the cell nucleus from a mature human cell has been transplanted and a non-fertilized human ovum whose division and further development have been stimulated by parthenogenesis" must also be classified as a "human embryo" because "although those organisms have not, strictly speaking, been the object of fertilization, due to the effect of the technique used to obtain them they are capable of commencing the process of development of a human being just as an embryo created by fertilization of an ovum can do so"[133].

5. Conclusion

Charles Malik, one of the drafters of The Universal Declaration of Human Rights, wrote that during the drafting works of the declaration there was a fundamental issue not always present to the mind of the Commission. "It was nevertheless there, at the

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[132] "§ 2 II 1 No. 3, of the German Patent Act is derived from this EU Directive. EU Directives harmonize law within the EU, and the Member States have to implement the legal meaning of the Directive into their national statutes – in this case into the German Patent Act – a process that leaves space for interpretation, legal uncertainties and disputes such as this one. Article 6 (2) (c) of the Directive does not allow the Member States any discretion regarding the fact that the processes and uses listed therein are not patentable. In other words, § 2 II of the German Patent Act – in particular its concept of embryo – cannot be interpreted differently from that of the corresponding concept in Article 6 (2) (c) of the Directive"; C. Langer, *The European Court of Justice Bars Stem Cell Patents In Landmark Decision*, Berkeley Tech. L.J. Bolt (January 5, 2012), http://btlj.org/?p=1646.

[133] C-34/10, Olivier *Brüstle c. Greenpeace e V.*, Gr. Sez., 18 ottobre 2011.

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base of every debate and every decision. It was the question of the nature and origin of these rights. By what title does man possess them? Are they conferred upon him by the State, or by Society, or by the United Nations? Or do they belong to his nature so that apart from them he simply ceases to be man?"[134]

It seems to me that the three scholars' accounts agree with the fact that human dignity is the basis of human rights. However, they define dignity using very different proverbial tools: Habermas the political, Waldron the juridical, and George and Lee the metaphysical.

Jürgen Habermas connects human dignity with the demand for recognition[135]. He understands that the juridical concept of dignity is also a political concept which is the key for an equal inclusion in a political community. His view shows that once humans have achieved a degree of material equality in their private lives, they will then want to live in a world ordered by Hanna Arendt's[136] notion of equal participation, defending the liberty of all against the threat of domination by any group or individual. The moral value of dignity, indeed, is the result of a recognition of political struggles overcome in the history, so that dignity is both a history and political concept connected to the idea of equality.

Therefore, "human rights are debated and decided upon in particular political communities and are not in themselves inherent in nature. However this requires a universal safeguard of human dignity; humankind's right to belong to a genuine political community in order to resolve issues of rights"[137]. This perspective is well suited with cases involving discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability.

However, dignity as connected to the demand of recognition concept is essentially distinct from inherent dignity. These two types of dignity emphasize different aspects of personhood.[138] Inherent dignity focuses on the universal attribute of individuals as

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134 C. Malik, *International Bill of Human Rights*, 1948, http://www.udhr.org/history/ibrmalik.htm.

135 The desire to be recognized, to have the political and social community acknowledge and respect one's personality and dignity, derives from the idea that individuals are constituted by their communities and therefore their self-conception depends on their relationship to the greater social whole. See N. Rao, *Three Concepts of Dignity in Constitutional Law*. Notre Dame Law Review, Vol. 86, No. 1, pp. 183-271, 2011; George Mason Law & Economics Research Paper No. 11-20. Available at SSRN: http://ssrn.com/abstract=1838597.

136 See H. Arendt, *The Origins of Totalitarism*, Harcourt, , 1951; Id., *The Human condition*, The University of Chicago Press, 1958; Id., What is freedom?, in H. Arendt, Between Past and Future: Six Exercises in Political Thought, The Viking Press, 1961, pp. 143-172

137 See J. Helis, Hannah Arendt and Human Dignity: Theoretical Foundation and Constitutional Protection of Human Rights, Journal of Politics and Law, Vol. 1, N. 3, September 2008.

138 "Inherent dignity focuses on the universal attribute of individuals as human agents, able to choose and direct their own lives. Recognition dignity focuses on the individual, but finds that the dignity of a person exists not only in making choices, but also in having those choices validated and accepted by the state and other members of the community. These forms of dignity, both focused on the individual, will sometimes run in the same direction. But they can just as easily conflict, for example when recognition and respect for one person requires constraints on another person's speech or expres-

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human beings. Instead, according to Habermas, dignity as demand of recognition is political because it involves the democratic deliberation of a political community so that it is connected to the idea of relational attitudes of the individual.

Waldron's approach to human dignity is also addressed not towards a foundational concept as a basis for human dignity but he believes it should be understood as a "high-ranking legal, political, and social status" that is equally accredited to everyone. According to Waldron's view dignity is understood neither as inherent and universal attributes of human beings, nor as political community recognition (inclusion) of groups and individuals. Dignity as we saw above has its natural habitat in the law because it is a "constructive idea with foundational and explicative function"[139]. Therefore, dignity is not a moral idea but a juridical one. The best evidence that dignity is an autonomous legal concept is that it is originally legal. It is a matter of status and status is a legal conception. Many of the forms of social interaction characteristic of high status when the latter was part of a hierarchical society were forms of deference and submission. Waldron "has given us several vivid and persuasive examples of ways in which the law may be used to defend the high rank or dignity of the ordinary person by protecting her from degradation, insult, and contempt"[140]. Michael Rosen offered us very interesting criticisms to Waldron arguments.

First of all, he believes that the history of the concept of status reveals deep conceptual ambiguities and tensions, tensions that require clarification: "the agreement that came about at the end of the second world war represented a moment of precarious though precious compromise – but it is an agreement that has subsequently, unsurprisingly, fallen apart when the compromise proved incapable of playing the foundational role for which it hoped"[141].

Secondly, if the foundational concept is understood as a "high-ranking legal, political and social status" that is accredited to everyone, "will this bold proposal bring peace to the battlefield of (moral) metaphysics? […] Who is "everyone"? Does it include zygotes, embryos, fetuses, the severely mentally handicapped, and those in persistent vegetative states?" [142]. If there was an answer to this question in Waldron's account of human dignity, it wasn't clear. Moreover, it seems to me that if every individual belongs to this status the borders which separate this conception from the natural law theory of inherent dignity are not so divergent. The wall between an anthropological interpretation of dignity and a juridical one does not appear so strong.

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sion, or when recognition and preferences for some racial groups means exclusion of particular individuals from selective opportunities". *Supra* note 136, pp. 268-269.

139 J. Waldron, *Dignity, Rank and Rights*, Oxford University Press, 2012.

140 M. Rosen, *Replies to Jeremy Waldron: Dignity, Rank and Rights Tanner Lectures,* Berkeley, April 21-23, 2009, p. 18. Available at http://scholar.harvard.edu/files/replies_to_jeremy_waldron_0.pdf.

141 M. Rosen, *Dignity Past and Present*, in J. Waldron, *Dignity, Rank, and Rights*, Oxford University Press, 2012, p. 84.

142 *Supra* note 140.

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Finally, the connection between dignity as status and legal cases regarding degradation of human beings shows us that the notion of human dignity is related to the conception of "respect". Article 3 of the European Convention on Human Rights prohibits torture, and "inhuman or degrading treatment or punishment". We can find the same prohibition reading article 5 of the Universal Declaration of Human Rights: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". Thus, "what degradation, insult and contempt have in common is that they are expressive or symbolic harms, ones in which the elevated status of human beings fails to be acknowledged"[143]. Rosen agrees with this understanding of dignitary harm but also notes that this understanding of dignity as requiring "respect-as-respectfulness" has a very important consequence. "If we take the view that dignitary harms are essentially symbolic – failures to express respect for status – then we must believe either that all violations of fundamental human rights are essentially symbolic or that dignity cannot fulfill the role assigned to it in our basic human rights documents – to provide a foundation for the rights embodied in them"[144].

This last criticism links us to Robert George's and Patrick Lee's lecture of inherent human dignity. Their account tries to provide a basic foundation of human rights by showing the core of dignity: "all human beings have a special type of dignity which is the basis for the obligation all of us have not to kill them, the obligation to take their well-being into account when we act, and even the obligation to treat them as we would have them treat us, and indeed, that all human beings are equal in fundamental dignity"[145]. On one hand, human beings needs recognition or respect of their integrity (physical and moral). On the other hand, there is something more original then these "fundamental needs": the idea of something inherent, an inherent inviolability of a human being as a human being. This conception is neither only juridical nor only moral and it is deeply connected to cases regarding the right to life. In this paper, I also quoted the European Court of Justice case *Brüstle v. Greenpeace* (2011) which does not involve the right to life but the opportunity to patent embryonic stem cells. However, it seems to me that the court confers to human dignity an ultimate value in order to protect the human embryo, or, in other words, in order to preserve human life in all stages of its development from a commercialization of it. This interpretation of dignity doesn't exclude Habermas' and Waldron's views, on the contrary it points out the core, the origin of the dynamism of dignity (fundamental needs of recognition and respect) that shows in the same time the root and the complexity of integral human flourishing. The importance of inherent dignity is exceptionally explained by Charles Malik, one of the

143 *Ibi,* p. 19.

144 Michael Rosen doesn't believe that symbolic harms are not real harms but they cannot, surely, be the most fundamental. After all, as he wrote, the worst of the Nazi state did to the Jews was not the humiliation of herding them into cattle truck and forcing them to live in conditions of unimaginable squalor; it was to murder them; Id., *Dignity Past and Present*, 2012,

145 R. George, P. Lee, *The Nature and Basis of Human Dignity*, Ratio Juris. Vol. 21 No. 2 June 2008, p. 173.

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drafters of Universal Declaration of Human Rights. He stated that "if human rights simply originate in the State or Society or the United Nations, it is clear that what the State now grants it might one day withdraw without thereby violating any higher law. But if these rights and freedoms belong to man as man, then the State or the United Nations, far from conferring them upon him, must recognize and respect them, or else it would be violating the higher law of his being. This is the question of whether the State is subject to higher law, the law of nature, or whether it is a sufficient law unto itself. If it is the latter, then nothing judges it: it is the judge of everything. But if there is something above it which it can discover and to which it can conform, then any positive law which contradicts that transcendent norm is by nature null and void. Finally, if my fundamental rights and freedoms belong to me by nature, then they are not a chance assemblage of items: they must constitute an ordered whole. Responsible inquiry must then exhibit their inner articulation.

The deepest formulation of the present crisis in human rights is not that these rights have been brutally violated in the recent war; nor is it that there is not enough clamor demanding their proper establishment and protection; nor certainly is it that the United Nations has done nothing about them. There is more talk today about human rights than ever before, and the United Nations has a full-fledged Commission wholly dedicated to that cause.

The real crisis in human rights does not lie along any of these lines. It consists rather in the fact that people today do not believe they have natural, inherent, inalienable rights. You should see and hear modern man argue about his rights! Can you suggest to him that he is originally and by nature possessed of his fundamental rights? The merest suggestion that there is nature, reality, truth, peace and rest, an unchanging order of things which it is our supreme destiny to know and conform to, is anathema to modern man. He seeks his rights not in and from that order, but from his government, from the United Nations, from what he calls 'the existing world situation' and 'the last stage in evolution.' Destitute and desolate, he goes about begging for his rights at the feet of the world, and when the Commission votes an article by 10 to 8, he rejoices that there, there he is granted a right! Having lost his hold on God, or more accurately, having blinded himself to God's constant hold on him, he seeks for his rights elsewhere in vain. The spectacle of a being having lost his proper being – can there be anything more tragic?"[146]

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146 C. Malik, *International Bill of Human Rights*, 1948, http://www.udhr.org/history/ibrmalik.htm. Cf. also R. Spaemann, *Love and dignity of human life*, Wm. B. Eerdmans Publishing Co., 2012. F. Botturi, *Dignità e Rispetto Reciproco,* Catholic Muslim Forum 4th-6th November 2008.

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Therefore inherent dignity is irreducible either to a political term or to a juridical one. It includes both these expressions of its nature but it is not identifiable with just one of them. In some way it includes and at the same time it overcome its political and juridical determinations.

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The Universality of Human Dignity

Possibilities, Limits and Aporias of Justification

Harald Seubert

When asking what is meant by the universality of human dignity and how best to establish it generally, the question of substance simultaneously leads both to a question of methodology as well as to a question concerning the fundamental principles of (practical) philosophy.

Providing philosophical foundations has always carried the special feature that those very convictions, including those remaining firmly unquestioned, will, for the most part, be put in doubt. Yet this also entails setting what is doubted into doubt. It is only in this twofold movement, rather than by way of a Euclidean demonstration in the Euclidean geometrical fashion, that philosophy has its inception. It does not achieve this perspective by means of a God's eye view but in that the thinker instead comes to reflect on him or herself. It is, as Plato observes in his Seventh Letter, *apaideusia* [bad manners] that is unable to distinguish between that for which one ought to require demonstrations and for which not. Inasmuch as the dynamic of this question remains within the horizon of a self-questioning, the *gnothi seauton*, the problem of human dignity is an exceptionally distinguished paradigm of such a dynamic.

Even where focused on the universality of human dignity, it will not primarily seek its own unconditionality but much more attempt instead to secure those conditions needed to engage one another together in conversation and—above all—in understanding. In the process, it will also encounter the limits of foundational thinking, which are differently articulated under different conditions. Philosophical thinking is expressed and differentiated by limits and contradictions, as detailed in Hegel's methodological outline, according to which the fear of contradiction is itself already a contradiction. And such thinking does not ultimately overcome aporia: it knows the sharply limited range of that which is still not knowing, which, in addition to astonishment, is a basic condition for Platonic philosophical knowledge.

When what is at stake is the universality of human dignity, this signifies that the situational invariant holds without exception or regard for person, indeed across all cultural differences as well. In this sense, as Robert Spaemann has observed, human dignity is the basic assumption that human beings have rights.[1] It is thus not a right alongside other rights. And given such universality there can be no judge or arbitrator

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[1] R. Spaemann, „Menschenwürde und menschliche Natur," in: Spaemann, *Schritte über uns hinaus. Gesammelte Reden und Aufsätze II* (Stuttgart, 2007), pp. 93 ff. See too Spaemann, *Grenzen. Zur ethischen Dimension des Handelns* (Stuttgart, 2001).

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who would be authorized to grant or deny human dignity. This would be a major claim. Can it be cashed out?

I. Conceptual Histories and Structures

1. Let us approach this problem indirectly, inasmuch as a basic structure of human dignity arises from the interweaving of individual moments of conceptual history. What is ultimately essential is that a *universal* notion of human dignity has been attempted in vain since Greek antiquity. The human being is perceived in Sophocles' *Antigone* as the most terrifying or uncanny [*deinotaton*]. [2] Indeed, endangered by their own hubris, human beings even engage in conflict with the gods. This kind of dignity is thus and simultaneously an abyss. As the tragedy always plays out, the human being, even when physically destroyed, is superior to the gods. To the extent that they survive their sufferings, winning self-insight in their own regard, they frame a self-knowledge beyond themselves. If one reads Plato's dialogues on the explicit question of the human being, what is striking is a remarkable reticence in speaking of the human being at all. And one may not be going too far, if one assumes that there, yet again, is the reflection of the Sphinx's riddle, met by the great hubris of Oedipus: to have resolved the puzzle of the who of human being.

2. In Cicero, it is, following the Stoa, well known that there are two applications of human dignity. On the one hand, dignity is *dignitas*, accruing to great, distinguished, human beings and expressed in public interaction with them.[3] When Aristotle describes the great-souled and magnanimous, *megalopsychia*, as calmness, serenity, representative characteristics of a human being who pursues only higher goals, who proceeds slowly and carefully, and whose speech is deliberate,[4] these distinguishing features are thereby especially emphasized. Dignity, in this sense, is attributed to individuals in special and particular measure. And for this we esteem them and rightly so.

Yet beyond this, Cicero has a second terminological usage, to wit, dignity understood as the nature and essence of humanity: as dependent upon the human being. Hence the Roman liturgy likewise prays on a Christian foundation: "God, who didst wonderfully create, and yet more wonderfully restore, the dignity of human nature." Cicero himself speaks more negatively of specific forms of life that do not reach the level of human dignity. There is therefore duty in human dignity. Yielding to one's own satisfactions without limit or measure would oppose it. Wherever loss of dignity is at stake, the human being will institute a measure for himself. Thereby human dignity gains a fully ethical, normatively human, qualifying meaning. For Cicero, human dig-

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[2] Sophokles, *Antigone*, V. 332 ff. S. H. Flashar, *Sophokles. Dichter im demokratischen Athen* (München 2000).

[3] Dürig: Art. *Dignitas*, in: *Reallexion für Antike du Christentum,* 3 (1957): 1024–1035;V. Pöschl: *Der Begriff der Würde im antiken Rom und später* (Heidelberg 1989); P. Kondylis u. a.: Art. *Würde* in: O. Brunner / W. Conzer / R. Koselleck, eds., *Geschichtliche Grundbegriffe* 7 (1997): 637-677.

[4] See Arist., NE IV.7.

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nity is consequently common to all human beings through reason [*ratio*]. The dignity and nobility of human nature (*De off*., 1, 105 f) is realized in the obligatory ['*kathekon*'] as the highest conception of ethics. A specific form of knowledge is endowed with this, that of *syneidesis* (conscience), the human being's own knowledge and awareness regarding his deeds. This qualifies him as '*honestum*,' the highest anchoring point of honor. On the basis of Cicero's conceptual architecture, here in bare outline, human dignity is one part of the assumption of *lex aeterna*, of an eternal law.

This is further continued in Christian thought in the High Middle Ages, as in the case of Thomas Aquinas. The concept of a person stands in the most intimate connection with human dignity. "And because subsistence in a rational nature is of high dignity, therefore every individual [*individuum*] of a rational nature is called a *person*."[5] In this (which Kant will pursue further), it is revealed that the responsibility for one's actions is also constituted with dignity. Human dignity refers to morality. Otherwise humanity would fall behind the nature of all other forms of existence. This is a foundation accruing ipso facto to human beings, the grounding of which is to be located exactly in their being: one needs must therefore point out here that the caveat contra the naturalistic fallacy can in no way lay claim to validity.

3. That dignity belongs to the substance of humanity is stipulated in the hitherto discussed intersections of our reflections in the guise of natural law. Again, this too would not hold without further ado as a foundation for modern forms of thought, and certainly not less for the *universality* of human dignity; had natural law however not largely lost its significance as the pole star of Western ethics via the de-theologizing of the concept of nature (M. Weber). And even more John Locke's problematization here signifies a break. Locke's empirical verification of rights uses the concept of substance in order to talk of human dignity in the first place.[6] The language of a substance is for him a reduction for the sake of assuring the unity of experience: nothing more, nothing less. David Hume as a result will describe the human being as "nothing but a bundle of different perceptions."[7] How they are related is by no means self-explicative by this reduction.[8] In consequence, dignity allows itself to be attributed solely to concrete acts of consciousness, and these would be one's self-persistence as a rational being read positively in some cases or sometimes thereby falsified, whereby self-identity itself is not merely a moral matter but also a problem for human self-understanding. Yet dignity is associated with acts of reflection, identification etc., or at least to the predisposition to such actions (and in texts from the empiricist tradition to this day, this is the central problem precluding the assumption/conviction of a universality of human dignity). Consequently such acts afford criteriological standards for denying or for ascribing personhood. And human dignity, for its part, depends solely upon actual, or at the very

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[5] Thomas Aquinas, *The Summa Theologica*, Q. 29, Art. 3, *Reply Obj. 2*).

[6] Locke, *Essay Concerning Human Understanding*, Book II, Ch. 10, §§ 8 and 10.

[7] Hume, *Treatise on the Understanding*, Part IV, sec. vi.

[8] See J. Wilbanks, *Hume's Theory of Imagination* (The Hague, 1968); see too R. S. Woolhouse, *The Empiricists* (Oxford, 1988) and J.P. Wright, *The Sceptical Realism of David Hume* (Manchester, 1983).

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least, latent personhood. To attribute to it universal validity would accordingly be proscribed.

This is a demystification by way of the clarification of language use that has deep roots in Anglo-Saxon philosophy.

Another important problem here comes into play: to wit, Locke understands the concern of the people to be able to preserve itself as a focal point of personhood. Yet is this the ultimate anchor? One can introduce the well-known puzzling case, given someone who took their nourishment via tube-feeding, whether being assured self-preservation through the infiltration of pleasant images of life would not be in some fashion a more desirable condition of humanity? Is not the Aristotelian definition of *eudaimonia* as rationally ordered action inescapable in fact and therefore an indication likewise of the irreducible demands of dignity? It would then be at the very least questionable to shift self-preservation to the center in this way, connected thereby to an ultimate end by means of an at best occasional, reductive interpretation of dignity. Parfit has pointed to the fact that there is another perspective to be thought beyond that of self-preservation as he reflects that the concern with identity is necessarily included in the concern with survival. It however includes a clarification not only that but also how and as whom I want to survive.[9]

In this sense, the concept of person also increases in concision in contemporary Anglo-Saxon philosophy, at least in those traditions illustrating the irreducibility of mental experiences to materialistic events and conditions. Actions, thoughts, intentions are not a result of their physicalistic representations, even if depicted in them. "*De se*" predications, as more recent concept-semantic research has been able to show in highly differentiated fashion,[10] are not to be traced back to access from the third person singular. However, if human dignity is not to be explained from current actions, as acknowledged or denied by a third person, but as anticipated as one's own, then empirical plausibility must be significantly restricted. At the very least, the conceivability of a universal and a priori human dignity will again be possible.

4. This brings us into contact with another horizon. Christian faith makes human dignity on the basis of central kerygma and dogma an indispensable consequence, that the human being is in the image of God and soteriologically this likeness unto God is again constituted as Jesus Christ as true God and true man. For a pluralistic and secular world, the objection naturally presents itself that this assumes recourse to a partial source which is by no means rightfully universalizable. These considerations remain in need of examination. Yet at the same time it is given for reflection that the presupposition of faith may prove reasonable if it represents an idea of dignity as an inevitability of corporal-spiritual, individuated, self-knowing humanity. One may recall the basic scholastic doctrine according to which the revelation of purely rational

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9 D. Parfit, *Reasons and Persons* (Oxford, 1984).

10 See D. Lewis, "Psychophysical and Theoretical Identifications," *Australasian Journal of Philosophy*, 50 (1972): 249 ff., B. Loat, *Mind and Meaning* (Cambridge, 1981); H. P. Falk, *Wahrheit und Subjektivität* (Freiburg/Br., München, 2011).

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philosophy does not contradict the *lumen naturale* but much rather fulfills it. Kant assumes the Christian conception of human dignity on the one hand and opens his interpretation to the possibility of interpreting it in terms of rational and moral law, on the other hand.

This constellation is rendered more difficult as there are utterly divergent positions in the interpretation of the Christian concept of human dignity. Hence Thomas Aquinas claimed along with Cicero that "by sinning" the human being "withdraws from the order of reason, and thereby falls from human dignity, so far as that consists in man being naturally free and existent for his own sake."[11] By contrast, Augustine observes that the possibility of free action guarantees dignity, however deployed in fact. This also bears on fallen humanity: "as a runaway horse is better than a stone which does not run away because it lacks self-movement and sense perception, so the creature is more excellent which sins by free will than that which does not sin only because it has no free will." [12]

That an elementary form of dignity on the basis of the deiformity accrues to all humanity is first seen in late Spanish scholasticism and was connected with the conception of the human family. The basis for this is the problem of international rights in the *Conquista*, and the classic, text, often quoted, today: *Brevissima Relacion Las Casas* (1542). To be sure this formulates basic human dignity somewhat negatively. The Indians are not more barbaric than we are. International law is a kind of bond [*vinculum*] between peoples. Las Casas continues with: "all delight in the good, all abhor and reject evil [...] Thus there is a single human race, and all human beings are, with respect to their creation and natural conditions, like one another."[13] This is one of the first major *demonstrations* in which the inner knowledge of human dignity also becomes externally visible.

4. To *think* deiformity is already implied by the concept of an 'active intellect' in the theory of mind of the high Middle Ages that by no means only perceives but is itself original. It is not incarnate divinity. The philosophy of the Renaissance goes beyond this. Thus Pico della Mirandola has assigned a novel emphasis to the whole question of human dignity with his *Oratio de dign. hominis*. The human is manifest as another god [*alter Deus*]. In him are micro-and macrocosm together. Thus he can choose between the most various ways of living.

He is not fixed by anything. In this his non-restriction and his freedom (Pico thus conceived the human 'almost' as chameleon with respect to the fixity of creation), what

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[11] Aquinas, *Summa Theologica*, Secunda Secundae, Question 64, Art. § 3.

[12] Augustine, *The Problem of Free Choice*, trans. Dom Mark Pontifex (Mahwah: The Paulist Press, 1955), p. 155.

[13] B. de las Casas, *Apologética História, cap. 48, Obras Completas*, ed. P. Castaneda Delgado, 14 Vol. (Madrid 1988 ff.), Vol 9. cf. W. Grewe, *Epochen der Völkerrechtsgeschichte* (Baden-Baden, 1984); see too Grewe, (ed.), *Fontes Historiae Iuris Gentium* (Berlin/New York, 1988), Vol 2.

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is demonstrated is precisely his dignity.[14] He is ennobled by God, and the sovereignty of God the Creator is first shown in that it is precisely not compelled to limit his limitless power with respect to humanity. Hence the human being is called to be the "*pictor*" and "*fictor*" of himself: even his moral capacity for peace comes from the fact that it transcends all limitations. Here Pico already anticipates elements that will recur in later metaphysical anthropology. One could define this with Scheler's insight into humanity as the open position of the universe or else with Plessner's paradoxical images of "natural artificiality" and eccentric positionality.

In the composition of Pico's speech God addresses the human in just this fashion:

> You, by contrast, impeded by no such restrictions, may, by your own free will, to whose custody We have assigned you, trace for yourself the lineaments of your own nature. I have placed you at the very center of the world, so that from that vantage point you may with greater ease glance round about you on all that the world contains.[15]

The human being is the being of the in between, after Alexander Pope's „middle state." For he is neither heavenly nor earthly, neither mortal nor immortal, but sculptor and poet of himself: "It will be in your power to descend to the lower, brutish forms of life; you will be able, through your own decision, to rise again to the superior orders whose life is divine." Only with the perception of this nature, can he achieve the foundation of his freedom.[16]

Blaise Pascal saw the nether side of this uncanniness, compelled first by one side and then by the other. For him, human nature is a dual nature of or coincident with external weakness. Therefore the outer man is like a reed, vulnerable and finite. But it is also the case that "*L'Homme est visiblement fait pour penser*" [The human is manifestly made for thinking].

6. When what is sought is the justifiability of the universal dignity of man, Kant's insights must come centrally into view. Kant conceived the dignity of man as *absolutum*, an absolute value for which there can be no price. Otherwise it is only valued in terms of the concept of relative value. This dignity adheres to the moral condition of humanity, the possibility of *homo phainomenon* to be determined in freedom from the moral law and to be *homo noumenon*.

Kant formulated this in this fashion: "Thus morality, and humanity as capable of it, is that which alone has dignity."[17]

Kant had already sketched out this structure in its tectonics in a central passage of his *Fundamental Principles* or *Groundwork of the Metaphysics of Morals*. The moral

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14 Michael V. Dougherty, ed., Pico della Mirandola: New Essays (Cambridge 2008); Walter Andreas Euler, "Pia philosophia" et "docta religio". Theologie und Religion bei Marsilio Ficino und Giovanni Pico della Mirandola (München 1998).

15 Giovanni Pico della Mirandola, *Oration on the Dignity of Man*, trans. A. Robert Caponigri (Chicago: Henry Regnery Company, Gateway Edition, 1956), pp. 3-4.

16 Ibid., p. 7-8.

17 Kant, *Fundamental Principles of the Metaphysics of Morals*, trans. Thomas Kingsmill Abbott, (Radford, PA: A&D Publishing, 2008), p. 52.

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law, which each discovers in himself, gives the human being his dignity. This regard for himself and his dignity may dispose him to follow the 'causality of freedom.' This is the 'definition of man,' which Kant had explained as the fourth and crucial question in the general area of philosophy. It is not designed to be descriptive, not to be confused with the question, 'What is man,' it is normative.

Dignity is the sense of Kant's phrase

> nothing less than the privilege it secures to the rational being of participating in the giving of universal laws, by which it qualifies him to be a member of a possible kingdom of ends, a privilege to which he was already destined by his own nature as being an end in himself and, on that account, legislating in the kingdom of ends …For nothing has any worth except what the law assigns it. Now the legislation itself which assigns the worth of everything must for that very reason possess dignity, that is an unconditional incomparable worth; and the word respect alone supplies a becoming expression for the esteem which a rational being must have for it.[18]

The concept of autonomy requires special attention. „Autonomy" means self-legislation, made of itself in total freedom and aware of the moral law as its own. From this human dignity is attributed on the basis of the capacity for morality, and it is documented in the human-end formula, a subsidiary formula of the categorical imperative.

> Now I say: man and generally any rational being exists as an end in himself, not merely as a means to be arbitrarily used by this or that will, but in all his actions, whether they concern himself or other rational beings, must be always regarded at the same time as an end.[19]

With this, Kant's grounding justification comes more clearly to light: human dignity is granted to humanity as prerogative; it is owed to no natural also to no property of but rather to the *a priori* nature of morality, precisely indicated in that it accrues to every human being. One could, in the face of current and extreme bioethical issues add: to even and especially to those who, such as embryos, young children or severely disabled persons do not currently possess the same.

Through this basic principle of autonomy, human dignity then is closely connected with the freedom achieved on the ties of morality and in this fashion it delineates the concept of the person:

> that he must always take his maxims from the point of view which regards himself and, likewise, every other rational being as law-giving beings (on which account they are called persons).[20]

Kant knew that we are led in this sense, above all through such a conception of freedom, to the "comprehension of the incomprehensible." The height of this demand is plain. Kant took this in doctrine of 'radical evil,' that is to say, all the way to the radix

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18 Kant, *Groundwork for the Metaphysics of Morals*, trans. Abbott (Broadview Press, 2005) p. 94.
19 Kant, *Fundamental Principles of the Metaphysics of Morals*, p. 46.
20 Ibid., p. 39.

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[root] of perverse will. Dignity is not thereby renounced. In Kant, disposition to autonomy is the ground of dignity: "for the human and for every rational nature." However this includes a circular argument/demonstration, because dignity is simultaneously the condition for the person to function as an end in himself: "Every human being is a person and thus an end in themselves, and that is what grounds dignity." As I bind myself to the moral law, I have only one access to myself as *homo noumenon*. This dignity permits itself in relation to itself as to be redeemed as qualification, in some cases as sublimation and indeed even as the overcoming of certain inclinations. Kant thus stocks his Critique with ever more rigorously categorized maxims. The intensity of a wish can make us feel compelled, to the extent that we are driven to fulfill it at all costs. If the human being were to be forced by some external circumstances to cannibalism, he would still always have the freedom of an ad hoc resolve to opt for suicide. At the same time however one would say in such a case that his human dignity is grievously injured.[21]

In this regard, Kant speaks in his later *Metaphysics of Morals* of the rights and duties of man, which on the one hand he exercises against himself as a sensible being, and on the other hand, as an intelligible nature. And indubitably at this point resides a legitimate intention of the discourse ethics of Jürgen Habermas,[22] in which the conception of dignity as counterfactual assumption functions as mutual acknowledgment of the other. With this recognition, the possibility of a balanced discourse stands or falls. Schiller reflects in his beautiful essay, "On Grace and Dignity," on the concrete manifestation of dignity with reference to Kant. With this the concept of dignity shifts. It is liberated from the strict attachment to the unrestricted "should' and becomes empirically tangible. "Mastery of the drives through the moral force"[23] is the formula Schiller introduces. As Schiller also thinks as dramatist and regarding the design of exemplary characters, he combines beauty with grace.

Hegel had ultimately seen that its institutional realization belongs to the concept of morality. An immediate will to the moral good, he noted, does not yet have any dignity in itself. Only the human being attains to that dignity who knows itself in general, as the moral substance of its truth. Hegel articulated this more precisely: as spirit, "man ought to esteem himself and regard himself as worthy of the highest. Of the magnitude and power of the spirit he cannot think highly enough."[24] This extends Schiller's tendency; the concept of human dignity is to be understood in its a priori universality, but it should not be thought as a mere ought but rather in its materialization. With this,

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21 See according to this Kantian point of view: H.E. Allison, *Kant's Theory of Freedom* (Cambridge, 1990); see also C. M. Korsgaard, *The Sources of Normativity* (Cambridge, 1996).

22 See according to Habermas: C. I. Calhoun, *Habermas and the Public Sphere* (Cambridge, Mass., 1992); and P. Dews (ed.), *Habermas. A Critical Reader* (Oxford, 1999).

23 Friedrich Schiller, "On Grace and Dignity," in: *The Complete Works of Friedrich Schiller, Volume 8: Aesthetical and Philosophical Essays*, (New York: Collier, 1902), pp. 178-229; here pp. 187-88.

24 Hegel, "*Inaugural Address, Delivered at the University of Berlin* (22 October 1818)" in: Laurence Dickey, ed., *G.W.F.Hegel. Political Writings*, H.B. Nisbett, trans. (Cambridge: Cambridge University Press, 1999), p. 185.

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the concept of human dignity is convincing just when it goes further than natural contingency. Hegel also speaks of "progress in the consciousness of freedom" in order to be able to name what universality means in one historical and philosophical formula. Regarded in terms of the institutionalization of human dignity, it is only an additional step to the realization that most basic requirements for the viability of life must be met in order that a human being can live in accord with this dignity, even when this is ultimately to be deprived by nothing and by no one. Ernst Bloch had given this a succinctly expression in the context of 'natural law' and 'human dignity': "There can be no human dignity without the end of misery and need, but also no human happiness without the end of old and new forms of servitude."[25]

With respect to sensibility to misery comes Brecht's famous saying, which is not explicitly about human dignity, but which however seems to some materialistically minimal sense of this: "First comes the food, then the morality." [*Erst kommt das Fressen, dann kommt die Moral*]. Perhaps to our astonishment, Schiller had already anticipated this "No more on this, I beg you. Give him food and shelter. When you have covered his nakedness, dignity will follow by itself."[26] And in early socialism, Proudhon spoke less specifically of personal dignity [*dignité personnel*] as the basic principle of justice. This is a rather more negative term, whose significance must be clear, because factually just this dignity is again and again violated. To this is linked less moral duties as much as the claim that no human being ought to suffer hunger or thirst, so that he may be able to work under humane conditions. Human and civil rights are, therefore, especially including its economic offshoots, to be adequately substantiated. And yet the therewith accomplished implicit conversion and shift in emphasis from the universal structure of human dignity toward the realization of certain rights and legal claims depotentiates the concept of human dignity.

6. By contrast with this, Friedrich Nietzsche, completely in accord with his elitist divisions and distinctions, gave us to understand the "critique," locating the protest in the name of human dignity in the logic of a vanity, especially that of the less well-off, the envy of the have-nots. As Nietzsche puts it directly contra Proudhon "One *protests* in the name of *human dignity*, but expressed more plainly, that is that good old vanity, which experiences Not-being-equal-to or Publicly-being-esteemed-lower as the harshest fate."[27] This is uprightness with respect to one's own higher ideals. Dignity would then be granted, in accord with the older Greek and Stoic conceptual terminus, to higher spirits alone. It is the medium of genius. In fact, Nietzsche had subjected human dignity to a rigorous demythologizing in the reduced understanding of its routinely simplistic and to be increasingly socialist coin. It is based, as he observed, on the error of the human being's only incomplete knowledge of himself; on invented properties,

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25 E. Bloch, *Naturrecht und menschliche Würde* (Frankfurt/Main, 1975-).

26 Schiller, "Würde des Menschen," *Musenalmenach* (Tübingen: Cotta, 1800) [1796]). Epigram, pp. 32-33.

27 Friedrich Nietzsche, *Human, All too Human*, trans. R.J. Hollingdale (Cambridge: Cambridge University Press, 1986), §457, p. 167.

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comprehending the human being as "invention," but not in its facticity and its finitude. One such fiction is the "ego cogito" another would be freedom. Yet the human being is a "sick animal" in its facticity. It can be no surprise that Nietzsche is henceforth claimed for various positions describing human dignity as an illusion, calling for an age of "post-humanism" and putting all transcendental, essential, and other attempts at grounding human dignity altogether in question.[28] A post-humanism of this variety is the foundation where the human person is at the disposal of experimental improvements, from "enhancements" of his physical abilities to brain doping. Sloterdijk speaks of the "vertical dynamic," that is to be bred and sculpted, in order that the human being be worthy of dignity, which had in vain ultimately been attributed to him by every normativity and [ideal of] *paideia*.

Nietzsche, in fact, and particularly when understood apart from the context of the movement of his thought, might well serve as the leading witness for the denial of human dignity. Again and again, one can indeed read him as saying that at best the idea was a chimera. Thus the curtain was lifted and the stage was bare. But things are rather exactly not quite so linear for Nietzsche. He studied Darwinism and wonders what human beings are to do with the narcissistic injury of a theory of evolution which does not except humanity from an interconnected development of species and kinds.[29] For Nietzsche, what is fundamentally at stake is the reduction of the human being to an anthropomorphism, to his own "*partie honteuse*," as he gave a Darwinistically intoxicated Paul Rée to understand. Exactly for Nietzsche, and apart from this great disillusionment, the human being is essentially transcendence, a going beyond oneself ("overhuman"), and a faithfulness to himself. The representation of dignity therefore includes not only intelligibility but extends to "the great reason of the body."

It is on this that theorists of trans- and posthumanism will have to be measured. Influenced by Odo Marquard and Hans Blumenberg, Franz Josef Wetz invokes the incommensurability and diffuse nature of the concept of human dignity.[30]

Here, leaving the Kantian axiom of dignity fundamentally untouched in its validity, recent philosophers following Karl Jaspers have endeavored to elevate it existentio-philosophically to a more encompassing profile. In existential limit situations, and therewith precisely in devastation, in the face of human vulnerability and finitude, dignity is also lit up in experience and fact.

The human is not only that singular being aware of his own death. He can also meet extreme situations, in the knowledge that they may bring about his own death, or, conversely, endure deep disgrace, without either one depriving him of his fundamental dignity. A sublimation of the basic clarification of Kantian and the reflection of

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[28] Ibid.

[29] See B. E. Babich, *Nietzsche's Philosophy of Science. Reflecting Science on the Ground of Art and Life*. New York [1]1994; also: E. Düsing, *Nietzsches Denkweg. Theologie-Darwinismus-Nihilismus*. München [2]2007.

[30] F. J. Wetz, *Illusion Menschenwürde. Aufstieg und Fall eines Grundwerts* (Stuttgart, 2005); esp. pp. 50ff.

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deiformity is not to be seen here as much as their precis-ification and concretization. Good will and a [kind of] "School of Sensibility" is indispensable for this.

The post-humanists do not permit themselves to be persuaded. Instead, they emphasize that human dignity is not necessary but much rather dependent upon very contingent parameters. And they regard themselves, as if it were self-evident, as following in the wake of "weak thought." However, one must then inquire whether this thinking can demonstrate itself in its greater plausibility beyond those metaphysical leftovers it means to abandon at any cost. Contingent human dignity ought yet to retain validity in any case as a private conviction. As Franz-Josef Wetz expresses this: "In both secular society with its increasingly scientific world view, as also in the multicultural society of nation states, human dignity continues to be conceivable as a sole result of the common undertaking for the sake of a life of physical and spiritual integrity and free self-determination, as an indispensable adjunct to personal self-esteem."[31] Such a metaphysical, religious reference to dignity (no distinction is to be made here between 'metaphysics' and 'religion') goes beyond what the "constitutional state" expects of its citizens and of the individual in the public discourse of others. This credo of a free-floating liberalism[32] can apparently be founded on little more than a few basic trends of the current day. It seems highly problematic to assume a "secular scientific worldview" without question,[33] it is even more problematic to affirm an interreligious and intercultural understanding of human dignity as *eo ipso* impossible.[34]

In addition, at least three disagreements with these and related reviews are striking:

(1) The metaphysical-moral religious grounding of human dignity is explored along the lines of empirical properties. That this is intended in this fashion neither by [the ideal of] deiformity nor yet by Kant, inasmuch as these ontologies depend upon body-soul self-perception and -obligation, namely that we recognize one another as human beings, precisely this remains overlooked.

(2) Ruling in the background is a utilitarianism recognizing the good as a sheer function of the useful. References to this minimalism is generally not philosophical but grounded with respect to democracy.

(3) With all the delight at unmasking, emphasizing that at bottom there is no human dignity, those writing on post-humanism always ultimately retreat in the face of the consequences, like Gorgias, whom Socrates shows the specter of a polis that would

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31 Ibid., pp. 190ff.

32 About the normativity within liberalism: J. Rawls, *Political Liberalism* (New York, 1993) and to complete as well as to go against modern liberalism, see M. Nussbaum, *Creating Capabilities: The Human Development Approach* (Harvard, 2011).

33 See M. Bernstein, "Love, Particularity, and Selfhood," *The Southern Journal of Philosophy*, XXIII (1985): 287ff.; A. E. Buchanan, "From Chance to Choice," Cambridge 2000; M. Quante, "Precedent Autonomy and Personal Identity," *Kennedy Institute of Ethics Journal*, 9 (1999), pp. 365ff.

34 See against a relativistic perspective: M. A. Baaderin, *International Human Rights and Islamic Law* (Oxford, 2005; see also H. J. Sandkühler (ed.), *Recht und Kultur. Menschenrechte und Rechtskulturen in transkultureller Perspektive* (Frankfurt/Main, 2011).

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have to do without reverence and shame.[35] What is thus supposed is a reduced or minimized human dignity, as part of designedly weak, pluralist thinking. In the face of a transcendental and metaphysical background, precisely dignity is by no means to be quantified by degree, just as little as it is permissible to promise or to deny dignity to another. The transcendental basis of human dignity is also disputed by Michael Quante in a very carefully argued construction.[36] He similarly seeks to maintain dignity, yet only to a certain degree. Although it does not tolerate its own justification, paradoxically, dignity ought, nonetheless, to operate as a kind of foundational instance in public discourse. In Quante's sense, human dignity is an irreducible element of ethical practice, outlining a cordon of irreducible self-disposition over one's life, important precisely in borderline cases in bioethics. Why this determination?

Likely owing to the intimation that there is a comprehensive slippery slope: to be breached by nothing and by no one and lacking in human dignity. Would there not then be a removal of an unacknowledged presupposition of pluralism and neutrality, leading to emptiness and the conflict of the jungle? In this, even as particularly subtly argued, Quante ultimately says "The central property (or capacity), on the basis of which people are bearers of human dignity,"[37] is to be perceived in that they are able to lead a personal life. With this, dignity is dynamically functional, to be sure, however yet conceived as a determining property which may or may not belong to a person.

II. Foundational Dimensions and Deadends

1. As we see: the position of utilitarianism must patently come to a different result than from a classically Kantian metaphysical argument. If utility (the greatest possible advantage for the greatest possible number, as well as individual advantage) is the norm for the good, the ultimately unimpeachable thought should not lack the ideal of humanity as a good in and of itself, of dignity as absolute and ultimate frontier.[38] The consequence is that the killing of a human being cannot in principle be brought under a more rigorous condemnation than the killing of any other living creature. Argumentatively, utilitarian conceptions usually entail that personality and dignity are a real set of characteristics and dispositions belonging to different people in different ways. Thus not all human beings are persons. Peter Singer refuses to include the severely handicapped under the rubric of the person, while this property would be entirely ascribed to higher primates.

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35 See S. Bernardete, *The Rhetoric of Morality and Philosophy. Plato's 'Gorgias' and 'Phaedrus'* (Chicago/London, 1991).

36 Quante, *Personales Leben und menschlicher Tod. Personale Identität als Prinzip der biomedizinischen Ethik. Frankfurt/Main 2003.*

37 M. Quante, *Menschenwürde und personale Autonomie. Demokratische Werte im Kontext der Lebenswissenschaften* (Hamburg, 2010), pp. 203, and 204 ff. and passim.

38 It is yet something else again in preference utilitarianism. Robert Spaemann has thus rightly indicated out that preference utilitarianism closely approaches Kantian moral law, indeed that must make implicit use of the same.

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If human dignity is regarded and conceived as essential for human existence as transcendental a priori or metaphysically, — in the sense of its standard [*norma*], then this means that it may by be attributed to or refused anyone by any means and by no one. This is precisely the meaning of the Kantian ideal of humanity in one's own person and the person of every other never only as means but always also as an end. It is deepened in the *Critique of Judgment* with its invocation of human beings as the ultimate end of creation.[39] Just this is the unconditionality of human existence qua potentially-moral subjects, because the human being is the addressee and the origin of a moral universe. A demand for ultimate foundations need not be raised in consequence. I must, however, to the extent that I conduct myself as a human being, claim human dignity in my own and in every other person. And this again would be the position of Plato's Seventh Letter, whereby it is want of education to distinguish what does and what does not require justification.

Just at this point, one must ask oneself whether this dignity may be preserved in complete detachment from the image of God that same dignity. With an eye to bioethical issues of cloning, Jürgen Habermas has pointed out the difference that is made by whether a member of the same species is the origin or determiner of human nature or whether it springs from a transcendental origin not unavailable to him.[40] In consequence of this origin, human dignity yokes an original being spoken to with the possibility of being the addressed and to being the player in a moral universe.

In this discourse relation, human dignity also bears upon the metaphysical essence of the person. Philosophically, therefore, the anthropological distinction between 'someone,' to name the human being as a person, and 'something' (Spaemann) takes on a decisive, empirically irretrievable, significance. From empirically communicable properties, human dignity cannot in consequence be adequately justified, inasmuch as it lacks a view from outside.[41] A rough, caricaturing contrast may show this: the crown of creation, the swine of a human being, wrote Gottfried Benn, and others evoke him as "snub-nosed mammal" or as a special evolutionary kind of primate.

Kant had already named such naturalistic reductions as "audacious assertions of *materialism, naturalism, and fatalism,* which narrow the field of the Reason."[42] And Fichte spoke of the impotent assurances of this naturalism, which are at the same time a standing challenge to human self-understanding.

2. Similarly, in the face of dwindling support for legal doctrine of the concept of human dignity, the jurist Martin Kriele has rightly note that "Dignity does not admit a

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39 See P. Guyer, *Kant and the Claims of Taste* (Cambridge, Mass. / London, 1979); G. Lebrun, *Kant et la fin de la métaphysique. Essai sur la 'Critique de la faculté de juger'* (Paris, 1970) and Chr. Fricke, *Kants Theorie des reinen Geschmacksurteils* (Berlin/New York, 1990).

40 J. Habermas, *Zwischen Naturalismus und Religion. Philosophische Aufsätze* (Frankfurt/Main 2005. In English as *Between Naturalism and Religion: Philosophical Essays* (London: Polity, 2008).

41 R. Spaemann, *Personen. Versuche über den Unterschied zwischen ‚etwas' und ‚jemand'* (Stuttgart 1996); In English as *Persons: The Difference between 'Someone' and 'Something'* (Oxford, 1996).

42 Kant, *Prolegomena to Any Future Metaphysics that will be able to come forth as a science*, §60.

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justification via a naturalistic understanding of humanity. It is a metaphysical concept."[43] Certain features of the human, such as the surface area of the cortex, the upright stance, the complexity of the organism are insufficient here. The bodily manifestation and corporal-spiritual unity of the person is by contrast a trans-empirical term. We thus draw a preliminary conclusion in the sense of the categories applied.

(1) In a conceptualization focused on individual qualities and, practically, upon utility and functional consequences of behavior-referred thinking, the grounding of human dignity encounters basic limitations. It can only be claimed if certain actual properties are given. In this, the dimension of the universality of human dignity is scarcely attained, a universality that would have validity not only for the extremes of life (including death and the prenatal context) but across all cultural differences as well. One will not break through this fundamental deficiency by invoking dispositions toward dignity: a capacity for freedom and reflection and if one expands on this capability approach, such that it could be implemented in questions regarding developing or dying life in the field, as in a *in dubio pro reo* [the benefit of the doubt].[44] Even the confirmation of potentialities remains in an empirical vector. Kriele however is concerned to go beyond an ontology which indirectly tends towards human transcendence. This means furthermore that one does not get anywhere in this issue, if one seeks the unconditioned, but only if one acknowledges the conditions and seeks to include them for dignity's sake.

Such a thinking, which stands in the domain of indirect metaphysics, will not go astray by way of the anticipated reproach of a 'naturalistic fallacy' of is and ought. Much rather, human dignity refers to an inner normativity of human nature. It consists in having a nature, being that nature to a certain extent, but at the same time also able to comport oneself towards and to be obligated to it. The human being discovers himself in this nature, which is never merely given but is always at the same time given up or surrendered. But at the same time in intersubjective relations, he relies on this same nature, that it be recognized in him. A reflection in human dignity is here at stake and would furthermore not be understood as a counter-argument that it translates a moment of confirmed faith in the image of God, like unto a "glowing core," in the matrix of reason.

(2) The possibility of such a plausible justifiability is opened up only when human dignity is understood not as *actual* but transcendentally, as the essence, the *what* of human being[45] that can neither be attributed to nor denied but which is emergent in human relationships. Dignity is the elementary form of recognizing one another as a

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43 M. Kriele, „Menschenrechte und Gewaltenteilung," in: U. Klug and M. Kriele (edd.), *Menschen- und Bürgerrechte* (Stuttgart, 1988), pp. 20 ff.

44 See G. Damschen and D. Schönecker „In dubio pro embryone. Neue Argumente zum moralischen Status menschlicher Embryonen," in: G. Damschen and D. Schönecker, eds., *Der moralische Status menschlicher Embryonen* (Berlin, 2003), p. 187 ff.

45 Cf. on this and the problem of personal corporeality: W. Schweidler, *Über Menschenwürde. Der Ursprung der Person und die Kultur des Lebens* (Wiesbaden, 2012).

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reciprocal recognition. Human dignity is thus the fundamental expression of the human, distinguishing trait such that the human being can be part of a moral universe. One should not be afraid to raise the question *ti estin* in this sense and to ask: what is the human and for what does he or she exist? Human dignity therefore referred to an insurpassable limit of self-possession, which configures self-relation and determination at the same time.

(3) This is to be completed by the dimension of vulnerability, the "Do not kill me!" which belongs to the human being as a being aware of his own mortality. All reflection on the human with respect to itself has to come back to this, and a philosophical reflection cannot be otherwise. This is the principle to be objected countering the speciesism-argument.[46] Even animals have their dignity. But they are in just this way to be distinguished from human ways of being alive. And: new forms of artificial intelligence, robotics, etc. also present the problem of characteristic personality, which however is not to be confused, however, with the personal space of resonance of dignity. That inviolability commandment, which hardly anyone has brought to bear more deeply and more vehemently than Emmanuel Levinas, requires institutionalization. Otherwise one runs the risk Hegel raised contra Kant regarding a gulf between moral maxims and the actual course of the world.

(4)The sting remains: whether human dignity is not, in the end particular, inseparable from its origins in Europe, in the Judeo-Christian context and engendered out of certain contingencies? The concept and the matter itself has indisputably undergone a genesis, which is largely localized in the Western European world. Critics of the claim to universality critics can easily advert to this. Yet exactly here genesis and validity are to be distinguished.[47] In social philosophy and sociological genealogy, Hans Joas has recently outlined the sacralization of the person, which is not directly drawn from Christian sources, but precisely from such a secularization. In this Joas accurately admixes the ambivalence—and does so in two respects: on the one hand, he endeavors, after Ernst Troeltsch, to demonstrate that even questions of natural law are eternal questions included in the river of history, coming to be and passing away. However, this evokes the follow-up question, whether historicism may not have the last word, that is, to be shown if and how situation-invariant, permanent truths precipitate. And human dignity would necessary be part of this. On the other hand—and Joas takes far too little account of this—a sacralization of the human person is only possible if the core of sacredness shifts to them, in the sense of a transformed image and likeness of God. A partial culture and way of thinking may well bring about trans-temporal, which can also be comprehended from different perspectives and corners of the world in Aristotelian fashion as a 'possession for all time' κτῆμα εἰς ἀει, and this self-grounding is then no longer to be repealed with reference to a genesis story.

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46 See Schweidler, ibid., p. 115 with regard to Heidegger and Lévinas.

47 See regarding the problem of historicism and human dignity, H. Joas, *Die Sakralität der Person. Eine neue Genealogie der Menschenrechte* (Berlin, 2011), of interest particularly where he underlines the importance of Ernst Troeltsch for this sociological genealogy.

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Even *a posteriori*, this universality may be rendered plausible. It will require a dyad: on the one hand, the legally formal binding force and its acknowledgement as lingua franca of international reciprocal exchange. Without it, even international organizations might well encounter difficulties in their capacities for action. For the world, which unquestionably trades economically as one world, betrays profound differences beneath a surface coherence. On the other hand, there is also a need for a deep conversation between cultures, exploring their understanding and their approaches to human dignity. That a human and personal dignity primarily draws upon Christian-Jewish and Greek originary roots, and then uncovers a genealogy interior to Enlightenment reason, which at the same time disenchants those same stocks in reason, ought to lead to the search for analogies in other cultures: in Islam or in the foundation of human dignity in the far East transformations of the subject, that its sheer selfhood is to be sacrificed in a great All-one-I.[48] Whether, of course, a *Magnus Consensus* is to be won in this way, needs must remain an open question.

The distinction between a "utility-culture and a culture of norms" (Walter Schweidler) seems helpful in this regard in the sense of a more nuanced encounter between cultures.[49] It makes possible a deeper self-understanding dimension of Western culture, which is by no means merely 'occidental rationalism.' As should now have been shown, the absoluteness of human dignity presents the baseline of positive human rights. It ought and must at the same time open the space for their relative cultural realization. This is made possible only in the rational redemption of the claimed *Absolutum* and its transcription into another cultural different cultural reality, by way of the renunciation of the suspicion of conditions, even religious ones, as obsolete.

Even more from the cross-cultural context, is dignity to be verified as self-relation and relation to others rather than as a property. It is a status that is for good reason awarded to human beings *per se*. And it is against their transcendental metaphysical orientation to assume that one would have first to earn it. Thus it is an unmerited privilege and an obligation at the same time. It conflicts with anything that would deny or reduce to human integrity. Human dignity is thus, as Habermas has rightly pointed out, the proleptic statement of a species ethical self-understanding from which it depends, if we may continue to recognize each other reciprocally as autonomously acting persons, or not.[50]

(6). What implications does this have for human rights? These follow mainly from the idea of dignity. If they are to correspond with the universality of human dignity, they must not be inflated and their negative qualification is more important than the positive. They derive from the original right as a right to have rights and latterly from the sanctity of life and limb, of property, which comprises, by contrast with possession, the vector of the entire human freedom to act; the absence of coercion and threat, and

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48 See Schweidler, *Das Uneinholbare. Beiträge zu einer indirekten Metaphysik* (Freiburg/Br., München 2008), esp. Pp. 84 ff., and pp. 238 ff.

49 See also Schweidler, *Über Menschenwürde*, op. cit., p. 114 ff.

50 Habermas, *Between Naturalism and Religion*, esp. pp. 20 ff.

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then, positively, access to the resources necessary for life but access as well to the resources that make the articulation of human life possible. This shifts the question of the possibilities, limitations and aporias, previously discussed philosophically and in terms of the history of ideas, into the realm of law.

III. Human Dignity in the Law: A *nervus probandi* [crux of the argument]

1. There are obviously more serious difficulties in view, if one defines human dignity as fundamental law. "Human dignity is inviolable," so it says in Article 1, paragraph 1 of the Basic Law. Human dignity is not exactly not a right among rights according to transcendental metaphysical understanding. Legal doctrine takes account of this when it remarks that it is the enabling fundament, that people have rights and obligations and that such rights are legally unassailable and, without exception, even valid invariant to the situation. One knows that the entire conception of human dignity, received its concision and clarity in the face of the mass murders and violent excesses of the totalitarian experience precisely in the 20th Century, It is subject to the perpetuity clause, and has the character of a basic standard. Maunz and Düring refer to this with particular emphasis in their decades-long unquestioned in its authority, monumental commentary on fundamental law.[51] The new commentary in 2001 by the constitutional lawyer, Matthias Herdegen signified a turning point here, joining the Kantian and Christian background equally with image and likeness of God. Human dignity works merely as a rule of law among others, which can then be weighed against other standards for rights. This may have unforeseeable consequences.

2. When one considers the Human Rights Charter of the United Nations, taking into account its origin, it becomes clear what the imposition and appearance of the formulation of human dignity signifies. The presumption was at the time that human dignity in the emphatic sense excludes distinctions between internal and external groups. Human dignity, therefore, raises a claim which brought Ian Smuts to the conception of the "sanctification of the human person," which should however be limited in its scope to the British gentleman. The alternate formula of the "dignity and worth of every human being" failed to win the agreement of Smuts and others. Thus the phrase "worth of the human person" was found. This formula seemed to be universalizable in part because it is itself neutral.

If a constitution like the basic law is committed to human dignity in particular, this has the character of commitment in the sense of *praeambula fidei* [preambles of faith] and the Fathers of the Constitution knew very well that therewith a certain determination was made for the metaphysical, transcendental interpretation, especially as the

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51 Th. Maunz and G. Dürig, *Grundgesetz-Kommentar* [Commentary to the Constitution of German Federal Republic] (München, 1958 and 1999); G. Dürig, "Die Menschenauffassung des Grundgesetzes" , *Juristische Rundschau*, 7 (1952), pp. 259ff; Dürig, "Der Grundrechtssatz von der Menschewürde" in: Grewe, et al., eds., *Archiv des öffentlichen Rechts*, Vol. 81 (Tübingen, 1956), pp. 117 ff.; Dürig, "Dignitas", *Reallexikon für Antike und Christentum*, Vol. 2. (Stuttgart, 1957), pp. 1024 ff.

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basic law was itself for its own part committed in the Kantian sense to "morality." That not all problems are solved thereby, can be read off the circumstance that even a country like the GDR included in its constitution the formula of human dignity, albeit not expressed in the universal sense, but rather as the ideological specification of a socialist image of humanity.

Sharpening the concept is accordingly indispendable. But the answer to its blurring can scarcely consist in abandoning the claims of human dignity. The liberal interpretation would enshrine human dignity to the untouchable status of the individual, resulting in a positive principle of civic action, in the sense of an "overlapping consensus" as well as in its omission of a "greatest equal liberty" and hence resulting in creating and maintaining the greatest possible opportunities for preservation.[52]

In a slightly different direction, Niklas Luhmann has characterized human dignity as reclaiming "successful self-representation of a person as an individual personality."[53]

Questions with regard to a legal validation of the human dignity of an action can arise at the limits of institutionalizability: giving them legal protections, enforceability and expression in the legal domain faces obstacles. Among these to be distinguished is whether this question reflects fundamental features. Sometimes it is observed, with reference to the establishment structure of human dignity, that metaphysical foundations, and especially those of Christian religious kinds, are themselves merely particular. Or, as Horst Dreier had contended, an invocation of Kant remains problematic in articulation of Basic Law inasmuch as the Kantian foundation is entirely to be located in the *Mundus intelligibilis*.[54]

Here it must be said that a sharp distinction is to be drawn between ethics and law. It is certainly a distinction in the sense of complementarity, and Kant's own thinking can be taken into account for such tectonics. Right, even when constrained by morality, must not enforce morality. Kant's conception of freedom refers however, in the sense of Böckenförde formula, to foundations that can be self-securing. Hence in the liberal constitutional state, the human is assumed in advance as giving himself his own law for his own actions. Dreier would therefore to be answered, that naturally the Kantian '*Mundus intelligibilis*' is not to remain unquestioned as a basis for securing the foundation of human dignity as human rights.[55]

The Kantian tectonic, however, details how structures such as transcendent conceptual relationships are to be brought to bear in a regulative and counterfactual fashion. By contrast, positivist conceptions of law often assume that human dignity is

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52 See Rawls, *Political Liberalism*, op. cit., p. 320 ff. et passim.

53 N. Luhmann, *Grundrechte als Institution* (Berlin, 1965); see also Luhmann, *Law as a Social System* (Oxford, 2004).

54 H. Dreier (with Bishop W. Huber), *Lebenschutz und Menschenwürde in der bioethischen Diskussion* (Münster, 2002), p. 9 ff..

55 See E.-W. Böckenförde, „Die Historische Rechtsschule und das Problem der Geschichtlichkeit des Rechts," in: *Collegium Philosophicum. Festschrift J. Ritter* (Basel, Stuttgart 1965), pp. 9ff. See also Böckenförde, *State, Society, and Liberty: Studies in Political Theory and Constitutional Law* (New York, 1991).

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indefinable as their point of departure, and thus illusory, as legally unusable. A positivism that denies a conception of transcendence, exceeding what happens to be the case in a worldly sense, can speedily find land in the precipitous implication that right is limited to whatever system currently holds.[56]

And then it becomes concrete: the rights of protection and participation are founded upon human dignity. The ban on torture, as on genital mutilation, on forced feeding, the agreement of a minimum subsistence level that one may not fall below, protection of intellectual integrity, freedom of communication, participation and access to a minimum level of education, religious freedom, based on separation of church and state, and thus the right to an utterly a-religious life are all based in their situational invariance upon considerations of interest extending beyond one dimension — leading at least indirectly towards — conception of human dignity. How it were to be replaced in this fundamentality is a difficult problem to solve, and towards which solution those who dispute would have to contribute.

As little as in a naturalistic reductionism, is human dignity to be redeemed for legal positivism.

Dignity has therefore the status of prerequisite for the legal dealings of humanity in and with itself. Human dignity is thus to be understood as a justification of arch-positive rights, that for their part are again to be conceived as the basic standards of rights for the sake of right. Law for the sake of law. Right to rights. These have by no means only a negative status. It also always involves positive rights to protection and to participation, such as the protection of the material and cultural subsistence level; psycho-physical bodily-spiritual integrity; the private and the public sphere that is essential for the formation of each in an 'internal dialogue' and in exchange with trusted neighbors; the field of self-esteem.

What is decisive is that these rights are for their part to be codified and summarized in accord with the Kantian formulation, whereby my freedom can exist in concord with the freedom of everyone else.[57] Human duties, on the other hand, belong in the field of morality. They are to be positively and directly implemented, more as moral than as legal obligations to be implemented and may be understood as concretions of human dignity. Here the pre-Kantian and Kantian conception — of the duties toward humanity in his own person and in the person of every other — is to be thought. Kant had referred to this in the sense of his tectonics, oriented towards one's own perfection and the happiness of others and with respect to oneself, characterized as the driving and natural essence of moral being.

3. Now there can be conflicts. Human dignity is not a simple guideline in such factual issues and dilemmas. It is thus important to ask what is then to be done. To name only a few cases: self-defense or putative self-defense, tyrannicide (July 20

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[56] Carl Schmitt's contributions from 1933, in addition to multiple pathological and controlled reasons of expediency, is also a cautionary example of this.

[57] See R. J. Sullivan, *Immanuel Kant's Moral Theory* (Cambridge, 1989) and P. Guyer, *Kant and the Experience of Freedom* (Cambridge, 1993).

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1944), torture in order to get an offender to disclose hiding places, war in the case of self-defense, today especially with respect to humanitarian interventions. All strategies that depend upon utilitarian calculations are unsatisfying in the end. Although one can think of a preference rule for the benefit of the guilty (where guilt may be clearly assessed), the resolution tactics in the sense of postponing decisive inaction, at least if you make yourself fully aware that the human being is better able to see the advantages of action than of inaction and in consequence that he is to a still higher degree responsible for his actions. Particularly problematic is the rule of quantity, which is also mentioned again and again, as well as that the group that is smaller in number is to be 'sacrificed' in case of doubt. Even (moral) quality permits one to make such distinctions. And hardly with any better results.

4. In all of this human dignity would seem to be balanced against human dignity. And just this contradicts the *Absolutum* of the concept. If one were to go so far, one would then have, as Robert Spaemann has pointed out several times, just thereby sacrificed the claim to that universality which was inherent in human dignity.

Dieter Birnbacher cautions in the sense of criteriological possibilities for differentiation against the difference between basic and practical standards. The latter could always only inadequately depose the former while being determined by them. Ultimately, this is merely the old relationship between morality and law as decentered morality. However that may be: torture, shots putatively made in self-defense, are serious violations of human dignity. They may be understandable in certain circumstances, they may even be essential, yet they may not be justified. One is worth tens of thousands as Heraclitus says. And as the Greeks also knew, doing—and omitting—linked with guilt, hence the viability of non-action is thus no more than a seeming option. No calculus can remove the unsatisfactory in this relation. In action as in non-action as well, we cannot avoid being guilty.

One should therefore think differently about the problem. Therefore one should think the problematic in another way. To this end, Robert Spaemann has made a wide ranging proposal: Human dignity cannot be set against human dignity, in a conflict only those rights resulting from unconditional and inalienable rights of human dignity can come into conflict.[58] Human dignity permits no compromise. Only those resulting rights, consequently the juridical, not on the level of the morally fundamental, therefore allows limitations to be formulated from case to case. If an affected party plays a role, and even one that had become deeply guilty, must still and yet as a person in the field of moral reasons have his dignity preserved. As Spaemann argues: "human dignity is violated when it is openly or tacitly: to him is what matters."[59]

4. Legally and legal-politically, human dignity is also obligated to found itself in the public discourse of a pluralistic society, even if by no means to be count in linear

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[58] See Spaemann, "Is Every Human Being a Person?," trans. Richard Schenk, O.P., *The Thomist*, 60 (1996): 463-74 and: Spaemann, *Menschenwürde und menschliche Natur* (see at the beginning, remark 1).

[59] Ibid., see also the collection edited by Böckenförde and Spaemann, *Menschenrechte und Menschenwürde* (Stuttgart, 1987).

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fashion as secular.[60] The main problem dare not be that it is disputed by certain points of principle, but rather that one arrives at equivocal meanings.

In this sense, Hasso Hofmann has invoked the legal limitations requisite for human dignity, when they are not to become blunted weapons, an in every case community of recongition. Only within such can it be given empirically. However, a community of recognition would only first be brought into being via a shared ethos, as is pointed out by the much-vaunted Böckenförde formula In agreement with recent communitarian approaches, Peter Badura has demanded that human dignity be thought in terms of its vulnerabilities/injuries, pointedly articualted by the author Heiner Müller: "The dignity of the human being is (actually) graspable." Thus the Federal Constitutional Court has argued, however, according to a specific occasion, whether life imprisonment is in accord with human dignity: conformity to dignity of nonconformity cannot be determined via concept or principle out, but only in regard to situational-variant individual cases. *In concreto*, then there is exactly no ultimate limit setting via human dignity. "As a community-based and community-bound citizen, everyone must accept governmental actions made in the overriding public interest, while fully respecting the principle of proportionality, as far as they do not touch the unimpeachable arena of private life."

Werner Maihofer has, inasumuch as the justifiable line examination (?) is denied, drawn an extreme but nonremainderable limit in the tension between ethics and law: human dignity is that minimum degree of individual freedom, the loss of which for Maihofer would have to entail the loss of the self.

This is also important in international constellations. Human rights treaties are made, in order that the states involved submit to mutual criticism and recognizance, without sacrificing their autonomy. This will always take precedence over interference in national sovereignty.

IV. At the Boundaries of Life: Bioethical Lines

One specially obvious problem is introduced with the question of human dignity at the limits of life. Without being able here to make the subject the specific status of bioethics within philosophy,[61] it is shows itself here that bioethical judgments have to be compound judgments.

With recourse to the Aristotelian principle that "A human begets a human," has recently been formulated in terms of the potentiality argument, according to which with the emergence of independent DNA clearly genetically distinguished from the mother, human dignity is to be conceded to/recognized in the embryo.

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[60] Ch. Taylor, *A Secular Age* (Harvard, 2007).

[61] See A. Gewirth, *Community of Rights* (Chicago, 1996); M. Boylan ed., *Gewirth. Critical Essays on Action, Rationality, and Community* (Lanham, 1999); M. Quante and A. Vieth "In Defence of Principlism Well Understood," *Journal of Medicine and Philosophy*, 27 (2002), p. 621 ff.

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This dignity would remain, even if human life no longer disposed over the ability to reflect and the ability to relate itself to itself.

On the other hand, in these debates an identity argument has been brought upon the dignity according to which the numerical identity of the human body is cogiven. “Every living human body is the bearer the support of potential φ properties (freedom, autonomy, preferences, etc.), has dignity (1). Any viable human embryo is a living human body, that possesses φ-properties. (2). Any viable human body has dignity. Damschen and Schoenecker have in this rightly pursued an indirect strategy, comparing the moral status of embryos with that of vegetative state patients. To criticize it seems to me, that even in this subtle argument, although latent, as well as real, φ-features are assumed, on the basis of which dignity should adhere. But the basic approach of potentiality and identity arguments is valid, it would be transcendentally Kantian and anchored. On this basis, even death on demand and active euthanasia reveal themselves as unworthy forms of contract factively imposing the statment: “You should not exist any longer.” A legal sanction is withheld in essence as A particularly intricate relationship manifest in the sphere of suicide. He who kills himself may do it in the confidence thereby to prove his dignity one last time before himself and others. His act is inherently unfathomable. But if he were to ask *phronesis* from this distance, would he be vindicated?

Michael Quante indeed argues that human dignity is on the one hand to meet the test of secular public life, “the categorical prohibition of any act of killing on the basis of the doctrine of the sanctity of human life in a secular and democratic society cannot be justified.”[62] You will have to ask if an implicit consensus can and also ought to stand fast with this sanctity in public discourse and decidedly avoid exceeding this limit. Therewith we are in the range of questions that Wittgenstein in his “Lecture on Ethics” presents in the image of the fly that seeks to find the way out of the fly-bottle.

That in this area we exactly do not have certainty, but are however able to expand the vision of existence thereby is crucial. Thus Wittgenstein speaks of a way of thinking and acting, which he would never reduce.

As long as the human being understands himself in his foundation as absolute and without granting in advance the dominance and high sex appeal of today’s narrowest and therefore reductive forms of thought, he can maintain human dignity, totally and to be sure in that including the noncomprehensible thereby that he come to be led before the comprehension of the incomprensible.

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62 Quante, *Menschenwürde und personale Autonomie*, p. 163 ff.

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The rise of human dignity

Dietmar von der Pfordten

The phenomenon and concept of human dignity shows four decisive peculiarities: (1) A late appearance as concept in our ordinary conceptual scheme. (2) A late appearance as concept in practical philosophy. (3) A late appearance as fundamental human right in charters, constitutions and human rights declarations. (4) But it finally rose to be the lead right in some of these charters, constitutions and declarations, e.g. the United Nations Charter from 1945, the German "Grundgesetz" from 1949 and the Charter of Fundamental Rights of the EU from 2000.

The following reflections on human dignity are divided into two sections: first a *historical reconstruction* and second a *systematic suggestion* how one should understand the concept, especially in the light of these peculiarities.

I. Historical Reconstruction

1. Antiquity and Middle Ages

In Greek antiquity, there was no concept of human dignity or a terminological equivalent. So we face a late significance of the concept in antique philosophy. Cicero was the first to mention "dignitas" in *De Officiis* in 44 b. Chr.:[1] "If we want to consider that a superior position and dignity is in our nature, we realize how awful it is to let oneself drift along and live pampered and softy; and how it is on the other side honorable to live economical, abstinent, stern and sober. (*Atque etiam, si considerare volemus, quae sit in natura nostra excellentia et dignitas, intellegemus, quam sit turpe diffluere luxuria et delicate ac molliter vivere, quamque honestum parce, continenter, severe, sobrie*)." Cicero used the concept probably as a translation of the stoic "*axíoma*" from Panaitios from Rhodos, which means honor, respect, valuation, volition.

Already in this quotation we find, albeit not yet distinguished, two possibilities of the understanding of human dignity: dignity as (1) *unchangeable, essential inner worth of men*, (2) *a contingent, external property* like a) status/rank/office, b) behavior, c) aesthetic expression, which leads at best to an *inter-subjective* understanding of human dignity.

Subsequently human dignity is mentioned in the writings of Christian thinkers. In these writings, the accent lies on the first understanding, the understanding of *unchangeable inner worth* independent of the social position and with respect to the idea that man is *created by God*, an *image of God* and has *reason*. Thomas Aquinas writes e. g. in his *Summa theologica* from 1265 ff.:[2] "... when he commits a sin, man leaves the

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1 Cicero, *De Officiis*, I, 105 f.,

2 Thomas Aquinas, *Summa theologica* II-II, qu. 64, 2 ad 3. See also I, qu. 29 a 3.

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order of reason and therefore breaks away from the dignity of man, in so far as man is free by nature and exists because of himself… (… *homo peccando ab ordine rationis recedit: et ideo decidit a dignitate humana, prout scilicet homo est naturaliter liber et propter seipsum existens*…)". In these and other citations *dignitas* is understood as an essential, unchangeable quality. In the ethics of Thomas Aquinas the concept plays a certain role, but is not fundamental.[3]

If dignity is understood as an essential, unchangeable quality of man then we have to ask what the source of this quality is. Again, there are two possible answers: The source can be *internal (autonomous)* or *external (heteronomous)*. For Cicero and the Christian thinkers the answer is clear: The source of human dignity is *external*. They derive the unchangeable inner worth of human dignity from an *external* legitimation, an external source of value. Cicero roots it in the stoic *logos as law of the world* and Christian thinkers root it in God's creation of the world, the creation of man as God's image and the divine hierarchy of *leges* (*lex aeterna*, *lex naturalis*, *lex divina*, *lex humana*). Therefore, the external source of human dignity can be characterized as *heteronomous*, not autonomous.

2. Renaissance

In the Renaissance we find the term *dignitas* e. g. in Bartolomeo Fazio's *De excellentia et praestantia hominis* (1447) and in Giannozzo Manetti's *De dignitate et excellentia hominis* (1452), but it is not very central. These tracts about the *conditio humana* are directed against the medieval literature of misericordia, especially against Pope Innocent III's: *De miseria humanae conditionis* (1194/95). They are attacking the idea that man is bad from nature because of the original sin. They want to show that man is good because he is created as image of God with reason etc. In Renaissance we find a positive, optimistic notion of man. The Renaissance has set the person at the highest position that is at the centre of its anthropology without relying on religious foundations. However, dignity is not characterized as a special quality and no ethics with lasting influence was developed on this basis.

Some have thought that Pico della Mirandola is an exception. But his *Oratio quaedam elegantissima* from 1486 was only long after his death famously titled *De hominis dignitate* by the editor Jacob Wimpfling in his Strassburg edition from 1504, perhaps with the aim to show that this tract is in line with the Christian doctrine. Nonetheless, "dignitas" is not mentioned in the text. Pico puts the human being on top of a hierarchy, able to perfect himself. So the human being is not fixed and predetermined. He can sink to be like a beast and rise to be like a God. But dignity is not mentioned as a special quality. One can assume that this characterization is avoided consciously, because Pico does not propose a fixation of the human character with reference to man's creation by God, his God-like image or his reason.

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[3] Cf. J. Lenz, 'Die Personwürde des Menschen bei Thomas von Aquin', *Philosophisches Jahrbuch* 49 (1936), pp. 139-166.

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What is the reason that these early Renaissance thinkers, like Pico, did not use the term "dignity" and that they, like Manetti, did not put it in a central position of their argumentation? I think they wanted to avoid the religious loaded, heteronomous concept of dignity, which was coined by the Christian thinkers. In Renaissance, man is thought as autonomous beings, for example by Pico. Against this background, the religious and heteronomous understanding of dignity does not fit very well.

3. Early Modernity and Kant

Dignity does not play a role at all in the tracts of the major new thinkers of early modernity – that is of the 17th century – like Grotius, Descartes, Hobbes, Locke or Spinoza. The reason was probably the same as for the philosophers of the Renaissance: they wanted to avoid the religiously loaded, heteronomous concept of dignity coined by the Christian thinkers in late antiquity and the middle ages.

Only Pufendorf, who referred much more than the Western thinkers – that is English, French and Dutch ones – to the tradition of Aristotle and Christian theologians, mentions "dignity", albeit briefly. In *De jure naturae et gentium libri octo* from 1684 he writes:[4] "The dignity of man above all animals is revealed especially by the fact that he is equipped with a noble soul, which is able to understand and differentiate the things with extraordinary insight, to attain or dismiss them with an outstanding movability. […] This faculty of the human soul, which contains an image of higher insight, is result of reason (*Ex hoc igitur dignitas hominis prae brutis maxime elucet, quod iste nobililissima praeditus est anima, quae & insigni lumine circa cognoscendas & dijudicandas res, & exquistia nobilitate circa easdem adpetendas aut resiciendas pollet*. […] *Illa porro animae humanae potentia, quae instar aliquod luminis gerit, intellectus nomine venit*...)." This is – mentioning the soul as image of God – still a religious, external and therefore heteronomous concept of dignity, not an internal, autonomous one. There was no significant reception of this concept of Pufendorf or of the concept of human dignity in general by other natural-law-theorists of the 17th or 18th century, like Thomasius, Wolff, Achenwall and Hufeland.

Only Kant has finally stressed the dignity of man in his *Groundwork of the Metaphysics of Morals* (*Grundlegung zur Metaphysik der Sitten*) from 1785 by giving it a new *autonomous* and therefore *non-religious* understanding.[5] This has prompted some interpreters to assign dignity a central role in Kantian ethics.[6] This, however, should be

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4 Samuel v. Pufendorf, *De jure naturae et gentium libri octo*, I, 3, 1.

5 Immanuel Kant, *Groundwork of the Metaphysics of Morals/Grundlegung zur Metaphysik der Sitten*, Academy-Edition, Vol. IV, Berlin 1903/11, pp. 434 f. See for an interpretation of the notion of human dignity in Kant, Dietmar von der Pfordten, 'On the Dignity of Man in Kant', in: *Philosophy* 84 (2009), pp. 371-391. German: 'Zur Würde des Menschen bei Kant', in: *Recht und Sittlichkeit bei Kant*, Jahrbuch für Recht und Ethik, ed. Sharon Byrd et. al. 2006, pp. 501-517.

6 Neil Roughley, article 'Würde', in: Jürgen Mittelstraß (ed.), *Enzyklopädie Philosophie und Wissenschaftstheorie* vol. 4, Sp-Z, Stuttgart/Weimar 1996, pp. 784-787, p. 784; Josef Santeler, *Die Grundlegung der Menschenwürde bei I. Kant*, Innsbruck 1962.

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stated with caution for a number of reasons.[7] In the more extensive elaboration of his ethics in the *Critique of Practical Reason* (*Kritik der praktischen Vernunft*) from 1788, which is particularly important in the overall context of his critical project, the term does not occupy any significant position and is mentioned only twice *en passant*. In the second part of the *Metaphysics of Morals* (*Metapysik der Sitten*) from 1798, it only appears again in the *Doctrine of Virtue* (*Metaphysische Anfangsgründe der Tugendlehre*) but not in the *Doctrine of Right* (*Metaphysische Anfangsgründe der Rechtslehre*) In the *Groundwork of the Metaphysics of Morals,* the term dignity appears relatively late, namely in the course of explaining the third formula of the categorical imperative. Yet the concept of "human dignity" is often, and mostly without further discussion, associated[8] with the second formula of the categorical imperative: "So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means".[9] This is the case with the widely accepted interpretation[10] of the Federal Constitutional Court of Article 1 Paragraph 1 of the German Constitution, the prohibition of violating human dignity ("object formula").[11] However, in the course of developing the second formula of the categorical imperative, Kant does not refer to dignity at all.[12] This cannot be a coincidence. The second formula of the categorical imperative demands the recognition of others and of the agent himself as an end. However, this demand is formulated from the perspective of the individual agent. Only in the context of the kingdom of ends the perspective of a detached, godlike observer is taken, who is explicitly not an addressee of the categorical imperative. Only in this detached, godlike perspective, which Kant associates with the

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[7] Cf. for more details: Dietmar von der Pfordten, 'On the Dignity of Man in Kant', in: *Philosophy* 84 (2009), pp. 371-391.

[8] Beat Sitter-Liver, 'Würde der Kreatur: Grundlegung, Bedeutung und Funktion eines neuen Verfassungsprinzips', in: Julian Nida-Rümelin/Dietmar von der Pfordten, *Ökologische Ethik und Rechtstheorie*, 2. ed. Baden-Baden 2002, pp. 355-364, p. 359. Norbert Hoerster, 'Zur Bedeutung des Prinzips der Menschenwürde', *Juristische Schulung* 23 (1983), pp. 93-96, p. 93 equals without further reference the second formula with means in itself.

[9] Immanuel Kant, Groundwork of the Metaphysics of Morals/Grundlegung zur Metaphysik der Sitten, p. 429.

[10] The formula goes back to Günter Dürig, 'Der Grundrechtssatz von der Menschenwürde', *Archiv des öffentlichen Rechts* 81/2 (1956), pp. 117-157, p. 128: "It is a violation of human dignity as such if a human being is treated like an object by a legal proceeding."; id., in: Theodor Maunz/Günter Dürig (eds.), *Grundgesetz. Kommentar*, München 2001, Art. 1, Rn 28. Cf. Tatjana Geddert-Steinacher, *Menschenwürde als Verfassungsbegriff. Aspekte der Rechtsprechung des Bundesverfassungsgerichts zu Art. 1 Abs. 1 Grundgesetz*, Berlin 1990, p. 31ff.

[11] *BVerfGE* 5, 85 (204); 7, 198 (205); 27, 1 (6): "It is against human dignity to make a human being to a mere object of the state."; 28, 386 (391); 45, 187 (228); 50, 166 (175); 56, 37 (43). Cf. Christian Starck, 'Menschenwürde als Verfassungsgarantie im modernen Staat', *Juristenzeitung* 36 (1981), pp. 457-464.

[12] Therefore incorrect: Philipp Balzer/Klaus P. Rippe/Peter Schaber, *Menschenwürde vs. Würde der Kreatur: Begriffsbestimmung, Gentechnik, Ethikkommissionen*, S. 23. The quoted page BA 79, 80 does not mention the second formula but only the rest of the third formula and a summary of all formulas. In the context of the second formula at BA 66f. dignity is not mentioned.

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category of totality but not of plurality, which is associated with the second formula,[13] Kant mentions the dignity of man.[14]

What is the difference between the state of being an end in oneself and the dignity of man? Kant defines "dignity" as the quality of a rational being "who obeys no law other than that which he simultaneously gives himself."[15] Accordingly, it is a crucial condition that every being capable of dignity is himself the *author* of his own ethical restrictions. This is not yet necessarily established by the second formula of the categorical imperative, that is, the "end-in-oneself-ness" formula, for the recognition of others as ends in themselves only requires that the agent does not use others as mere means. And this does not say anything about *the reason why* he must not use others as mere means, that is, it does not make explicit on which foundation the obligation to recognize the independent ends of others rests. For it is not explicitly set forth that the obligation to recognize the ends of others and of oneself necessarily derives from the other and oneself as possessors of these ends. After all, one might also conceive of an ultimate obligation posed, say, by divine law, that is a heteronomous source. The second formula of the categorical imperative, the formula of ends-in-themselves (*Selbstzweckformel*), only states the necessity to ethically consider human beings for their own sake.

Only when Kant defines the human being as self-legislating and as member of the legislating kingdom of the ends of all rational beings, that is as an autonomous being, does he exclude an ultimate relativization of the "end-in-himself-ness" of persons to other normative sources, that is, to heteronomous sources lying beyond the affected individual in question, e.g. in God. Such alternative, heteronomous sources are excluded in two ways: First, the classification of individual human beings in the legislating kingdom of ends makes the idea of the completeness of the end-determining entities possible. The kingdom of ends represents a "whole of all ends."[16] Second, as mentioned before, God, as well as other possibly existing rational beings, is integrated into the kingdom of ends. The formula of ends in themselves is restricted to humanity, at least in its explicit formulation; by contrast, the "kingdom of ends" consists, according to Kant, not only of "members" – which, though universally legislating, are also subject to

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13 Immanuel Kant, Groundwork of the Metaphysics of Morals/Grundlegung zur Metaphysik der Sitten, p. 436

14 However, the identification of dignity and means in itself occurs 14 years later in the *Metaphysics of Morals*: Immanuel Kant, *Metaphysics of Morals/Die Metapysik der Sitten*, Academy-Edition, Vol. VI, Berlin 1907/1914, p. 462: "Humanity itself is a dignity; for a human being cannot be used merely as a means by any human being (either by others or even by himself) but must always be used at the same time as an end. It is just in this that his dignity (personality) consists, by which he raises himself above all other beings in the world that are not human beings and yet can be used, and so over all *things*." The bracketed notion "personality" after the notion dignity shows that it is here used differently than before in the Foundations. Norbert Hoerster, *Zur Bedeutung des Prinzips der Menschenwürde*, p. 96, tellingly omits the bracketed notion (personality).

15 Immanuel Kant, Groundwork of the Metaphysics of Morals/Grundlegung zur Metaphysik der Sitten, p. 434.

16 Ibid, p. 433.

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these laws – but also includes a legislating "head" which is not subjected to any law.[17] While Christian tradition rooted human dignity in the heteronomous dependency of human beings on God[18] Kant now conversely construes the dignity of man as partial equality of human beings and God as the moral legislator in a common legislating kingdom of ends. This idea of autonomous self-legislation and of the legislating kingdom of ends leads to the postulate that only rational beings can be legislating in the kingdom of ends. Since animals are not rational in this substantial sense, they cannot be awarded the status of legislating members in the kingdom of ends. According to Kant, they cannot claim internal, morally relevant dignity like human beings. For Kant there are no direct ethical obligations *to* animals, only obligations to other humans *with regard to* animals.[19]

The explicatory difference between the quality of "end-in-oneself-ness" and self-legislation as precondition of dignity becomes apparent in various places. Kant writes: "but that which constitutes the condition under which alone something can be an end in itself has not merely a relative worth, that is, a price, but an inner worth, that is, dignity."[20] Dignity is characterized here as an explication of the "condition" of "end-in-oneself-ness," not as a direct explication of "end-in-oneself-ness." Elsewhere Kant writes: "*Autonomy* is therefore the *ground* of the dignity of human nature and of every rational nature."[21]

Thus, self-legislation, the autonomy of man, is the central source of normativity in Kantian ethics. In the context of a kingdom of ends this self-legislation constitutes the dignity of man. It leads in conflict situations of individual ethics to the obligation to respect the "end-in himself-ness" of the other or of oneself as part of humanity. Among all living beings only human beings are to be respected as end in themselves and only human beings have dignity. However, dignity is not the ultimate source of ethical obligation. The ultimate reason for ethical obligation rather lies in the human capacity of self-legislation, in the "fact of reason"[22] or in the "moral law within me".[23] Dignity as absolute "inner worth" is an idealistic-analytic specification of this ultimate source of ethical obligation, namely, the idea of the legislating status of the human being in the kingdom of ends. By contrast, the obligation to respect the "end-in-oneself-ness" in

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17 Ibid.

18 For a modern version of this view see Josef Santeler, *Die Grundlegung der Menschenwürde bei I. Kant*, p. 282.

19 Immanuel Kant, Metaphysics of Morals/Die Metaphysik der Sitten, p. 442. Cf. Dietmar von der Pfordten, Ökologische Ethik. Zur Rechtfertigung menschlichen Verhaltens gegenüber der Natur, pp. 42 ff.

20 Immanuel Kant, Groundwork of the Metaphysics of Morals/Grundlegung zur Metaphysik der Sitten, p. 435.

21 Immanuel Kant, Groundwork of the Metaphysics of Morals/Grundlegung zur Metaphysik der Sitten, p. 436.

22 Immanuel Kant, *Critique of Practical Reason/Kritik der praktischen Vernunft*, Academy-Edition, Vol. V, Berlin 1908/13, p. 31.

23 Ibid p. 161.

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accordance with the second formula of the categorical imperative is an explication of this ultimate reason from the perspective of the direction of the act in the more specific conflict case. However, this specific Kantian view of the basis of ethical obligation is problematic.[24] The premise of a moral law inherent to human beings and of their autonomy in a strong sense is metaphysical and hence questionable.

After Kant the concept of human dignity played neither in Hegel nor in Fichte or Schelling a central or only elevated role. It is only rarely used *en passant*.

Fichte mentioned it, e. g. in *Das System der Sittenlehre* from 1798, in a clearly religious, that is heteronomous sense:[25] "The dignity of each human being depends especially on that he directs his business on a reasonable end or, what means the same, the end of God and that he could say to himself: It is God's will what I am doing. (*Die Würde jedes Menschen, seine Selbstachtung und mit ihr seine Moralität hängt vorzüglich davon ab, dass er sein Geschäft auf den Vernunftzweck, oder, was dasselbe heißt, auf den Zweck Gottes mit dem Menschen beziehen, und sich sagen könne: es ist Gottes Wille, was ich tue*.)." And in the afterword to his lectures with the title *Über die Würde des Menschen* from 1794 we do not find the term mentioned. The main conclusion of the text is the following:[26] *"All individuals are enclosed in the one great unity of the pure spirit.* (*Alle Individuen sind in der einen großen Einheit des reinen Geistes eingeschlossen.*)."

In Hegel's *Grundlinien der Philosophy des Rechts* from 1821 one does not find a significant mentioning, only occasionally the phrase "*sittlicher Wert und Würde*". In the *Vorlesungen über die Philosophie der Religion* from 1832, Hegel writes concerning natural religion:[27] "But to the contrary, man has total worthlessness here [i.e. in natural religion], because man does not have dignity through that what he is as immediate volition, but only insofar as he knows from an in-and-for-itself-being, a substance and submits his natural will to him. (*Aber im Gegenteil, vollkommenen Unwert hat hier* [*in der Naturreligion*, DvdP] *der Mensch – denn Würde hat der Mensch nicht dadurch, was er als unmittelbarer Wille ist, sondern nur indem er von einem Anundfürsichseienden, einem Substantiellen weiß und diesem seinen natürlichen Willen unterwirft und gemäß macht.)."*

In Schelling we find only two citations in the edited volumes of the academy-edition. In the Allgemeine Übersicht der neuesten philosophischen Literatur from 1797 and in the Philosophisches Journal he writes:[28] "dignity of human nature (Würde der

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24 For further criticism see Dietmar von der Pfordten, *Ökologische Ethik. Zur Rechtfertigung menschlichen Verhaltens gegenüber der Natur*, Reinbek 1996, pp. 42 ff.

25 Johann Gottlieb Fichte, Das System der Sittenlehre nach den Prinzipien der Wissenschaftslehre, p. 362.

26 Johann Gottlieb Fichte, *Über die Würde des Menschen*, p. 416.

27 Georg Wilhelm Friedrich Hegel, *Vorlesungen über die Philosophie der Religion*, Werke 16+17, Frankfurt/M. 1986, p. 301.

28 Friedrich Wilhelm Joseph Schelling, 'Allgemeine Übersicht der neuesten philosophischen Literatur'*, Philosophisches Journal,* Akademieausgabe*,* Vol. 4, Stuttgart 1988, p. 65, 99.

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menschlichen Natur)" and "dignity of human spirit (Würde des menschlichen Geistes)."

The decrease of the importance of the concept after Kant shows that Kant's successors did not regard the Kantian use of the concept as being important, especially his autonomous understanding. Instead we face a revival of the heteronomous understanding of the concept. This can perhaps explain why the concept of human dignity could not influence the human-rights movement in the late 18th and 19th century at all. This progressive movement had obviously no reason to return to a heteronomously and religiously understood concept of the Middle Ages.

II. Systematic Suggestions

The first main systematic question is whether human dignity shall be understood as an (1) *unchangeable, essential inner worth of men* or as (2) *a contingent property* like a) status/rank/office, b) behavior, c) esthetic expression, which leads at best to an *intersubjective* and *external* understanding of the concept.

1. Criticism of reductionist contingent or intersubjective conceptions

Contingent and/or intersubjective interpretations of human dignity reduce its significance in comparison to our highest-ranking interests such as life, health, mental and physical integrity. Such interpretations turn human dignity into one interest among others that can be delimited. This shortcoming holds for the view that human dignity is constituted by the recognition of others[29] or consists in the external representation of self-respect[30] and, hence, leads to the demand of non-degrading and respectful treatment by others promoting self-esteem. Nobody will deny that we have a legitimate interest to be recognized by others and to be treated with respect. However, identifying this interest, high ranking as it may be, with human dignity is problematic for three reasons: First, certain behavior can be disrespectful without violating human dignity. If somebody sneaks something from someone else's plate we would consider this as disrespectful and in certain cases even degrading. Yet, we would not consider this to be a violation of that person's dignity. Also, if somebody makes disparaging remarks about an absent third person we would consider this behavior as disrespectful, however, not as affecting that person's human dignity. Second, such a contingent and intersubjective view of human dignity has difficulties in explaining human dignity as pertaining to certain stages in life or certain forms of life, e. g. comatose persons and newborn children. These people have no present need for recognition or respect. Third, such a contingent or inter-subjective interpretation of human dignity contradicts our

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29 Hasso Hofmann, *Die versprochene Menschenwürde*; Peter Baumann, 'Menschenwürde und das Bedürfnis nach Respekt', in: Ralf Stoecker (ed.), *Menschenwürde. Annäherung an einen Begriff*, Wien 2003, pp. 19-34, p. 26-29.

30 Cf. Avishai Margalit, *The Decent Society*, Cambridge 1986, pp. 51 f.; Julian Nida-Rümelin, *Über menschliche Freiheit*, Stuttgart 2005, pp. 131 ff.

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general view about the status of dignity in the structure of different interests. On the one hand we believe that the value of human dignity is at least on the same level with life, health, mental and physical integrity (which does not say whether they can be balanced against each other). On the other hand we see that in all recent constitutions or human rights systems, human dignity is either set above or at least beside these most important interests of people.[31] Therefore, one has to conclude that human dignity cannot be interpreted as contingent or inter-subjective but needs to be interpreted as being necessary and essential. It is at least on par with our most important interests such as life and bodily integrity.

According to another view,[32] human dignity manifests itself in a *group of indispensable rights.* These indispensable rights include first the right to have the goods necessary for biological existence, second the right to be free from grievous and constant pain, third the right to a minimum of general freedom, and fourth the right to a minimum of self-respect. It goes without saying that these interests or rights are essential and need to be considered. However, it is questionable why only these rights should be assembled under the label "human dignity". This compilation does not meet the common and at the same time specific aspect of human dignity.[33]

It is however correct that a violation of human dignity is equivalent to a special *humiliation* and *degradation*.[34] Human dignity implies a right not to be degraded. But what does this mean? Somebody is degraded if he cannot respect himself. The dignity of a person exists in his self-respect. At first sight this appears to be clear. However, this characterization is still insufficient. Self-respect is nothing else than a form of self-assessment. However, self-assessment can refer to a variety of things. Somebody can for example lose his self-respect if he does not pass an exam or if he is not as successful at a sport as he wishes. However, in these cases we would not say that his human dignity was violated. Therefore, degradation and humiliation must be directed at a certain central quality of the human being, which is an essential and indispensable part of his self-respect.

2. Human dignity as being a master of one's own interests and concerns

The answer to the question about human dignity should start from the basic ethical insight of normative individualism. Accordingly, individuals have to be the ultimate point of reference of ethical justification.[35] If only individuals can be the ultimate ethi-

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31 Cf. Art. 1 I of the German Basic Law: "Human dignity shall be inviolable." UN-Charter; EU-Human Rights Charter.

32 Dieter Birnbacher, 'Ambiguities in the Concept of Menschenwürde', in: Kurt Bayertz (ed.), *Sanctity of Life and Human Dignity*, Dordrecht/Boston/London 1996, pp. 107-121, p. 110 ff.

33 For a criticism see Philipp Balzer/Klaus P. Rippe/Peter Schaber, Menschenwürde vs. Würde der Kreatur: Begriffsbestimmung, Gentechnik, Ethikkommissionen, p. 27.

34 Philipp Balzer/Klaus P. Rippe/Peter Schaber, Menschenwürde vs. Würde der Kreatur: Begriffsbestimmung, Gentechnik, Ethikkommissionen, p. 29.

35 Dietmar von der Pfordten, *Normative Ethik*, Berlin 2010, pp. 22 ff.

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cally authority and if they can principally decide autonomously about justifiable qualities, then the more concrete generalized interests such as mental and bodily integrity do not necessarily exhaust the amount of possible interests. The first and foremost interest is instead the second order wish or interest to have primary interests (which can be either, aims, wishes, needs or strivings). This second order wish is necessary for humans and an internal, not external, one.

The key to the understanding of necessary human dignity is found in an important insight: There is a basic difference between the four morally relevant qualities – aims, wishes, needs and strivings. Strivings and needs cannot be directed at other strivings, needs, wishes or aims. Hence, there are no strivings after strivings and needs after strivings or needs. But there are second order wishes and aims with regard to first order strivings, needs, wishes and aims. Therefore, we can develop the wish to feel the striving to do more sports or the wish to listen to nice music. We can also develop the aim to reduce our need for sleep, to limit our strivings for sweets and to set ourselves more ambitious ecological aims. In contrast to needs and strivings, wishes and aims can be iterated, i.e. they are possible second order qualities with regard to other morally relevant qualities. The reason is perhaps that only wishes and aims are necessarily *intentional* while this is questionable or contingent in the case of strivings. Only because wishes and aims are intentional, they can refer to other morally relevant qualities. Intentionality is in these cases not only *representational* but *evaluative*. Because of our wishes and aims we do not only have the ability to represent morally relevant qualities but also to evaluate them. In this way we can establish our own, subjective order among our morally relevant qualities. We are, for instance, able to super-ordinate the aim to finish a letter over the need to eat something.

Human dignity hence means necessary and internal self-determination and openness of decisions, i.e. of wishes and aims, concerning one's own interests and their importance.[36] An essential part of our self-understanding and of our self-respect is based on this self-determination and openness of our decisions over our aims, wishes, needs, and strivings. The need for recognition of this kind of self-understanding and self-respect is then only a secondary result of human dignity, not its basis.

This interpretation of human dignity as necessary and internal self-determination of one's own interests fits very well to the frequently found identification of human dignity with a ban of total instrumentalization of others as expressed in Kant's second formula of the categorical imperative (it can however not be based on Kant's writings at the time of the *Groundwork of Metaphysics of Morals*[37]).[38] When asking what it can

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36 Harry Frankfurt, 'Freedom of the Will and the Concept of a Person', in: id., *The Importance Of What We Care About, Cambridge* 1988, pp. 11-25, argues that for the concept of a person second-order-volitions are decisive. These refer to first order motivational reasons.

37 See above and Dietmar von der Pfordten, *Zur Würde des Menschen bei Kant*.

38 Immanuel Kant, *Foundations of the Metaphysics of Morals*, p. 429: "Act in such a way that you treat humanity, whether in your own person or in the person of any other, always at the same time as an end and never merely as a means to an end."

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mean to treat someone only as a means the answer cannot merely be: having a single ethically relevant quality disregarded, i.e. a first order interest. In contrast, negating actual or potential wishes and aims concerning one's own interests – i.e. negating second order ethical qualities – implies disregarding all first order interests at the same time as well. For if someone cannot even decide about his wishes and aims with regard to his own interests, then all first order interests are also devaluated as they are not genuine. Someone who negates second order interests also negates all first order interests even if he does not affect every first order single interest directly and independently. In this way it can be explained how a person can be used only as a means.

Conceiving human dignity as self-determination of one's interests can also explain why the notion of human dignity as a point of view on morality and law appears much later in constitutions and human rights declarations than the protection of first order interests such as life, bodily integrity, freedom and property. As it is the case with all meta-phenomena, reflecting on self-determination of one's own interests is an abstract activity that requires knowledge and protection of primary interests in the first place, such as life, bodily integrity, freedom and property.

Dignity conceived as the necessary and internal ability of human (or other rational) beings to reasonable evaluate on a meta-level one's own aims, wishes, needs, and strivings is the indispensable basis for self-respect, which in turn is the necessary ability of being self-contained and having internal independence. However, this ability is not just the ability to act morally as first order needs, wishes, and aims need not necessarily be directed at others but can also relate only to the agent himself. Nevertheless, it is a necessary condition to act morally because every genuine moral action requires a restriction of one's desires and appetite/drives on an evaluative meta-level.

Defining dignity as ability to assess one's own and others' wishes and interests on a meta-level has the advantage that it does not require strong metaphysical or religious premises. It can also be accepted by metaphysical skeptics and agnostics. However, Christians or other believers may interpret dignity in a religious way. An essential aspect of man being created in God's image would then consist in the ability of human beings to reflect on a meta-level one's own and others' interests.

3. Concrete dangers: forcible tube feeding, lie detectors, torture

Defining necessary, internal dignity of a human being as his actual or at least potential ability to reasonable – or at least potentially reasonable – draw reference to his own or others' first order needs, wishes and aims can help to explain concrete dangers for dignity, such as *forcible tube feeding*, the *use of lie detectors* and *torture*.

If prisoners decide to go on hunger strike, they have assessed their first order needs and wishes in a highly unusual way. They have subordinated their highest need of absorbing food for life preservation, which usually trumps all the other needs, to the secondary wish for political or humanitarian protest. This is an act that strikingly demonstrates the ability to relativize one's first order needs and wishes on a second, higher level. It is thus an act that manifests the dignity and internal independence of prisoners in an eminent way. Forcible tube feeding suppresses this exercise of independence and

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manifestation of dignity of prisoners and therefore violates their human dignity – at least as long as the prisoners are conscious. If they lose their consciousness, tube feeding does not violate their dignity as it is strictly speaking no longer forced. However, the wish not to be tube fed even in case of unconsciousness needs to be heeded as well.

Using a lie detector works in a comparable way. If defendants lie, they evaluate their own interests and the interests of the prosecuting body on a meta-level. They decide against cooperating with the prosecuting body and accept the risk of being proven untruthful. The possibility of second order assessment and with it the exercise of the human dignity is barred by using lie detectors. Therefore, using them or similar means like psychiatric drugs violates human dignity.

Why is torture a violation of human dignity? Inflicting pain without approval as well as the purpose of breaking someone's will contradicts important needs, wishes, and aims of the affected person and is therefore to be evaluated as negative. However, there can be certain situations in which some forms of negative effects on individuals are justified, such as a conviction to imprisonment because of a criminal offence (inflicting pain) or usage of force by the police to avert dangers (breaking the will). The characteristic aspect of torture lies in the *purposive connection of both* negative evaluated effects, thus in the connection of the instrument of inflicting physical and mental pain with the aim of breaking the will. Thus, physical or mental pain is afflicted *with the very aim* to break the second order will. Due to the pain, the body or the psyche of the tormented person does not express, as it is usually the case, the person's own will but virtually the foreign will of the torturer.

Thereby, torture sets the will of the tormented person not to reveal anything in destructive opposition to the person's own body or his own psyche, which makes the pain intolerable for him and which forces the confession. The natural unity of the human being, of will and body or psyche is torn apart. The tormented person experiences that his natural unity as a free, self-determined being and as a sensitive body and soul is denied. The natural ability to decide through wishes and aims over one's physical strivings and needs is hence eliminated.

4. Borderline cases

One may ask at this point whether, according to this definition, embryos, babies, and comatose persons have necessary, internal dignity. If one conceives of human dignity in the narrow way, as explained above, one cannot hold for these persons that an existing ability to assess aims, wishes, needs and strivings at a second order is violated. The interests of these persons are to be ethically considered, such as their interest to continue to live or their interest to be free of pain. However, they cannot be violated in their existing second order self-determination. Yet, one has to take into account pre-effects and after-effects of abilities on the second order. In the same way as actions that will damage somebody only in the future are already morally wrong in the present, the future actualization of the ability to assess on a second level is already vulnerable in embryos and babies, for instance if they are cloned or selected. In the same way necessary, internal dignity of comatose persons continues to exist as a claim on others as the

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now comatose had directed their self-determination upon a future up to the end of their lives and, in some aspects, even post mortem before falling into coma. Moreover, one can never be certain that a person does not gain the ability to exercise his self-determination about his interests again. Therefore, one has to hold that human beings from the beginning of life, that is already before birth, with the fusion of ovum and spermatozoon with regard to some aspects, up to the end of life and, with regard to some other aspects, even after life, have necessary, internal dignity.

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Practical Reason, Ius, and objectivity on Human Rights

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1. Introduction

Article 1 of the Universal Declaration of Human Rights (UDHR) states: "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." It is built with three 'building blocks'. A fact, a duty and a link between the ontological reality and the ethical obligation. The fact states a situation, a starting point, all human being exists with an inherent dignity and essential rights. The duty description falls upon everyone who claim those rights: "should act towards another" with solidarity, as members of the same family. The epistemological section –an inherent vehicle of knowing human rights- is described as "reason and conscience"[2].

What kind of rational operations must be performed to enter into the realm of human rights? What kind of 'facts' must be taken into consideration to reach a reasonable conclusion related to human rights?

If we notice, the Enlightenment ideas and language of inherent rights can be recognized in the first and factual section of the article. But if we look closely, there is no *right* claimed in the first article of this declaration of *rights*. In fact, there is a call to solidarity and a duty to be performed by the right holder. There is a rational argument to be built and a conscience duty to be fulfilled. It seems that an emphatic 'right holder' who recognize his own duties next to his rights, replaces the Enlightenment individual, with his essential autonomy and freedom[3].

What does this mean? What consequences of this approach can be followed in our understanding of human rights?

We think that UDHR, with some of its roots grounded in Enlightenment soil, requires a new understanding of human rights and our practical discovering of these rights. Enlightenment's school of thought understands human rights as entitlements and claims of an individual that express his autonomy and freedom through those rights.

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[2] The first recital of the Preamble has a similar idea: recognition (an epistemological statement) of an inherent and universal human rights (ontological statement): "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"

[3] For he drafting process and is relation with Enlightenment, see Glendon, Mary Ann, A world made new. Eleanor Roosevelt and the Universal Declaration of Human Rights, Random House, 2001; Morsink, Johannes, The Universal Declaration of Human Rights: Origins, Drafting and Intent, University of Pennsylvania Press, 1999, specially Chapter 8; Morsink, Johannes, The Philosophy of the Universal Declaration, Human Rights Quarterly, Vol. 6, no. 3 (1984), pp. 309 y ss. Also see, Charles Malik, The Challenge of Human Rights: Charles Malik and the Universal Declaration", edited by Habib C. Malik, Oxford: Center for Lebanese Studies, 2000.

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When these abstract and faceless human beings determines its human rights, he does not sees as starting points neither the reality nor the objectivity of the facts; the 'things' are not relevant. These 'individuals' demand only its equal freedom to claim their rights; individual wills who express their desires through rights that must be respected. Is it an abstract freedom or is the will of individual a reasonable ground to respect human rights? Can we discover the shared rights of a shared with humanity if freedom and will as the starting point?

UDHR recognizes that common humanity has essential links to reason, and a conscience as a process of discovering and commitment to rights of solidarity. We will try to explain what kind of "reason" and "conscience", what kind of "reality" is known by a reason that oversees the individual just as an atom of freedom and autonomy. Our argument will have three sections: (i) the relevance of recovering the understanding of *ius* not only as "right"; (ii) how certain realities are relevant to determinate human rights besides freedom and bare dignity; and (iii) what kind of acts are performed by the "reason and conscience" in order to integrate those aspects of reality in the responsibilities implied in 'solidarity' or *spirit of brotherhood*.

2. '*Ius*' as the proper balance of 'rights'.

Ordinarily, we understood human rights as subjective rights. Faculties of the human person that express her autonomy and the requirements for the fulfillment the basic human needs and purposes, in other words what human dignity entitle to as claims. Rights considered as "protected choices and as protected interests"[4] with a basic scheme: a "right holder" with a correlative "duty-bearer". In human rights documents, the "right-holder" usually is determinate as "a individual human being (…) located at the center of a whole series of concentric circles of duty-bearers […] extended from our families and next of kin to our local communities with their school boards and the like, to regional and state affiliations, and from there to states and international organization like the United Nations, all the way until we reach the human family"[5]

This description of human rights focused its interest on the basis of moral rights that belong to an individual subject, that 'right' allows him to claim against an unfair intromission or unjust omission. This approach centers its analysis in a subject, an individual, with entitled *right* that can claim something in its benefit from another one. The weight of the concept is on "qualities", "faculties", "entitlements" or "claims" of the individual. A *power* "drawn from the being itself of the subject, from his essence, from his nature" [6].

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[4] Tierney, Brian, The idea of natural rights: studies on natural rights, natural law, and church law, 1150-1625, Emory University, 1997, p. 7.

[5] Morsink, Johannes, Inherent Human Rights. Philosophical Roots of the Universal Declaration, University of Pennsylvania Press, 2009, p. 44.

[6] "Donc ce terme de droit subjectif désignait cette espèce de droit qui serait en dernière analyse tire de l'être meme du sujet, de son essence, de sa nature" Villey, Michelle, "Droit subjectif, I", in Seize Essais de Philosophie du droit. Dont un sur la crise universitarie. Dalloz, Paris, 1969, 145.

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Tierney states that in the origins of natural rights theories –and in human rights theories- "we can find an important shift of language, a new understanding of the old term *ius naturale*, as meaning a kind of subjective power or ability inhering in individuals"[7]. In his controversial account, Villey asserted that "subjective rights" was used as a claim –an 'eclosion'– by Ockham, a "Copernican moment" in jurisprudence which took place on 14th century. Since Ockham, *right* implies subjective rights as an "attribute of the subject", a power that "appertained to his essence, that was inherent in him". Finnis explains that "somewhere between the two men [Aquinas (1270) and the Spanish Jesuit Francisco Suarez (1610)], we have crossed the watershed", between *ius* as *the-just-thing-itself* and *ius* as a *facultas* or a "kind of moral power"[8].

The Tierney-Finnis debate [9] is focused on two issues: first, if medieval thinkers understood *ius* as 'subjective rights' –where to draw the line between the use of *ius* as '*the-thing-owed-to-another-one*' or *ius* as *right-to-claim* or *facultas*. And second, they debate on the meaning of 'subjective right'.

Finnis argues that the concept of *ius* includes a personal right or subjective claim, a *facultas*, because *ius* is not only 'the what's fair', "*the just thing itself*"[10] but also it takes into consideration the persons in relation through the just thing. If *Ius*, defined from objects, is an owed thing that manifests, expresses, and evokes the relation between two persons. Or if we rephrased the meaning, now from subjects, the relationship between two persons adjusted through the owed thing. A (i) *personal relationship element*[11], we may say a subjective aspect of (ii) the 'just thing'[12], an objective element. Therefore, '*ius*' could be defined from the 'just thing' to 'two persons related through it' or vice versa; but always including this two related components. Thus, a synonym of '*ius*' would be *just-thing-as-a-mean-of-personal-relationship* or *two-persons-related-through-the-just-thing*.

Tierney understands 'subjective rights' as a certain choice. "The word '*ius*' as used here (as we have explain) did not have the same meaning as our English word '*right*' used in a subjective sense. The modern word implies a certain freedom of choice, a freedom to act or not act in the relevant sphere"[13]. According to Tierney, even if we

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[7] Tierney, The idea of natural rights…, p. 8

[8] Finnis, John, *Natural Law and Natural Rights*, Clarendon Press, Oxford, 1980, p. 207.

[9] Cf. Tierney, Brian, "*Natural Law and Natural Rights. Old Problems and Recent Approaches*", The Review of Politics, Vol. 64, No. 3 (Summer 2002), pp. 389-404. In the same volume a Finnis' response could be found as "*Aquinas on ius and Hart on Rights: A response to Tierney*", pp. 407-410. The Tierney's Rejoinder appears on pp. 416-420.

[10] "[A] thing, action, object, state of affairs considered as subject-matters of relationships of justice"

[11] In Aquinas' account: "it is proper to justice… to direct man in his relations with others (…) for equality is in reference of one thing to some other [*quod iustitiae proprium est… ordinet hominem in his quae sunt ad alterum (...) Aequalitas autem ad alterum est*]"

[12] Therefore justice has its own special proper object over and above the other virtues, and this object is called the just, which is the same as "ius" [*Et propter hoc specialiter iustitiae prae aliis virtutibus determinatur secundum se obiectum, quod vocatur iustum. Et hoc quidem est ius.*]"

[13] Tierney, Natural Law and Natural Rights…, p. 392.

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accept that Finnis could find a subjective element on Aquinas account[14], the modern meaning of *right* and therefore, *subjective right* and *human rights* implies "the idea that persons have rights that others must respect", "choice rights", "liberty rights" or rights to a sphere of human autonomy or liberty.

In any case, both authors agree that our modern use of 'right' cannot be used as translation of '*ius*'. In consequence the translation from '*ius naturale*' to 'natural right' is not only a substitution of words but also a switch of meaning. If so, then, the transition from *natural rights* to *human rights* might be more than a justification of personal entitlements without a theological foundation explained by Grocio, Puffendorf and the Enlightenment.

How might this switch of meaning be relevant in human rights discourse? Let me use three examples. A criminal trial imposes just 'penalty'. If justice is to give everyone that which he deserves, to render to every man his due, or "*ius suum quique tribuere*", the criminal deserves and is owed his penalty. His punishment is his *ius*. It lacks any coherent meaning using the word *right* as a translation of *ius* if we understand that a penalty as a *ius* that must be given to its owner[15]. It is not commonly use the word *right* to describe a burden, a weight, a charge a punishment.

John Finnis offers this example. Gaius said "the '*iura*' of urban estates are such as the *ius* of raising a building higher and of obstructing the light of a neighbor's building, or of not raising [a building], lest the neighbor's light be obstructed; that [the *ius*] of allowing the dripping of rain-water on the roof or the ground of a neighbor (…)"[16] Here the use of *ius* covers either "*ius* of raising" or "*ius* of preventing a raising"; includes either "*ius* of the dripping of rain-water" or the "*ius* or not do so". Finnis explains that "[o]bviously, we cannot replace the word *ius* in this passage with the word *right* (meaning 'a right'), since it is nonsense (or, if a special meaning can be found, it is far from the meaning of this passage) to speak of a '*right not to raise one's building, lest the neighbor's light be obstructed*'."[17]

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[14] Besides, Tierney argues that we cannot say that 'there is a line' between Aquinas and Suarez about the meaning of '*ius*' as '*just thing*' or '*facultas*'; "because references to *ius* as *facultas* or *potestas* existed in the juridical language of Aquinas's own day", but he never uses in the sense of expression of autonomy.

[15] For example, the barbarous execution of a parricide is *ius*:, (D. 48.9.9) "as prescribed by our ancestors, is that the culprit shall be beaten with rods stained with his blood, and then shall be sewed up in a sack with a dog, a cock, a viper, and an ape, and the bag cast into the depth of the sea, that is to say, if the sea is near at hand; otherwise, it shall be thrown to wild beasts. [*Poena parricidii more maiorum haec instituta est, ut parricida virgis sanguineis verbaratus deinde culleo insuatur cum cane, gallo gallinaceo, et vipera, et simia; deinde in mare profundum culleus iactatur; hoc ita, si mare proximum sit, alioquin bestiis obiicitur]*". Villey use this example to show this nonsense. I do not want to distract with the cruelty aspect of this punishment. I just want to clarify the idea that the word 'right' do not describes correctly the meaning of 'ius'. This distinction it is part of the argument of this essay.

[16] D.8.2.2: "Urbanorum praediorum iura talia sunt: altius tollendi et officiendi luminibus vicini aut non extollendi: item stillicidium avertendi in tectum vel aream vicini aut non avertendi: item immittendi tigna in parietem vicini et denique proiciendi protegendive ceteraque istis similia."

[17] Finnis, Natural Law and Natural Rights…, p. 209.

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My last example will focus on human rights that protect certain freedom. A *right* to freedom of speech means the right to choose whether to speak or not; a *right* to freedom of movement means whether to travel or live in certain city or somewhere else. We understand freedom as a *right*.

A medieval jurist Pedro de Bellapertica (d. 1308), explains that our freedom—more specifically our inclination to it—is a fact, a datum, or 'a happening'. This natural capacity is a *fas* (faculty, fact) rather than a *ius* (right). There is a difference between the "*naturalis facultas*" to do something and the '*ius*' that would exist to do so. For example, going through a field of another one is allowed event (*fas est*), still there is no true right (*ius*) to do so […] because freedom is a natural faculty, not a right. In the same passage, Bellapertica points out that if the owner prohibits to going through without his permission, then, the fact (*fas*) has been introduced to the realm of 'rights' as *ius* or *iniura*[18]. We are dealing now with something more than freedom. To this jurist, freedom needs to be understood under the light of "personal relations" and "owed things" in order to become an *ius*.

Is this important to human rights? Freedom is relevant because in some rights it is the only way to make them relevant to the human being, as a person with dignity, like freedom to access to a situation—i.e. the right to marriage—or to realize it—i.e. the right to education-. But this freedom interacts with the fair adjustments between things, situations and persons.

If the human right to education is understand as a *subjective right*, the affair would be seen from a right-holder and his freedom in front of the duty-bearer and its burdens. Without the proper balance, it could obscure the objective requirements of the education by itself, its ends (*telos*), process, tradition, social capacities, state's possibilities its available resources, etc.

To center the analysis of the human right to education in its consideration as a '*ius*', the task would be the consideration of 'due things', the 'fair relationship between persons through this affair', the discovering of rights and duties of the persons and institutions required to develop the education. The task would be to establish an objectively adjusted state of affairs in the context of the education. The benefits and charges would be established accordingly: to the students, they would have the right to attend class and study, and the duty to answer an exam and to respect their classmates. If we notice, the fair requirements of the educational affair and the personal relationships created through it, illuminates the rights and duties of the people involve in the situation. Human rights would be not only an expression of an autonomy, and the respective right-holder facing a duty-bearer.

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18 "Per agrum alienum ire fas est... Sed per agrum alienum ire fas est, sed non ius. Ideo si dominus me prohibeat non ibo; sed si irem sibi tenerer actione iniurarum. Et ideo dicit est naturalis facultas. Non dicit quod est ius vel omnes homines liberi sunt non processit ex statuto; in hoc differt ius naturale a iure gentium, ut dixi. Nam omnia permissa sunt nisi prohibita sint; et ideo erat non ius uti plena libertate». Cfr. *Lectura Institutionum.* Printed by Forni, ed. 1536, «De iure personarum», no. 11, pp. 120-121. in Carpintero Benitez, Francisco, "*El Derecho Natural Laico de la Edad Media. Observaciones sobre su metodología y conceptos", Persona y Derecho*, vol 8, 1981, pp. 76-77.

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The language of rights to certain freedoms is focused on the minimum liberty required to live those realities as human persons and assume its consequences and responsibilities: the right to marry or not, to choose a profession or vocation of life, to choose religion or worship. Without freedom, we may not been able to fulfill the just requirements of these kind of affairs. We call 'rights' to the 'liberties' to engage those activities because in this case, freedom is not only '*fas*' -a fact- but also '*ius*'. But 'freedom as right' do not mean that everything 'that I want' or 'I can' is equivalent to 'I have a right, then you ought to'.

If human rights language reduces its sources to a scheme of "right in one side of the relation, duty in the other remote side", if human rights tightens its scope to be just a claim, a '*right*' it would be left without the real, objective and rational criteria that must be found through the objective and just requirements for an personal relationships adjusted through the owed things. "Individual autonomy" or a "mere dignity of the person" has not enough rational criteria to justify or determinate a human right or an owed situation. How can we determinate the right to education, if we focus our justification in a mere freedom to choose or not to be part of the educational process? Or, how can we determinate the right to free press considering only the *free will* element and forgiving the technical process of the media?

We know that actual language of human rights has an "emphasis on the powers of the right-holder, and the consequent systematic bifurcation between 'right' (including 'liberty') and 'duty' is something that sophisticated lawyers were able to do without for the whole life of classical Roman law"[19]. We are not trying to turn the clock back. We just want show how a human rights rational justification improves when it is balanced with the consideration of *ius*.

The rational justification of human rights that forget any consideration of the '*ius*', would be as misleading as thinking the human person *qua* human person with complete, finish and definitive rights. Because that kind 'person' is not real. Neither the person is just a person-*qua*-person, 'floating' by herself, demanding the fulfillment of individual desire and will, nor human rights are absolutely determined (completely finished) as an a priori abstract entitlement or requirement opposed to another one.

In the following section I shall describe some elements that may be necessary to consider in order to determine what configures and shapes the content of human rights. But I would like to clarify two ideas. First, the 'human rights' concept is commonly used as a (i) political goal, (ii) an ethical expression, moral object or a requirement of socially good behavior, (iii) a legal or juridical issue. These different points of view may have connections, but in any case, each one has different ways to rationally justify human rights within their realm; they have diverse means to protect or promote human conduct; they offer a distinctive kind of means to defend human dignity. Unfortunately, this confusion in the realm of human rights, or layer within human rights, misleads our understanding and expectation of the same.

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19 Finnis, Natural Law and Natural Rights, p. 209.

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'Human Rights' as a legal or juridical set of issues must deal with (i) state duties to respect, to assure, to protect, to promote or to fulfill, in relation with (ii) normative content or the right under consideration like life, freedom, work, and so on. The legal approach to human rights must find (iii) if can be an imputation to the state; must analyze if there is a viable (iv) judicial remedies and consider its procedural rules; and finally (iv) what kind of reparations can be requested. The rationality in this area is more technical and specific than the ethical description of UDHR's Article 1.

'Human Rights' as an ethical requirement embraces a wider range of issues and purposes than the legal approach. At the same time, it is different from the political use of 'human rights' as a goal of a political system. Because as an ethical issue, it shows a language of dignity as an end of human actions. A political approach must deal with the social relevance of the personal claims, the available resources, the different moral projects of people, the bureaucratic organization, etc.

And secondly, our account of human rights uses an abstract language but the real human right exist only "here and now" in a concrete case, with a concrete duty-bearer, and object of the right. The abstract language used by the Declaration of Human Rights or by any other general declaration has the task of indicating the general aspect of a human right, but the abstract description is not the real human right.

Therefore, I think that it is not necessary to say things like "my having a human right does not require that the corresponding duty-bearers be immediately identifiable. Since my having, for instance, the right to food depends only on my own humanity and since that presumably is not in question, I have that right even if it is not immediately clear who—among a range of possible duty-bearers—has the moral duty to actually feed me."[20]

The duty bearer is not identifiable in the general description, because the language of the general statements, and the description of *rights*, does not require that kind specification. Precisely because the concept is weighted to the side of the *right holder*. But a judge deals with concrete cases and situations and determines who are the right holder, who is the duty bearer and what is the concrete things, actions and situations that needs to be adjusted and ordered. Administrative authorities determinate—if the concrete person—'someone' who can be included in the formula "everyone has the right to"—fulfills the requirements to receive a specific benefit from social programs.

Something similar can be said when we deal with 'dignity issues' among human persons: that I am a real person with real and my concrete entitlements is related with another real people. General accounts of human rights do not deplete the real human right.

Sometimes, the emphasis on the claim of the right holder can mislead, because the excessive weight on that aspect can easily incite the conclusion that the right exists by itself without a concrete duty bearer or without any owed *just-things*. The real human

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[20] Morsink, Inherent Human Rights, p. 40.

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rights exist only if there is a clear duty bearer and a concrete situation in which the human right comes to be.

As we have said, in the language of the UDHR's article 1, the scheme "right-holder and duty-bearer" is contrasted—or better, watered down—with the call to solidarity and the recognition of duties of the owner of the rights as relevant as his claims. The person, who holds the right, is called to embrace his duty of solidarity. This duty is discovered by an 'inherent' capacity of knowledge. Article 1 implies that when a right holder discovers his right through "reason and conscience", he also discovers that the dignity claimed as foundation of his right is shared with the other members of the human family and in consequence he has a duty to fulfill. The dignity is used as the foundation of rights, but also as the source of duties of the right holder. The claims of his entitlements has are born of and are bound to duties.

Article 1 opens the human rights discourse to duties of the right holder included in his own rights. If so, the person in relation with others, and the things, situations or affairs which are the environment in which that relation exist and develop, became relevant to the rational justification of human rights. We have called '*ius*' that *just thing as a mean of personal relation* or to *the personal relation through the due things and affairs*. Ancient Roman and medieval jurists used the adagio "*ius oritur ex facto*" to synthetize the need of examining the 'relevant facts' in order to determine the appropriate *ius*. Human rights are shaped with more facts than the mere autonomy and freedom that can be opposed to the other members of society.

Which *facts*, then, are relevant in the configuration and determination of human rights? What kind of *facts* express the objective and right state of dignity's affairs in a particular context? Which situations are inherent to the expression of human dignity or what kinds of requirements are inherent to the situation in which the dignity is at stake?

3. Real and relevant human situations as sources of '*human rights*'.

3.1. The person as such.

Being a person means someone—not something—that expresses her existence throughout decision; an existence that not only "happens" to her, but also is able to "take a position" before existence. Being a person means being "*sui iuris*" or the owner of herself. This quality allows persons to recognize himself as irreplaceable. Nobody can be replaced as a person. To be a person means more than 'a specimen of humanity', it is being irreplaceable, '*alteri incomunicabilis*'. Someone cries the burial of a beloved, not because the lost of group of cells by decomposition, or the lost of a member of the human species; but because "*I have lost her… it is you whom I have lost*".

Being a person means, in consequence, being a part of an existential web of relationships. Everybody is 'son/daughter' or '*being-originated-from*', her existence happens and is accomplished within a society ('*being-with*') and developed through her commitment towards others ('*being-for*')

The experience of being '*sui iuris*', '*alteri incomunicabilis*', 'being-*from-with-for*', the experience of person is also the discovery of someone with a radical and absolute

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value. This is the idea or Article 1 of the UDHR, we do not know human persons just as a 'fact' but as a someone with dignity and absolute value. The Second World War was the consequence of forgetting that experience.

Catalogs of human rights, specially the UDHR, describe how dignity is recognized by itself, and how person is expressed in different situations as a live and free member of the human family—as well as others—as a worker, as governed, as a subject of trial, as a member of multiple social institutions between the person and the state: religious, cultural, familial, educational, economical, leisure, political communities, etc. Their goal is to describe dignity as such.

3.2. Person as member of human condition or the ecology of human condition.

Aquinas inquires if it is possible to discover a universal rational order of human ends and affairs—human ecology—that must be followed by human persons in order to establish a community of solidarity[21]; are there certain duties owed to every single human being that binds every single human action? How can we discover the essential human goods that cannot be destroyed without destroy human beings and human freedom?

His answer starts on a previous step: how universal is that kind of knowledge. Aquinas states that there is "a certain order is to be found in those things that are apprehended universally". In theoretical knowledge, it is self evident that any thing whatsoever is apprehended by man is "being". This apprehension includes a "first principle" or first statement about this "being": "the same thing cannot be affirmed and denied at the same time". Analogically, practical reason's first known object is "good" as an "end to be reached by action". Similarly, the first statement—the first principle—that our practical reason discovers is, therefore, "good must be done and pursued, and evil must be avoided" or "the action that reach an end must be performed and the action that keep us away from it must be avoided".

If "good" is universally known as the practical end that ought to be pursued, how do I know what is 'good'? How does our reason discover those ends universally? Aquinas understood that our human condition is directed to an end. Those ends are built in our way of being and we are inclined to discover them when the action that we are going to decide puts that essential end at stake. He calls that ends, "natural inclinations".

Being human, being a member of the *homo sapiens* species, implies some "natural inclination" that are discovered as an ends by the reason, and therefore, as "objects of pursuit". Which means that, when a human being acts as a rational and ethical person, he would discover the path of his fulfillment through the rational discerning of the ends of his nature as the goods that must to be done. These natural inclinations are predispositions of his being to be fulfilled toward certain kind of actions discovered by reason.

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[21] S.Th. I-II q. 94 a. 2.

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As post Kantians, sometimes our understanding of the word "nature" is reduced to mechanical and biological process. "Natural inclination" would be understood as biological tendencies. For Aquinas biology is not ethics. He uses "nature" meaning *human nature*, a rational being, with biology—of course—but a person who tries to find out what action must be done, rationally speaking, here and now.

The 'natural inclinations', the ends intended by our nature, imply that human actions must seek (i) the actions that preserve his existence as a *being*, as well as all *beings* procure, (ii) the action that express the 'coherent ecology' of the human beings, as well as all *animals* tries to do with their existence; [22] (iii) the actions that preserve and express the rationality toward his social nature and his personal relationships.

Therefore, *natural inclinations* are those predispositions or suggestions that pointed out the goods and ends from our human condition that are at stake on a particular action, discovered in the context of a practical reason. The universality of that rational disposition for discovering the common ends of our *being humans* ("this action is the good to be pursued") and its ethically binding nature ("you must do and pursue this good") show us that our *being humans* shapes the *human rights* claims[23].

We only are able to know how or what that *kind of being*—the human person as a member of human species—through out action. And human action shows us that a reasonable action, a reasonable human being takes into consideration that *human being's ecology*. Human rights are shaped by these requirements of the human existence.

From a liberal perspective, Martha Nussbaum's account on *human capabilities* focuses on "what people are actually able to do and to be, in a way informed by intuitive idea of a life that is worthy of dignity of the human being". In other words what "core human entitlements […] as a bare minimum of what respect for human dignity requires […]"[24] and therefore should be respected. She does not want to offer a metaphysical ground for human rights, but to show how central human capabilities express the demands of every person who shares the human condition[25].

Her central human capabilities are: (1) life; (2) bodily health; (3) bodily integrity; (4) senses, imagination and thought; (5) emotions; (6) practical reason; (7) affiliation;

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[22] Aquinas use as examples, the procreation—as animals—or education and foster of the offspring.

[23] Traditions, culture, society, have synthetized this kind personal and ethical experience in theoretical sentences. Theoretical approaches try to describe and justify these ethical sentences. They explain how and why human nature operates like that. But general accounts *are* not the *natural inclination*, just a recount of it. And *natural inclination* is not general descriptions of human nature.

[24] Nussbaum, Martha, Frontiers of Justice. Disability. Nationality. Species Membership, Belknap, Harvard, 2007, p. 70.

[25] She recognized that her purpose is to build a bridge between Rawls' liberal contractualism and Grotian natural law tradition. A philosophical tradition quite different than Aquinas. She said that her goal is to offer a "source of political principles for a liberal pluralistic society", implicit in the idea of a life worthy of human dignity, but in "a manner free of any specific metaphysical grounding" in order to get a "consensus among people with very different comprehensive conceptions of the good", in *The frontiers of justice*, p. 69-70.

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(8) living with concern for and in relation to other species like animals, plants, nature; (9) play; (10) control over one's political and material environment.[26]

These two approaches try to explain what kind of rational claims can be extracted from the consideration of the common human condition. Still, some times the fair provisions of human right exceeds what can we rationally obtain from the requirements of the person and her dignity (3.1) or the claims based on natural inclination, central human capabilities or human ecology (3.2).

3.3. Social role or social position.

Both, the Latin "*persona*" (literally "*sounding through*") and its Greek equivalent, "*prosopon*" (literally "*look toward*") use a prefix that express "heading for", relatedness[27]. The Greek concept "*prosopon*" express an essential idea of "in direction to"; the Latin "*persona*", a relation through dialogue. As is commonly known, *prosopon* indicates the mask that constructs character into the embodiment of someone else. This *personhood*, this mask, allows the interaction with the others. Personhood allows the character to be placed in a play, to have a role to fulfill, to have relations and responsibilities toward its community. Without its place within society, person could not have any kind of communication with others or fruitful relations.

Being a *characters* or *personage* means (i) to be part of a common relationships as the personification of a role, (ii) to deploy a precise function relevant to that society. Every person is not just a plain human being with his individual autonomy "as such", but "male", "female", "mother", "father", "son", "husband", "wife", "citizen", "indicted", "summoned", "teacher", "student", "judge", "buyer", "seller", "student", "worker", "citizen", etc. A juridical aphorism of Middle Ages said: "One man bears multiple persons"[28].

Any single social role, social function, *officium*, involves a specific task in society, a social expectation of fulfillment within the community to which it belongs. If we notice those social requirements are relevant to human rights. Being a "professor" implies some benefits and burdens, rights and duties that are indispensable for the development and fulfillment of the education's ends. A person can decide weather or not become a professor, but being a professor imply some inherent actions to that *officium*.

It cannot be part of the firefighter's contract to withdraw or suspend all rescue services and become a call center for cellphone repairs. Nor can it be removed from a teachers contract the inherent requirements of the social function of teaching. He has the right of teach not only because he is a person with dignity, but also because he perform a specific role in society. Being a "father" requires some rights and duties inherent to the social function of the fostering and education of his offspring.

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[26] Cfr., Idem, pp. 76-78.

[27] "*Pro-*" (toward, Greek), "*per-*" (through… to, Latin).

[28] *Unus homo sustinere potest plures personas.*

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Some rights and duties are born just because someone bears an *officium*, without a reference to autonomy: being a "citizen" implies pay taxes, being a "son" implies the right to care for elderly parents and the duty to do so, being a "parent" implies the right to choose the education of their children and the duty to provide it.

Thus, *officium* provide rational requirements for determining the *ius* of human rights or what would be the rights and duties that allows a *normal* development of that social function. The *normal* requirement of a "judge" is that he hands down justice, and that the behavior of a parent toward their son and daughter may be *normal*. This expected *normality* is related to the end of the social relation of the *officium*.

Here, we are using *normal* more as an *ethical normality* rather than *empirical normality*. Normal is the practice or human action that fulfill and develops the human dignity, the human condition, and the social function or *officium*. It would be *normal* (an empirical fact), if, unfortunately, a wife would be frequently beaten by her husband, but that kind of behavior is not *normal* (ethically justifiable). There may be many capricious people unwilling to pay their debts, but that kind of debtors are not *normal*.

The common standard of behavior required by an *officium* in order to reach its social goal is relevant to determinate the human right. Here, *normality* is *normative*. Any parent must be good parent. Being a person means also to fulfill the requirements of *normality* of the *officia* that she embraces. Human rights are not only a requirements or entitlements of the individual autonomy of freedom.

Officia contributes to the determination and configuration of human rights through: i) the social role or social function of the *person-in-this-social-situation*, ii) the action and behavior required for the *normal* fulfillment or effectiveness of the *officium*, and iii) in a certain way, the historical or cultural stereotype in which that social function is expected to be realized.

This does not mean that the human person can be diluted in the social role. Rights and duties of the prosecuted in a criminal trial find their rational justification in the person's dignity but also in the social situation and in the ends of the trial. He appears in court in the *officium* of defendant, he has the rights related to his fair defense but also, those rights are intent to respect that the accused embodied not only that *officium* but also, being a person.

Even though, a *professor* has some preeminence in a university not only because the dignity of the *professor-as-person*, but because the institution of university and the *professor-as-social-function* in it, requires certain actions to be executed by him in order to fulfill its social goals or to develop the common good of the university. At the end, a university must respect persons, but human rights recognize the ends of social institution and the role of a social function required to reach that goal.

Persona-qua-persona, and *persona-qua-officium* must be considered related and fair and balanced in the consideration of human rights. An unjust person may want to use the person as a mere function in his benefit, rounding up people in their social roles. But he cannot concentrate his attention to the unique value of the person as such, because he would not know, or it would be impossible, to discover what may be required to a father, professor, worker, etc. In other words, the "*ultimate atom* of the human

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individual will"[29] cannot provide by itself, enough rational criteria to justify the rights and duties of a father, but the fact that "I'm the father" and there is a personal relation with a human being who needs to learn and develop his capacities.

We just want to clarify that human rights grounded only on the individual interest or on individual as an atom of rightfulness and freedom, or just in a floating personal dignity, are fictional rights because that kind of person is not real. It would depend on the human right issue to determine how relevant would be the *officium* for the rational justification of an adequate solution. Being a "father" means that it is expected to fulfill the functions of fatherhood, but does not imply that everything is defined only by this *officium*.

Subjective rights needs to harmonize its demands with some objective requirements of the social function. The facts of the case, the objective demands of the situation under examination, will determine—or maybe "suggest" or "incline" would be a more precise verb—what would have more weight in a just solution, the subjective right over the social function or vice versa.

3.4. Culture

Culture is the common effort and tradition of understanding the flourishing of the person and social requirements that frame it. The human rights are not an abstract and complete claim that looks for its place within a society.

The person receives from the communities a peculiar way to resolve the fact and meaning of their existence in relation to God, the world, other human beings and herself. These common understandings of human existence, are integrated and presented in a particular cultural way. "Christmas", the date, places, rites and the 'proper' way of celebrating it offers a mean to express, to transmit and to discover the fact and the meaning of family, society, religion and their interaction. Islam may have different rites, places and dates, but they have a cultural way to express, to transmit and to discover the fact and the meaning of family, society, religion and their interaction.

That culture expresses the way in which a person understood herself and her proper existence. Therefore, culture is relevant to determine some human rights, because culture, and the cultural way of expressing a human right appears as ethically bound to the members of that culture and in consequence a matter of the legitimate expression of personhood.

The process of transmission of culture or tradition (from Latin "*tradere*", to deliver, to transmit) is also a process of a new learning, thinking and validation process. Because the sciences grow by the accumulation of data, but culture implies reason and freedom. Each generation received the experience of its tradition but must live, think and reformulate that cultural expression. They can correct some misunderstandings of the culture or emend the expected standard or cultural solution. Culture is not transmit-

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[29] Carleton Kemp, Allen, *Legal duties and other Essays in jurisprudence,* Oxford, Clarendon Press, 1931, p. 164, he is quoting Paul Vinogradoff.

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ted as science; it is more an invitation of action, it is a challenge to freedom and a requirement to think, again and again, the reasons for doing certain actions.

Besides, sometimes the cultural solution does not express human dignity. Meals and food have a cultural aspect and biological element that must respect 'human ecology'. The culture must be grounded and adjusted in the light of the person's dignity. A culture can learn about itself and correct its deviations if it maintains and open its solutions to reason, truth and other cultures.

In the case of the *"Street Children" (Villagrán-Morales et al.) vs Guatemala* the Inter-American Court of Human Rights condemned Guatemala, among other things, for damaging personal integrity of the parents, caused by the murder of their children. Specifically, the court stated that the damage was caused because: "it is evident that the national authorities did not take any measures to establish the identity of the victims, […] This evident negligence of the State should be added to the fact that the authorities did not make adequate efforts to locate the victims' immediate next of kin, notify them of their death, deliver the bodies to them and provide them with information on the development of the investigations. All these omissions delayed and, in some cases, denied the next of kin the opportunity to bury the youths according to their traditions, values and beliefs and, therefore, increased their suffering"[30].

Furthermore, "the Court must stress the treatment of the corpses of the youths whose bodies were discovered in the San Nicolás Woods, (…) were not only victims of extreme violence resulting in their physical elimination, but also, their bodies were abandoned in an uninhabited spot, they were exposed to the inclemency of the weather and animal scavengers, and they could have remained thus during several days, if they had not been found by chance. In the instant case, it is clear that the treatment given to the remains of the victims, which were sacred to their families and particularly their mothers, constituted cruel and inhuman treatment for them."[31]

The remains of the dead must be treated according to certain traditional rites. The court has taken into consideration the culture in order to determine the human right violation. Culture is part of the content of human rights because it shows a paradigm of worthy behavior towards others that must be followed the persons and their community. In the case of *Moiwana vs Suriname*, the Inter-American Court grounded the state's responsibility in the light of the indigenous emphasis "upon punishing offenses in a suitable manner"[32].

In this context, "[t]he State's failure to fulfill this obligation has prevented the Moiwana community members from properly honoring their deceased loved ones" had a "particularly severe impact upon the Moiwana villagers, as a N'djuka people. As

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30 INTER AMERICAN COURT OF HUMAN RIGHTS, Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala. Merits. Judgment of November 19, 1999. Series C No. 63, parr. 174.

31 Íbidem

32 INTER AMERICAN COURT OF HUMAN RIGHTS, Case of the Moiwana Community v. Suriname. Preliminary Objections, Merits, Reparations and Costs, Judgment of June 15, 2005, Series C, No. 124, par. 93.

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indicated in the proven facts, justice and collective responsibility are central precepts within traditional N'djuka society. If a community member is wronged, the next of kin—which includes all members of his or her matrilineage—are obligated to avenge the offense committed. If that relative has been killed, the N'djuka believe that his or her spirit will not be able to rest until justice has been accomplished. While the offense goes unpunished, the affronted spirit—and perhaps other ancestral spirits—may torment their living next of kin."[33] This cultural assumption and the failure of the state originates, as a victim said, a "great fear of those spirits and much remorse that their efforts at justice had not yet succeeded." In consequence, "not only must the Moiwana community members endure the indignation and shame of having been abandoned by Suriname's criminal justice system—despite the grave actions perpetrated upon their village—they also must suffer the wrath of those deceased family members who were unjustly killed during the attack."[34]

3.5. State determination of Human Rights

The social dimension of the *search* and configuration of human rights can be determine by state actions: in general terms, by laws; in concrete conflictive cases, by judges and remedies; or by the concretion of a political disposition.

Some times, the law determines the prudent and the law usually determines minimal standard for the content of human right, or what would mean and imply a specific normality of an *officium* or a situation with social relevance. For example, the determination of reasonable time for judicial processes; or the number of years of basic education; or the duties of parents or professors.

By law, also, a society can choose one of the multiple, possible and reasonable ways in which a certain right can be developed, providing legal certainty. Finally, the law provides legitimacy to the limits of human. Our language of human rights is overfocused on right-holder subjective rights and its relations with the duty-holders and the objective requirements of social situations must to be balanced with social limits imposed by laws.

In addition, if the rights—and duties of everyone else—must be balanced with legal limits duties rooted on the right holder, this law and duties are counterbalanced with certain rules that must be applied to this kind of laws, as proportionality, fair ends, possibility of judicial review, etc.

Courts determinate, also, the human rights when determining particular cases. They study the situation, the entitlements or requirements of persons' dignity, the *normality* of the relevant *officium* of the case, the concrete and specific social goods at stake. The judge analyzes what is considered socially *normal* by the basic and social principles, the international standards of human rights, the necessary structures and disposition of state branches, and then, decide what is the content of human rights, what

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[33] Idem, par. 95.
[34] Idem, par. 96.

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are the rights contended, the duties that must be attended, the objects that must be given and the actions that must be performed, the reparation and restitution that must be granted, in order to respect, to fulfill and to complete the specific human right.

Executive power determinates human right when transform the "type of person" described in law and recognized in a specific case, and granted the benefits descrived by law. Then it realizes the content of the human right. Also, this kind of authority elaborates programs of action, public policies in order to distribute their available resources that determinate how much, where, when, and how, a human right can be satisfied.

3.6. Practical reason and the basic spheres of experience

Martha Nussbaum explains that we can recognize that there are common "*basic spheres of experience*" or "certain areas of relatively greater universality can be specified (…) something that is experienced differently in different contexts, we can nonetheless identify certain features of our common humanity".[35] Sooner or later, it can be said that all human beings would be part of a practical situation, or common experiences, in which every human being will have to deal with. For example, mortality: "No matter how death is understood, all human beings face it and (after a certain age) know that they face it. This fact shapes every aspect of more or less every human life."[36]

These spheres of experience ground our life in a certain way, in our common humanity. Cultures and ethical schools of thought try to explain what kind of actions, reasons and virtues are consistent and consist in a reasonable, worthy and human response within[37]. What kind of practical situations express this being-acting-person? What kind of practical situations are common to the existence of everyone? Consequently what kind of practical situations must be taking into consideration as relevant to human rights? We propose the following open-ended catalog:

> (i) Regarding the radical meaning and significance of our personal history, the freedom of conscience, and the decisions related to our personal role before God, the others, and ourselves, integrated in a coherent personal history worthy to be lived, told and repeated;
>
> (ii) In relation to our vocation to communion with others, our duties and response to our ancestors and to our community;
>
> (iii) Concerning to the presence and existence of the others, our duties and respect to their life, body, and integrity;

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[35] Nussbaum, Martha, "*Non-Relative Virtues: An Aristotelian Approach"*, World Institute for Development Economics Research of the United Nations University, WP 32, 1987, http://www.wider.unu.edu/publications/working-papers/previous/en_GB/wp-32/_files/82530817639581768/default/WP32.pdf, accessed March 2012, p. 26. Also in *Quality of Life*, ed. By Amartya Sen and Martha Nussbaum, Oxford, Oxford University Press, 1993.

[36] Idem, p. 27.

[37] Cf. Idem, pp. 27-29.

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(iv) About our common existence, the duty of recognizing the beauty of the person shown through its being-male or being-female, including their body and emotions and sexuality.

(v) Regarding the practical experience of just things, their property, the duty to give those owed things to the owners as the first step of social life, and as minimal recognition of the dignity of others;

(vi) In relation to the discovered truth and good faith, the duty to speak and live according to the known truth and respect for the honor of others.

4. "Reason and conscience" in discovering human rights.

We have said before, that human right is a porous concept. It can be used as a part of justification of a political project; it could be analyzed as a matter of legal theory and jurisprudence. Or it could be studied as an ethical inquiry. Each area of knowledge is connected to the others, as communicating vessels. They may share some results and reasons. But they have different intellectual tools; they attend unequal requirements and attempt diverse results.

Section 3.5 was focused, primary, in the state's role on human rights. But, as an ethical issue, we must now to discuss an essential element in the configuration of the human rights as '*human iura*'. The integration of all the previous elements within the practical reason, and the personal commitment established by it.

Human Rights tend to be understood as personal entitlements that express freedom and autonomy. We have "rights" (juridical) and that express the "right" sense of our existence (ethical), and political communities must be created to develop our rights. We usually are educated to appraise our rights and freedoms and defend them against unjust intromission. But then, we have to recognize that we embodied some social functions, with burdens and benefits, that are reasonably beyond any consideration of our autonomy and freedom; as a professor, son, brother or citizen-. We realize that society demands to provide efforts to common goals.

The generalization of human rights language tends to understand these right as a complete, terminated, and definite 'thing'. With right-holders, objects and duty-bearer previously and absolutely determined. But the historical, contingent and real person, realizes that she is under a circumstance in which she has to discover what is the just-right thing to do, here and now.

The task of practical reason is not to describe a general and definitive formula of freedom or dignity, as a riverbed, in order to make the human rights always flow within that kind of borders. General descriptions of autonomy, freedom, "natural inclination" are not human rights, but the suggestion of possible actions, and therefore provide a starting point of the rational analysis of any given situation. Practical reason sees in those general accounts or in those "natural inclination" or in those "human capabilities", an indication, inclination or direction about the intelligibility of the owed things that must be delivered as an *end-to-pursued-by-action*.

General formulas may indicate, incline or propose a course of action, but a rational and practical determination must be employed. Practical reason allows positioning

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ourselves within the real requirements of the situation in which we are looking for the right thing to do. "What is happening here? What is the ethical issue at stake? What are its inherent and just requirements? What I have to do, here and now?" Practical reason is the reason in discerning, in choosing, in assuming commitments the specific means —here and now— to reach specific ends.

We have explained how many requirements have to be taken into consideration, how many demands must be *adjusted*, in the determination of human rights. Sometimes *person-as-such* would be relevant enough to find out the *adjusted* human right in a specific situation. But some times we would have to *adjust* the human right giving more relevance to *person-as-officium*, to *person-as-relation*, to *person-as-human-condition*, to the culture, to laws, to judicial sentences, or to administrative provisions.

The subject described in article 1 of UDHR, "endowed with reason and conscience" has the duty to "act towards one another in a spirit of brotherhood". What means "reason and conscience"? What kind of rational process must be performed in order to fulfill her duty of solidarity? That rational operation, I think, means the art, the rational intuition of situate ourselves "inside" the state of affairs or *things*—in Latin *res*, the origin of *real*— that *relates* or *mediates* persons through or by the those things; *medium rei* in Aquinas' account-. And then, trying to calculate, to measure or to discover what is the ad*just*ed thing, relevant for dignity, within that situation and relation.

This is the art of rational measurement, calculation or discovering of the *ad-just-ed things*, Finnis uses '*arights*'[38], and all its adjusted actions, objects, benefits, burdens and persons. This is a rational process of trying to place ourselves, inside or within what is the real, inherent, and internal situation or position between two persons "mediated by" or "related through" the just things, the owed action, or simply by the *dignity-as-ius*. The adjusted behavior, the adjusted *things* to be given back, appears in practical reason as the end of the action to be performed, or as "the good to be done". Consequently, the rational discovering implies the personal commitment—in conscience—to act in that direction.

Therefore, UDHR's Article 1 could be reformulate as the rational art and the ethical commitment within the conscience of discovering the real entitlements, the inherent requirements, and the internal behaviors that are owed or adjusted in a specific situation related to dignity of all human beings, in order to establish a proper, worthy and human relationship between persons.

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38 Cf. Finnis, *Natural Law and Natural Rights*…, p. 206. "One could say that for Aquinas 'jus' primarily means 'the fair' or 'the what's fair'; indeed, if one could use the adverb 'aright' as a noun, one could say that his primary account is of 'arights' (rather than of rights)".

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IV.

Intercultural Perception

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On natural law in Islam. Some preliminary remarks

Remi Brague

Let me begin with a *captatio benevolentiae* that must be neither short nor merely rhetorical in nature.

My topic is not an easy one for two reasons. The first reason is that I must warn you against myself: I am in no way a specialist on Islam, let alone on Islamic Law. To be sure, some years ago, I wrote a book on the idea of divine law in Judaism, Christianity and Islam that was published in 2005. It contains some pages on the link between the ideas of law and nature in Islamic thought[1]. The present paper will mainly reproduce their content. Yet, I have not been giving a great deal of my time to such issues ever since.

The second reason that accounts for the difficulty of my topic is that it might be a leprechaun. There probably is no such thing as a natural law in Islam. Some authors bluntly make this point. This is the case of Patricia Crone, in her bulky history of medieval political thought in Islam[2]. Therefore, I might indulge in some shadow-boxing.

The silence of recent scholarship

As for the first reason, I wanted to somehow keep up to date. In order to do that, I had a look at more recent work and skipped through two books, both published in 2009, one in German by Matthias Rohe (University of Erlangen-Nuremberg) and the synthesis in English by Wael B. Hallaq (McGill University, Montreal)[3].

As for the second reason, I was surprised to observe that in those books that are meant to present us with an overview of Islamic Law, the items "natural law", and even "nature" are conspicuously absent from the index of ideas. Some other words are absent, too, such as Conscience / *Gewissen*.

There are two recent works that claim to specifically cope with the topic of natural law in Islam. I could not find the book of an author by the name of Abu 'l-Fadl Ezzati[4]. But I could lay my fingers on a most recent book, the revised form of a PhD written by a gentleman by the name of Anver M. Emon, which deals most explicitly with this topic and was published last year[5]. Now, what is especially striking is that, most sur-

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[1] R. Brague, The Law of God, tr. L. Cochrane, Chicago: Chicago University Press 2005 [here: Law]

[2] P. Crone, God's Rule: Government and Islam, New York, Columbia University Press, also as: Medieval Islamic Political Thought, Edinburg: Edinburg University Press 2004, 263-264.

[3] M. Rohe, Islamisches Recht (Munich: Beck 2009); Wael B. Hallaq, Shari'a. Theory, Practice, Transformations, Cambridge: Cambridge University Press 2009; Id., Introduction to Islamic Law, Cambridge: Cambridge University Press 2009.

[4] A. Ezzati, Islam and Natural Law, London: ICA Press 2002.

[5] A. M. Emon, Islamic Natural Law Theories, Oxford: Oxford University Press 2010.

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prisingly, the word "nature" is absent from the index. There are two entries that roughly correspond to what could have been an entry on "Nature".

But the first one, "Naturalistic fallacy", sends us to a passage that deals with the way in which some Islamic thinkers rebuked the idea according to which we can elicit norms from what happens among things. Whether the idea was actually supported by some people or whether it was, as this often happens in Islamic heresiography, put forward only in order to be refuted, need not bother us here.

The second entry is concealed under the Arabic word *tab'*, which actually means something like "nature". Now, it does not occur as such, but only in the formula *Ahl al-tab'*. This is a category to be found in the work of Ibn ʿAqīl, a conservative collector and commentator of hadiths ("traditionist") of the 11th Century. The phrase is translated as "the People of natural dispositions". Those people are supposed to have contended that the right and the wrong can be distinguished on the basis of the individual's natural dispositions, without recourse to God's revealed word[6]. Again, we may ask whether this group was more that a mere logical possibility, a mere scarecrow. In Emon's book, the English word "nature" does occur, but, unless I am very much mistaken, never as the translation of the Arabic word *tabī'a*. Nature designates what the author calls "natural teleology".

There are other strange things in Emon's book. For instance, the Arabic word *maqāsid*, which means the intentions of the laws, is present in the Index, but not in the text.

The bulk of the book deals less with nature than with reason. It emphasizes the rational character of some rulings, the way in which some legal scholars looked for the reasons *('illa)* that underlie the rulings, in particular the advantage *(maslaha)* of people. But the concept of a natural law is hardly there.

How is this to be accounted for?

Islam as unknown

The first thing that deserves to be brought to mind is the nature of Islam. It is not the case that we have of Islam an adequate understanding such as to enable us directly to ask what natural law in Islam is. The very word Islam is ambiguous. Let me distinguish three basic meanings. Islam designates as well:

(1) what I will call, at least provisionally and for want of anything better, a "religion", a stance of wholehearted surrender (in Arabic: *islām*) to the will of God;

(2) a historic and geographic fact. A culture that stretches in space from Mauretania to Indonesia, from the 7th Century to our present day; and finally

(3) a group of people living today in countries in which Islamic religion is dominant and that were the stage on which Islamic culture took place.

The trouble with Islam is not so much our knowledge of it. To be sure, knowledge of Islam among Western people is not as satisfactory as it should be. This depends very

6 Ibn Aqil, Al-Wadih fi usul al-fiqh, ed. G. Maqdisi, Beirut: Steiner 1996, t. I, p. 9.

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much on the kind of people: uneducated or educated, not to mention learned orientalists. Legends about Muhammad abounded in Medieval Europe, and they were for the most part rather libel than history. Yet, alongside of it, there exists a long tradition of oriental studies, beginning as early as the 12th Century with Peter the Venerable's enterprise of having translated into Latin the Quran and some basic documents about Muhammad and his message[7]. It never was interrupted and produced a bevy of great scholars that have enlarged our knowledge.

The real trouble is double. It lies first in the thing itself, then in our perception of it. The points I am about to make have no direct bearing on our topic. Yet, I will substantiate them by looking at examples that I picked because of their relevance for the said topic.

Facts

First, the circumstances which brought about the birth and spreading of Islam are far from being clear and our knowledge about them scanty. To be sure, we possess an official history of sorts, which is to be found first and foremost in Ibn Ishaq's Sira, some sort of life of Muhammad that Ibn Hisham claims to have edited and published. We possess a reliable English translation, with notes and indices[8]. This book, together with some other ones like the Book of the Conquests *(Kitāb al-Maġāzi)* of al-Waqidi[9], remains the basis of almost every biography of Muhammad and of the rise of Islam.

Now, those books were written about a century and a half after the facts they purport to relate, in a geographic and above all social and cultural surrounding that differs widely from the framework in which the reported events are supposed to have taken place.

If we decide, for reasons of method, to rely exclusively on sources that are dated, i.e. monuments, inscriptions, coins, documents of legal and administrative nature, reports from non-Muslim authors living in the Islamic area, etc., we get a somehow different picture. For instance, we possess a report of a discussion held in the early years of the 8th century between the emir of the "Hagarenes" and a Christian patriarch about the legal authorities of both sides. Curiously, there is no allusion whatsoever to the existence of a new religion, of a new book, let alone of a new prophet[10]. Facts of this kind have led some scholars to adopt a very critical stance towards the traditional account.

Be that as it may, it is interesting that the first hard fact that we can grasp in the late 7th and early 8th century is not religious, but military, political and—what is espe-

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[7] See P. Kritzeck, Peter the Venerable and Islam, Princeton: Princeton University Press, 1964.

[8] A. Guillaume, The Life of Muhammad. A Translation of Ibn Ishaq's Sirat Rasul Allah, Oxford 1955.

[9] The Life of Muhammad. Al-Waqidi's Kitab al-Maghazi, tr. R. Faizer, Routledge 2010 *[non vidi]*.

[10] F. Nau, Un colloque du patriarche Jean avec l'émir des Agaréens et faits divers des années 712 à 716 [...], in: Journal Asiatique, XI-5, 1915, p. 225-279.

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cially relevant for us—*legal* in nature. From the mid-7th century, Arabic tribes obviously exert state power in areas that used to be controlled by "Roman" power, i.e. the Eastern Empire, which we call "Byzantine" from its capital Constantinople. A meaningful example is the fact that the earliest dated document that we possess is a legal document, a receipt written on papyrus in 643 in the Greek and Arabic languages, bearing witness that taxes were paid to the local authorities by an Egyptian fellah[11].

The military and political situation was the occupation of vast territories, peopled by a motley mixture of peoples, by a military caste living in the country in the same way as every foreign ruling class had done in the Middle East, from the Persians to the Hellenistic Greeks after the conquests of Alexander the Great and finally to the Romans, first pagans, then converted to Christianity.

This can help us better to understand why Islam emphasizes so much the rules of conduct: an aristocracy has to stick to its own habits and mores in order to distinguish itself from its subjects. Having precise rules to abide by was not only required for people to live peacefully with each other, which happens in each and every form of society. What was at stake was the very identity of a group that wanted to stay together and to go on wielding power over the rest. For this reason, they needed a strong legitimating principle: rules of behaviour had to stem from the highest source of authority, i.e. from God.

Islam as unknown: ideas

The second difficulty may be greater still. It is intellectual in nature. We are at great pains to look at Islam without our donning Western spectacles, less prosaically, without our foisting on it Western categories. They largely determine what we accept to take cognizance of and what our intellectual stomach simply cannot swallow.

Let me take as example Islamic rules of behaviour in everyday life, again because they are germane to our present topic. As is well known, Muslim males are expected to trim their moustache and let their beard grow; females are expected to cover their head and chest with a veil. In the face of such phenomena, Western people more often than not adopt the point of view of the tourist who looks at unusual and colourful habits with amazement and perhaps with a touch of contempt, but at the same time with some aesthetic pleasure. They think: that is just one more "queer thing that queer foreign people do". In the Scottish Highlands, gentlemen wear filibegs; French people feed almost exclusively on frogs and snails; in Islamic countries, ladies wear a headscarf, etc. All these practices are supposed to be on the same level, to belong to some sort of folklore. Western people simply cannot understand that, for many Muslims, this kind of dress code originates in God's explicitly formulated will: the male hairdo in an utterance of the Prophet, a so-called Hadith; the female head-gear in two verses of the Holy Book (XXIV, 31; XXXIII, 59).

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11 Papyrus Erzherzog Rainer. Führer durch die Ausstellung, Vienna 1894, N. 558, p. 139 or A. Grohmann, From the World of Arabic Papyri, Cairo 1952, p. 113-115.

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Western people more or less easily accept that God can issue commands that are moral in nature, like the Ten Commands, the so-called Decalogue (Exodus, 20). On the other hand, they can hardly believe that God takes interest in the puniest details of our everyday life.

The very word "religion" that I used above as a first step, is misleading, because it is Eurocentric. Thrown into the bargain, this meaning is a recent one, not much older than the 19th century. The medieval scholastic authors knew better, when they used the Latin word *lex*. St Thomas Aquinas, for instance, speaks of the *lex Maurorum*, meaning thereby Islam[12]. Theses authors meant by *lex* a full-fledged system of salvation, which could present itself under different guises: in Christianity, it took the shape of the biblical salvation history that developed in the two Covenants and culminated in Jesus Christ's death and Resurrection; in Islam, it became the system of rules which mankind has to abide by in order to deserve paradise.

Now, we commonly look at Islam from a Western point of view, i.e. through Christian or formerly Christian glasses. As a consequence, we look for things that could be the equivalent of what we know or experience in Christianity. When they are not there in Islam, we take up some that are and recast them in Western terms. We furthermore identify what really is extant according to our own standards. In particular the Western student of Islam constantly has to struggle against a temptation to reduce Islam to what interests him or her and to look for the "essence" of Islam or for "true" Islam in what can be marginal. Many people are interested in Islamic philosophy or mysticism because they are interested in philosophy or mysticism *tout court* more than in real Islam. On the other hand, few scholars choose to concentrate on what constitutes the core of Islam, i.e. law. The paucity of studies that deal with this topic is accounted for, partly by the tediously technical character of such studies, especially for Western people for whom the rulings of Islamic law do not obtain, and partly by the temptation that I have just been sketching.

We have to distinguish between what a Muslim may do and what he/she has to do; between what they actually do and what they should do; between the compulsory and the optional; between duty and hobby. Mysticism and philosophy are, at best, allowed. Obedience to the divine Law is compulsory and can be enforced.

Sociology simply does not want to look at things that way and, for reasons of method, does not distinguish between what people do and what they should do according to their own principles. Well now, on this point at least, sociologists may go and boil their head.

The centrality of Law

Law is not only a discipline among other ones in the spectrum of Islamic pursuits. It is the discipline of disciplines. It is the instance that distinguishes what is to be done and avoided. It distinguishes the right from the wrong in the case of areas of knowl-

[12] See Law, p. 107-108

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edge, too. It is competent on its own competence. A good example is Averroes' (too) famous *Decisive Treatise*, in which he deals as a legal scholar with the question of whether philosophy has to be compulsory, forbidden, encouraged, etc[13]. Basically, the work is a legal answer *(fatwa)* issued by the highest legal authority of the Almohad dynasty, the Great Qadi of Cordoba in person. Averroes as a highly competent professional issues a ruling on the activity that the same Averroes pursued in his leisure hours, as an amateur. To be sure, little wonder that Averroes1 should authorize and even condone as a duty what Averroes2 does. But the power to decide belongs to Averroes1, not to Averroes2.

As for mysticism, it had to worm its way into Islam to which it did not originally belong. There is no trace of it in the earlier historians. It was originally suspicious, and remained so till a relatively recent date, nay is still frowned upon in some circles. In order to gain acceptance and to find its way into mainstream Islam, it had to water down some of its claims. This happened in the 11th century, i.e. long ago, to be sure, from our point of view, but more than four centuries after the rise of Islam. Sufism had to show that it enhanced the scrupulous practice of the law by supplementing it with inner life and devotion. Al-Ghazali was among the main artisans of this synthesis. It required a new interpretation of the idea of "intention". The word *(niyya)* originally designated a verbal declaration that one meant to accomplish a definite ritual action, so that the performer could not be understood to act haphazardly and to perform accidentally what the law requires. Later on, it went to designate the inner disposition of the "heart" that commands and orientates the "limbs" that perform visible actions.

Philosophy remained a marginal activity in the Islamic world[14]. It produced men of great genius and great achievements in various domains: logics with Farabi, metaphysics with Avicenna, careful exegesis of Aristotle with Averroes, et al. Their work deeply influenced Western thinkers. But socially they remained amateurs, people who had a job (music in the case of Farabi, medicine in the case of Avicenna, law in the case of Averroes) and indulged in their hobby after their day's work. This increases their personal merit. But philosophy never became a social institution.

This took place only in Europe, with the Universities. Each student who wanted to launch into the career of a physician, a lawyer or a theologian, first had to go though several years of "liberal arts" among which there were big chunks of philosophy. Every theologian is first a trained philosopher. He has to be one: study of philosophy is compulsory for theologians. On the other hand, one can be a perfectly competent *faqih* or, for that matter, rabbi, without having studied a whit of philosophy.

This is more than a fact of social and/or cultural history. We already are in the heart of the matter, since the basic concept of the philosophical enterprise, the concept

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13 Averroes, Decisive Treatise, tr. C. Butterworth, Provo: Brigham Young University Press 2002.

14 This paragraph summarizes some passages from my The Legend of the Middle Ages. Philosophical Explorations of Medieval Christianity, Judaism, and Islam, tr. L. Cochrane, Chicago: The University of Chicago Press 2009 [here: Legend], especially p. 49-50.

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on which it is grounded is the concept of nature. Things are supposed to possess a stable nature that can be grasped and expressed in concepts.

Let us now turn to this concept of nature, first in Greece and in the Bible, then in Islam. For, in order to have a natural law, you must first have in your intellectual toolbox the adjective "natural", hence, basically, the concept of nature.

Nature: "Athens" and "Jerusalem"

You have this concept in Greece, particularly but not exclusively, among philosophers. Aristotle, the main philosophical authority for Islamic and Jewish philosophers as well as for Scholastic theologians, furnishes us with a full-fledged definition of "nature" in his *Physics*[15]. Moreover, he has a concept of the natural right. He distinguishes what is just *(dikaion)* according to nature and what is so because of some arbitrary convention[16].

Interestingly for our purpose, the sources of Aristotle's thought are far older than his own concept of nature, but hail back to two big discussions. The first one took place among poets about the respective part played by natural endowment and training in the achievements of athletes: *phyè* vs. *meletè*. The second one was fought between Sophists and/or philosophers on the origin of laws, natural or conventional: *physis* vs. *nomos*[17]. And this is what interests us here.

Is the concept of nature present in the Bible?

In the New Testament the answer is definitely yes. Early Christianity took over the Greek concept of nature in the framework of a discussion on the validity of Moses' law. Paul asks: How is it that there are "decent" pagans, who are ignorant of the Torah? Moses' Law can't possibly be the only source of moral judgment. There must be something like "nature" *(physis)*, like "conscience" *(syneidēsis)*. This is what Paul contends (Romans, 2, 15). Noble Pagans do by following their nature and obeying their conscience the same good works than Jews do because they abide by Moses' law.

As for the Old Testament, the question is trickier. It certainly does not contain the Hebrew word for "nature", *tèva'*. It is not found earlier than the Mishnah, which was put together in the 2nd century. In general, the Old Testament does not contain concepts, but rather stories. Nevertheless, if the *word* is lacking, the *idea* may be there, expressed in the biblical way, that is, through stories. Let me give some examples:

(a) In the first account of Creation at the beginning of Genesis, God creates plants that contain their seed that produce their fruit that contains their seed according to their species *(mīn)*, in a constant cycle *(le-mīn*+suffix*)* (Genesis, 1, 11.12 (2x). 21.24.25).

(b) The same idea is expressed by the story about God's resting after the six days work (Genesis, 2, 1-2). Of course, He does not need to take a nap because He is tired.

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15 Aristotle, Physics, II, 1.

16 Aristotle, Nicomachean Ethics, V, VII (10), 1134b18-1135a15.

17 See F. Heinimann, Nomos und Physis. Herkunft und Bedeutung einer Antithese im griechischen Denken des 5. Jahrhunderts [1945], Darmstadt: Wissenschaftliche Buchgesellschaft 1972.

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But he leaves Creation to develop according to its own logic. The biblical author suggests this by indulging in a deep pun on the "they were completed" *(wayekhullu)* said of the heavens and the earth on the one hand and God's "He rested" *(wayekhol)* on the other one.

(c) Again, after the Flood, God swears that he will not destroy life again. The cycle of sowing and harvest will go on indefinitely (Genesis, 8, 22).

(d) Finally, in Isaiah's parable of the vineyard, God does not have to command His vine to produce grapes, and not, say, bananas. He simply expects it spontaneously to produce its fruit (Isaiah, 5, 2c .4b)[18].

Islam and the idea of nature

Islam does not feel easy about the idea of nature.

The Quran has a tendency to attribute *directly* to God whatever happens in the world, not only what he created in the beginning, but what is still taking place. God lets rain fall so that grass can grow, etc. To be sure, analogous utterances are to be found in the Bible.

"Nature" is not a concept that Muslim thinkers willingly use. The philosophers who remain in the wake of Aristotle are a notable exception, but they never influenced the Islamic world-view deeply and permanently. Mainstream Islam fears that nature should be considered as some sort of rival deity. As is well known, "association" *(širk)*, worshipping besides the only God other beings, is the only unforgettable sin in Islam. This has led some extreme Mutakallimūn to say that whoever speaks of nature as being the cause of a state of affairs is a polytheist. God is supposed to act directly and to create whatever takes place in the world: things, events, and even volitions in the hearts of men.

Causality came under fire with the thinkers of the Islamic school of apologetics (Kalam) and with Ghazali. In the Kalam, after the Muʿtazilites were defeated in 861, thinkers of the Ashʿarite school seized the intellectual power and kept it almost until our own day. According to them, things are loose bundles of properties. God simply has the habit *('ādah)* of joining together some of those properties when creating afresh at each instant a certain thing. Butter is yellow, melts easily, etc., whereas iron is hard and black, etc. not because there is a nature of butter and of iron, but because God, by and large, associates these properties in them[19].

Philosophers accept the idea of nature more willingly than people of the Kalam. Nevertheless, when they find the idea of a natural law in their Greek source, they water it down, or shirk it. So do Farabi and Averroes when commenting upon Aristotle[20].

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18 More on this in my On the God of the Christians and one or two others, tr. P. Seaton, South Bend: Saint Augustine's Press 2013, p. 124.

19 See S. Pines, Studies on Islamic Atomism, tr. M. Schwarz, ed. T. Langermann, Jerusalem, Magnes Press, 1997; H. A. Wolfson, The Philosophy of the Kalâm, Cambridge, Harvard University Press, 1976.

20 See Law, p. 160-161.

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An innate Law

Whereas nature is not named in the Quran, we find there the idea that religion is natural to mankind, and in particular Islam is some sort of spontaneous, innate religion of every human being. This is expressed by the rather obscure word *fitra*[21].

Muslims often call their religion by the name of religion of the *fitra*. This rests on a verse from the Quran: "So set thy purpose (O Muhammad) for religion as a man by nature upright – the nature *(fitra)* (framed) of Allah, in which He hath created man. There is no altering (the laws of) Allah's creation. That is the right religion, but most men know not" (Quran XXX, 30).

A famous declaration *(hadith)* put into the mouth of Muhammad casts some light on the concept of *fitra*: "Narrated Abu Huraira: Allâh's Messenger said, 'Every child is born on Al-Fitrah but his parents convert him to Judaism, Christianity or a Fire-worshipper, as an animal delivers a perfect baby animal. Do you find it mutilated?' *(Ma min mawlūd yulad ilā yulad 'alā l-fiṭra, fa abawā-hu yuhawwidāni-hi aw yunaṣṣirāni-hi aw yumağğisāni-hi, kamā tantiğu al-bahīma bahīma ğam'ā'a; hal tahissūna fīhā min ğad'ā'a)*. Then Abu Huraira recited the holy Verses 30:30"[22].

Interestingly, non-Muslims are compared with mutilated animals. Unbelievers do not fully meet the requirements of humanity. This tallies with what the Quran contends: they are like animals, nay worse than animals (Quran, VIII, 22)[23]. This is an almost necessary consequence of the idea that obedience to God's will, such as it is contained in His Law, is the only factor that makes man authentically human. Little wonder that in Judaism, too, pagans are sometimes said not fully to partake in humanity[24].

Conversely, according to law books, a foundling is supposed to be Muslim as long as parents belonging to another religion do not claim him.

Furthermore, the Quran introduces a scene in which Islam is supposed to be rooted in a stage that is far earlier than the actual existence of human beings: "And (remember) when thy Lord brought forth from the Children of Adam, from their reins, their seed, and made them testify of themselves, (saying): Am I not your Lord? They said: Yea, verily. We testify. (That was) lest ye should say at the Day of Resurrection: Lo! of this we were unaware" (Quran, VII, 172).

The content of the scene may have been borrowed from some Jewish Midrash, which contains something analogous[25]. Be that as it may, there is, or was a point in time (or before it) in which all generations were there together. They are contemporaneous in front of the eternal God. The salient point is that the answer of mankind is

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21 See G. Gobillot, La Conception originelle, ses interprétations et fonctions chez les penseurs musulmans (Cahiers des Annales Islamologiques, 18), Cairo : IFAO 2000.

22 Bukhari, Sahih, Volume 8, Book 77 (Qadar), §597, in: A. J. Wensinck, Concordance et indices des Traditions Musulmanes, Leiden 1933-, vol. 5, 179b-180b.

23 See Law, p. 80.

24 See bBaba Metsia, 114b, bYebamot, 61a and Maimonides, quoted in Legend…, p. 113-114.

25 See Midrash Tanhuma, Wayyigash, quoted in H. Speyer, Biblische Erzählungen im Qoran, Hildesheim: Olms 1961, p. 304-305.

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supposed to have been given before history began and to still hold good today. Each and every man has acknowledged God as his only lord, i.e. has professed Islam. As a consequence, each non-Muslim who lived and is still living has to be considered as an apostate from this primitive religion.

Law: its realm

Law for Islam is first and foremost an inseparably moral and religious evaluation of human actions. They fall into to five categories *(ahkām)*: mandatory, recommended but not mandatory, neutral, advised against but not forbidden, forbidden. What is mandatory is rewarded, what is forbidden is punished. What is recommended is praised, but not rewarded; what is advised against is frowned upon, but not punished.

In principle, there is no separate moral or religious realm. Nevertheless, there used to be, in the Middle Ages, some sort of independent ethics, in the wake of the Greek and Persian ethical tradition. Such was the content of the treatises on the "refinement of mores" *(tahdhīb al-akhlāq)* written by Christians such as Yahya Ibn Adi or by Muslims, the most famous one among the latter being Ibn Miskawayh[26].

The whole realm of what human beings can do *(praxis)*, in contradistinction to what they can make *(poiēsis)* is called by Aristotle, the medieval thinkers, and still by Kant (in a modified meaning) "practical". It encompasses three ways of governing *(tadbīr)*: governance of the individual, i.e. ethics, governance of the household, i.e. "economy", governance of the city, i.e. politics. Now, according to Islam, the whole realm of the practical, whatever a human being can do, is submitted to the claims of the divine.

There is no human action the quality of which is left out of the ken of divine legislation. Some authors, for instance al-Ghazali, even contend that neutral actions (rubbing one's chin, twiddling one's thumbs, etc.) are not just so; they have to be said to be such by an explicit declaration of the Law[27].

Law: its divine origin

It is apposite to distinguish two concepts: legislation *(šar')* and law *(šarī'ah)*[28]. The second word is well-known to the Western audience. It designates the concrete result of the legislative activity: a legal system such as it arises from the interplay of several factors that have to be compounded with each other. The first one designates the fact that God decides to provide mankind with rules of conduct. Western historians

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26 Miskawayh, The Refinement of Character, tr. Constantine K. Zurayk, Beirut: American University 1968.

27 Al-Ghazali, Al-Mustafā min ʿilm al-usūl, ed. I. M. Ramadân, Beirut: Dar al-Arqam, s.d., t. 1, p. 192.

28 Wilfred Cantwell Smith, The Concept of Shariʿa among some Mutakallimun, in: G. Makdisi (ed.), Arabic and Islamic Studies in Honor of H. A. R. Gibb, Cambridge, Mass.: Harvard University Press 1965, 581-602.

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look for the origin of Islamic Law in merely human phenomena, for instance customs of ancient Arabia, remnants of the legal systems that obtained in the Near East, elements of Roman provincial law that were later ascribed to the Prophet, etc[29]. But for mainstream Islamic thinkers, at least since the 12th century, those rules are the content of Islamic revelation.

Its object is not God's nature, not even His mores, but His will. God remains hidden behind a thick veil. I did not say "mysterious", for the Christian God too is mysterious. Christians see Him as a person, or more personal still than human persons. As a consequence, He is as mysterious as any person whose free decisions cannot be fully understood, let alone foreseen.

According to Islam, the only legitimate legislator is God. He alone can reward and punish seriously, i.e. eternally. Human rulings are hardly more than rules of thumb made necessary by the arising of some concrete problem for which no guidelines can be found in Revelation. No human ruling can stand in front of God's Word.

Now, God spoke through two channels.

First, he spoke directly in the Quran. The Quran is the word of God literally speaking. It was not inspired like the Christian Bible, but dictated to the Prophet. The "author" of the Quran is God in the same way as Milton was the author of Paradise Lost, even if he had to dictate it to his daughters, after he became blind. Muhammad is as little the author of the Quran as were Milton's daughters.

There is a second source, which is the very person of the Prophet. He is supposed to have been "purified"—this is the meaning of the epithet *mustafa'*, that became a popular first name for male children. Muhammad was preserved *(ma'sūm)* from sin and error. As a consequence, he is, according to the Quran, "the beautiful example" *(al-uswa al-hasana)* that can be imitated (Quran, XXXIII, 21). To be sure, imitating his behaviour is compulsory up to a point only, since the hadiths that tell us about what he did did not reach us through equally reliable channels, hence do not possess the same degree of certainty and cogency.

The Prophet even had some privileges that held good for him only and ceased with his demise, for instance marrying as many women as he wanted (Quran, XXXIII, 50). But what He did cannot be utterly wrong.

Law: consequences of its divine origin

1) Reason

Reason is a concept that should be made use of with caution. Many people attack Islam because it is believed to be "irrational". But, to the contrary, Islamic apologetics frequently points out that Islam is a rational religion, that does not require from us any "sacrifice of the intellect" (to take up the common misunderstanding on this phrase). It

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29 Those scholars move in the wake of the path-breaking work of J. Schacht, The Origins of Muhammadan Jurisprudence, Oxford: Clarendon Press 1950.

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does not contain commands the reasons for which are not accessible to the unaided human mind, unlike some *huqqim* in Judaism. In any case, it is more rational than Christianity that would like us to believe unbelievable things: three Gods, a God that changed into a man, bread that turns into human flesh, etc. Christianity is full of "mysteries" (once again, according to the popular misunderstanding of this concept), Islam is free from any.

Reason is a useful tool. As for religion, the Quran is full of injunctions in which the divine Speaker praises and recommends the use of intelligence *('aql)*. Through its use, man should be able to grasp the existence of a powerful and benevolent Creator[30]. The verses in which reason receives from God Himself the highest legitimization are constantly harped upon by scholars who interpret them in different senses. Some early mystics consider reason as being hardly more than the ability to understand that it is in our interest to obey God's commands and that disobedience would be foolish[31].

As for the concrete history of Islamic civilization, Muslims wielded reason with as much dexterity as other people, so that scholars who lived in the Islamic world made considerable advances in many fields, for instance in mathematics (including astronomy) and other "profane" sciences[32].

But on the other hand, unaided human reason cannot possibly be the source of legal obligation. Al-Shafiʿi, the leading figure of an influential legal school *(madhab)* even contended that whoever judges by himself is objectively a polytheist[33]. Reason can help us to find what is right whenever there is no authorized text. When there is one, reason has to submit and to content itself with the subordinate role of deducing from the divine ruling a whole range of applications. An extreme position is Ibn Khaldun's. For the Tunisian historian, "The intellect has nothing to do with the religious law and its views" *(fa-inna al-'aql ma'zūl min al-šar' wa-anẓārihi)*[34].

2) Interpretation

Interpretation has a special meaning in Islam. In the West, the idea of interpretation has its roots in the legal realm, where Western law admits of a judgment of equity.

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30 See my The Wisdom of the World. The Human Experience of the Universe in Western Thought, tr. T. Fagan, Chicago: The University of Chicago Press 2003, p. 58-59.

31 See Y. de Crussol, Rôle de la raison dans la réflexion éthique d'al-Muḥāsibi ; Aql et conversion chez al-Muḥāsibi (165-243 / 782-857), Paris: Consep 2002.

32 For an overview, see R. Morelon and R. Rashed (ed.), Encyclopedia of the History of Arabic Science, London & New York: Routledge 1996, 3 vol.

33 See Law, p. 167.

34 Ibn Khaldun, Prolégomènes d'Ebn Khaldoun, ed. E. Quatremère, Paris: Duprat 1858, t. 3, p. 122, 11-12; tr. F. Rosenthal, The Muqaddimah. An Introduction to History, New York: Pantheon books 1958, t. 3, p. 154. The recent French translation is curiously ponderous: "La raison est *située en un espace distinct* de celui de la loi religieuse et de ses vues", Le livre des exemples, I. tr. A. Cheddadi, Paris : Gallimard 2002, p. 970.

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Aristotle already gives us a full theory under the name of *epieikeia*[35]. A law cannot foresee each and every case and has to rule in a rough way. When an injustice would arise from the strict application of the letter of the law *(summum jus, summa injuria)*, the judge has to reason uphill from the wording of the law to its spirit, i.e. to the intention of the legislator. He must ask: what did the legislator want to prevent? If what he aimed at can be get by different means, that avoid blatant injustice, all the better.

In Islam, the Quran is believed to be not human in origin, but, literally speaking, God's Word, not inspired to a messenger, but dictated. Now, if God is the author of a text, no interpretation is possible if this should mean understanding God's intentions.

One example may suffice, since it was heavily discussed, especially in my native France. The command to the women of having to put head-gear (a veil) is twice in the Quran (XXIV, 31 and XXXIII, 59); but it is black on white in St. Paul, too (1 Corinthians 11, 3-16). The content of the injunction is very much the same. But their sources are utterly different. When St. Paul expresses his wish that women should wear something on their hair when praying, he speaks like a man of flesh and blood who lived in the 1st century in the Near East. His utterances can be interpreted to mean, generally speaking, that women should be clad modestly, according to habits that depend on time, place and fashion.

But in the Quran, God in person is supposed to speak. Now, He is not in space and time, He is eternal and omniscient. He knows his things and chose His words properly. Interpretation cannot possibly be the overbearing claim to know better than God what God wanted to convey. As a consequence, "interpreting" can only mean giving the *words* their exact weight. In this case, what is at stake is not the veil in itself, but, say, its length, its opacity, etc.

3) No common ground between believers and unbelievers

A consequence of the absence of the idea of a natural law is that, in principle at least, there are no common rules for the Muslims and the "unbelievers". To be sure, there are, because there must be, ways to solve concrete problems of coexistence and to exchange goods or prisoners with each other. For example, ambassadors from non-Muslim countries had to receive a warrant for their safety *(aman)*, etc.

On the level of principles, however, the absence of a common ground in natural law has consequences. Let me give two examples of them:

a) Al-Ghazali (d. 1111) has a chapter on the command of the good and prohibition of the evil *(al-amr bi 'l-ma'rūf wa l-nahī 'an 'il-munkar)*, an idea that originates in the Quran: "You are the best community, you command the right and prohibit the wrong" (III, 106-110), a formula that is in itself interesting. He discusses among, several ques-

35 Aristotle, Nicomachean Ethics, V, x (14), 1136b31-1138a2.

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tions, who is allowed to exert this command and this prohibition[36]. He selects the example of fornication (sexual intercourse between unmarried grown-ups) as the least serious of all sexual sins. Now, Ghazali teaches: A non-Muslim living under Islamic rule, a Jewish or Christian *dhimmi*, is not allowed to prevent a Muslim from doing wrong by force. He hardly could, anyway, since he is not allowed to carry weapons. But supposing he could by mere brachial force, this would amount to exercising power over him. Now, Muslims are to wield the power over non-Muslims, not the other way round. What is still more interesting is that the non-Muslim is not even allowed verbally to remind a Muslim of what he should do or leave alone. The reason is that this would amount to display a pretension to authority over him, which would be a humiliation for him. Now, an unbeliever is far more worthy of humiliation than a Muslim, even a sinner.

b) Since law originates in God's commands, there is no way for people who adhere to the true religion of God, viz. Islam, to acknowledge the legitimacy of the rights of unbelievers. By this token, their properties do not really belong to them. They are unable to use them in an honest and proper way. As a consequence, it is a duty to deprive them of a good that they neither rightly possess nor exploit to the real advantage of mankind.

Al-Mawardi (d. 1058), in his treatise on Islamic leadership, quotes a hadith according to which Islamic soil makes what is in it forbidden, whereas the soil of "Associators" *(dar al-shirk)* makes what is in it authorized[37]. This means that whatever belongs to people who worship alongside Allah other divine beings (including the Christians) are free booty for the Muslims.

His contemporary, the philosopher Avicenna (d. 1037) expresses the reason for that in his description of the Just City: "such property and women (*furūj*, litt. vulvae) are not administered *(mudabbarah)* according to the constitution of the virtuous city, they will not bring about the good for which property and women are sought. Rather, they would contribute to corruption and evil"[38].

Three centuries after them, Ibn Taymiyya, now the leading authority for Wahhabite Islam, an author who hardly pampers the philosopher when he attacks the "Logicians", agrees with him on this point[39].

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36 Ghazali, Ihyā ʿUlūm ad-Dīn, II, 9, §2, Beirut: Dar alkotob al-ilmiyah 1996, vo. 2, p. 342; see M. Cook, Commanding Right and Forbidding Wrong in Islamic Thought, Cambridge: Cambridge University Press 2000, p. 429-430.

37 Al-Mawardi, Al-Ahkām al-sultāniyya wa-'l-wilāyāt al-dīniyya, V, 2, Beirut: Dar al-kotob al-ilmiyya s.d., p. 76.

38 Avicenna, The Metaphysics of The Healing, X, 5 (7), tr. M. E. Marmura, Provo: Brigham Young University Press 2005, p. 376. See Legend…p. 136.

39 H. Laoust, Le Traité de droit public d'Ibn Taymiyya. Traduction annotée de la Siyāsa shar'iya, Damas : Institut français 1948, p. 35-36 ; on the larger context, see A. Morabia, Le Gihad dans l'Islam médiéval. Le « combat sacré » des origines au XII^{e} siècle, Paris: Albin Michel, 1993, p. 246 ; see too p. 231, 237-238.

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It is interesting to compare the position of those authors with the one of Thomas Aquinas, who grants non-Christians *(infideles)*, at least in some cases, the right to exercise power over the faithful[40].

Conclusion

As a conclusion, I would like to draw a chart of sorts in which three complexes of legal ideas will take place. There is first the classical idea of natural law, that is, law grounded on human reason and conscience, such as it is defended in Greek philosophy, from Aristotle to the Stoics, and later on in Medieval Christian thought. Second, there is legal positivism, defended in modern Europe from Thomas Hobbes to Hans Kelsen and contemporary scholars. Third, there is Islamic legal thought.

Now, the three corners of this triangle, although they are worlds apart on some points, agree on some basic assumptions, even if this agreement may sound paradoxical, and does.

Natural law and legal positivism disagree on the origin of norms, but are in basic agreement as to their content. This content constitutes the "great platitudes" (C. S. Lewis), the elementary rules of decency, the survival kit of mankind, to which neither the former nor the latter add specific rulings, especially in the realm of cultic acts.

Natural law and Islam agree on the ultimate origin of Law, which is divine Law. Hence I could venture the paradox according to which both Christians and Muslims live in a theocracy, for the ultimate authority is and remains God's[41]. But the way in which God issues commands is not the same. In Islam, God's Word is first the Book, and secondly the Messenger. In Christianity, God speaks in human conscience.

Legal positivism and Islam agree *ex negativo* in their common rejection of a natural law. Contemporary, post-Christian legal scholars in the West share with Islamic doctors the tenet that law originates in a decision, so that there is only positive law. They disagree on the nature of the legislator: for Islam, it is the eternal omniscient and omnipotent God, for legal positivism it is unaided human reason, no longer understood as the image of the divine Word *(Logos)*, but in a merely secular way. One may ask whether, in the long run, the latter will be able to hold its ground against the former.

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[40] Thomas Aquinas, Summa Theologica, IIaIIae, q. 10, a 10.

[41] See my Are Non Theocratic Regimes Possible?, in: The Intercollegiate Review, 41-1, 2006, p. 3-12.

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The Question of Shari´a and Human Rights

Rocio Daga Portillo

"The Universal Declaration of Human Rights opens up to the hope of a universal juridical order. This is one of the great contemporary debates and should not be engaged in with an approach of conquest or colonization but in line with reason (…) Humanity should be seen as one."[1]

The theme of this paper is not aimed at exposing crimes against human rights that could take place in countries where Shari´a is in one way or the other applied. It is not intended to be an assessment on the compatibility of Islam and human rights. Indeed it is no more than a reflection of conflicting points of Shari´a and human rights from a historical perspective and under the light of modern reforms and changes in the legal system, that have taken place during the last centuries in Islamic countries. It is important to notice that Muslims, willingly or not have gone through a period of secularization and influence by modern Western thought and laws in modern times.

How much the actual changes in society could influence reforms of Shari´a, remains to be seen. As a matter of fact, every country has its own history and has been confronted with modernity in a different way. One has to differentiate among westernized countries in North Africa and the Middle East from those less permeated by Western culture, like the Gulf countries, Pakistan or Afghanistan.

Classical Shari´a and reformed Shari´a of modern times are to be pondered from the perspective of human rights. Both systems of rights and duties that of Shari´a and that of human rights, have a different origin and foundation. However, the question on Shari´a and human rights has been raised by scholars, Western and Muslims, not only at a political level but also at a theoretical one. Nonetheless, the first question to be made here is, perhaps, the most problematic one:

What is Shari´a?

What is Shari´a?

Literally it could be translated as "the path to the source of water".

Shari´a is a way of life, Muslims say, and not a set of laws, least of all, of codified laws. It is the path to be followed to overcome the tests set by God in life, so that man exercises his capacity to reach Paradise. The law of God is like a propaedeutic that helps people and society to reach the state of perfection and the rewards in the afterlife. Since there is no conception of original sin and nature is not wounded in itself, the way of perfection is to fulfill the path established by Shari´a. Man has the capacity if he submits himself to the will of God and his law.

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[1] Jean-Marie Lustiger, "Citizen, Community, State. Towards a Critique of Modern Reason" in *Oasis*, 12, 2010, p.13.

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Shari´a includes all aspects of life. It consists of religious cult, ethics, as well as positive laws. It includes family, property, commerce, inheritance laws, social organization, war and peace, relation with non-Muslims and political order.

Hence, Shari´a is the framework for objective values for the majority of people in Islamic countries. Although, it must be pointed out that the realm of morals does not belong to the domain of individuals in Islam. Morals are a matter often controlled by the state. In the case of an Islamic state, morals would be controlled and sanctioned by a police institution, with its origin in medieval Islam, the *Hisba*.

At any rate, Shari´a being the source of morality in these societies, it is seen by Muslims as the *alternative* to the moral decadence of western societies.

On the other hand, Shari´a as a foundation for political and social organization is mainly used as an ideology by different political groups.

The question of Shari´a becomes complicated, indeed, since it includes a just demand by many people of sustaining identity, tradition and values. However, as a legalist tradition, and one without the possibility of questioning or reflecting on itself on philosophical grounds as well as in its historical context, Shari´a, became a set of rules, that cannot be question, concerned with what should be prohibited and allowed, *al-haram wa-l-halal*. Nonetheless, this cannot possibly be the answer to the real demands and problems of people in a changing and globalized world. The question what is Truth, Justice and Good has to be made by individuals and groups beyond any political interest within their own religious tradition and inquiring by the means of reason.

Moreover, Shari´a might be defined as the hermeneutic of the will of God. Shari´a is not considered to be the revelation of God´s essence or revelation of himself, but the revelation of his will. The will of God is to be found in the Koran and Sunna/ Hadith, the transmitted words and deeds of Muhammad.

Revelation in Islam does not take place in history of mankind. It does not happen through the experience of a people, like that of Israel and the life of those called upon by God, the Prophets. There is no conception of a history of salvation. Revelation had been given directly, dictated, by God to the Prophets. A God incarnated in history, who remains among his people in his instituted Church as the Emmanuel, God among us, and the Lord of History is even more unconceivable. God is completely separated from his creation.

According to Muslims, the final revelation was given to Muhammad. Jews and Christians have falsified the previous revelation given to mankind. Islamic revelation was given or dictated by God through an angel to Muhammad after he had been elevated into the world of angels. Thereafter, Muhammad would articulate it in the Arabic language. The words in the Koran are the literal words of God written down in Arabic. The Arabic language has in this sense an ontological value.

The way revelation takes place, coming directly from God and written down in Arabic in the Koran, has implications for the interpretation or hermeneutic of Koran. The Koran contains around 500 verses, with a content related to cultic prescriptions and laws of social organization for the community of Muslims, the Umma. The interpreta-

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tion of these verses is done basically on a philological basis without a critical historical method. The Koran is not be interpreted in a historical context.

The Sunna or Hadith, the second source of revelation, completes the revelation of Koran. Sunna, at the beginning an oral tradition, had been written down in the 9th century and established as canonical works in six compilations or books , with the most important ones being those of al-Bukhari and Muslim.

In pre-Islamic Arabia, Sunna used to be understood as the imitation of a virtuous predecessor. In the Islamic period, it became to mean the imitation of Muhammad, the most virtuous predecessor of all times past and to come. "At an early period the ancient Arab idea of *sunna,* precedent or normative custom, reasserted itself in Islam. The Arabs were, and are, bound by tradition and precedent. Whatever was customary was right and proper; whatever the forefathers had done deserved to be imitated."[2]

But "Sunna in its Islamic context originally had a political rather than a legal connotation; it referred to the policy and administration of the Caliph. The question whether the administrative acts of the first two Caliphs, Abu Bakr and ´Umar, should be regarded as binding precedents, arising probably at the time when a successor to ´Umar had to be appointed, and the discontent with the policy of the third Caliph (…) took the form of a charge that he, in his turn, had diverged from the policy of his predecessors and, implicitly, from the Koran. In this connection, there appeared the concept of the *sunna* of the Prophet, not yet identify with a set of positive rules but providing a doctrinal link between the *sunna* of Abu Bakr and ´Umar and the Koran."[3]

Sunna or hadith came to mean, at some point, the words and deeds of Muhammad. Shafi´i, the engineer of Islamic law, established this tradition of hadiths-whose real origin may be found in customary law and the practice of the first caliphs- as Sunna of the Prophet. While Malik still follows customary law of Medina and takes as a model the actions of Muhammad´s companions, Schafi´i defines the methodology of Islamic law and established as the second source of law the Sunna of the Prophet in form of hadith.[4] An oral tradition, written down in the 9th century, became a binding source of Law, only second in importance to the Koran.

The opposite of *sunna* would be innovation, *bid´ah,* which is considered as a synonym for heresy. In other words: "S*unna* presents an obstacle to every innovation"[5], J.Schacht affirmed.

Western scholars have stated that hadith is the practice of the Umayyad ascribed in retrospective to Muhammad containing elements of Arabic customary law, Jews and Roman law. For their part, Muslim experts on Islamic Law do not do question the origin of the hadith, taking them literally as the words and deeds of Muhammad. The science of hadith cultivated by Muslims scholars and ulemas consists in the study of the

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[2] J. Schacht, *An Introduction to Islamic Law*, Oxford University Press, Oxford, 1964, p. 17.

[3] J. Schacht, *An Introduction to Islamic Law*, pp. 17-8.

[4] J. Schacht, The Origin of Muhammadan Jurisprudence, Oxford, 1950, pp. 24,73, 77.

[5] J. Schacht, *An Introduction to Islamic Law*, p. 17

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chain of transmission and content, which provides the criteria to evaluate each hadiths and establish their juridical/theological weight as a source of revelation.[6]

The system of deriving the Law, *Fiqh*.

The way Islamic law or Shari´a adopted a system to derive the law, which constitutes the so-called fiqh, was not without controversy. This controversy takes place in the midst of political events and is influenced by political power. The period of formation coincides with the consolidation of the Islamic Empire, from the 8th century to the 10th century.

During the period of the 8th century to the 10th century, there were two contending trends of thought, a rationalist one, *mu´tazilah*, and that of Ibn Hanbal, which defends the transmitted sunna or hadith as the second source of revelation, after the Koran and against any rationalistic method applied to the Koran.

Shafi´i and later al-Ash´ari will find a middle way. Hadith/sunna obtains the status of canonization and elements of the rationalistic method incorporated, i.e. analogy.

At that point the science of *fiqh* or the basic principles of *fiqh*, *usul al-fiqh*, were laid down. From now on the method of finding out the will of God or the law of God would follow a certain methodology. "Legal reasoning", *ijtihad*, was established as a method in Shari´a, with subsequent figures of legal reasoning. Shafi´i established the method of legal reasoning as follows[7]:

Law must be derived from the Koran and Sunna, the foundation of law and first sources of law. They never contradict each other but complement each other.

The result of legal reasoning for later derivations of the Law cannot contradict the first sources of Law. A legal rule derived from clear text in the Koran and/or widely transmitted hadith is certain and no subject to disagreement.

Whatever cannot be found in Koran and Sunna, it will be found in consensus of the first virtuous generation or consensus of the experts in law, the *´ulama*`.

The following step, in the event nothing is found in the previous sources, would be to apply analogy, *qiyas*, and other juridical concepts, like juridical preference*, (istihsan)* – although *istihsan* is not accepted by Shafi´i, only by the other schools of law –; welfare, *(maslaha)* necessity, *(darura)*and custom, (*´urf*, *´ada)*. Each school of law would put particular emphasis on one or another juridical concept for its methodology of deriving the law.

All of these concepts in a given hierarchy comprehend the methodology used by jurists and *´ulama*` in order to derive Islamic law from the Koran and Sunna.

A rule derived from legal reasoning and analogy may be subject to disagreement, which it is a recognized juridical institution in Islam, *ikhtilaf*. In this way, we find in Shari´a a juridical figure that allows calling Shari´a a plural and flexible system within the untestable framework of Koran and Sunna. The category of *ikhtilaf* permits the

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6 M. Rohe, *Das Islamische Recht*, C. H. Beck, Münich, 2009, pp. 54-55.

7 W. b. Hallaq, *Islamic Legal Theory*, Cambridge University Press, Cambridge, 1997, p. 30.

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differences in legal opinion between the ´ulama`. This will constitute the basis for the creation of the four legal schools of law and a wide basis for incorporating customary law of conquered people. Traditionally is said, "*ikhtilaf* is mercy"[8], *rahma*.

On the other hand, modern Muslims believe in the flexibility of the Shari´a, urging for the abolition of *fiqh* as a product of man´s mind. However, the conflicting points of Shari´a law are found already in the Koran and Sunna. Therefore the problematic begins with the hermeneutic of these texts, not mentioning that texts from the Koran and Sunna are hardly interpreted in their historical context, while possessing a normative value. As a matter of fact, the strictest school of law that of the hanbalis, relies only on the Koran and Sunna and not in derived jurisprudence, *fiqh*.

The schools of law with its juridical method of legal reasoning and tenets remained unchanged since the 10th century, until the Islamic world was impelled to introduce reforms and changes as a result of the encounter of Islamic civilization with the West in 18th.c.and 19th.c. Shari´a law is a law based on precedents and is not codified. In modern times, Shari´a had been submitted to a process of codification, taking the form of positive law. This codification, according to complains from Muslims, has introduced a major inflexibility in Shari´a. The question is where the real root of inflexibility is.

From the 19th century through the middle of the 20th century, enormous reforms were introduced in many fields of culture and law. Already since the exploration of Napoleon in Egypt, the eyes of the Ottoman rulers were blinded by the technical achievements of the West. Thus, the period of *Tanzimats* or reforms began, which is characterized by missions sent to the West in order to learn and then introduce the new sciences and advanced technology. Nonetheless, Western ideas and literature also found their way in through international relations and colonialism and changes were extended also to Islamic law.

These reforms were mainly done from above for and by the elite of these Islamic countries.

While in British India it was still necessary to abolish Koranic punishment, also called draconian punishments, *hadd* punishments, in countries belonging to the Ottoman Empire this particular law was reformed by a Muslim Caliph, regardless of the Shari´a. "The very first of these Ottoman *qanun names* ,that of Sultan Mehmmed II (1451-81) repeatedly refers to Islamic Law and freely uses its concepts. It treats, among other matters, that of penal law; it presupposes that the *hadd* punishments are obsolete and replaces them by *ta´azir*, i.e. beating, and/or monetary fines which are graded according to the economic position of the culprit."[9]

The Ottoman Caliph also reformed commercial laws, with the Code of Commerce of 1850, as well as the laws regarding the status of non-Muslim fellows. In 1856, under pressure from the French consulate in Turkey, the Dimma Status of non-Muslims was abolished. Already ´Abdul Mejid (1839-61), had declared non-Muslims for the first

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[8] Abdur Rahman I. Doi, Shari´a: The Islamic Law, London,1997, p.85.

[9] J. Schacht, *An Introduction to Islamic Law*, p. 91.

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time "subjects" so that they were not longer called Dimmis or "protected subjects".[10]However, the status would remain as a kind of unwritten law.

But it was first in Egypt that an intense intellectual activity was developed in the 19th.c. and 20th century, trying to elaborate the law in accordance with Western law and practice. After independence of the Ottoman Empire in 1874, "Mixed Courts" were introduced and Shari´a began losing ground against Western law that took over. Most areas of law were modified according to Code Napoleon, even though some tenets of Islamic law were introduced or compatibility was eagerly sought. In 1920 a law book with 647 paragraphs on person and family law after the three main school of law[11] was published. Codification of Shari´a law had begun seemingly with no return.[12]

The work done by the Caliphs in the Ottoman Empire and especially that done in Egypt became the corpus of law for the rest of Middle Eastern countries. In that way, a process of secularization of the law took place: "One legal subject-matter after another was withdrawn from the orbit of Islamic law."[13]

By the middle of the 20th.century, other reforms took place at the hands of the Egyptians. One year after the pact between England and Egypt, which guaranteed the independence of the country, the "Mixed Court" was abolished. The time for the nationalization of the law had come,[14] and the law was taken under revision. The need to incorporate the Shari´a, as the spiritual inheritance of the country, was considered necessary for law giving. Shari´a had to be protected and used as a source for law giving. Still that would be done on the realm of the possible and having as criteria the law that had already been incorporated from the West. In fact, the claim was to take from the Shari´a what was possible to take, while the system remained basically based on a Western code of law.[15]

This re-elaboration or blending of Western law and Shari´a was accepted and incorporated by the rest of the Arab countries. Shari´a had always remained and continued to be applied in its most pure form only in the field personal, family and inheritance law.

An important date for the Islamic world had been that of the abolition of the Shari´a and the Caliphate by Ataturk in 1924. It was not by coincidence that the Muslims Brotherhood was founded in Egypt four years later, as the heirs of the true Islam and guarantors of the identity and continuity of the ´Umma. Their role will become prominent, as seen at present, especially after the new world order in the eighties.

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10 J. Schacht, *An Introduction to Islamic Law*, p. 92.

11 First Egypt had a codification of hanafi Law, the school of the Ottoman Empire. In 1920 the other two schools of law, present in Egypt were took into consideration for law giving.

12 Example is the Work in Arabic of al-Jaziri. "Islamic Law according to the four school of Law", still a work used today by jurists and ´ulama`. In Turkey Shari´a was first codified in al-Majalla in 1876-7, as the Ottoman Civil Code after hanafi school of Law.

13 J. Schacht, *An Introduction to Islamic law*, p. 92.

14 T. Nagel, *Das islamische Recht*, p. 307.

15 T. Nagel, *Das islamische Recht*, p. 308.

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Still, during the decade of the seventies in the 20th century, there will be a process of reform in the area of family law, enacted by secularized Muslim governments in a period of secular leadership and values. We have an example in polygamy law in Egypt. Yihan Saddat, the first lady of Egypt, introduced reforms in polygamy law, so that women had to be informed in the event their husband took a second wife and she had the right to opt for divorce in that case. It has to be taken into consideration that women have very little rights to apply for divorce.

The secular period came to an end in the eighties. The triumph of the Iranian Revolution, the growing influence of the Gulf States, with the strict school of law, Wahhabism, and the new world order paved the ground for a major splitting up of Islamic countries from the West. With the Cairo Declaration of Human Rights in Islam in 1990, Shari´a became the source of legislation in all Islamic countries. Any law enacted in these countries could no longer contradict Shari´a law, at least in a theoretical way.

Muslims would no longer attempt to imitate the West, but on the contrary, to return to their tradition of Shari´a. Under the stronger political presence of Muslims Brotherhood and derivative groups, Shari´a became a slogan for identity and continuity, a slogan that assures the solution to all economic and political miseries, a slogan that gives hope to the new generation.

The question would be which Shari´a is aimed to and which are the methodological principles for deriving laws.

The meaning and object of Shari´a.

"In the two religions in which the law gained a central place-Judaism and Islam-(in the latter) law is presented in a particular light. In Islam, *the law is already the central content of revelation*."[16]:

Shari´a has been defined as a deontology[17]. Similar to Kant's deontology, the metaphysical question has been censured. Contrary to modern philosophy with its turn to the subject, Shari´a looks for the wellbeing of the community, *´Umma*. So considered, Islamic society instead of being endangered by relativism, is rather to be feared of falling into totalitarianism. Whoever controls the religious Law has control of the people. Since the spheres of politics and religion are not well defined, any limits imposed by Shari´a to individual freedom are to be accepted as long as they are good for the ´Umma.

In a society where so many illiterate people exist and the elite tends to have an interest for practical sciences or Islamic knowledge, the question for the role of reason has not been seriously posed, even less than that of philosophical reasoning. Moreover, the scholarly tradition of ´ulama` considered philosophy as a heresy. Logic had been accepted as a useful instrument, but no place was given to ontology. For metaphysics is

16 *The Law of God*, University of Chicago Press, Chicago, 2008, p. 160.

17 R. Brague, *The Law of God*, p. 164.

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a question that goes beyond the capacity of human mind, therefore it is forbidden for men to enquire about it.[18]

The relation between Islam, Shari´a and philosophy had not been a harmonious one. Reason has the function of conforming itself to the revealed Law. Indeed, reason should not question the content of law. "The question of the divinity of law is thus secondary in relation to that of the divine authenticity of Muhammad´s mission."[19] Once the prophecy of Muhammad is accepted, by the same logic, law has to be accepted, asserts R. Brague. Revelation is given and rooted in transmission and tradition, without a systematic reflection under the light of reason. Theology, *Kalam*, is more an apology directed to prove the authenticity of the prophetic mission of Muhammad than to show the intrinsic value of the law or explaining faith through reason.

The authentic religious attitude is obedience to the law, which means obedience to God. To follow the ritual prayer and other prescriptions of Islamic law is what is expected from Muslims in order to get into paradise, God alone determines what is good and bad. He can order something to be considered as good, even though it is seen as something abominable by reason.

Al-Juwayni, Ghazali´s teacher formulates this as the doctrine of orthodox Islam:

"The intellect does not indicate either that a thing is noble or that it is vile in a judgment that obliges, *hukm al-taklif*. It is informed about what it must consider as noble and as vile only by the resources of the law and by what tradition renders necessary. The principle of what must be said on the subject is that a thing is not noble by itself, by its genre, or by an attribute that belongs to it. It is possible that something may be noble for the law, while something similar to it and equivalent to it is vile according to all judgments of attributes of the soul."[20]

No doubt, Islamic culture developed a complex and sophisticated system of law for its time. R.Brague mentions: "The quality of the law (…) could nonetheless be invoked as a proof of the superiority of the Koran over the other holy books."[21] In that way, "Law became a powerful instrument in the hands of the emerging governing classes of Islam, which prevailed of melting itself into the conquered populations. A law of its own gave impermeability to the governing elite."[22]

The fall of the Arabic Empire after the 11th century made it even more necessary to rely on religious law, since the Caliphate had lost its credibility with the loss of actual power. Nonetheless, the Caliphate was formally preserved and Shari´a became the identity figure of the Umma, joined together with a de facto political power. For the sake of the survival of the Umma, political power was transferred to Turkish men and

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18 Al-Gazali, *Tahafut al-Falasifah*, Pakistan Philosophical Congress, Lohore, 1963, pp. 1-3.

Ibn Khaldun, *The Muqaddima*, transl.F.Rosenthal, Princeton University Press, Princeton, Vol. III. pp. 246-50.

19 R. Brague, *The Law of God*, p. 161.

20 R. Brague, *The Law of God*, p. 166.

21 R. Brague, *The Law of God*, p. 164.

22 R. Brague, *The Law of God*, p. 147.

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Mongols, even if they were barbarians in the eyes of the cultivated Arabs and Persian population.

According to some jurists, after the 11th century "the gate of ijtihad", or creative legal reasoning, had been closed. As a matter of fact, Islamic law and culture had stagnated from then on. Arabs complain that the decadence is due to the Turks, who invaded the Arabic Islamic Empire without adopting the Arabic language, in this way, not being able to keep with the achievements of Arabic culture. The period of imitation of previous juristic decisions*, taqlid*, began and continue until the encounter with the West, when part of the Shari´a had been abolished and Western law was introduced in Islamic countries.

Fundamentalists would revive the call for the Shari´a in the 20th century with considerable success. Against the moral decadence in the West and neocolonialism, they claim Shari´a to be the solution. In fact, Shari´a has been presented as a utopia rooted in the first period of the history of Islam, which represents a time of complete harmony between politics and religion. This is a time to aim for, since it incarnates the pure and perfect life. In that sense, Islamic ideologies look backwards to an idealized period of history, that of the first centuries of Islam, as the guaranty for political changes and hopes.

Given that Islam proved itself through successful conquest at the beginning, both Muslim modernists and reformers of the 20th century, like the Mufti of al-Azhar Muhammad Abduh, would affirm that the state of decadence in the Islamic world is due to the fact of not being good Muslims.

The Islamic discourse on international human rights[23].

Liberal voices in the Islamic milieu defend the compatibility of Islam and human rights. However, these voices have diminished in the last thirty years. Secular political discourse has been silenced through the emergence of fundamentalists, which have taken great care to marginalize liberal intellectuals.

A widespread opinion is that human rights can only be fully realized under Islamic law. Only God gives rights to man and these are attached to their dignity by being Muslims. Dignity is founded in religion and in the belonging or proximity, being the case of Jews, Christians and Zoroaster, to the religion of Islam. Religion, being intermingled with a social and political organization, defines the dignity of the person. This conception is expressed in the Shari´a especially regarding the status of non-Muslims, who enjoy partial rights or no rights at all, in case they have a pact -*Dimma* pact- or do not have any pact-*harbi*-.

A different case is that of women. Since given rights are dependent on duties and responsibilities in social life, women will have equal dignity as men in front of God, but different rights, due to their different tasks in life.

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23 Mashood A. Baderin, *International Human Rights and Islamic Law*, Oxford University Press, N.Y.2003, p. 13-5.

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A more aggressive discourse against human rights asserts that international human rights are an imperialist agenda and must be rejected. *Human rights are identified as a civil religion* that pursues the destruction of Islam in the same way as it has done with the Church in western societies. This anti-religious agenda is based in the idea of separation of religion and state.

Nonetheless most Muslims are not against international human rights but complain of the double standard of the West, since the Universal Declaration of Human Rights in 1948 coincides with the creation and recognition of the State of Israel and deprivation of Palestinian Land.

The issue of Human Rights has become in general highly political, and less a question to consider and reflect on, in order to reach a judgment. The theoretical question on the foundation of human rights has been treated by some Islamic Scholars from different perspectives. Traditional scholars see the basis of human rights in the Koran. Others try to prove the origin of international human rights in Islam, tracing the way back to the end of the Middle Ages, when Islam influenced the West and became part of its heritage. In that way "P. Bellow, Ayala, F. de Victoria would have been influenced by Islam during the period of the Renaissance through the transverse of knowledge from Islam into Spain and Sicily."[24]

At present, the question of human rights in developing countries and especially in Islamic countries is discussed on the basis of cultural relativisms or the question of universality versus universalisms.

In the West there are those who see the origin of human rights in the tradition of natural law. Others, for their part, see it in the political experience of western civilization and History of positive law, without reference to natural law.

This last position tends to be a relativist one, denying the possibility for knowing absolute and objective values. The concept of dignity of a person, even the most basic concept of person is put in question and left to be defined by cultural, social, political consensus or the consensus of experts. The will of a lobbying group working with "experts" will define what belongs to another sphere of knowledge.

Against the opinion that there are universal values and rights to be recognized by all as expressed in the Declaration of Human Rights, there is the position of criticizing western universalisms, which is seen as an ideology. In that sense, international human rights should, in the opinion of Muslims, recognize the values and richness expressed in the Shari´a, which, not to mention, is for Muslims of universal value.

Still within this discourse, it is said that if the Declaration were presented today to be signed, there would be no general acceptance on the part of developing countries. Cultural inferiority is not acceptable anymore. Developing countries have gained self-confidence and will not let the West intrude in their cultures on the basis of a neo-colonial political weapon called universal human rights. From the beginning, Saudi-Arabia, anchored in a traditional society and with enough self-confidence, did not rec-

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24 Abdur Rahman Doi, *Shari´a. The Isalmic Law*, TaHa Publishers, London, 1987,p. 422.

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ognize human rights because of the articles on equality of men and women and religious freedom.

Subsequently, and parallel to this political discourse, we have the Cairo Declaration of Human Rights in Islam, that was signed by the States of the Islamic Conference in 1990.

Some passages shed light into the Muslim perspective on Human Rights and Islam[25] :

"Reaffirming the civilizing and historical role of the Islamic Umma which God made the best nation that has given mankind a universal and well-balanced civilization in which harmony is established between this life and the hereafter and knowledge is combined with spiritual faith; and the role that this Umma should play to guide humanity confused by competing trends and ideologies and to provide solutions to the chronic problems of this materialistic civilization.

Wishing to contribute to the efforts of mankind to assert human rights, to protect man from exploitation and persecution, and to affirm his freedom and right to a dignified life in accordance with the Islamic Shari´a.

Convinced that mankind which has reached an advanced stage in materialistic science is still, and shall remain, in dire need of faith to support its civilization and of a self-motivating force to guard its rights.

Believing that fundamental rights and universal freedoms in Islam are an integral part of the Islamic religion and that no one as a matter of principle has the right to suspend them in whole or in part or violate or ignore them in as much as they are binding divine commandments, which are contained in the Revealed Books of God"

Article 10 states: "Islam is the religion of unspoiled nature (*fitra*). It is prohibited to exercise any form of compulsion on man or to exploit his poverty or ignorance in order to convert him to another religion (apart of Islam) or to atheism."

Article 10 makes freedom of religion not only impossible but it also expresses the concept of "nature in the religion of Islam. There is not a given common nature to every person that confers its dignity upon a person as such; it is the belonging to the religion of unspoiled nature, Islam, which confers dignity upon the person. In that sense, non-Muslims do not enjoy the same dignity as Muslims, according to the Shari´a.

Conflicting points of Shari´a and international human rights.

As it has been mentioned before, Islamic culture developed a complex juridical system in the Middle Ages and defined itself through the law. We find in the Koran and Sunna the principles and duty of safeguarding the right of life, property, family, upright mind and religion. These rights can only be fulfilled in a complete way in the Umma, the community of Muslims. For the law is characteristic and identity factor of a people to whom God revealed it. Each religion has its own law, says Ibn Khaldun in *al-*

[25] M. A. Baderin, *International Human Rights and Islamic Law*, pp. 237.

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Muqaddima, and since Islam is the only religion with a universal mission, religion and politics are united.[26] Here it is to be observed that religion and law are used as synonyms and as such the mission of expanding religion requires and makes it necessary to include expansive politics.

This conception of Shari´a is already conflicting with human rights. More specifically, there are four main fields of law conflicting with international human rights:

1. Koranic punishment.
2. Women´s rights.
3. Relation to Non-Muslims.
4. Freedom of conscience and speech.

1. Koranic punishment or hadd punishment.

They are so called, because these five offenses are explicitly mentioned and forbidden in Koran. Since they are found in the Koran, it is considered to be within the realm of God´s rights and they have a religious character. In fact, they were often used as measures of military discipline. However, since they are found in the Koran, no one can diminish the punishment for the crime, change it into a discretional punishment, abolish or modify them.

However, modernity had brought about the abolition of *hadd*-punishment in many countries, either at hands of the Ottoman Caliphs or under the influence of Western culture and colonialism.

The Koranic punishment is applied in case of five kinds of offenses:

1. Adultery and fornication. The punishment is different for adultery and for fornication or sexual intercourse of non-married people. Adultery is punished by stoning or crucifixion, and the latter case by a hundred lashes. That will suffice since it is understandable, that young people fall in the trap of necessity or curiosity.

In both cases, four male eye-witnesses, with legal credibility, are required to establish proof. Moreover, it has to be proved that the act was voluntarily done. That makes it almost impossible to establish proof. For that reason Muslims see koranic punishment as something seldom to be applied.

A modern jurist, Shalabi, "points out that the proof required makes the punishment only applicable to those who commit the offence openly without any consideration to public morality".[27]

2. False accusation for adultery, which is punished with eighty lashes. This is found in Koran 24, 4., possibly having its origin in a false accusation raised against Aisha, Muhammad´s wife.[28]

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[26] B.1, pp. 320-22.

[27] M. A. Baderin, *International Human Rights and Islamic Law*, p. 80.

[28] J. Schacht, *An introduction to Islamic Law*, p.175.

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3. Theft is punished by amputation of a hand and each consecutive time with cross-amputation of foot and hand. The thief has the opportunity to recant his crime by returning the stolen object before the crime is brought before the court. In this case, the Koranic punishment will not be applied. In addition to that, the stolen thing should amount to a certain value for the Koranic punishment to be applied.

4. Rebellion or armed robbery is punished by crucifixion, cross-amputation of the hand and foot or banishment.

5. Intoxication, mainly through drinking alcohol, is punished with forty or eighty lashes, depending on the law school and it has to be proved that it happened voluntarily.

The sixth crime punished by means of Koranic punishment would be that of apostasy, which requires the death penalty. However, some modern jurists consider apostasy not within the realm of Koranic punishment, but as an issue to be left for the afterlife, to be punished by God. Hence, it should not be punished by death, unless it reaches the category of rebellion against the State. But this topic will be dealt with under the question of religious freedom.

Besides the crimes and punishment established in the Koran, penal law in Islam has its foundation in the law of vengeance, talion. This chapter of law belongs to the realm of men, to their rights. For that reason, it can be exchanged or not applied, even in the case of murder, if the contending parties reach an agreement. In case of intentional killing, the life of the murderer could be saved by paying blood money, if the family of the victim agrees that life should be spared. Then the criminal will be put in prison after having paid blood-money.

In case of offences like having been wounded, the same kind of wound should be inflicted upon the criminal, unless the victim decides to forgive.

The justification for these disproportionate punishments is that they a deterrent for society. However, there is a kind of utilitarian conception of justice, when it is argued, that the disproportionate punishments are almost not applied and affect a minimum of people. This contradicts the idea of justice that implies that the value of each and every member of society is equal and infinite. A single transgression of justice done through a disproportionate punishment, even if it is for utilitarian reasons, is injustice.

2. Women´s rights.

We can gather together the conflicting women´s issues as follow:

Polygamy, the right of man to punish his wife, marriage of infants girls, compulsory marriage, compulsory dress, strict separation of genders, no right to keep their children in case of divorce or becoming a widow, no rights to ask for divorce against the unlimited right of a man, inequality by inheritance, no possibility for a woman to marry a non-Muslim, compulsory divorce in case man commits apostasy.

The Koran 2,228 and 4, 34 are verses that speak about the rank of women. The Koran 2,228 says in a context of the law of divorce:

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"Divorced women shall wait concerning themselves for three monthly periods. Nor is it lawful for them to hide what Allah hath created in their wombs (…) And their husbands have the better right to take them back in that period, if they wish for reconciliation. And women shall have rights similar to the rights against them, according to what is equitable; but men have a degree (of advantage) over them."

Koran 4, 34 says:

"Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and because they support them from their means. Therefore, the righteous women are devoutly obedient, and guard in absence what Allah would have them guard. As to those women on whose part fear disloyalty and ill-conduct, admonish them(first), (next), refuse to share their beds,(and last) chastise them (lightly)."

These are the verses used to legitimize the submission of women to men and the right men have to chastise women physically.

In a historical context these verses could be easily interpreted as an expression of a patriarchal society that has become obsolete at present. However, since the Koran is the word of God it is difficult to declare them as obsolete. It will depend on the education of man, the social class, and character, if they will make use of or not of the Koranic allowance to chastise their women.

The verse allowing polygamy in the Koran has its origin in the restriction given to a tribal society to limit the number of wives to four. With new economic conditions, especially in the cities, polygamy is not as wide spread as it is used to be.

Moreover a popular opinion among some Muslims is that de facto polygamy is prohibited, since the Koran demands a just treatment of all wives and this is completely impossible to fulfill. Nonetheless, the most accepted opinion is that polygamy is necessary in extreme cases and for that reason should not be prohibited.

These cases are as follow:

– When the woman is sterile, she cannot have any children or produce male descendant.
– When the wife becomes ill or old, and cannot fulfill her wifely obligations.
– When woman have behaved badly.
– When the man has an extraordinary sexual need or drive.

As a matter of fact, polygamy is predominantly found in the countryside, where a big family means having the necessary hands to work the fields. A different kind of polygamy is that of the upper-class. Here polygamy is a symbol of status and male fulfillment.

Muslims support the argument for the legality of polygamy by saying that legalized polygamy is better than having illegitimate relations, as in Western society. Muslims consider Islam as the religion of the just-middle, the middle between two extremes, that of Atheism and of Christianity. Therefore, polygamy would have the function of keeping up with "reality", fulfilling a need and even lowering the level of suffering and burden for people and society.

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However, observing this perspective, these considerations point to a kind of utilitarian morality, where the value of each and every single person does not count, but it counts rather the principle stated by J. Bentham: "the greatest happiness for the greatest number".

Modern family law has introduced reforms to classical Islamic law so that in some countries men need the permission of the court to take an additional wife. The court will examine if he has the required material means to support a second wife and that the first wife is informed of the intentions of the husband. In Egypt, for instance, the first wife would have the option to apply for a divorce in this situation, where Islamic law normally would not allow it.

In 1924 and 1956 respectively, polygamy was abolished in Turkey and Tunisia. In spite of the fact that it is punishable by imprisonment and a fine, the practice as a long grown tradition has continued in these countries, showing that Shari´a has indeed a higher authority than the law of the state. Recent voices in Tunisia have called for re-introducing polygamy, as a fulfillment of the idea of a country conformed to Islam.

Other points in Shari´a on women´s right are as follows:

– Child marriage is legal according to the Shari´a. Women are given for marriage when they are nine or ten years old which is the age of sexual maturity or adult age according to classical Islamic law. This law can lead to the actual selling of young girls by their parents in order to manage a difficult economic situation. However, modern reforms have been occurred in most countries, stating the age of maturity to 16 and 18 years old.

– A compulsion to marry can also be inflicted upon adult women. A woman needs someone to represent her to conclude the contract of marriage, exception in *hanafi* law, and this person usually is her father or a close male relative. A mute answer or silence, when ask if she accepts her partner, is interpreted as a sign of approval according to Shari´a. Maliki law approve compulsory marriage, if the marriage have been arranged by the father of the bride. He is not obliged to ask her opinion.

– Within marriage, a woman enjoys different rights than a man. For instance, children belong to the family of the father. According to classical Shari´a, in case of divorce the woman has the right to have the children until the age of 7 for males and 12 for females. Reforms in modern times have provided in some countries that the mother could keep the girls till they get married while boys belonged to the father. In the case of a non-Muslim mother, children belong to the family of the father in all instances. If divorce occurs or she becomes a widow, the mother only would have the right of nourishing the baby till the age of two. This is justified on the basis, that the mother would educate the child in the wrong religion.

– Another controversial issue is divorce. Divorce is a right of a man, who can repudiate a woman without mentioning any reason for it. In classical law, and today if an Islamic marriage has not been registered, the man does not need to go to court to obtain a divorce. It will be enough to swear three times before two witnesses in order to obtain a legal divorce.

In contrast, women can request a divorce in only few and extreme cases:

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– When the man cannot sustain the family economically
– When he disappears for a long time or is in prison for life
– If he becomes mentally ill
– If he is impotent
– If he uses extreme violence against her
– Another resort is when a man agrees to the petition of divorce of his wife, *khulu´*, in this case she has to pay the dowry back.
– Compulsory dress and strict separation of gender is derived of the concept of the relationship between man and woman. However, the veil has become more of a political issue than of a religious one in modern times. In some countries, like Iran, the veil is prescribed by the state. In other countries it is still optional although the social pressure is strong, to the point of being a condition for employment in some companies or institutions.

Few women view the veil as an expression of their relationship with God. The veil is a demonstration of identity and belonging. Women wear it sometimes due to pressure by their male relatives and sometimes it comes from their own political consciousness. On the contrary, the *burqa* is not a Koranic prescription, but a religious recommendation for those that voluntarily would like to fulfill it.

The veil in the Koran is given as sign for the righteous women to be respected by their Muslim men. Koran 33, 59 mentions:

"Oh Prophet! Tell thy wives and daughters, and the believing women, that they should cast their outer garments over their persons: that is most convenient, that they should be known as such and not molested."

This implies that non-veiled women are to be considered non-respectful ones in conservative circles. The status of a woman in general is given by the status of her family and the protection that the family can provide for her.

3. Relation to Non-Muslims.

We find a kind of first draft of international law in Islamic law regarding the issue of relation with non-Muslims. The laws of war and the rules regarding the way of dealing with non-Muslims were already developed in classical Shari´a. Here, we find humanitarian laws, i.e., the killing of civilians was forbidden by law, and that includes the killing of women, children, elderly and ill people as well as monks.

Traditionally, Islamic law divides the world in *Dar al Islam*, the House or Territory of Islam, *and Dar al-Harb*, the Territory of War. Later on, it was developed the concept of *Dar al-Sulh*, the territory of Pact.

Relations with non-Muslims are normally addressed at the end of a Shari´a book, under the title and chapter on Jihad.

The relations with non-Muslims outside the Territory of Islam are a belligerent one in classical Shari´a, unless a Pact, *Sulh*, has been signed. In the case of Iran today, they consider countries having diplomatic relations with Iran as *Dar al-Sulh*. Those countries without diplomatic relations are considered *Dar al-Harb*. Citizens of *Dar al-Harb*

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do not have any rights, including the right of protection of their lives, if they enter Iranian territory.

A temporary permission to enter and practice an activity in Islamic territory, mainly commerce, was already provided by law in the Islamic Middle Ages. Permanent residency, however, would not be allowed in Islamic territory to non-natives non-Muslims, unless by marriage, according to Shari´a.

The status of non-Muslims living permanently in Islamic territories dates from the time of the conquest and is called Dimma Status. The Dimma Status has its origin in a war pact, by which non-Muslim subjects agreed to recognize the dominion of Islam and pay extra taxes in exchange for having their lives and property protected and permission to practice their own religion within certain restrictions. The pattern and origin of this pact is that of a victorious nation over a submitted one.

The relation to Non-Muslims living permanently in a Muslim country, according to the Shari´a, is a relation between a submitted nation and a victorious one. The basis for the status of Non-Muslim living permanently in Islamic territory, called Dimma Status, or status of protected people, goes back to a pact sign up by the Caliph `Umar b. al-Khattab. This contract is transmitted in different forms in different juristic works, from a soft version in K. al-Kharadj of Abu Yusuf in the 8th century, until the last known version in the 12th century by al-Turtushi. These pacts reflect the status of Non-Muslims in different periods of Islamic history.

The Dimma status provides, according to the Shari´a, for the protection of life, property and restricted religious practice in exchange for the recognition of Muslim rule and the payment of extra taxes by each adult male, with exception for the ill, elderly men and monks.

Islam entered the Christian territories of the Middle East and established itself as a military rule. Nothing changed at the beginning and the social structure remained apparently intact. The Umar Pact reflects how Muslims believed that the Dimma status would be a temporary one. Consequently the population had the right to keep their churches and synagogues, but not to build new ones. They were also committed to help Muslims in war, give them lodging, and help them to build bridges. Insulting Muslims, hitting them or serving the enemy as spies or denouncing their weak sides was prohibited. Carrying and having weapons was forbidden for them. Bells were not supposed to sound during or before the Muslim prayers and processions were limited to once a year

Al-Turtushi in the 12th century adds more of these restrictions. Churches and synagogues are not to be restored. Proselytizing and incitement to apostasy from Islam is strictly forbidden, but any conversion to Islam should be not hindered. Non-Muslims should not sell alcohol or have a direct view over a Muslim house. Processions were forbidden as well as the public display of crosses and sacred books. Bells were supposed to ring quietly. Separate forms of dress were required for non-Muslims, so that non-Muslims could be distinguished from Muslims. Muslims were to be treated with respect, been given priority to sit, if they wish to sit down and be greeted first.

These conditions have not always been applied in the same way in all periods. Nonetheless, some of them have always been enforced in all times and periods, like the

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law concerning the building of temples. Other laws have been temporarily applied, when required. Some of these rules have been kept in Muslim secularized society in modern times as unwritten laws, like that of non-Muslim.

The Dimma status had been abolished in the Ottoman Empire under pressure from the West, meaning with that the abolishment of extra-taxes. However, remnants of the Dimma status endured in written or unwritten laws. It remained extremely difficult to build temples and their de facto status continued to be that of second class citizens, with exception of the colonial era, and especially when the Christian elite played a key role in the modernization of society.

The conception and pattern of a nation living under the rule of another nation has still not disappeared at an official level in Islamic society. This pattern had been a pragmatic solution of Islam in its conquering period in order to incorporate quickly a vast amount of territory. This pattern of *Dimma* status is previous to the creation of national states and conflicts in many aspects with it. Under this form of organizing the state, it is conceivable that a people can live separately from the Muslim population in their own cities or areas, having their own system of family law and personal status and still belong to Muslim territory. Even if it was conceived to be a temporary situation, the Dimma status has however remained in society for centuries to the present days.

The concept of equal rights, especially political rights for non-Muslims, does not exist according to Shari´a. Man does not innately possess a nature and dignity per se; this is given by a religious belonging to Islam. Christians and Jews as well as Zoroastrians have a certain dignity because of their proximity to Islam, so that they can become *dimmis* or protected people. Atheists, on the other hand, have very little dignity according to the Shari´a. They are expected to convert to Islam. For that reason, Muslim men may marry a member of these three religions, but not an atheist. An atheist woman must to convert to Islam.

Other discriminatory rules are found in the Shari´a for non-Muslims men and women. A non-Muslim cannot give witness in court against a Muslim.

If blood money has to be paid, because of an accident or murder, the life of a non-Muslim man is worth half of that of a Muslim, a non-Muslim woman only a fourth of a Muslim man and half of that of a Muslim woman. In case of inheritance, non-Muslim women will not inherit from their Muslim men, even if they become widows.

4. Freedom of religion and speech.

It has been mentioned before that some jurists consider apostasy to be one of the Koranic punishments. Meanwhile, a few other jurists, following a modern trend of thought, consider apostasy as a sin to be punished by God in the afterlife.

Apostasy could indeed be compared with the offense of high treason from the perspective of classical Shari´a. Since the ´Umma is a political-religious community, to leave the community is not only an issue of being punished by God in the afterlife, but it is to be punished with the death penalty. An indicator that there is a political conception underlining the punishment for apostasy is the fact that men are to be punished in all cases with the death penalty while women, depending on the school of law, are not.

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They are usually imprisoned and beaten to secure a change of opinion. Jurists justify the punishment on the basis that a man can make war and fight the ´Umma. In becoming an enemy of the community, he is more of a threat for the stability of the community than a woman and he should be eliminated since he commits rebellion. In either case, both men and women have three days to repent and be considered Muslims once again, and no punishment will be administered.

The origin of this penalty is to be found in the *Ridda* or the Wars of Apostasy. As a measure against deserting the troops of Islam, desertion was prevented by punishment for the crime for apostasy.

Liberal Muslims jurists try to place the punishment for apostasy in the afterlife. However, this opinion is not widespread, since the question of the allowance for departing from the true religion, from goodness, is made.

At present, after the reforms of Shari´a and the legal system, most Westernized Islamic countries penalize apostasy with prison or exile.[29]

Some moderate Muslim jurists assert that if a conversion is made in private and it does not represent a threat to the Islamic community, the person should not be punished. This means, that the person must not be a public figure and any conversion has to be done in secret.[30]

A non-Muslim who has insulted Islam or Muhammad will be also condemned to the death penalty and their only course of escaping punishment would be conversion to Islam. In this situation, Shari´a considers that this person has lost the Dimma status that provides protection over life.

In both cases, apostasy and losing the Dimma status, appear in modern times under the same label, that of Blasphemy Law. Blasphemy law is a modern appellation for apostasy and the prohibition for Non-Muslims of insulting Islam and Muhammad, by which they lose their status as protected people, *Dimmis*.

Both cases point out the challenge posed by Islam to freedom of religion and personal freedom. The difficulty of acknowledging freedom of religion in Islam has its origin in the fact that Islam is given genealogically to the children; a child of a Muslim father is by law a Muslim. In addition to that, abandoning the "true religion" or not choosing goodness is not justified to the eyes of Muslims. Human nature is predisposed to be Muslim, according to the Shari´a. Only the parents divert their children into a different religion or non-religion. *The concept of original sin does not exist in Islam,*

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29 This is the case of Abu Zayd, scholar from Egypt, who had to leave his country in 1994 because he was charged of heretical interpretation of the Koran and Shari´a. His wife was compelled to divorce him, although she was able to escape the country. The charge was brought to court by a traditionalist of the official institution for Islamic Affairs, al-Azhar.

30 When Magdi Alam, an Egyptian and Muslim journalist living in Italy, was baptized by the Pope on Easter Night of 2008, al-Azhar issued and statement against the public character of this baptism, for it would be better if he had been baptized in private. In this case, the person was beyond the jurisdiction of Islam, and Sunni law, different from Shi´a one, does not allow persecution of apostates outside the borders of Dar al-Islam. However, fundamentalists threaten the journalist.

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therefore is found the conception that the Shari´a guides and guarantee nature to reach its pure and natural state.

In that sense, Sayyid Qutb, the great theoretician of the Muslim Brothers, in referring to a verse in the Koran, "there is not compulsion in religion", explains that since everyone is Muslim by nature, there will be no compulsion in religion if someone is obliged to become a Muslim.

Excursus: Jihad. Violence in a religion of the 21st century?

Jihad literally means effort, to fight (to make effort) in the path of God. The word is usually used, in the context of fighting "on behalf of God".

Classical Shari´a classifies Jihad in two forms:

Small Jihad, with the meaning of war, and big Jihad, understood as asceticism.

The ascetical meaning is especially found among Sufis. It is often aimed for those who prepare themselves for war.

Other types of Jihad are that of Jihad of the word, on behalf of the mission of Islam and monetary Jihad, meaning to provide the means for that mission.

However, the question of Jihad is not whether Muslims as such are violent or if their society is of a violent nature. This is an erroneous and an inaccurate question. The correct question is if Islam, as a system of social organization, may contain an element of violence given by an anachronistic law, that of classical Shari´a.

From a historical perspective, Islam was an Empire or, in modern terminology, a colonial power, during the middle Ages. Politics and religion, both sacred and profane, were together from the beginning. Muslims assert that, the first era of Islam, during the time of Muhammad and that of the four rightful caliphs is the period when a complete harmony between religion and politics existed in History. Thereafter, political power became corrupt in the struggle for power and dominance of different groups and families.

Real politics gained ground. The decadence of the Arab Empire began in the 11th.c, and political power was transferred to those who had military power, the Turks, after a formal recognition of Islam. Thereafter, Jihad continued to be waged by the Ottomans, as successors of the Arab Islam.

Given that Islam brings together the sacred and profane sphere, and has proven itself by building an Empire, there is no principle, historical example or dogma that allows it to declare Jihad as an obsolete concept.

Nonetheless, it must be taken into account that Jihad as a religious obligation, *fard kifayya*, is not meant for everyone, but for a certain number of people in the community. The rest of the people assume the obligation of jihad only when no one fulfills the commandment or it is required by the Caliph, in case of great danger for the ´Umma. Therefore, Jihad could be compared with the concept of an Army obliged by religious law to constitute itself.

In classical Islam, Jihad was recalled and waved by the Caliph, Sultan or ruler. Indeed, it is a modern phenomenon that Jihad is invoked by groups with no political

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functions, in the form of people movement, or as a movement fighting for social and political rights.

Fundamentalism originated as a result of the abolishment of the Caliphate in 1924 by Ataturk. By no coincidence the Muslim Brothers were founded in Egypt in 1928, four years after the caliphate and the Shari´a had been abolished by Ataturk. They saw themselves as the true heirs of Islam, the one who preserved and guaranteed identity and continuity to the Islamic ´Umma.

The element of violence in Islam is found at a political level, justified by a religious tradition where the profane and sacred is not separated and clearly defined and where dogmas and historical examples cannot help.

However, it is necessary to distinguish between a political system anchored in a history of building an Empire on the base of religious belief and the population as well as particular individuals. When the population, mostly illiterate, gets involved in violence, it happens often because of manipulation by certain political factions.

Conclusion

The period of secularization of the first part of the 20th.c until the seventies, has come to an end in the Islamic world. Equal rights and freedom remain a challenge for Islam, as long as the legalist tradition of classical Shari´a remains. Reforms have taken place in modern times in Islamic countries and these reforms also affected the Shari´a. Appreciation for the value of freedom and the use of reason are part of Islamic societies in one way or another. Some conservative groups, fearing to follow the path of moral decadence of the west, hold on to values of their own religious tradition. Political groups, however, use the just demand of the population for moral values and social justice, for their own interest. The claim for Shari´a becomes an instrument of control and manipulation when freedom is not taken into account. In this case, the rights of the population, Human rights, are not considered and Shari´a might be used to limit the freedom of individuals on behalf of the interest of the community.

On the other hand, the west does not have all the answers or the right to impose ideas or political systems on others. As a matter of fact, the danger of a relativistic interpretation of Human Rights that could revert against western society itself is real, if the foundation on which they rest is forgotten. Although Human Rights apparently are well accepted in the west, the extreme individualism and relativism of a self-centered society may well result in a back lash.

A blending of western and Islamic ideas, institutions and way of life has already taken place in the Islamic word in the last century. Globalization is a fact that challenges everyone to open up and achieve more solidarity. It is a task for everyone to deepen the own tradition under the light of reason and good will in order to search for the roots that binds the human family together.

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Relationship of Bioethics in Albania and Traditional Islamic Teaching

Bardhyl Çipi

1. Introduction

At present, all countries consider the human health one of the highest values respecting human rights, dignity and individuality (1). In this framework, where Bioethical opinion gets an important place, it is necessary to know the influence of traditional Islamic teaching in Bioethical practice, especially in our country, because the majority of Albanian people practice this religion.

Issues of medical ethics, medical deontology, and bioethics have been studied extensively as means to improve health care in Albania. When it comes to ethical concerns, people often turn to religious or deontological norms and values to answer difficult questions.

In fact, about 90 % of world population finds religion to be a more important source of guidance in life than science (10).

Based on these arguments, different issues of Albanian bioethics are analyzed from an Islamic point of view since most of the population in Albania affiliates with Islam.

There is a specific feature to Albania regarding this topic. Bioethics and Medical Ethics were developed only after the year 1990, when the social system changed after a long isolation period. This corresponded with the start of an open religious practice, including Islam. The majority of the Albanian people recommenced to practice and develop their religions only after 1990, because before this period the communist regime had totally forbidden the practice of religion.

Under these circumstances, I, as a regular researcher of Bioethics and Medical Ethics with over 30 years of experience, maybe with a forensic medicine spirit, since I am at the same time a forensic doctor, very often asked myself if there was a relationship between Bioethics and religion, especially Islam, as the majority of Albanian people practice this religion.

In this forum (6th Southeast European Bioethics Forum, Belgrade 2010), I want to introduce some preliminary information of a study that I have done recently concerning this issue.

First, I want to present some information about the attitude of Islam on some fundamental issues of Bioethics and Medical Ethics, and some concise data of Albanian Bioethics and Medical Ethics, followed by a comparison between them.

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2. The Attitude of Islam regarding some fundamental issues of bioethics and medical ethics

Aspects of Bioethics and Medical Ethics covered by Islam are termed Islamic Bioethics because the fundamental lesson emphasizes prevention and teaches that the patient must be treated with respect and compassion. The physical, mental and spiritual dimensions of the illness experience must be taken into account (5).

The four main concerns of Islamic Ethics are similar to that of other ethical systems: autonomy, beneficence, non maleficence, and justice. In distinction to western secular ethics, more emphasis is placed on beneficence over autonomy.

These aspects are given in Shariah (Islamic Law), which itself is based on two foundations: the Quran (the holy book of all Muslims, the words of Allah transmitted to Muhamed, and it is considered as the primarily element of the Islamic civilization, also it is "a healing and a mercy to those who believe", and the Sunna (the aspects of Islamic Law based on Prophet Muhammad's words or acts). The Islamic jurisprudence has two other sources: ijmaa (consensus) and qiyas (analogy), resulting in four major schools of jurisprudence (7).

At the same time, because the Quran is seen as eternal and immutable truth, the principles of the law are seen as immutable. Nevertheless, as the circumstances of the day change, the interpretation of the law changes with each age. Islamic law (Shariah), then is in spirit dynamic and flexible, exemplified by the idea that "necessity renders the prohibited permissible" (7).

So, in Islam, the determination of valid religious practice, and hence the resolution of bioethical issues, is left to qualified scholars of religious law.

To respond to new medical technology, Islamic jurists, informed by technical experts, have regular conferences where emerging issues are explored and consensus is sought, for example about organ transplantation, brain death, assisted conception etc.

On the other hand, Islam is not monolithic and a diversity of views in bioethical matters does exist. So, in Canada, some Muslims communities from Central and Eastern Europe and East Africa are more liberal than more conservative communities from Pakistan or some other Middle Eastern countries (7).

Let us explore some of the attitudes of Islam concerning aspects of Bioethics and Medical Ethics.

– *The medical confidentiality*

The principle to maintain patient confidentiality is considered of the highest value to a Muslim physician. In Islam, when a patient reaches the age of maturity, the physician is not obligated to reveal any matters that the patient has confided in him to his parent or anyone else (8).

Regarding this topic, according to Islam, doctors do not have to maintain medical confidentiality in cases when it becomes danger for the others (8).

For example, the case of a bus driver with epileptic crises unknown to his employer but known to his doctor:

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In this case, if the doctor would keep this secret, this attitude would be against the honesty notion that Islam preaches. In fact, God has ordered Muslims to be honest and sincere.

The consent

According to the principles of Islamic Bioethics, a doctor does not have the right to cure or operate on a patient without his consent (8).

For example, the case of a 60 year old person who has a prostate hypertrophy: The surgeon performs prostatetectomy, also he performs the ligature of ductus deferens, assuming that the sterility in this age is an action with no need of consent.

In fact, this attitude is also against the respective principle of Islamic Bioethics.

Competent medical specialists must perform the treatment or surgery after the patient consent.

Under consent rules, the physician is also obliged to inform the patient.

For example, the case of 38 years old patient who undergoes a surgery of lumbal sympatectomy, because he suffered from blood vessel constriction of lower extremities (endarterits obliterans), and was not informed of the consequences of such surgery. Unfortunately, sexual impotence was the side effect of this surgery and the surgeon that performed the surgery was responsible for it. According to Islamic bioethics, all the necessary information should be presented to the patient prior to the procedure or treatment (informed consent). If this implemented, and a side effect will manifest during the procedure, the medical doctor will not be responsible for the outcome based on the judicial concept of assumption of risk.

Death and autopsy

Death is considered to have occurred when the soul has left the body, but this exact moment cannot be known with certainty. Death is therefore diagnosed by its physical signs (the cessation of respiration and cardiac activity) (4).

The concept of brain death was accepted by a majority of scholars and jurists at the Third International Conference of Islamic Jurists, in Amman, Jordan, in October 1986. Most, but not all, Islamic countries now accept brain death criteria. In Saudi Arabia, for example, about half of all kidneys for transplantation are derived from cadavers, with the application of brain death criteria (5).

According to the Islamic Bioethics, brain death is defined as follows: “When brain is damaged, and its activities completely cease, brain death is present, even if it is possible for the patient to be kept alive in a vegetative state with artificial respiration and medication even the heart and the liver are functioning. Brain death is indisputably established and is considered irreversible when artificial respiration ceases, spontaneous respiratory efforts ceases with five minutes”(5) .

In connection with the autopsy, since according to Islam, the human body is a noble creature in the eyes of God, he should be respected just as if they continuously live. The autopsy that is inconsistent with this nobility is prohibited. Also prohibited is the

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cremation and mutilation of the body. However, in cases of absolute necessity, i.e. in forensic cases in violent deaths, an autopsy will be allowed. The body of the deceased, according to the Islamic religion is washed, wrapped in a white shroud and buried, usually within 48 to 72 hours (7).

Besides ban on autopsy, Islam also bans the use of certain food products, such as the flesh of a dead animal, blood, pork (7).

Euthanasia

Euthanasia, defined as intentionally fastening of a patient's death and it is considered murder, thus is not permissible in Islam (5,7,8). This includes using a substance that causes premature death (active euthanasia), withholding treatment (passive euthanasia) or "assisted" suicide.

In connection with this attitude, the Quran (9) writes:

"Whoever kills a person shall be deemed to have killed people as a whole ....". According to the Prophet: "The biggest sin after the denial of God, is to become the cause of the shed blood."

"None among us wants to die because of any bitterness."

"My Lord, if it is preferable to live, please keep me alive, whether it is preferable to die, please let me die."

Euthanasia, which means the action of causing the death of the patient who suffers from an incurable disease and pain, this action that opposes life will not be considered fair. This is because the person has no hope to live, yet not dead, though death with a great opportunity to happen, life is still a reality. In this situation, it may happen that the person due to a miracle can recover. Of course, this is a rare case, but that happened sometimes in the history of medicine, called "cases of miracles" (9).

However, in Islamic Bioethics, there are some occasions when euthanasia may be allowed. For example, when the patient or the person who serves him, refuses treatment that does not bring any improvement conditions or quality of life. Similarly, the withdrawal of medical treatment of a patient with cerebral death, will not be considered a form of euthanasia, and therefore would be considered a permitted act (5).

Human Experimentation

Human experimentation is accepted and allowed by Islam. This is because, according to Islam, human life is sacred, it should be protected from diseases by all means and possible treatments. But to determine the nature of the disease and efficacy of treatment are needed experiments (7).

These experiments, when are carried to the human body, should fulfill the following conditions (7):

1. Consent of the person subject to experiment.
2. Experiment should not be rewarded.
3. It must be performed by a physician competent and honest.

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4. The physician should have strong reasons to think that the results will be positive for health.
5. The physician must be almost sure that the person subject to this experiment will not suffer any physical, psychological or mental damage.

Organ transplantation

Islamic Bioethics pays great attention to life and health of human beings, which is expressed in the primary sources of Islam.

The Quran (9) says that "the human being as the most valuable creature in the eyes of God, their life and health should be protected and their body should be respected." Prophet prohibits any action that affects their life or destroys the health of human beings. He advises ill people to be treated by a doctor.

In support of these arguments, Islam allows human organ transplants from Muslim and non- Muslim donors, based on the principle that the need of the living supersede those of the dead.

Xenografts, including porcine organs, are also permissible.

Drawing and transfusing blood and blood products are permissible, both from and to Muslim and non-Muslims.

However, to carry out transplants of human organs and tissues must fulfill the following conditions (6):

1. The need to perform transplant organ or tissue should be determined by a qualified physician with a good moral.
2. The physician should be almost sure that the medical treatment will have a satisfactory result.
3. The organ or tissue will be taken from the corpse of a person whose death is certified by a physician.
4. The authorization of the organ or tissue transplant must be given by the donor, or this consent should be given by his relatives when the donor has not given any statement contrary during his lifetime.
5. No action of transaction should be carried to the organ or tissue, since human being is the most noble creature and occupies a special place in God's eyes, therefore no part of the human body, alive or dead should not be sold.

– Issues of reproduction (5,7)

For Islam, sexual life will be respected only in the context of marriage. Premarital sex is forbidden and abstinence is expected of both boys and girls until time of marriage. Because dating is not permitted, Muslims tend to marry earlier than in Western societies. Adolescent marriages are permissible, but less and less common, because of

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increase of higher education for girls. The average age for marriage for girls in most Islamic countries is between 19 and 22

Birth-control (5,7)

Birth-control is permitted by Islam because sex in married couples is considered to be a wholesome pleasure. This view is explained by the argument that if for some reason, parents can not provide for children a good education, they may have a number of limited children, or they can have children not at all, since the purpose of marriage is not just making children, but that the couple have a life to give love and pleasure to each-other. In fact this view is contrary to Christian religion in which sexual relations between spouses without the reproduction intention, have blamed, because in this case, it is violated the sacred nature rule.

Sterilization (5,7)

Islam prohibits any kind of sterilization, because it stops forever the ability to reproduce a human being (sterilization for the purpose of contraception).

However, when there are important reasons for women because the pregnancy may cause her death or dangers her life, in these cases, her sterilization is permitted (therapeutic sterilization).

Abortion (5,7)

When husband and wife do not want to have children for various reasons, e.g. fear that a parent's illness may be transmitted to children, economic difficulties, illness of the woman, etc. then it can be used contraceptive methods to prevent unwanted pregnancies. While abortion, after the attitude of some representatives of Islam is forbidden, considering it as a crime, if there is no medical reason to do it. But this performance can be allowed if the mother is ill and when this disease no doubt danger her life.

However, there are views that allow abortion.

The general Islamic view is that although there is some form of life after conception, full human life with its attendant rights, begins after the ensoulment of the fetus. Most Muslims scholars agree that ensoulment occurs at about 120 days (4 lunar months plus 10 days) after conception; other scholars, perhaps in the minority hold that is occurs at about 40 days after conception.So abortion has been allowed after implantation and before ensoulment in cases in which there were adequate juridical or medical reasons. Accepted reasons have included rape. Abortion after ensoulment is strictly forbidden by all authorities, but most of Islamic scholars do make an exception to preserve the mother’s life. If a choice has to be made to save either fetus or the mother, but not both, then the mother’s life would take precedence. She is as a root, the fetus as an offshoot.

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In Vitro Fertilization (babies eprouvette) (7)

This procedure means that if the woman can not remain pregnant with normal street, her eggs can be placed in a test tube with the sperm of her husband. After fertilization, the embryo must be inserted into the womb of the woman, and takes place there. Islam for this procedure requires that the following conditions are fulfilled:

1. Ova and sperm must belong to a legally married couple.
2. Man or woman must be affected by an illness or disability that prevents them from having a child naturally.
3. Husband and wife should both want to use this method.
4. Medical authorities must be convinced that the birth of a child with this method will not have harmful effects on natural character, psychological and mental health on the parents and child.

According to the surrogacy, after the Shariah, the birth mother, not the ovum donor, would be the legal mother. Surrogacy is therefore excluded.

– *Torture (7)*

Islam prohibits torture against a person or animal.

The Prophet said:

"God will surely punish Day, anyone who would have tortured a human being down here."

"I would punish the woman who has left a cat trapped in house without food until it dies."

"Any man who threatens to injure his brother, although he is brother with the same father and mother, will be cursed by angels till he should stop this menace." So Islam forbids any kind of cruelty (savagery) or torture that harms the body or soul, or that causes suffering or distress.

3. Summary of data on bioethics and medical ethics in Albania

These disciplines were almost unknown in Albania prior to 1990 and only began to develop after this period using as a model western countries while respecting the medical/religious tradition of our country.

The main source of Bioethics and Medical Ethics in Albania is the medical legislation that emerged after 1990. Thorough studies of aspects of bioethics and medical ethics are detailed in textbooks and numerous other publications available to medical school students of our country. Likewise, Albanian doctors are made aware of bioethics and medical ethics aspects by the New Order of Doctors institution with the goal of implementation of ethical practice of medical profession in our country (2,3,4).

Some of the main aspects of Bioethics and Medical Ethics in Albania are related to (4):

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— several principles, where patient confidentiality and consent are of importance

— aspects surrounding end of life and death which comprises criteria of death determination, cerebral death, autopsy, euthanasia, etc.

— ethical aspects of human experimentation and transplantation of human organs and tissues.

— ethical issues surrounding genetics and reproduction that encompass sterilization, abortion and in vitro fertilization etc.

— torture, a form of infringement of human rights, is considered part of bioethics.

4. Confrontation of Albanian bioethics and medical ethics with traditional teaching

The emerging relevant question is whether bioethics and medical ethics developed using western countries as models observe the traditional Islamic teachings given the fact that the majority of the Albanian population affiliates with Islam?

Perhaps some difficulties that are encountered in the implementation of medical ethics during the practice of medical profession in our country, are related or not to the absence of properly reflecting of Islamic bioethics in the legislation?

In order to answer these questions, let us confront the main aspects of Islamic teachings with Albanian Bioethics and Medical Ethics.

It is immediately evident that they are very similar:

— The stance towards medical secrecy (rules and cases when it should not be observed). The concept of consent that is studied and implemented in our country is almost identical to those of Islamic Bioethics.

— Death related aspects such as the criteria for death determination, brain death criteria examined in our country are similar with the positions of Islamic bioethics.

— Laws that prohibit euthanasia in our country are the same as Islamic teachings. For example, both Islamic bioethics and current Albanian euthanasia laws permit passive euthanasia in cases when a patient has lost all consciousness and there is no hope for recovery.

— The attitude towards ethical issues related to human experimentation expressed in Albanian legislation is identical to Islamic bioethics.

— The attitudes toward transplantation of tissues and organs are also similar. In Albanian legislation, law on organ transplantation (1977) emphasized the prohibition of sale of transplants as well as any activity that promotes the advertising, marketing and trafficking of illicit transplants (Article 4), attitude shared by Islamic bioethics.

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— The positions of bioethics and medical ethics in Albania are very similar to those of Islamic bioethics even concerning problems related to reproduction, birth control, in vitro fertilization, abortion, torture.

However, there are a few differences between them especially regarding autopsies. For example, according to autopsy laws of our country (1994), autopsy must be performed in cases where death occurs at a hospital and forensic cases. However, autopsies in case of hospital deaths have not been carried out for over 20 years. Perhaps, Islam in our country that generally prohibits autopsies influenced such interruption.

Furthermore, differences between Islam ethics and Albanian autopsy law are also evident in articles concerning proper burial. According to the law, burial must be performed 12 up to 24 hours after death (4), while Islam bioethics demand that burial must occur 48 up to 72 hours after death.

In addition, surrogate maternity, accepted by our legislation in the law on reproductive health (4), is not permitted by Islamic bioethics.

5. Conclusion

From the presentation and discussion of the above data, it should be noted that in the Medical Ethics and Bioethics studied and implemented in Albania, the bioethical thought is very important for the respecting of human rights.

These disciplines developed in Albania using as a model western countries, are very similar with the ideas of traditional Islamic teaching.

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Human Rights in China: An Alien Element in a Non-Western Culture?

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China and human rights is a topic that time and again sparks off the debate on the universality or relativity of ethical norms. It also has bearing on the question of the global legitimacy of modernity, at least if we follow the classic self-understanding of modernity in terms of the implementation of the principle of "free subjectivity" (Hegel) including guarantees of subjective rights and participative political institutions. Against this understanding, alternative forms of a multiplicity of "modernities" substantially different from the "Western" model have been proposed which would also be marked by another relationship to human rights. This would imply that "our" notion of human rights is only a specific value that cannot be generalized without imposing an excessive demand on other cultures. At least, culture specific preferences between the routinely distinguished three "generations" or "dimensions" of human rights—civil rights, social rights, and collective rights—would be possible: the traditional and still prevalent "Western" emphasis on civil rights with the free individual as its point of departure would not be the only legitimate one.

In this debate, the *universalists* advocate the primacy of right over culture. In this case, human rights, unreduced to collective rights, would be the highest norm that if necessarily trumps cultural particularities. The *culturalists,* reversely, regard culture-specific value systems as the ultimate normative axioms. The classical credo in this direction was formulated by the American Anthropological Association in 1947, when it warned against the impending proclamation of the "Universal Declaration of Human Rights" by the United Nations General Assembly: "Standards and values are relative to the culture from which they derive so that any attempt to formulate postulates that grow out of the beliefs or moral codes of one culture must to that extent detract from the applicability of any Declaration of Human Rights to mankind as a whole." (American Anthropological Association 1947:539) This seems to be, more or less, still the majority conviction in cultural studies, with a deep impact on sinology.

A third group that could be called the *historists* would like to leave the matter to the course of history. They refer to the "autopoiesis" of social and political systems or to the change brought about by commerce (as in the German proverb "Handel bringt Wandel"), as circles interested in unhampered market economy gladly attest. Culturalists and historists often take the position of legal positivism—what is valid is decided by the different constitutions or juridical systems.

Not only has the normative preference that one should choose with regard to human rights been a subject of controversy, but also the assessment of China in this context. How to evaluate China is important because of the political and economic weight of the country and its claim to represent an original and time-honoured cultural heritage

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in its own right. As the alleged antipode of the West, China has served as an acid test for the universality of norms already for some centuries.

As a matter of fact, the notion of human rights has not been brought forward in pre-modern China, but was imported as an originally foreign idea from the West in the 19th century. Strictly speaking, it had no lasting impact on Chinese politics, except for the situation in Taiwan in the last two decades after the end of martial law. Against this background, it has often been maintained that there is a basic repugnancy between human rights and "the" Chinese culture. However, before invoking the argument of culture, the failure of human rights can be explained by a number of historical reasons. It was not pushed by the West itself where legal positivist, Darwinist and often enough anti-modern ideologies were dominant, not to mention its colonial policy aiming at the domination and exploitation rather than political modernization of the rest of the world. A striking example is Hong Kong: Efforts to democratize the "crown colony" can essentially be found only in the final years of British rule, when they were cheap and non-committal (von Senger 1997). Western handling of human rights has contributed more to discrediting them than their alleged incompatibility with other traditions, and seeing Western politicians playing the human rights missionary creates an unpleasant aftertaste. In China itself, the idea of human rights was ground down in an unsupportive atmosphere of struggle for national survival and civil war.[1] Today, it is officially not altogether rejected but tailored to the needs of the dictatorial system.

The stance of the People's Republic on human rights is a mixture of the above-mentioned universalist, relativist and historist positions, with a distinct relativistic-historistic tendency. It is true that human rights were included in the State Constitution in 2004 in the sentence "The state respects and preserves human rights" (Article 33), although politically restricted by the Preamble and Article 51.[2] Interestingly enough, the protection of human rights was added to the Constitution together with the right to "lawful" private property (Article 13). China officially regards their formulation as a sign of progress relevant for all mankind. However, it insists on its own reading. According to this reading, as laid out in the famous White Book of 1991 "The Situation of Human Rights in China" (Guowuyuan xinwenbangongshi 1991) and many other documents to follow, the most fundamental human right is the "right to subsistence" (*shengcunquan*). The practical realization of this right presupposes the collective "right to development" (*fazhanquan*) in trusteeship of the state. This, again, generates the state's "right to sovereignty" (*duliquan*), with the duty of non-intervention on the part of other states. Thus the Chinese human rights project ends up in the right of the state as a developmental agency in the interest of the collective rather than in guaranteeing

[1] For the Chinese discussion of human rights in the last century cf. Angle and Svensson 2001.

[2] The Preamble still defines the political system as a "democratic dictatorship of the people" under the leadership of the Communist Party. Article 51 provides that "the exercise by citizens of the People's Republic of China of their freedoms and rights may not infringe upon the interests of the state, of society and of the collective, or upon the lawful freedoms and rights of other citizens." (Constitution of the People's Republic of China, http://english.peopledaily.com.cn/constitution/constitution.html)

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rights to individuals against the state. Criticism of China's human rights record in the name of individual rights to political participation and legal protection is regularly denounced as an attempt to hamper the country's development. Development as such is claimed to be in the interest of the great majority of the people and in this sense to be per se democratic. The Western equivalent to this kind of reasoning is that the best way to promote political reform in China is the uninhibited unfolding of the market economy without making too much fuss about present human rights abuses. However, to make human rights an appendix of economic growth, a logic which is curiously reflected in the 2004 amendment of the Chinese Constitution, would mean to regard the human being as a means for realizing profit rather than an end in itself. This corresponds to the reduction of the holder of rights to a possessive individualist, to which I will return.

China defends its position by pointing out the historical situation of the country and the practical difficulties in governing it. However, it also appeals to the "cultural factor" (*wenhua yinsu*) with arguments reminiscent of the "Asian values" campaign of the Southeast-Asian states in the 1990s. An excessive individualism, a one-sided insistence on rights over duties and an "atomistic" understanding of society and thus a view of the human being that would prioritize individual over collective rights are rejected as Western-specific and incompatible with the endogenous value system. The emphasis on collective rights together with the strong position of the state would thus have a cultural backing. This standpoint also has an impact on bioethics: Here, we find the argument that because a human only exists as a member of a community, which means in a strict sense only after birth, consumptive embryo research, to give an example, would not pose an ethical problem in China. Thus, one and the same "relational" view of the human being would justify an illiberal conception of politics on the one hand and a liberal attitude towards biotechnology on the other (Roetz 2009a).

It has to be stressed that these positions are not unanimously shared in China,[3] although they are often presented as a cultural consensus. In Western Chinese studies, they have again and again met with voluntary as well as involuntary support. Some Sinologists feel even greater discomfort than the Beijing government when it comes to finding a place for individual rights in Chinese culture. It has been maintained, for example, that in China there is no general notion of a human being in the first place, but only the notion of different social roles like father, mother, son, wife, ruler etc. Therefore, the abstract conception of a "subject" as the bearer of corresponding general "subjective" rights would not exist. The German Sinologist Wolfgang Bauer has declared that individual rather than collective rights would be incompatible with the "traditional Chinese point of view", since the human being is "primarily defined by his or her membership in a certain social community, an estate or a 'class'." (Bauer 1994:54) Henry Rosemont has argued that in Confucianism humans are nothing but the "totality of roles" they live "in relation to specific others"—they *are* these roles rather than

[3] For an important different voice on bioethics, cf. Nie 2011.

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performing them (Rosemont 1988:177). David Hall and Roger Ames, again, have stressed that in Confucianism "in the absence of the performance of these roles, nothing constituting a coherent personality remains: no soul, no mind, no ego, nor even an I know not what." (Hall and Ames 1998:209) Ames also maintains that "in the Chinese tradition humanity is not essentialistically defined," but "understood as a progressive cultural *achievement*". This would imply that "those who violate social relations and the values they embody are truly brutes," rather than humans who still deserve respect (Ames 1988:202,203). In such assessments, "Chinese" is normally identified with "Confucian" in a rough sense, and there is little distinction made between pre-modern and modern China. Instead, what is regarded as traditional Confucian attitudes is identified as the still prevalent true Chinese "habits of the heart".

Do we have to come to the conclusion, then, that there are definite "cultural limits for the Western form of legitimizing and limiting state power by inalienable rights," (Müller 1997:283) with the result that from a universalistic point of view Chinese culture has to be overcome, or, from a relativistic point of view, the universality claim of human rights has to be discarded? I suppose that there is a third way, because the picture is more complex on both the Western and the Chinese side. Human rights universalism is neither the quintessence of the West nor is it the necessary adversary of Chinese culture.

As to the West, the idea of human rights was not the logical culmination of an indigenous cultural dynamics. It was the outcome of a *crisis* of the traditional outlook on the world that tore Europe apart when the Christian *ordo* collapsed in disastrous religious civil wars, clashes between the emerging nation-states, the rise of political absolutism, and, last but not least, the breaking through of the limits of the closed Occidental world in the Renaissance, the age of discoveries (Roetz 2002). It is true that the human rights idea is a product of the West, although its history cannot be sufficiently described as exclusively "Western", and Confucianism by its influence on the European Enlightenment already has some share in it. [4] The way to it has been paved by, among others, Christian theologians like Francisco de Vitoria and Francisco Suárez of the school of Salamanca, and it can in retrospect be related to central elements of the Jewish-Christian tradition like the view of man as God's image (*imago dei*) as one source of the idea of human dignity, and monotheism as one source of the claim to universality. Still, both these aspects need to be qualified and are open to divergent developments. Man's likeness to God is restricted by his original sinfulness. The monotheistic claim to universality, again, could lead into repressive uniformity rather than tolerance. This was even the most important *negative* reason — to an extent unknown in China — for demanding the right to the freedom of conscience. It is symptomatic that the fiercest enemies of human rights can be found among the popes of the 19th century, and that the

[4] Zhang Junmai has argued that China has actually contributed to the history of human rights, since, as he says, the "Declaration of the Rights of Man and of the Citizen" of the French Revolution was indirectly inspired by the ancient Confucian Mengzi (Zhang 1981:386). Cf. for this topic Roetz 2011:273-276.

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Catholic and Protestant churches have remained reserved about this subject in the name of the Christian tradition until the middle of the last century (Schrey 1983, Walf 1990). One need not follow Sun Yatsen's claim that China's historical problem was an over-abundance rather than lack of freedom (Sun 1973:678-679), which promoted the ill-fated engineering-understanding of politics among large parts of the modern Chinese elites. But religious tutelage of the aggressive European type was certainly missing in pre-modern China.

The historical attitude of Christianity shows that the final success of the idea of human rights is at least as much due to a departure from the European tradition as it is due to its latent potentials. I assume that a similar ambivalence applies for any culture that has to find new normative bases when confronted with the dissolution of transmitted contexts and world-views, as is the case all over the world in the age of modernity. It is at least an option in this situation, to try to *critically reconstruct* a cultural tradition in a way that is *accommodating* and not repugnant to human rights, rather than altogether discard or conservatively reinstall it. The philosophical justification of the human rights idea as well as the commitment to a human rights policy do not necessarily presuppose such reconstructions—one can cherish human rights for their own sake simply because the idea is convincing in itself, without making a detour through a cultural tradition. Human rights, after all, are themselves *creating* culture rather than merely being its offspring; what really matters is not the cultural heritage, but the actual practice. Still, if such reconstructions were not possible *in principle*, the idea would be suspended in mid air and could no longer be shown as being rooted in the basic structures of human social existence as such, independent of the particularity of a specific culture like the Western one (see below). In any case, such reconstructions are of great political advantage inasmuch as they can foster the intercultural acceptance of the human rights idea through "anamnetic effects" of re-cognition and dispel the argument of threatened "cultural identity". I assume that this applies to any culture, and it also applies to China. The principal tension between a "modern" and a "traditional" world notwithstanding, rather than setting the Chinese cultural tradition against the mentioned classical understanding of modernity, one can search for the anticipations of modernity in this tradition itself. As I see it, the most important source for such an endeavor is the philosophy of the "axial age" (Jaspers), intellectually the main founding phase of the Chinese civilization.

In the "axial age", China went through an epoch of early enlightenment in the sense of a reflective disassociation from everything hitherto valid and a breakthrough towards "postconventional" (Kohlberg), "decentered" (Piaget, Habermas) or "second order" (Popper) thinking (Roetz 1993, Bellah 2011: China chapter, Roetz 2012). Since then, China has possessed a textually fixed and transmitted stock of critical consciousness, the potentialities of which have historically never been exhausted and are still at hand. This above all refers to two domains of postconventional thinking which have become part of the Chinese intellectual heritage and furnish proof that claiming the general incompatibility of "Chinese culture" with the aforementioned modern "princi-

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ple of subjectivity" would lag behind constituent elements of this culture itself: The *critique of power* and the *detachment from tradition.*

Whereas the critique of power contains *material* aspects that can underpin the modern ideas of human rights and dignity, the critique of, or detachment from, tradition contains *formal* or *meta*-aspects that from the beginning contradict any exclusivist reification of culture against those ideas. These points, in particular the second one, have remained underexposed in Chinese studies due to a widespread *hermeneutics of contrast*—as against a *hermeneutics of accommodation*—dating back to Hegel's and Weber's influential picture of China as the retarded counter-world of the developed West. The culturalist and postmodernist turns of the last decades have basically accepted the content of this conviction and have only replaced the negative assessment by a positive or neutral one. In East Asia itself, after a period of hypercriticism of the traditional culture following the downfall of the Chinese empire, to reconstruct the indigenous potential for modernization has been the endeavor of "New Confucian" philosophers like Mou Zongsan, Zhang Junmai (Carsun Chang) or, in the next generation, Lee Ming-huei (Li Minghui) (Li 2002), who have rediscovered the critical spirit of Confucian ethics after the end of its liaison with the old political system. The same applies to Deng Xiaojuns independent attempt to show the "logical link between Confucian and democratic thought" (Deng 1995), or to Yu Kam Por's (Yu 2005) and Nie Jingbao's (Nie 2001) interpretation of the Chinese philosophical tradition as supportive of the idea of individual human rights, to mention only some examples. To remind of authors like these is important in a time when Confucianism is again being instrumentalized to legitimize an authoritarian dictatorship.

In what follows, I will discuss some aspects of the *critique of tradition* and the *critique of power* mentioned above inasmuch as they might be of relevance to the search for a *virtual Chinese prehistory* of the human rights idea.

Ideal-typically speaking, culturalism makes two claims: the empirical claim that there is a certain essence of a culture with a specific system of values in its center, and the normative claim that one should safeguard and endorse this essence. Ironically enough, the questioning of both claims is part and parcel of most cultural traditions themselves. In China, the corresponding step is constitutive of the very coming into existence of Chinese philosophy itself, which was the answer to the deep *crisis* and breakdown of tradition in the middle of the last millennium B.C. This formative experience, which leads into the "axial age", is reflected in an impressive series of anti-traditional arguments brought forward in the philosophical classics. They call into question the reliability and validity of appeals to tradition by logical (tradition presupposes innovation), ontological (the true cannot be transmitted), epistemological (the past is not clearly recognizable), historical (times have changed), empirical (tradition is too heterogeneous), ethical (traditional ways of life can contradict moral norms) and anti-ideological (traditions can be forged) considerations.[5] They thus express the insight

[5] For a detailed analysis of the respective arguments cf. Roetz 2005 and 2009.

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that a tradition is no unequivocal and authoritative entity, but needs interpretation and justification by some other criteria in order to be appropriated or, as the case may be, rejected. It is pointed out, for example, that following established ways of life may be equivalent to practicing cannibalism, infanticide, and geronticide, thus contradicting the moral principles of humaneness and justice.[6] New normative criteria are formulated that no longer take their orientation from the past, with practical consequences in the 3rd century B.C., when a novel political system, the centralized bureaucratic state, replaces the old feudal order. Sanctifying tradition is compared to throwing a baby into a river, just because the father was a good swimmer (*Lüshi chunqiu* 15.8:178). Correspondingly, there is a shift in the political focus away from *established* norms (*cheng fa*) to be endorsed to *formal procedures how to establish* norms (*suo yi cheng fa*) (*Ibid.*:177).[7] This search reaches its climax in the postulation of the *primacy of the better argument* without the further consent of another authority in the *Mozi*:

"Humane persons inform each other of the reasons why they choose or reject something or why they find something right or wrong. He who cannot bring forward reasons follows the one who brings forward reasons. He who has no knowledge follows the one who has knowledge. He who has no arguments submits to the other, and when he sees something good, he will change his position accordingly. Why then should they [quarrel]?" (*Mozi* 39:182)[8]

The problematizing of and turning away from tradition has not only constituted a specific meta-tradition of its own, but it has directly influenced most of the fundamental issues in the history of Chinese philosophy. The existence of such a "second order" tradition, under pre-modern conditions surely beside the mainstream, takes cultural essentialism to absurdity, since it shows the critical attitude towards tradition to be part of that tradition itself. It not only provides scope for the new—like the idea of human rights—by precluding its rejection on grounds of being incompatible with the old. Its decentered, detached perspective also has an intrinsic affinity to the inherent universalism of the idea of human rights, because it *formally* shares their context- and culture-transcending nature. Any appeal to a so-called "cultural identity" that does not take into account this non-traditional aspect of tradition would undermine what it claims to protect.

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[6] Mo Di (5th century B.C.) confronts the proponents of funeral rites, which regard these as the traditional "way of the sage kings," with the argument: "This can be called to consider a habit as convenient and regard custom as a norm for what is just. In ancient times, there was a land named Kaishu east of Yue. Right after birth, the people dismembered the firstborn child and ate it, saying that this was propitious for the younger brothers. When the grandfather died, they loaded the grandmother on their back and abandoned her, saying that they could not live together with the wife of a ghost. The superiors regarded this as the correct order, and the people saw it as a custom. Thus they carried on practicing these things and did not give them up. But how could this, in fact, be the way of humaneness and justice? This means to consider a habit as convenient, and to regard custom as a norm for what is just." (*Mozi* 25:115-116)

[7] Cf. Roetz 2009:367.

[8] Cf. for this point Roetz 2012:264-265.

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Even in the center of the one school routinely associated with traditionalism, Confucianism, we find the element of detachment from the old. This refers above all to two of the most conspicuous elements of early Confucian ethics: Confucius's (551-479) Golden Rule and Mengzi's (370-290, latinized Mencius) moral anthropology. According to Confucius, the Golden Rule (*shu*)—"What you do not wish done to yourself do not do to others"—fulfills the requirement of a general maxim that "consists of just one word and for this reason can be practiced throughout one's life." (*Analects/Lunyu* 15.24) It only presupposes the thought experiment of *ego* taking on the role of *alter* on the basis of generalized human needs, irrespective of the values of concrete contexts or a specific tradition. The locus of the Golden Rule is the *here and now* of formal reflection. It paves the way for the moral anthropology formulated by the Confucian Mengzi, which is likewise based on immediacy rather than history—the immediacy of the spontaneous impulse and the intuitive "good knowledge" (*liang zhi*) of the moral disposition (*xing*) (see below). It is not by accident the Golden Rule as well as Mengzi's anthropology, both of which stand in another time paradigm than the paradigm of traditional thinking, also deliver the foundations of the Confucian *critique of power*. This critique refers on the one hand to the expectation of *reciprocity* between the ruler and the ruled and on the other hand to the respect for the *dignity* of a human as a *moral being* different from a brute.

As to reciprocity, cultural anthropology has shown it to be the most important mechanism of integration of the early societies before the emergence of the state (Mauss 1966, Lévi-Strauss 1949: Chapter V). Reciprocity secures the bond within the social groups and regulates the relationships between them. It also remains present after the coming into existence of political rule: Stable political power can never be based on mere violence, but must bring some advantages to the governed. The acceptance of rulership with all its prerogatives presupposes a return service.[9] Yet, rulership shows a constant tendency to set itself free from this consensus and fall into despotism. This experience is reflected in the political philosophy of axial age China, when philosophers rediscover the topic of reciprocity and make it the center of their theories. They remind the powerful that the ruled are human beings with feelings and expectations like themselves and should be treated as such. Legitimate power has to adhere to the standard of a just give and take. It comes as no surprise that the early formulations of the Golden Rule are often to be found in a political context—the ruler "should not do to others what he does not wish for himself" and "should not inflict onto others what he does not feel comfortable about himself." (*Guanzi* 51:275, 66:341) When Zhou literature keeps on repeating that subordinates will behave just as their superiors do and retaliate what is done to them, this is a reminder of the expectation of reciprocity.[10] In

[9] For some examples of this conviction from ancient Chinese texts cf. Roetz 1993:36.

[10] Cf. for example *Mengzi* 4A21 and 4B5: "If the ruler is humane, everybody will be humane. And if the ruler is just, everybody will be just." — "If the ruler regards his subjects as his hands and feet, they will regard him as belly and heart. If the ruler regards his subjects as his dogs and horses, they will

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ancient China, this has not led to the idea of a judicial protection of equal rights. But the foundation for such a step is laid—the acknowledgment of equal membership of all in a community. Human rights can be seen as the final judicial form of this acknowledgment, while the Golden Rule is its moral form. In this sense, reciprocity as the structural basis of all human existence is the original wellspring of human rights, and to build a political philosophy on this basis is not principally removed from their recognition.

Another check on political power in Chinese axial age philosophy is exerted by a moral anthropology that in tendency treats humans as subjects in the sense of being bearers of certain claims even before entering into relations with others that have to be respected: the moral anthropology of Mengzi. Mengzi bases his program of a "humane politics" (*ren zheng*) on the conviction that every human being is, by virtue of his heavenly endowed natural inclinations (*xing*), not only capable of but also spontaneously driven to moral judgment and action. For together with the feeling of compassion, the feeling of shame, the feeling of modesty, and the feeling of right and wrong, the "four beginnings" (*si duan*) of humaneness, justice, propriety and moral knowledge are innate to the human being (*Mengzi* 2a:6, Roetz 1993:200). These "beginnings" exist as our "good knowledge" (*liang zhi*) and our "good capacity" (*liang neng*) before any deliberation and learning (*Mengzi* 7a:15, Roetz 1993:130), simply by virtue of being a human and independent of social position or achievements. They are "not cast into us from outside, we have them in ourselves originally." (*Mengzi* 6a:6)

For Mengzi, a "humane politics" is a politics that "cannot bear to see the suffering of others." (*Mengzi* 2a:6) By grounding the possibility for such a politics in the natural disposition, Mengzi can exert pressure on the powerful—nobody can talk his way out by declaring himself incapable of morality. However, the point of his anthropology is not only to prove the powerful guilty of violating their moral nature when they neglect their duties and behave like murderers and robbers rather than ideal kings. Obviously, Mengzi is also convinced that the same fact that obliges the actor to moral action, the moral nature endowed by Heaven which distinguishes a human from a beast, also constitutes a *claim on the other side*—the side of those *affected* by the actions—to be treated as humans. As he says to King Hui of Liang,

"When there is fat meat in the [king's] kitchen and there are fat horses in the stables, but the people have the look of hunger and die by starvation out in the country—this is as if letting the beasts devour men! Men already despise the beasts for devouring one another. But when a prince, being father and mother to his people, administers his government in such a way that he lets beast devour men, where is then his being father and mother to the people?' When Confucius said, 'He who first made tomb figures to be buried with the dead should be without posterity!', he said so because that person

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regard him as a commoner. If the ruler regards his subjects as mud and weeds, they will regard him as a robber and an enemy."

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used (instrumentalized!) men by making semblances of them. What should then be thought of him who causes his people to die of hunger?" (*Mengzi* 1a:4)[11]

Although we can call Mengzi's ethics primarily duty-oriented, there is an obvious *complementarity* here of a duty on the side of the king and a moral quasi-right on the side of the people: they *do not deserve* to be treated worse than beasts. In another passage, Mengzi praises a king who shows compassion with a trembling ox being led to ritual slaughter as "humane", but at the same time expresses astonishment why the king does not extend such an attitude to the people (*Mengzi* 1a:7). This shows that the morality of an action follows not only from the intentions of the actor, but from the correspondence of the intentions with the nature of the object—an act of compassion can also be aimed at an animal, but it has its true place among human beings. And what makes the human being stand out in comparison with an animal is the moral propensity which enables one to resist the desire for profit (*li*) and even to give one's life for justice. Even a beggar, Mengzi says, refuses the gift that would save his life, if he receives it with a kick (*Mengzi* 6a:10, Roetz 1993:153-154). The beggar example suggests that this uniqueness of the human being is linked to the idea of *dignity*. As a matter of fact, the notion of dignity becomes explicit in Mengzi's ethics.

According to Mengzi, human nature represents an intrinsic "dignity" (*gui*) prior to any other external dignity that might be conferred by state and society. As he says in his polemic against the powerful of his time, "To desire dignity (*gui*) is an aspiration all men have in common. But every single human has *something dignified within himself* which he only does not think of. What men [normally] esteem as dignity is not the good dignity (*liang gui*). Whom [a potentate like] Zhao Meng can honor, Zhao Meng can also degrade." (*Mengzi* 6a:17)[12] In accordance with this argument, Mengzi has placed the "heavenly ranks" (*tian jue*) of morality with "humaneness" (*ren*) at the top above the "human ranks" (*ren jue*) of the political hierarchy in the preceding passage (*Mengzi* 6a:16, Roetz 1993:196).

That a human is a being to be respected by the powerful instead of being treated like an animal is obviously due to this "good dignity" of human nature. The autonomous capability of judging and acting morally (the *liang zhi* or *shi fei zhi xin*) should still be fostered by education, but does not justify external tutelage. According to Mengzi, it is above all for political reasons if this capability falls by the wayside in practice. For instead of providing optimal conditions for their subjects to unfold their intrinsic natural goodness, rulers by their disastrous policy and greed drive them into misery and force them into crime. In this case, however, it would amount to "trapping" people to penalize them for their offenses—the ruler loses his right to punishment (*Mengzi* 1a:7, 3a:3). The claim to loyalty and allegiance, too, is bound to a return ser-

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[11] The critique of using tomb figures in the shape of human beings was probably motivated by the assumption that this led to the practice of human sacrifice in burial.

[12] Möller (1999:117-118) has criticized the translation of *gui* with "dignity" as causing false associations. I am convinced, however, that the associations, the difficulties that the text poses notwithstanding, are not misleading. For a discussion of Möller's argument cf. Roetz 2008:105-106.

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vice. Thus Mengzi justifies the refusal of the people of Zou to die in war for their superiors who had previously maltreated them (*Mengzi* 1b:12, Roetz 1993:78). Mengzi's teaching of man's innate moral goodness subsequently provided the main theoretical and rhetorical foundation for the critique of despotism in China (de Bary 1988, Ommerborn, Paul and Roetz 2011). In contemporary "New-Confucianism", it is still the most important point of departure in order to develop Confucian political philosophy in the direction of human rights and democracy (Li 1995 and 2002).[13]

However, there is a difficulty in Mengzi's approach that has to be considered: Speaking of the "dignity" of "human nature" (*xing*) is not identical with speaking of the dignity of the *human being*. It can at first glance not be ruled out that dignity is only then transferred to the human being if he or she acts in accordance with the moral nature. There is an ambiguity here in the *Mengzi* that reappears today in some "New Confucian" attempts to link the enjoyment of human rights to the actual *performance* of virtuous acts.[14] As a matter of fact, Mengzi says that man in practice can demean himself to such a degree as to resemble an animal (*Mengzi* 3a:4, 4b:19, 4b:28, 6a:6). But he also explicitly stresses that this does not affect man's "true condition" (*qing*): "When others see him being brutish, they think that there was never any talent in him. But how would this be man's true condition!" (*Mengzi* 6a:6) There is a never changing "true condition" of the human being, then, which can always be revitalized if only one "seeks for it." (*Ibid.*) A human would not be defined by performance or achievements, then, but by moral *possibilities*. This is exactly what the "four beginnings" mean, which every human being has within himself in the very same way as he possesses his "four limbs." (*Mengzi* 2a:6)

Mengzi speaks of dignity, then, with regard to the general moral *potential* of the human being. It is this potential from which not only the individual, but also the state should take its orientation. The autonomous capability of morality does not justify excessive employment of state enforcement and sanctions but, reversely, calls for a modest policy that directs all its activity to protecting and supporting the natural goodness of man. A human is worthy of being free from subjugation under the state's coercing whim. Mengzi's ancient critics are clearly aware of the "dangerous" implications of this anthropology: They reproach him for calling into question the necessity of education and the "principle of government", and for betraying the tradition—if the human being is "good" in itself, one no longer needs the sages of the past (Roetz 1993:221-222).

In fact, Mengzi himself was not willing to draw such radical conclusions from his philosophy—in many respects he is a child of his time. Like all pre-modern Confucians, he is a monarchist and elitist and tends towards a benign paternalism. Moreover, he is intolerant of other opinions. Therefore, when it comes to *developing* his philosophy

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[13] Based above all on the *Mengzi,* Lee Ming-huei has convincingly argued that individual rights in particular rather than collective rights are compatible with Confucianism. He thus reverses the "official" Chinese order (Li 2002).

[14] Cf. the examples discussed in Roetz 2002, p. 316.

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to find a starting point from where a virtual Chinese prehistory of the ideas of human rights can be written, one has to think *with* him *against* him. Nevertheless, such a development is possible: In line with the suspicion of his critics, Mengzi's moral anthropology in principle opens up a perspective which surpasses what was within his own imagination: The perspective of a free democratic state that treats humans as mature and self responsible citizens, relying on their autonomous competence of judgment, and protecting them from any bullying by institutions.

What is more, Mengzi's ethics would *mutatis mutandis* not only deliver a theoretical Confucian basis for the acknowledgment of human rights. Anthropological assumptions like his might even be a *conditio sine qua non* for justifying the idea of human rights in the first place: If a human were no more than a rationally calculating egoist, guaranteeing human rights would amount to giving wings to the tiger, and the strategic derailment of any promotion of human rights would be preprogrammed. This is an important critical point in the human rights problematique which probably also helps explain the Western history of gross human rights abuses. That the one culture which takes pleasure in declaring human rights part of its identity could at the same time be their greatest violator is perhaps more than a deplorable inconsistency. It might have to do with the understanding of the holder of rights as a "possessive individualist" (Macpherson 1962),[15] an "isolated monad secluded in itself" (Marx 1976:364),[16] primarily obliged to his or her self-interest, which has exerted a sustained impact on modern political, economic and, last but not least, legal thought to this day. It comes as no surprise that the right to private property figures prominently in human rights catalogues, and it is revealing that the connection between both is also visible in the revised Constitution of the People's Republic of China, where the gates have been opened to an extreme form of capitalism. Obviously, modern "subjectivity" has a double if not contradictory face, which also becomes apparent in the ambivalent meaning of "autonomy": It can, with Kant, refer to the free submisson to the moral law, but is can also refer to self-determination in general. The acknowledgment of subjectivity is the indispensable precondition of political, social and cultural freedom, but it has a negative side which already sparked opposition at an early stage: It can foster acquisitive individualism with the tendency to make the rationality of means and ends the dominant form of rationality and the calculated contract the dominant form of social relations. Thus it might not exhibit a sufficient power of cohesion to prevent society from drifting apart (Hegel: *Entzweiung*). This has given rise to the backward-looking temptation to curb

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[15] Possessive individualism is according to Macpherson (1962:269) based on the following premises: "Individuals are by nature equally free from the jurisdiction of others. The human essence is freedom from any relations other than those that a man enters with a view to his own interest. The individual's freedom is rightly limited only by the requirements of others' freedom. The individual is proprietor of his own person, for which he *owes nothing to society*." (Italics added)

[16] As Marx says (*ibid.*), "The human right of freedom is not based on the connection of man and man, but on the separation of man from man. It is the right of this separation, the right of the reduced individual, reduced to himself."

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subjectivity again by a reestablished organic form of community with authoritarian institutions and a corresponding constraint on human rights.

If one wants neither to subscribe to this conservative solution nor to the disastrous unfolding of "rugged individualism", one would have to specify the notion of subjectivity in such a way that the self-sufficient *autarky* of the individual is suspended without rescinding its claim to *autonomy* and *authenticity*, which irrevocably remains part of any society that can call itself "modern". Hegel and Marx have already made a step in this direction (Hook 1936: 41ff.). The "classical" answer to the question has been given by American pragmatism with the transformation of the paradigm of subjectivity into the paradigm of *intersubjectivity*. It implies that autonomy, rather than being an innate quality of the human being, becomes a function of human relations and is, therefore, less prone to a solipsistic reduction—we owe it to the other.[17] Rights would not be something one "possesses" as one's private property, but they would be the juridical form of a mutual recognition without which human beings would not be what they are and would not have what they have. To remind of this indebtedness to the others can, at least in theory, forestall the enjoyment of rights at the expense of the commitment to the human community; it demands from us the "intertwining of autonomy and devotion" (Habermas 1992:122).

Contemporary Confucian literature often asserts that Confucianism, too, has consistently avoided isolating the individual and always thought in the relational paradigm (cf. e.g. Tu 1985). The argument is routinely politically exploited for legitimizing the subordination of the individual under an external authority. As mentioned above, Western sinology has also tended to present Confucianism as a collectivistic ethics without a notion of a human "subject". However, the *Mengzi* shows that the picture is much more complicated and that Confucianism is in fact closer to a philosophy of subject (*Subjektphilosophie*) than the stereotype tell us. A "Mencian" solution to the problem we are discussing would, more in line with Western natural law philosophy than with the paradigm of intersubjectivity, draw on the "true condition" or "essence" of a human as an *ens morale* rather than a mere *homo oeconomicus* by nature. This, too, would forestall the loss of commitment to the common weal that can accompany the enjoyment of individual rights and has in fact been one source of anti human rights polemic. Right would be tied to morality as its original source. The modern Confucian philosopher Mou Zongsan (1909-1995) has developed Mengzi's ethics in this direction by introducing the idea of a "self-restriction" or "self-negation" (*ziwo kanxian*) of what Mengzi, as mentioned above, calls the innate moral "good knowledge" (*liang zhi*) (Mou 1961:55ff.):[18] The "good knowledge," which primarily informs us about our moral duties, restrains itself in order to leave ample scope for right. Right is not the abdication of morals, then. It is a moral obligation in itself to organize the protection of human

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[17] I have discussed the pragmatist position as it has been developed by Charles S. Peirce and in particular George-Herbert Mead in connection with the sinological debate on Confucian ethics in Roetz 2013.

[18] For a discussion of Mou's theory, cf. Chen 2007.

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dignity by making rights share equal space with duties rather than exclusively rely on duty-consciousness. This division of labor would bring to light a complementarity of duties and rights that is already implicit in the duty-centered model.

I sympathize with this derivation of rights from morals, provided that it does not result in making the enjoyment of rights dependent on the *performance* of virtuous acts[19] (see above) rather than on the general human *capability* to perform such acts: a human *deserves* rights not because he or she verifiably *fulfills duties*, but because he or she, as a human, *is able to fulfill duties*. Furthermore, a human *needs* rights in order to ensure that acting morally does not amount to an imposition, as is the case in an unjust world where many have to live in misery and, forced below the breadline, often enough have to become criminal in order to survive—as Mengzi, the moralist, already knew.[20]

Nevertheless, the Mencian model delivers only a necessary, but not a sufficient basis to obtain moral norms from where in turn legal norms can be generated—it seems to overstretch the normative capacity of human nature. In this model, human sociality has only a supportive, but not a generative role for morality, which is already innate to the human being in the form of dynamic "beginnings". This delivers a counter argument against reducing the human being to the "possessive individualist" who calculates his personal benefits. At the same time, it delivers a strong notion of a human person or subject furnished with self-consciousness in awareness of its autonomous capacities. The *Mengzi* is replete with proud manifestations of unyieldingness and independence of the moral actor from political patronage—if necessary, he will "stride his way alone" and not "bend to authority and power".[21] This strong notion of an autonomous subject, though with elitist overtones not fully consistent with the egalitarian dimension of Mengzi's moral anthropology, is certainly an asset when it comes to reconstructing Confucian ethics in accordance with the human rights idea. However, the Mencian model does not call into question the very framework of *Subjektphilosophie* itself which in principle also covers the strategic form of subjectivity described by Macpherson. The Mencian approach is closer to its rival than it appears at first sight: both appeal to something that the individual *has* or *possesses*—natural morality or natural rights—*prior to society*. There is no attempt made to explore *intersubjectivity* as a source of solidarity—it is only taken into account as an ethical responsibility or as a strategic factor, but not (at least not sufficiently) as the medium to which the moral as

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[19] This suspicion leads Yu Kam Por's to abandon the Mencian model, since, as he sees it, because of its moral emphasis it might actually be a hindrance to actively claiming rights. Unlike most Confucian philosophers, he refers to Mengzi's Confucian critic Xunzi in order to find a basis for a Confucian conception of human rights (Yu 2005, Roetz 2005a).

[20] Cf. *Mengzi* 1a:7: "As to the people, without a fixed livelihood, they will not have a fixed heart. And without a fixed heart, there is nothing they will not do, be it self-abandonment, devious conduct, depravity or extravagance. When they thus have fallen in crime to punish them accordingly—this is to entrap the people. How can such a thing as entrapping the people be done with a humane ruler on the throne?"

[21] *Mengzi* 3b:2, Roetz 1993:172. For other impressive examples from the *Mengzi* and other Confucian texts cf. Roetz 1993:81-89 and 172-174.

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well as the calculating self owes its very *constitution*. The interrelatedness of the ego with the other is well expressed in the Golden Rule—I find the right way to act as soon I recognize myself as an element in a reciprocal relationship with my fellow humans. But it is characteristic that, in contrast to Confucius, in Mengzi's ethics the Golden Rule does not play a major role, if any[22]—the "good knowledge" already tells us what to do *before* we realize ourselves as relational beings. Herewith, the moral qualification notwithstanding, Mengzi does not abandon the self-referential subjectivism that also informs the "possessive individualist". This suggests a step beyond the Mencian model: In order to transcend and at the same time "sublate" (*aufheben*) the subjectivistic paradigm, the two prominent readings of the central virtue of "humaneness" (*ren*) in Confucianism in terms of the Golden Rule and innate benevolence would have to be integrated in such a way that the subjects are neither led into a new bondage nor renounce their responsibility for the common interest. This means that a strong notion of the subject as implicit in Mengzi's moral anthropology remains important. It is a necessary gateway to and element of a philosophy of intersubjectivity that takes into account the social constitution of the individual without subsuming it under the dominance of the collective.

The problems that I have discussed in the last part of my paper with regard to the naturalistic foundation of Mengzi's ethics are reminiscent of similar ones in the European natural law tradition which, after all, was a powerful driving force for the development of the human rights idea. They refer to internal problems of the philosophical foundation and justification as well of the practice of human rights about which there is no unanimous consensus and do not in the least affect the main thesis that I would like to defend: that China delivers an excellent example of the possibilities at hand in a non-Western intellectual tradition in order to support the acknowledgment of human rights of the individual against the state.[23] It is not the case that China would prove the cultural limits for such an acknowledgement. Generally speaking, the problem lies not with the cultural traditions but with the way we position ourselves relative to them and what we make out of them under modern conditions. There is certainly no historical culture that, measured by the standard of human rights, would not deserve to be under critique—in this case, the idea of human rights would never have appeared and gained currency. But there is also no culture that would not have at its command the means to critically reflect on itself and agree on or generate new norms, if necessary—the more so, if these norms are rooted in the deep structures of human society as such. There is no cultural license, there is only political accountability for the denial of human rights.

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[22] Cf. Roetz 1993:146-147.

[23] In this article, I have referred primarily to Confucian literature. For arguments concerning the compatibility of human rights with Daoism cf. Schweidler 1999.

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Looking for sources of human rights in Japanese traditions

Raji C. Steineck

What to look at, and what to look for in discussing sources of human rights in Japanese traditions

The notion of "human rights", especially if named "universal human rights" as in the pertinent UN declaration ("The Universal Declaration of Human Rights" 2013 (henceforth cited as UDHR), contains something of a paradox: If we accept their universality, we are wont to assume that they have been conceived, or at least have been conceivable, in all human societies at all times. But that would mean to obscure the historical truth (– and, lest we forget, truth is another "universal value" –) that, "universal human rights" were a revolutionary idea first legally adopted in nations fighting the European, colonialist *ancien régime* in the wake of the modern industrial age, most notably, because without the colonialist reservations that persisted in the case of revolutionary France, in the constitution of Haiti of 1804. Although they were soon adopted by progressives in the metropolis and, when the news spread, in the periphery of the colonialist / imperialist world, the idea in its popular understanding remained partial for some time (excluding women and the peoples and races destined, by the powers that be, for slavery or other forms of permanent subordination), and continued to meet with resistance around the globe. However, since it was ultimately successful, and has, since 1945, increasingly become a part of the global legal and quasi-legal framework, some former opponents (most notably, European conservatives and the Christian churches) have turned around and claimed, for their traditions, not only compatibility with the concept, but even intellectual responsibility for it.

If this be cunning, there is still reason in it, which makes such claims hard to reject. If we truly believe that human rights are unalienable and universal, we can hardly even want to think that they are at the same time fundamentally incompatible with convictions deeply engrained in anybody's cultural traditions. Moreover, as the 1990s' debate on human rights in Asia has shown, whenever human rights are "othered" as foreign impositions by apologists of some particularistic social ethics, we see local partisans come to the fore, claiming that those human rights are part and parcel of the best of the very tradition that is used to deny them (Cmiel 2004, 117). And this, or so I believe, is just as well. While I take human rights to be, both historically and in their very essence, a revolutionary idea – an idea that was and is most useful when directed *against* a *status quo* of systematic and cruel oppression of individuals and groups – there is good reason to argue that they express values which, at some level, have been present (albeit dormant, and possibly on the margins) in the relevant traditions of each country and society. If one were to shun that strategy, one would be left with a rhetoric of radical innovation, forcing people to choose between a presumed moral high ground (human rights) and the ways of life and thought they have followed so far. That, however, is for

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most people an impossible choice to make, the imposition of which can only generate anxiety and alienation. Conversely, to insist on specific and exclusive cultural roots for human rights in the traditions of the "Christian Occident", as a coalition of liberal cultural relativists and Euro-American conservatives would have it, does mean to deny to anybody who is identified, on their own accord or by someone else, as coming from another background the possibility to make the concept of human rights their own. This would also mean to consciously or inadvertently sound a note of Western suprematism, which can only alienate people in areas that were exposed to Western cultural and political imperialism. What follows from this is that, in order to avoid a self-defeating method in advancing human rights, we have to search for ways to picture them as standing in *continuity* with cultural traditions around the globe, without necessarily having to postulate that they were explicitly acknowledged in all areas, and at all times. In this manner, looking into historical sources can also help us to become aware of the *relativity* of each specific *formulation* of human rights to the social conditions of the age. It is worth noting that this strategy of establishing a continuity without insisting on identity was advanced in Japan already in the early decades of modernization by liberals such as Nishi Amane[1] (Steineck 2013) or (in a less reflective manner) Yamaji Aizan (Squires 2001) against nationalist authoritarians such as Yamagata Aritomo, Shinagawa Yajirō, or Inoue Tetsujirō (Ito 2010).

It is with these preliminary thoughts in mind that I want to look, in the following pages, for possible intellectual sources of the concept of human rights in the premodern intellectual heritage of Japan. In my search, I shall consciously employ the same "hermeneutics of good will" that has traditionally been granted to slaveholders (Plato and Aristotle), profiteers of human trafficking (Locke; discussed in Glausser 1990), or racists (Kant; discussed e.g. in Bernasconi 2008, but see also Kleingeld 2007, who argues that he eventually changed his mind) when rooting human rights in the European traditions. I shall to some extend follow the pattern established by Micheline Ishay in her seminal *The History of Human Rights* (2008) in looking for both implicit and explicit acknowledgements of norms pertaining to liberty (namely, injunctions for tolerance, and restrictions of state interference in private affairs), equality (provisions for legal and social justice and universal welfare), and fraternity (willingness to extend respect and welfare to all human beings, regardless of social divisions). I will, however, not follow her in highlighting some ancient sources before jumping to the modern history of human rights. Instead, I will quite selectively mention some sources from antiquity and the medieval period, before discussing a particular early modern (Edo period), Confucian school of thought and its (partly diverging) ideas on human nature in more detail. This is not to privilege Confucianism as the single source relevant in

[1] Japanese names are given in the customary Japanese order (family name first, personal name second). As for the references given, apart from primary sources directly discussed here, I have privileged sources in Western language over the vast and insightful pertinent scholarship in Japanese language simply for reasons of accessibility for the presumed readership of this volume. All translations from the Japanese are mine if not stated otherwise.

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establishing pre-cursors to the idea of human rights in Japan. Rather, I want to focus on the said 17th century school of thought for two reasons: First, Confucian "role ethics" have been presented as contrasting, if not contradicting "European universalism" in parts of the literature, while others have argued quite to the contrary, that Confucianism is a token of "post-conventionalist", universalist ethics (most notably Roetz 1993). The controversy usually revolves around the "classical Confucianism", i.e. sources from Chinese antiquity. However one reads these sources, taking up early modern Japanese positions allows us to see something more of the diversity of opinions that developed *within* Confucianism, which in itself helps to foster a nuanced appreciation of the universalist and the conventionalist/particularistic *tendencies and potentials* in this tradition. As suggested above, in my view the problem is not so much whether ancient to early modern Confucianism (or Buddhism, or Shinto, for that matter) conceived of "human rights" in the way we do today. They did not, and could not, for Confucius, or Itō Jinsai, could no more than Plato or Aristotle have thought "equality" the way we do, nor of a "right to nationality" (UDHR, Art. 15) or a "right to work" (UDHR, Art. 23), which make sense in the modern system of nation states and capitalist economy only. The question, then, is whether a formulation and legitimation of human rights *can be developed* in Confucian etc. terms.

Looking at one later formulation of Confucian thought will also allow us to grasp, at least in part, the *historical and dynamic* character of this tradition, in contrast to the singular focus on its earliest and classical sources, which (albeit often inadvertently) serves to strengthen the conviction that there was no *history of thought,* no *development of ideas,* and thus, no progress, outside Europe.

Elements of human rights in ancient and medieval Japan

In the following, I want to turn the light on some important sources and developments in ancient and medieval Japanese history that can be read as documenting insights fundamental to the idea of human rights. For various reasons, the first text to turn to is the so-called "Seventeen Article Constitution" (in fact, more a collection of principles of government and administration then a fundamental law), documented in the *Nihon shoki* (fasc. 22)*,* the first official history of the Japanese Kingdom, and attributed there to the Prince Regent Shōtoku (574?-622?), a figure in which retrospective imagination and historical facts are decidedly mixed (Como 2008, 4–5). Whatever the true origin of this document and the factual character of its putative author, both have time and again served as points of departure for discourses on what Japan is or should be like (Como 2008; Itō 1998), and in this vein the text has also recently been used as the corner stone for the largest collection of source-texts in Japanese Philosophy to date. (Heisig 2011, 35–39)

While the text as a whole evidently bears witness to the Yamato dynasty's effort to centralize government and install itself as the one and only source of authority (which in itself was – very benevolently – interpreted by the above-mentioned Yamaji Aizan as an attempt to protect the common people "from the despotism of the nobility" (Squires

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2001, 152; cf. Yamaji 1965, 315), several of its articles are of relevance to our search for sources of human rights in the Japanese traditions. Yamaji (ibd.) specifically takes up article 12, which bars provincial officials and nobility from exacting levies, as evidence of the intention to protect the welfare of the common people:

> Neither Provincial governors nor the provincial nobility shall collect levies or impose labour on the good people. The country does not have two lords, and the people do not have two masters. The king is the master of all people in the land. The officials he entrusts are all his vassals. How can they, aside from the government, collect levies from the common people? (NST 2 , 18; 19; compare the modernizing translation in Heisig 2011, 38)

If this is about protecting the "good people" (J. *hyakusei* 百姓, also read *ohomutakara,* lit. "the (king's) treasure"*,* which may be understood quite literally as those who contribute to the royal treasury by tax and corvée labor, as distinguished from the itinerant and lowly, tax evading *senmin* 賤民), it is at least as much about establishing a royal tax monopoly, and a principle of suzerainty hitherto unknown in Japan.

Less ambiguous are the articles 5, 6, 10 and 11, which relate to values such as impartiality, tolerance, and justice, and explicitly mean to protect the weak from extortions by the rich and powerful, including corrupt officials. Article 5 reads:

> Stop craving for delicacies, give up greed, and decide petitions in a transparent manner. … Recently, those deciding over petitions take profit as their constant, and hear cases with a view to bribes. Thus the petitions of the wealthy pass like stones being thrown into the water. Those of the poor resemble water being thrown at a stone. If things are like this, poor commoners have nowhere to turn to. Consequently, the way of the vassal-ministers is compromised. (NST 2, 14; 15); cf. again Heisig 2011, 37)

While there is no idea of a "right" of the common subjects to receive equal treatment, the principle of impartiality in itself is evidently, and explicitly, formulated – a principle that, under the conditions of the rule of law, may well be transposed into the idea that "All are equal before the law and are entitled without any discrimination to equal protection of the law." (UDHR, Art. 7)

Our text's Article 10 calls for tolerance with respect to diverging opinions. This may well have first and foremost referred to policy discussions among the governing elite, but the injunction is put forth in a general way:

> Stop being wrathful, discard rage, and don't be angered by people who differ. Everyone has a mind, and something his heart clings to. What they think is good may be bad for us. What we think is good may be bad in their eyes. We are not necessarily sages, nor are they necessarily stupid. After all, we all are just ordinary, deluded people (J. *bonpu* 凡夫). Who can decide what is good or bad? We all alternate between wisdom and stupidity, without end, like a ring. Thus, even if the other side is enraged, we should be worried lest we ourselves are mistaken. Even if we think we alone have grasped the matter, we should submit to consensus. (NST 2, 18; 19)

While the last sentence may read like a license to opportunism, it is generally understood as an injunction against the magisterial enforcing of judgements on a reluctant

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majority. (NST 2, 383) The passage may thus be understood as putting forth the principle of tolerance not only of divergent views, but also of different ways of life, as a principle of governance – a principle translatable into the granting of civil liberties, such as granted by the UDHR's Art. 12.

One could also find at least the first traces of an idea of human equality here in the absence of reference to privileged insights of the ruler. But no mention is made (as yet) of a human intelligent or moral nature that would substantiate claims for human dignity – instead, the text refers to the limitations of human capacities in arguing against the arrogance of those in positions of power.

Articles 6 and 11 of "Shotoku's Constitution" request rulers to "punish wickedness and encourage goodness", and to honor merit appropriately. Since Article 6 precedes article 10, it also restricts its apparent relativism, implying the indisputability of certain moral standards. Again, this is not articulated in terms of formal law and legal justice, but Article 6 makes explicit reference to a "golden rule of antiquity" (Heisig 2011, 37; NST 2, 14; 15), which makes it open to a reading conformant to principles of equality before the law, impartiality of justice, and the like.

The political and legal thinking of these injunctions is largely informed by the Chinese classics that, in the West, have been subsumed under the term "Confucianism", with notable elements of Buddhist thought (as apparent in the term "ordinary, deluded people" in Art. 10). The latter is also deemed mainly responsible for the remarkable discontinuation of capital punishment in later antiquity subsequent to a decree issued by Saga Tennō in 818 that "all capital punishment for theft be mitigated into incarceration," which lasted until militant political conflict resurfaced in the capital with the Hōgen disturbance of 1156 (Schmidt 2002, 11; see ibd. 11-12 for an overview of the explanations given in the pertinent literature).

In the ensuing medieval period, marked by the preponderance of armed conflict and a military aristocracy, penal law and practice reverted to increasingly violent means, and capital punishment was frequently applied even for minor offenses (Schmidt 2002, 12–15). On the other hand, new concepts conducive to a universalist understanding of human nature and dignity were developed within the dominant religious paradigm that combined the cult of local and national deities with Buddhist creeds and practices. In the field of Buddhist doctrine, the resurgence of armed conflict and the increasing social violence resonated with the notion of a "final age of the Dharma" (*mappō* 末法) in which human beings would be increasingly dependent on the grace of Buddhas and Bodhisattvas for salvation. While the widely popular concept of reliance on the "other power" (*tariki* 他力) of Buddha Amida was arguably designed to work against spiritual elitism and arrogance (see the statements by Hōnen and Shinran, quoted in (Heisig 2011, 247–248; 253–255), it did translate into tendencies for social egalitarianism, including the establishment of a regional non-aristocratic self-government in one area of Japan that lasted for over 100 years (Pauly 1985). Conversely, other schools of Buddhism emphasized the idea of a "Buddha nature" (*busshō* 仏性) shared by all living beings and of an "original enlightenment" (*hongaku* 本覚) inherent to human nature to counter the notion that some human beings were born

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without the moral and spiritual capacity for enlightenment. (Both terms were interpreted in various ways; see Stone (1999) for a window into this discourse.) These concepts were, with notable contributions by Buddhist monks, translated into a fledgling Shinto theology (Teeuwen 1998; Fabio Rambelli 2009). The *Ruijū jingi hongen* 類聚神祇本源 ("The Original Source of the Classified Texts pertaining to the Heavenly and Earthly Deities"), a fascinating text that attempts a Shintō synthesis of the Chinese classics, Buddhist sources, and Japanese Mythology, has in its chapter on "The Deeper Meaning of the Way of the Gods" an early formulation of a thought that is, to say the least, open to readings supportive of a positive notion of human dignity: "Man is the divine / sacred being on earth." (*Hito wa sunawachi tenka no shinbutsu nari* 人ハ乃チ天下ノ神物也。NST 19, 115) While modern Shintoists have generally more excelled in championing Japanese particularism, if not chauvinism (Antoni 1998), this serves to show that there is no need to exclude this tradition when connecting the idea of human rights to older Japanese sources.

Discourses on Humaneness and Human Nature in Early Modern Japan

From these perfunctory glosses into Buddhist and Shintō sources from late antiquity and the medieval period, I turn to the literature generally categorized as "Old Learning" (J. *Kogaku* 古学). *Kogaku,* which as a historical label refers more to a methodological paradigm of giving prevalence to "old" (Zhou to Han period) over "new" (Song and Ming period) sources than to a unified school of thought, emerged in the 17th century from critical reflections on the then dominant school of Chinese Learning that based itself on the metaphysics of Chinese Song-period thinkers such Zhou Dunyi (1017-1073) and Zhu Xi (1130-1200.

With the firm regulation of religion in general and Buddhist institutions in particular enacted by the Tokugawa Shogunate, the language of Classical Chinese scholarship (which is a more appropriate circumscription of what in the West is popularly called "Confucianism") within a few decades became the dominant idiom of intellectual discourse, supplying paradigms which in turn inspired new forms of Buddhist scholarship and a national learning movement that was seminal for the development of a modern nationalist ideology.

The government-sponsored Hayashi School (founded by Hayashi Razan 林羅山, 1583-1657) emphasized a grand, but ultimately static view of the natural and social cosmic order (Brüll 1970; Boot 1979; Brüll 1989) that resonated well with the shogunate's efforts to stabilize the realm and its own grip on power (Totman 2000, 219–225). In terms of individual moral practice, this school, in line with the inspiration it drew from Buddhist sources and practices, emphasized "quiet sitting" (*seiza* 静坐) as a means of reverting to one's original nature inherently in tune with cosmic principle (Tucker 2004, but see Tucker 2002 for an interesting exception to the rule).

In contrast, the "Old Learning" paradigm, represented by thinkers with no (or severed) ties to the shogunate, and partly a townspeople rather than an aristocratic background, preferred a more dynamic reading of human nature that foregrounded moral

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and political *action*. In the following, I turn to two representative thinkers of this tradition, Itō Jinsai 伊藤仁斎 (1627- 1705) and Ogyū Sorai (1666-1728), not least because the latter inspired the great Meiji period philosopher Nishi Amane 西周 (1829 – 1897) to conceive of a modern and liberal variant of Confucian philosophy (Steineck 2013).

Itō Jinsai's *Gomō jigi* 語孟字義 (Meanings of terms in the *Lunyu* and *Mengzi*) discusses seminal terms of Confucius' Analects and Mencius with a critical, sometimes polemical view to their interpretation in the tradition of Song and Ming scholars. Chapter eight is dedicated to "human nature" (*sei*). In its second paragraph, Jinsai refutes the notion of an "original state of human nature" (*honzen no* sei 本然の性) that would be characterized by an apriori form of goodness, regardless of an individual's empirical capacity for, and record of, moral action (Tucker 1998, 134–135; NST 33, 48–50). Jinsai, who identifies human nature with the inborn disposition, declines the idea of a kind of inherently good spiritual nature that would be the same in all human beings. To the contrary, he believes that humans are born with different dispositions, but that they all share a moral sense that sets them apart from animals. This implies two things: being able to discern good from bad, and a natural preference for what is good that may, however, loose out to other impulses according to individual disposition and habitus (i.e., degree of moral cultivation). This is how he interprets Mencius' concept of the goodness of human nature:

> Mencius also explained, "People can become good because of their feelings (*jō* 情). That is what I mean in saying human nature is morally good." Mencius' point was that chickens and dogs, lacking any ethical understanding, cannot be taught goodness. But human feelings are such that, despite the reality of extremely inhumane deeds such as theft and murder, people are happy when praised and upset when chastised. In knowing the good to be good and the bad to be bad, both are the ground for the doing of good. That is what we mean by saying that human nature is good, and not that everyone's nature on earth is the same and we don't find anyone who is bad. From this it is clearly evident that Mencius' saying about human nature being good is not at variance with Confucius' saying that humans are similar in nature (NST 33, 50; the translation of the first three sentences is taken from Tucker 1998, 135).

The ensuing paragraphs of his discussion of human nature make it even more clear that Jinsai identifies the specific and indelible trait of human nature that distinguishes humanity from other animals not as a substantial goodness, but as the ability to know good from bad, which is, as he goes on to say, is the foundation for all moral as well as immoral acts; in paragraph 4 he writes:

> All talk of the good is in contradistinction to what is bad. When there is the good, there is also the bad. But if we, by conjecture, attempt to grasp their ultimate origin, we will inevitably end up relying on goodness (NST 33, 52, cf. Tucker 1998, 138).

Two points are of special importance in the context of our discussion. Firstly, we have a clear formulation of the moral nature of human beings that can serve as a conceptual foundation for the articulation of human dignity (Art. 1, UDHR) and might, via its implicit reference to human freedom, be developed into a Confucian articulation of civil liberties. And secondly, this moral nature is conceptually removed from questions

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of moral substance or merit: even "thieves and thugs who commit horrible crimes" (Tucker 1998, 139; cf. NST 33, 52) in Jinsai's eyes are not exempt from partaking in it. In thus clearly distancing the notion of human moral nature from questions of merit or demerit, Jinsai not only explicitly emphasizes the possibility and importance of moral cultivation (which connects to the right to education and participation in social life). His concept also speaks against acts that deny to humans the status of moral agents, regardless of the origin, status, and moral record of the person in question.

It is, in this respect, interesting to see how Jinsai deals with the traditional distinction between the noble few and the common crowd (*kunshi shōjin* 君子小人; chapter 23). First, he points to the history of the terms, which initially indicated status distinctions, but later came to refer to differences in record and were, as Jinsai says, polemically used in cases where there was a positive or negative mismatch between merit and social status. He then goes on to further identify "the way of the refined / noble person" (*kunshi no michi* 君子の道) from the "way of the sage" (*seijin no michi* 聖人の道): while the latter is only accessible for people of exceptional capacity, the former is open to all and characterized by its unobtrusiveness. Jinsai, who hailed from a non-aristocratic background, seems to consciously emphasize the constant, even pedestrian nature of the "way of the noble person" in an effort to subvert the social and political elitism traditionally connected with the above named distinction (NST 33, 80-81; Tucker 1998, 195-197).

Ogyū Sorai 荻生徂徠 (1666-1728), a member of the warrior class and for a period of time counselor to Shogun Tsunayoshi's chief advisor Yanagisawa Yoshiyasu (Lidin 1973, 38–51), is certainly less of a candidate than Jinsai if one were to search for precursors of democratic values in premodern Japan. However, his criticism of the tendency of the tradition to conflate the virtues of good government with general thoughts on human nature and the cultivation of benevolent feelings may be seen as laying the groundwork for the separation of the spheres of law and morality, and thus, for a theory of a state of law. This was, incidentally, the way in which the 19th century liberal philosopher Nishi Amane read and developed his ideas (see below). Furthermore, Sorai continues Jinsai's championing of moral action in contrast to the emphasis on "returning to the source" and "quiet sitting" (although he criticizes Jinsai rather severely on other points, see e.g. Tucker 2006, 189).

In chapter three of his own work on terminology, *Benmei* ("Discussion of terms"), Sorai defines the central virtue of "humaneness" (C. *ren*, J. *jin* 仁) as "the virtue of being a leader of men and providing for the peace and stability of the common people." (NST 36, 53; Tucker 2006, 186 omits the part about leadership.) To his understanding, it is thus clearly a virtue of the governing elite, and not for commoners. He goes on to criticize the received view:

> Confucians of later generations did not fathom the way of the sages, and so misunderstood humaneness. They claimed, "Humaneness is the principle of live and the virtue of the mind." They further alleged, "Humaneness appears when selfish desires are fully cleansed and the principles of heaven flow actively." … Their insights on humaneness derived from the teachings of Buddhism and Daoism. Consequently, they emphasized

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> notions such as "principle" and "the mind." Because later Confucians misread the Doctrine of the Mean and Mencius, they interpreted humaneness as human nature. … Their idea was that the humane person loves humanity. However, love is simply a feeling. If the feelings are quieted, as they advocated, how could love become manifest?" (Tucker 2006, 188; cf. NST 36, 55)

It is, by the way, clear for Sorai that, while "humanity" consists in the enactment of practical policies for the sake of the whole population, the moral cultivation of those assuming governmental authority remains an essential element:

> Practicing humane government takes self-cultivation as its foundation. If self-cultivation is not engaged in, the people will not follow even if humane government is enacted (Tucker 2006, 191; cf. NST 36, 57).

Taking this as an aside as to the importance of moral credibility in politics that one would certainly wish contemporary politicians to take to heart, I want to focus here on Sorai's emphasis on governing in a way that is practically beneficial —and not just abstractly benevolent— to all in favoring "creative production" (as Tucker aptly translates *sei* 生 in this context; Tucker 2006, 186; NST 36, 53) and fostering social cooperation while taking account of the divergences in individual dispositions.

Sorai highlights providing for a peaceful and stable social environment and creating a social structure in which everyone can prosper by contributing to social live according to their talent as the two central embodiments of "humaneness" (NST 36, 53-54; Tucker 2006, 186–187). Sorai specifically insists that precisely because humans differ in their individual dispositions, they can be, and need to be, integrated into a society where their capacities are made to work for mutual benefit — and it is the responsibility of those with governmental authority to provide for such a framework:

> While human nature does differ from person to person, regardless of an individual's knowledge or ignorance, worthiness or worthlessness, all are the same in having minds that mutually love, nourish, assist, and perfect one another. People are also alike in their capacity to work together and undertake tasks cooperatively. Thus for government, we depend on a ruler; for nourishment, we depend on the people. Farmers, artisans, and merchants all make a living for themselves by relying upon each other. One cannot forsake society and live alone in a deserted land: it is simply human nature that makes it so. Now, "the ruler is one who organizes people into groups." Were it not for the virtue, humaneness, how could people possibly be so well organized and unified into society? (Tucker 2006, 187; cf. NST 36, 54)

Sorai also affirms the old Chinese idea that this is what in the long run legitimizes governmental authority (NST 36, 57; Tucker 2006, 190). In stressing the importance of concretely beneficial policies over against the quietistic contemplation of lofty ideals, he is certainly closer to a "materialist" reading of human rights. He may thus be read with an eye towards to rights for securing individual survival, participation in social and cultural life, and, to some extent, distributive justice (UDHR, Art. 1, 2, 22).

To reiterate, by highlighting these thoughts of Sorai, I do not want to imply that he or any other source previously quoted here had a theory of human rights in mind. I

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simply want to indicate that the idea of human rights and some of its more concrete articulations do resonate well with seminal concepts from various older Japanese traditions. In other words, I want to suggest that Japanese is a possible "native language" of human rights — that human rights can be formulated by making use of traditional terminology and with reference to time-honoured ideas from what has been received as the canon of Japanese thought. This will, however, not be possible if one subscribes to a form of traditionalism that accepts these sources as authorities that reign supreme. Instead, one has to opt for a kind of creative reading of the tradition that allows for their re-interpretation and adaptation in the light of new insights and circumstances. As I have mentioned already in the introductory paragraph, such a reading is not without precedent in Japanese modernity: It was already employed in the early decades of political modernization by various liberal intellectuals in their struggle against the nativist authoritarianism that ultimately carried the day — eventually leading up to the cataclysms of Japanese imperialist chauvinism, and the breakdown of the empire in 1945. Since we are currently witnessing a resurgence of nationalist ideologies in Japan, this alternative, and its continuity to what may arguably be the best of the intellectual tradition of Japan, surely deserves renewed attention.

I therefore want to close this paper by very briefly highlighting how Nishi Amane, often termed "the father of [scil. modern] Japanese philosophy" (Botz-Bornstein 2006, 70), attempted to critically develop a "Confucian" theory of the rule of law, and civil liberties. While Nishi is today mainly "known for his pioneering work in introducing European philosophy and other disciplines into Japan" (Heisig 2011, 583), and most notably for coining the term *tetsugaku* 哲学, which has come to denote philosophy in the Western tradition, he also strove to connect what he had learned in Europe to the tradition he had first studied — Classical studies in the tradition of Ogyū Sorai. This is most obvious in his "New theory of the unity of the various fields of learning" (*Hyakuichi shinron* 百一新論, 1874; NAZ 1, 232-289). Consider the following paragraph, which reads like a modernized version of Sorai:

> Some scholars suppose that by coming to know the 'principle' of all things and to have a sincere heart and 'mind' they can spontaneously govern the country without further study; without investigating and clarifying what is in its interests or to its advantage. It is painful to think of the harm that would result from governance based on something like a Zen monk doing '*zazen*'. (Heisig 2011, 584; NAZ 1, 237-238)

Witness also the following reflections from a later treatise:

> ... Human society, too, comes about because of the benefits it brings: the morality of mutual support (as with husband and wife, or father and son), the laws of division of labor (the exchange and distribution of work), the distinction between leaders and commoners (those in office and those not in office) and between government and citizens (the judiciary prevents conflicts, the army protects the nation). Hence, seeking what is beneficial is the basis of morality. The way of freedom does not gainsay the pursuit of gain. (Heisig 2011, 584; cf. NAZ 2, 312)

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One immediately notices the similarities to the paragraph from Sorai quoted above, but also how the old ideas are transposed into a new key, which is adapted to modern circumstances and based on a notion entirely absent in Sorai (or any of the other sources quoted above), i.e. that of "freedom" (J. *jiyū* 自由). (The treatise bears the title: "On the Idea that Freedom is Independence.") Nishi converts the old idea that maintenance of authority is dependent on the ability to exert it for the benefit of all into the modern concept that the establishment of the state limits individual discretion for the sake of general freedom. However, he ingeniously connects traditional "Confucian" notions to modern liberalism by defining freedom through its relation to benefit: "Freedom is the freedom to attain what is beneficial (*jiyū wa iwayuru shūri no jiyū nari* 自由者所謂就利之自由也) ", and thus connects Sorai's notions of social cooperation, beneficial government and dutiful behavior to the golden rule of the modern liberal state:

> Those who are loose with the limits [of freedom] cannot but be treated strictly, and therefore we cannot use our own freedom to violate the freedom of fellow human beings. ... Only animals, insects, fish and the like are free to pursue and gain benefit for themselves alone. In human society, one forfeits this smaller, lower form of freedom to obtain a greater, higher freedom. (NAZ 2, 312; the English translation of the last two sentences taken from Heisig 2011, 584-585)

One of the central points of *Hyakuichi shinron* that is pertinent to our discussion of human rights is Nishi's critique of the tradition for its neglect to distinguish the sphere of law properly from that of morality, and his subsequent introduction of the term "right" (J. *ken* 権) into the discourse (NAZ 240-247). Having argued that "law" (J. *hō* 法) and morality (J. *kyō* 教) differ both in intension and extension (NAZ 1, 263-265), Nishi goes on to reassure his readers that "law has its origin in human nature" (J. *hō wa motomoto hito no sei ni motozuku mono* 法は元人の性に基づくもの) and is therefore implicitly present in the (Chinese) classics as well, where it is, he says, subsumed under the term *gi* 義 ("obligation"). Nishi explains:

> What is called "obligation" emerges in the relation between two people. For example, the retainer has the "obligation" to serve his lord, and conversely, the lord has the "obligation" to support the retainer. With the respect to such obligations, there also emerges what is called a "right" (*ken* 権) – but in the Han Classics, this also was called "obligation," and the two were not clearly differentiated. In contrast, in Western thought both are separated, and consequently there is much talk of "rights" there. However, the idea of a "right" is present in the *Analects* when they speak of there being an "obligation" that one grasps later, or that one looks to an "obligation" with an eye to profit. In *Mencius,* it is discussed whether one would be righteous or unrighteous when taking such an "obligation" – and while this is also called an "obligation", it is said with respect to the side of the one who takes, and is different from the obligation to give something. This is what in the West is called a "right". For example, the retainer has a "right" to receive support from the lord. The lord has a "right" to expect obedience from the retainer. Thus, rights and duties spring forth mutually between two people. (NAZ 1, 272-273)

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We can see here how Nishi at once critiques the tradition and strives to maintain continuity with it. Through this creative form of reading he is able to introduce modern notions of liberties, the rule of law, and the like while maintaining the link to the cultural heritage. Nishi by the way anticipated that the introduction of a discourse of rights might be perceived as fomenting dissent and conflict in society, and that some would take recourse to the revisionist idea of replacing the discourse of "rights" entirely by the promotion of morality. But while he did believe that "rights" can only work properly and beneficially if complemented by "morality", an awareness of duties that complements the awareness of rights, he was adamant that regress to the confusion of the spheres of law and morality is not viable, and could only be to the detriment of both. (NAZ 1, 274)

Conclusion

I have shown in the preceding paragraphs that seminal documents from various pre-modern Japanese schools of thought provide for terms and concepts that can be used to articulate and legitimize the idea of human rights in a language that is in continuity with Japanese (and East Asian, for that matter) tradition. There is thus no need to invoke East-West dichotomies, or fear that by promoting human rights, one would of necessity impose "alien" ideas on Japanese society. My remarks are first and foremost addressed at a Western audience, and meant as a critical intervention with an eye to both a conservative "universalism" that assumes the concept of human dignity to be a Christian Occidental invention and prerogative, and a liberal "cultural relativism" that shies away from posing hard questions to "traditionalist" defenders of Asian variants of authoritarianism. However, I would also like to express the hope that Japanese philosophers and intellectuals re-discover and re-appropriate the strategies of Meiji liberals like Nishi Amane, and move confidently beyond the dichotomical paradigm that has, for the most part of the 20th century, and certainly not for the better of Japanese society, forced Japanese to choose between authoritarian traditionalism and a liberal (or Marxist) universalism that spoke with a distinctly "Western" tongue.

An immediate qualification is in place: By demonstrating that it is *possible* to couch human rights issues in terms that invoke continuity to older Japanese traditions, I do not want to say that it is *necessary* for Japanese to do so. First of all, there is no duty to cater to national tradition, and one may have good reason to keep one's distance. Secondly, even if one chose, while arguing for human rights, to also participate in the work of imagining the national community, one might as well opt for highlighting one of the modern intellectual traditions of Japan (such as Kantianism or Neo-Marxism, for example). It is simply my point that the *option* exists to connect the idea of human rights to traditions pre-dating the influence of Western thought, and thus present it in a genuinely "Japanese" light. Since we live in societies where individuals are to some extent defined by attributions of nationality, and large parts of the population identify themselves by belonging to a nation, this option seems important if one wants the idea of human rights to succeed. And, to re-iterate, the said proposition goes both ways:

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while it *affirms* the possibility to be a "good Japanese" and at the same time champion human rights issues, it *negates* an exclusive link of human rights to Occidental traditions. Human rights are a revolutionary idea – but one which can draw on sources from all parts of the world.

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