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When Ambivalent Principles Prevail.  
Leads for Explaining Western Legal Orders'  
Infatuation with the Human Dignity Principle

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## **Abstract**

This paper originates in the statement of the human dignity principle's (HDP) growing importance in many legal orders. It first examines whether many legal orders' interest for the HDP may be linked to its intrinsic (symbolic/axiological) or extrinsic (usefulness in terms of litigation) qualities. Since the conclusions of this examination do not prove totally convincing –or at least not to the degree that one would expect for such a “foundational” principle as the HDP-, the argument looks in another direction: that of scholarly promotion. Indeed, a research conducted on French material provides with firm bases for suggesting that one of the striving forces of the recent legal infatuation with the HDP has to do with the fact that it has been seized by critical trends of legal scholarship as a favorable occasion for promoting the resurgence of theoretically naturalist representations of law.

## **Keywords**

Human Dignity – Dignitas – Rights – Obligations – Naturalist theories of law – EU Charter of Fundamental Rights (art. 3) – Gene patenting – Laser games – Refusal of medical treatment.



***When Ambivalent Principles Prevail.  
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Human dignity is said to have invaded Western legal orders<sup>2</sup>; legal scholarship qualifies human dignity as foundational<sup>3</sup> of legal orders, thus depicting an unavoidable as well as comprehensive<sup>4</sup> principle. Naturally, the German example must have already popped into every reader's mind, for article 1 of the 1949 Basic Law is famous: "Human dignity is invaluable. Respecting and protecting [this value] is the duty of all authority in the State".<sup>5</sup> Germany does serve as the major reference on human dignity<sup>6</sup> for legal scholarship. But what is really new on the topic is that dignity has recently imposed itself on the same basis (centrality, unavoidability...) in other legal orders as well, where it is deprived of such an explicit basis as provided for under the German Basic Law. This can be said (for example) about France. Not only is the French 1958

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<sup>2</sup> And maybe more; see for example, mostly about the South African 1996 Constitution but also referring to the African Charter of Human Rights, A. Chaskalson, 'Human Dignity as a Foundational Value of our Constitutional Order', (2000) 16 S. African J. Human Rights, 193.

<sup>3</sup> See among many examples, G. P. Fletcher, 'Dignity as a Constitutional Value', (1984) 22 U.W. Ontario Law Review, 171.

<sup>4</sup> Comprehensive in the sense that a great number of legal domains have to do with this rise of the human dignity principle: bioethics (see for example, J. J. Paust, 'The Human Right to Die With Dignity: a Policy-Oriented Essay', (1995) 17 Human Rights Quarterly, 463), constitutional law (see for example M. D. Goodman, 'Human Dignity in Supreme Court Jurisprudence' (2006) 84 Nebraska Law Review, 740), gender and law (see M. Minow, 'Lawyering for Human Dignity' (2002-2003) Gender Soc. Pol'y & L., 143), privacy (see J. Q. Whitman, 'The two Western cultures of privacy: dignity and liberty', (2003-2004) 113 Yale Law Journal, 1151), honor (see J. Q. Whitman, 'Enforcing civility and respect: three societies', (1999-2000) 109 Yale Law Journal, 1279).

<sup>5</sup> Not to mention the fact that article 79 of the Basic Law prohibits any constitutional amendment that would modify articles 1-20 –thus making the human dignity principle intangible.

<sup>6</sup> J. Q. Whitman, the American leading scholar on the subject, has investigated German law thoroughly; so have others: see E. G. Eberle, 'Human dignity, privacy and personality in German and American constitutional law', (1997) 4 Utah Law Review, 963.

Constitution silent about the concept of human dignity,<sup>7</sup> but so were most French legislative and judicial norms until the mid 1990s.<sup>8</sup> The situation changed drastically after the *Conseil constitutionnel* in 1994<sup>9</sup> and the *Conseil d'Etat* in 1995<sup>10</sup> successively recognized it as a major legal principle. In the following decade, the human dignity principle's presence in both legal norms and legal scholarship was multiplied by numerous factors. Similar observations can be made in relation to the American model. If a "jurisprudentially-based inquiry" led to the conclusion of an only moderate presence of human dignity in American constitutional law in 1984 (cf. the notion of "implicit prominence"<sup>11</sup>),<sup>12</sup> mostly due to Justice W. Brennan's judicial policy,<sup>13</sup> the most recent period reverses the picture. Many recent prominent Supreme Court decisions are based on human dignity: this is the case of *Lawrence v. Texas* (striking down the Texas ban on sodomy),<sup>14</sup> *Atkins v. Virginia* (finding capital punishment for the mentally retarded is a violation of the eighth amendment),<sup>15</sup> *Roper v. Simmons* (finding capital punishment for a 17-year old is a violation of the eighth amendment).<sup>16</sup> Moreover, other legal sources such as statutory law or State constitutions must be taken into account. In relation to State constitutions, for example, three States (Montana, Louisiana and Illinois) contain an explicit dignity clause. It has been tentatively argued that in Montana, a judicial understanding of the principle has been developed that offers a potentially higher standard of rights' protection than the federal constitution.<sup>17</sup> Therefore, one may argue today that human dignity is a "core value" of American law.<sup>18</sup> In some ways, the 2000 European Charter of Fundamental Rights can be seen as the climax of Western legal orders' infatuation with the human dignity principle. Not only does its article 1

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<sup>7</sup> One could add that, as a matter of fact, the only French constitutional text that actually referred to the human dignity principle was rejected, in 1946, by a popular referendum –certainly not for that reason as such. See CURAPP, *Le Préambule de 1946. Antinomies Juridiques et Contradictions Politiques* (Paris : Presses universitaires de France, 1996).

<sup>8</sup> Even then, only some laws, (such as the 1986 law on communication, that erected the human dignity principle into a legal restriction to freedom of speech), or judicial decisions referred to it explicitly.

<sup>9</sup> C.C., 94-343-344DC, *Lois bioéthique*, Rec. p.100 : human dignity is said to be a principle of constitutional value (*un principe à valeur constitutionnelle*).

<sup>10</sup> C.E., Ass (2 espèces), 27 octobre 1995, *Ville d'Aix en Provence et Commune de Morsang sur Orge*: human dignity is, along with public tranquility, security and salubrity, a legal aim of preventive police measures (such as, for example, the prohibition of a show in so much as its breaching the peace may be testified by its affecting human dignity).

<sup>11</sup> Expression by R. G. Wright, 'Consenting Adults: the Problem of Enhancing Human Dignity Non-Coercively', (1995) 75 Boston University Law Review, 199.

<sup>12</sup> See J. J. Paust, 'Human Dignity as a Constitutional Right: a Jurisprudentially-Based Inquiry', (1984) 27 Howard Law Journal, 145.

<sup>13</sup> This idea was a quite a motto of American constitutional scholarship until the early 2000s; see S. J. Wermiel, 'Law and Human Dignity: the Judicial Soul of Justice Brennan', (1998) 7 William & Mary Bill of Rights Journal, 223-239. See also W. Brennan, 'The Constitution of the United States: Contemporary Ratification', (1986) 27 South Texas Law Journal, 443.

<sup>14</sup> 539 US 558 (2003).

<sup>15</sup> 536 US 304 (2002).

<sup>16</sup> 125 US 1183 (2005).

<sup>17</sup> See C. Jackson, 'Constitutional Dialogue and Human Dignity : States and Transnational Constitutional Discourse', (2004), 65 Montana Law Review, 15.

<sup>18</sup> n 3 above, 743. For a global study, see J. Resnik, J. Chi-hye Suk, 'Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty', (2002-2003) 55 Stanford Law Review, 1921.



solemnly proclaim that “human dignity is inviolable”, but also the whole first chapter of the Charter, entitled “Dignity”, is composed of a variety of rights that are thus presented as derivations of the human dignity principle itself. In addition, the explanatory note to the Charter,<sup>19</sup> affirms human dignity is not only a fundamental right in itself, but also the foundational principle for all other fundamental rights. The die is cast: human dignity is both the summit and the foundation of Western legal orders -its cardinal reference.

When facing such an uncommon reality, the legal scholar cannot but wonder why. Indeed, both normative and scholarly unanimous enthusiasm towards a legal concept are uncommon mores in the world of the law.<sup>20</sup> All the more uncommon in the particular case that they apply to a particularly unclear object for it is very difficult to give a definition of human dignity. D. Beyleveld and R. Brownsword have usefully distinguished two colliding approaches of the concept: dignity as empowerment and dignity as constraint;<sup>21</sup> and others could be added.<sup>22</sup> Therefore the concept of human dignity can alternatively serve as a ground for rights *or* for obligations of the individual.<sup>23</sup> Such uncertainty as to the definition as well as the function of the human dignity principle renders Western legal orders' contemporary infatuation with it all the more intriguing. The aim of this paper is to reflect upon the reasons that could explain the concept's success. Part I of this paper will successively examine two hypotheses: (i) Does the human dignity principle have an intrinsic value that would explain this quite sudden and global apotheosis? (ii) If not, is its rise to be explained on the grounds of its legal / practical value, ie. is it particularly useful as a tool of legal reasoning? A critical standpoint will be adopted to argue that the human dignity principle's success has more to do with its promotion by scholars than with legal / theoretical reasons. This argument will be based mostly on research conducted on French case law. Part II sets out the main conclusions of that research that can be of interest for lawyers and scholars from other legal orders concerned with the same principle, the general idea thus being that the human dignity principle's contemporary success has more to do with its instrumentalization towards other ends that will tentatively be unveiled (eg. the reinvention of jusnaturalist approaches of law) than with its actual capacity to either

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<sup>19</sup> The explanatory report was written by the *Praesidium* and considered by the authors of the born-dead 2004 treaty establishing a Constitution for Europe to be worth receiving binding force; see L. Burgorgue-Larsen, ‘Article II-112’, in L. Burgorgue-Larsen, A. Levade, F. Picod (eds), *Traité établissant une Constitution pour l’Europe. Commentaire article par article, Partie II* (Brussels: Bruylant, 2005), 658.

<sup>20</sup> It is, indeed, hard to think of other legal concepts as widely consecrated (by norms) and celebrated (by scholars).

<sup>21</sup> D. Beyleveld and R. Brownsword, *Human Dignity in Bioethics and Biolaw* (Oxford: Oxford University Press, 2001), 1: “One conception, ‘dignity as empowerment’, treats human rights as founded on the intrinsic dignity of humans and, characteristically, this issues in a reinforced plea that individual autonomy should be respected. The other conception, ‘human dignity as constraint’, is more concerned with human duties than with human rights”.

<sup>22</sup> C. Girard, S. Henneke-Vauchez, eds, *La Dignité de la Personne Humaine. Recherche sur un Processus de Juridicisation* (Paris : Presses Universitaires de France, 2005) insist on the importance of a third meaning of the HDP, that derives from the ancien *dignitas*, and is all about obligations.

<sup>23</sup> For others, it is neither and should only be viewed as a virtue, an aspiration, although potentially favored by a number of fundamental rights; see notably D. Feldman, ‘Human Dignity as a Legal Value’, (1999) *Public Law*, 682 [part 1] and (2000) *Public Law*, 61 [part 2].

serve as a litigation tool or as an answer to the haunting question of the ultimate foundation of democratic legal orders.

### **The Reasons for the Apotheosis of the Human Dignity Principle**

In preliminary, it is important to point out two types of reasons for which a legal principle may be established. First, some concepts acquire that legal status for symbolic reasons, for their ability to epitomize the axiological foundations a legal order wishes to give itself –or proclaim it has (and maybe even more so nowadays in Western constitution-centred legal orders than according to prior more legicentric traditions, since constitutionalism seems to have led to substantive approaches of democracy). To start with, I shall examine whether human dignity can be viewed according to this first explanation, that is whether its success can be linked to its capacity of conveying positive or cherished values. Secondly, and since another possibility is that a legal concept exists because it is useful for legal reasoning (it enables to reach and find sound solutions, to express norms, to litigate etc)<sup>24</sup>, I shall try to figure whether or not it has become easier to litigate and decide cases of conflicting interests since the human dignity principle (HDP) has become widely available.

#### ***The Case for the HDP's Intrinsic Value***

At first glance, the hypothesis is convincing: of course no one opposes human dignity – that is the particular magic about it; and one could well thus argue that human dignity is a relevant foundational value for democratic legal orders. More generally, this idea of the HDP's intrinsic value has to do with what is generally said about the historic bondage between the human dignity principle and legal formalizations of reactions to World War II. After the atrocities within and parallel to the conflict, proclaiming the necessarily intangible respect for human dignity in legal (international, constitutional) norms was a way of reaffirming the law's commitment to respect humanity. This story is not seldom told –and is probably genuinely true, in so far as the legal actors of the post-War period involved in the promotion of the human dignity principle at the time certainly were pursuing such an axiological end.

But these elements must not conceal the fact that they were historically and politically possible only thanks to a number of pre-conditions that had already contributed to endow human dignity with positive connotations it lacked *ab initio*. What is meant here is that if post-WWII is a period of generalization of positive [legal] references to human dignity, it is only possible because they follow (or are contemporary to) a social construction process that has made human dignity a *positive* concept. Indeed, there is no reason to consider human dignity as an *a priori* pure or univocally positive concept for a variety of reasons. First, the historical ancestor of the “human dignity” concept quite certainly is that of “dignity” – and more accurately, of *dignitas*. *Dignitas*, undoubtedly, is the emblem of the unequal foundations of ancient or pre-revolutionary (in France) regimes. *Dignitas* as a concept is correlated to public and official mandates and designates a number of specific duties or obligations one has because of his office.

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<sup>24</sup> For examples of the importance of the legal reference in everyday life, see notably S. Silbey, P. Ewick, *The Commonplace of Law. Stories From Everyday Life*, (Chicago: University of Chicago Press, 1998).

Subsequently, *dignitas*'s antonym is not so much indignity as equality.<sup>25</sup> Nothing remains from this historical ancestor of the HDP that our contemporaries would really claim.<sup>26</sup> Second, human dignity appears in non-democratic constitutional texts as a major reference. For example, it is mentioned in several constitutional projects of the Vichy Regime in France, such as the following: "The individual lives within communities, the Nation, the State, which protect and surround him. It has no political and social reality but throughout them, although human dignity is compelling to communities, the Nation and the State".<sup>27</sup> Finally, and from a more conceptual standpoint, it has also convincingly been shown that there are "important threads of continuity" between what could be called the contemporary dignity era and the "fascist era".<sup>28</sup> No genetic purity for the HDP indeed! Arguably then, if legal orders as well as academic debates are nowadays somewhat infatuated with the HDP, this has much to do with its social construction, in so far as it has been invested with positive connotations it did not necessarily originally convey. Certainly this social construction remains to be studied, for little attention is paid to the *words* of political mobilizations, and thus firm sources establishing that human dignity has become a widespread vector of political claims are still lacking. However, some elements such as the literature on *recognition*<sup>29</sup> as a now prominent structural element of political identity may lend support to this intuition.

The widespread conceptual tie that is often accounted for between the HDP and kantian philosophy<sup>30</sup> also needs to be examined.<sup>31</sup> At this point, I would like to stress that what

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<sup>25</sup> See A. Simonin, 'L'Indignité Nationale : un Châtiment Républicain', in M.-O. Baruch (ed.), *Une Poignée de Misérables. L'Épuration de la Société Française après la Seconde Guerre Mondiale*, (Paris : Fayard, 2003, Coll. Pour une histoire du 20<sup>ème</sup> siècle), 47.

<sup>26</sup> On this historical ancestor of the HDP, D. Feldman writes "this however, is not human dignity of the sort which could conceivably be treated, in a sane world, as a fundamental value or as capable of generating a fundamental constitutional right", in 'Human Dignity as a Legal Value', (1999) *Public Law*, 682, 687.

<sup>27</sup> (my translation) For a presentation and an analysis of many of the 1940-1944 constitutional drafts in France, see E. Le Floch, *Les Projets Constitutionnels de Vichy*, PhD dissertation, University Paris II, 2003.

<sup>28</sup> J.Q. Whitman, 'On nazi "honour" and the new European "dignity"', in C. Joerges, N.S. Ghaleigh (eds), *Darker legacies of law in Europe. The shadow of national-socialism and Fascism over Europe and its legal traditions*, (Oxford: Hart Publishing, 2003), 243-266. The author continues: "To be sure, there are prominent aspects of the contemporary law of "dignity" or "human dignity" that are best understood as the products of a reaction against fascist-era coldbloodedness [enumeration follows]. Yet at the same time, the unpalatable truth is that certain other prominent aspects of the contemporary European law of dignity rest on practices whose histories reach well back into the fascist period, and even into the Nazi darkness [the protection of personality, or the regularized probation categories of German law are cited here]" And further: "These facts do indeed tell us something really important about real continuities between the Nazi era and the German world of today. "Dignity" as it is protected in contemporary German law is not just the product of a reaction against Nazism; seen in proper sociological perspective, "dignity" as it is protected today, is the product of an evolution that partly took place during the fascist era", 243-245.

<sup>29</sup> See among publications by A. Honneth, 'Recognition and Justice : Outline of a Plural Theory of Justice', (2004) 47 *Acta sociologica*, 351 ; See also C. Taylor, *Multiculturalism and the Politics of Recognition*, (Princeton University Press, 1992).

<sup>30</sup> See, for example, G. P. Fletcher, n 3 above.

<sup>31</sup> See D. Belyveld and R. Brownsword, *Human Dignity in Bioethics and Biolaw* (Oxford: Oxford University Press, 2001), 53: "Kantian thinking can be invoked to give support not only to one of the

may make sense in Germany from an altogether cultural, social, historical and legal standpoint does not necessarily make sense in other settings. When the human dignity principle is said to derive, generally speaking, from Kantian philosophy, it is often with regard to the famous categorical imperative according to which man must never be treated only<sup>32</sup> as a means towards an end. But the relevance of such rapid genealogical statements may be questioned, especially since that categorical imperative is one that commands the sphere of morality that is quite distinguished, by Kant himself, from that of legality. Therefore, it would probably be unfaithful to the Kantian perspective to derive normative (legal) consequences (be they rights or obligations) from such enunciations, especially in the context of legal orders such as France and the United States that are based on a theoretical commitment to the separation between law and morality, be it for cultural, political or theoretical reasons. The case for Germany is probably a little different, because the possibility of deriving normative consequences from moral laws, such as the Kantian imperatives hypothetically embedded in the human dignity principle, rests on the very conception of fundamental rights that has been developed in that country.<sup>33</sup> Fundamental rights in Germany are both subjective and objective – meaning that they are not only tools in the hands of the individual for the sake of his liberty and a protection against others, but can also found *obligations* of the individual. The idea of a necessary correlation between rights and duties seems deeply rooted in the German tradition / conception of fundamental rights and therefore distinguishes it from other European conceptions<sup>34</sup> and also constitutes a favourable context for the human dignity concept to bloom. For that matter, it is noteworthy that the European Charter of Fundamental Rights conveys the German view more than others, for the preamble clearly states that rights are correlated to duties and responsibilities – not only towards others, but also towards human society as well as future generations.<sup>35</sup> Apart from this latter reference, the often-taken-for-granted link between moral duties / the HDP / legal rights or obligations is to be denounced as contrary to both the Kantian distinction between law and morality and a majority of the Western legal tradition.<sup>36</sup>

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foundational axioms of human dignity as empowerment but also to one of the more problematic aspects of human dignity as constraint”.

<sup>32</sup> Let us observe that the word “only” is often left aside when reference is made to the imperative.

<sup>33</sup> See D. Capitant, *Les Effets Juridiques des Droits Fondamentaux en Allemagne*, (Paris : Librairie Générale de Droit et de Jurisprudence, 2001) ; O. Jouanjan, ‘La Théorie Allemande des Droits Fondamentaux’, (1998), *Actualité Juridique Droit Administratif*, 44.

<sup>34</sup> As a matter of fact, the French 1789 *Déclaration des Droits de l’Homme et du Citoyen*, notably because it ignored duties and only proclaimed rights, constituted the starting point of the late 18th century contra-revolutionary tradition in political philosophy as illustrated notably by the work of E. Burke, *Reflections on the Revolution in France*, (1790, London: Penguin Classics, 1982).

<sup>35</sup> The preamble states: “Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations”. For a critique, see O. Cayla, ‘La Négation de toute Possible Identité Européenne par la Charte Européenne des Droits Fondamentaux’, in G. Lebreton (ed), *Regards Critiques sur l’Evolution des Droits Fondamentaux de la Personne Humaine en 1999 et 2000*, (Paris : L’Harmattan, 2002), 103-113.

<sup>36</sup> For a somewhat more detailed investigation, see S. Hennette-Vauchez, ‘Kant contre Jéhovah? Refus de Soins et Dignité de la Personne Humaine’, (2004) *Recueil Dalloz*, 3154.

### ***The Case for the HDP's Extrinsic Value***

Maybe the recent enthusiasm many different legal orders have shown recently towards the human dignity principle is not linked to its intrinsic but its extrinsic value, i.e. with its performance as a legal tool, as a helpful element of legal reasoning. This second possibility will be explored with the aid of examples taken from European but also national law. However, the results of the investigation will once again prove unsatisfactory, for it is easy to demonstrate that the HDP often blurs more than clarifies legal issues.

#### *European law: when the HDP obfuscates rather than clarifies*

Critical appreciations of the interest, value and usefulness of the HDP can be formulated when its European usages are considered. The central position of the HDP within the EC legal order, especially since the European Charter of Fundamental Rights was adopted, has already been mentioned. But does that make it legally useful? A number of critical viewpoints may be expressed. First, one might underline the interesting fact that the European Group of Ethics had found the role the Charter imposed on the HDP quite problematic. For that reason, it tried, in vain, to draw the Convention's attention to the fact that the HDP was capable of conflicting with the liberty principle, and suggested that the European Charter modify a number of formulas.<sup>37</sup> Second, one might want to take a close look at a number of those rights proclaimed under the "dignity" chapter. Say, for example, we look at article 3. After proclaiming a right to physical and mental integrity, article 3 enumerates a number of principles, such as (i) the necessity to obtain free and informed consent of the patient to medical treatment "according to the procedures laid down by [national] <sup>38</sup> law" (ii) the prohibition of eugenic practices, in particular those aiming at the selection of persons (iii) the prohibition of making the human body and its parts as such a source of financial gain (iiii) the prohibition of reproductive cloning. Certainly all these principles are both important<sup>39</sup> and consensual (who opposes the legal prohibition of reproductive cloning or the legal imposition of the prior and informed consent rule?). Nonetheless, when examined more attentively, these formulations appear to be quite futile: they do not clarify much. Indeed, what is the point of proclaiming the prior and informed consent principle if only immediately to send its effective definition back to national legislations? Since at law the only

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<sup>37</sup> Citizens Rights and New Technologies: a European Challenge. Report of the European Group on Ethics on the Charter on Fundamental Rights related to technological innovation, May 23 2000, 11 at [http://ec.europa.eu/european\\_group\\_ethics/docs/prodi\\_en.pdf](http://ec.europa.eu/european_group_ethics/docs/prodi_en.pdf) (Last visited April 13 2007): "According to some people, all rights and freedoms stem from dignity, as an inherent value of the human person. Thus ideally there should be no conflict between dignity and freedom. But it cannot be denied that there are conflicts between this idea in the current debate. The bioethical discussion in particular illustrates this kind of conflict in a wide range of issues such as abortion and euthanasia. The Group believes that clearly associating the ideas of dignity and freedom is the best way to ensure that the principle of dignity does not lead to an authoritarian society. In associating dignity and freedom, the Group underlines the necessity to debate what appears contrary to dignity according to society and to the person concerned".

<sup>38</sup> My addition.

<sup>39</sup> In particular, one can not fail to be delighted that it is the first time "biomedical issues" appear in a general text on human rights, which signifies that those issues are no longer specialized but really considered as they ought to be, ie. a matter of fundamental rights

problematical dimension of that issue is that of the exact scope of the requirement, the only added-value of the European Charter would have been to clarify the extent of its binding force –and especially, that of its corollary, the right to refuse medical treatment (notably, does the prior consent rule encompass the right to refuse a life-sustaining or life-saving treatment?). By sending the concretization of the prior consent principle back to national regulations, not only does the Charter leave the legal situation perfectly intact (a variety of national situations exist) but it also does it reinvigorates critical standpoints on international human rights altogether. If national discrepancies on a given issue are too great for an international norm to be actually binding, what is the point of international norms anyway?<sup>40</sup> D. Feldman’s warning takes a lot of sense here: “It seems that speaking of human dignity is a way of expressing a set of moral problems rather than a technique for resolving them (in hard cases at any rate)”.<sup>41</sup> And similar observations can be repeated about the other paragraphs of article 3. When formulating a prohibition of eugenic practices, then again the text is unclear: why prohibit these practices “especially those which aim at selecting people”, since that is the very definition of eugenic practices? Moreover, how can eugenic practices be ‘prohibited’ when most countries of the implied legal orders have actually legalized many such practices, from abortion, when motivated by fetal abnormalities, to pre-implantary diagnosis. Certainly, what the Charter really wanted to prohibit was the large-scale (collective), as opposed to individual, eugenics; but for reasons that cannot be explored here, it misses its aim and thus blurs more than clarifies. More critical appraisal of article 3 could be given,<sup>42</sup> but the point should already be clear: human dignity may be a foundational value of the European Charter as well as the principle from which all the rights such as those defined under article 3 derive; however, there is a strong case for its inability to clarify. There is no reason to explain its presence and status within the European Charter by its interest or usefulness in terms of legal reasoning.

And the European scale may also serve as an example of shortcomings of the HDP when exploited in court decisions rather than in legal norms, as show the 2001 *Netherlands vs. Parliament and Council* and 2004 *Omega* cases. As to the former,<sup>43</sup> everyone remembers how chaotic the adoption process of the 1998/44/CE Directive on the Protection of Biotechnological Inventions has been: after rejecting a first project in 1995, the Parliament continued to be the scene of intensely disputed debates, tight votes... up to the point where the ECJ was seized and had to decide whether it should

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<sup>40</sup> In this perspective, about the European Charter as such, see P. Pescatore, ‘La Coopération entre la Cour Communautaire, les Juridictions Nationales et la Cour Européenne des Droits de l’Homme dans la Protection des Droits Fondamentaux. Enquête sur un Problème Virtuel’, (2003) 466, *Revue du Marché Commun et de l’Union Européenne*, 151 ; and about international human rights norms, see C. Girard, ‘L’Universalisation à Visage Humain?’, in S. Hennette-Vauchez (ed), *Bioéthique, Biodroit, Biopolitique. Réflexions à l’Occasion du Vote de la Loi du 6 août 2004*, (Paris : Librairie Générale de Droit et de Jurisprudence, 2006, Coll. Droit & Société), 51.

<sup>41</sup> D. Feldman, ‘Human Dignity as a Legal Value’, (1999) *Public Law*, 682, 688.

<sup>42</sup> See S. Hennette-Vauchez, ‘Commentaire de l’Article II-64’, in L. Burguorgue-Larsen, A. Levade, F. Picod (eds), *La Charte Communautaire des Droits Fondamentaux. Commentaire Article par Article*, (Brussels : Bruylant, 2005), 52; and also S. Michalowski, ‘Health Care Law’, in S. Peers, A. Ward, *The EU Charter of Fundamental Rights. Politics, Law and Policy* (Portland: Hart, 2004), 287, both on the irrelevance of art. 3 since the rights it proclaims fall outside the scope of EU law and on the restrictive and conservative dimension of those rights conveyed by the objective vision of human dignity.

<sup>43</sup> ECJ, 9 oct. 2001, C-377/98, *Kingdom of the Netherlands v. European Parliament*.

be annulled. Among other more strictly legal questions, the plaintiffs argued the Directive constituted a violation of the HDP, since it lacked an strong enough ethical dimension and treated the issue of the protection biotechnological inventions (a especially that of gene patenting) as a mere matter of competitiveness. But the emphatic grounds of the claim strongly contrast with the laconism of the Court's answer, for it only devotes 5 paragraphs to the issue, examines two articles of the Directive and briefly concludes that: "It is clear from those provisions that, as regards living matter of human origin, the Directive frames the law on patents in a manner sufficiently rigorous to ensure that the human body effectively remains unavailable and inalienable and that human dignity is thus safeguarded".<sup>44</sup> In this case, the court's laconic answer may be viewed as a further illustration of the inability of the principle to clarify anything, for the decision –although being one of the first ones by which the ECJ referred to the HDP- not only fails at giving any idea of the scope and content of the HDP but thus also falls short of satisfying the plaintiffs.<sup>45</sup> In the second case –the *Omega* one,<sup>46</sup> in which a firm pleaded the freedom of circulation of services was illegitimately violated by the German decision to prohibit the Laserdrome game that consisted of firing human targets using laser beams ("playing at killing people" in the German authorities' words)-, the Court did not repeat such an elusive answer, for the allegation of violation of the HDP was much more concrete. Although the decision clarifies that the HDP is a general principle of law within the EU legal order,<sup>47</sup> the ECJ does not seem at ease when it comes down to giving a sense of the –specific- German approach. For that matter, it is interesting to see that although the question before her was 'Is the German prohibition of the Laserdrome game *on the basis of the national constitutional understanding of the HDP* a valid ground for restricting the freedom of services?', the Court answered a different one, namely 'Is the HDP *as a matter of public policy*<sup>48</sup> a valid ground for founding an art. 46EC restriction to the freedom of circulation?' Thus the Court eluded parts of the question, notably those pertaining to the manner in which national appreciations of the HDP are to be taken into account within the EU legal order;<sup>49</sup> it refused to answer clearly whether the HDP exists as an autonomous<sup>50</sup> constitutional

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<sup>44</sup> ECJ, 9 oct. 2001, C-377/98, Kingdom of the Netherlands v. European Parliament, §77.

<sup>45</sup> For a criticism of this aspect of the decision, see C. Maubernard, "Le Droit Fondamental à la Dignité Humaine en Droit Communautaire", (2003) 54 *Revue Trimestrielle des Droits de l'Homme*.

<sup>46</sup> ECJ, 1st chamber, 14 oct. 2004, *Omega Spielhallen vs. Oberbürgermeisterin der Bundesstadt Bonn*.

<sup>47</sup> See §34: as the Advocate General Stix-Hackl argues in paragraphs 82 to 91 of her Opinion, "the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law".

<sup>48</sup> See the final ruling: "Community law does not preclude an economic activity consisting of the commercial exploitation of games simulating acts of homicide from being made subject to a national prohibition measure adopted on grounds of protecting public policy by reason of the fact that that activity is an affront to human dignity".

<sup>49</sup> see §34 of the decision: "As the Advocate General argues in paragraphs 82 to 91 of her Opinion, the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law. There can therefore be no doubt that the objective of protecting human dignity is compatible with Community law, it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right." And despite the final ruling (see above n. 41), it can be inferred from the decision that it is left to the discretion of the Member States to determine whether given activities conflict with the HDP.

<sup>50</sup> Some authors say 'heteromorpheus', see C. Kombos, 'Fundamental Rights and Fundamental Freedoms: a Symbiosis', (2006) 12 *European Public Law*, 433.

right that can validly restrict the EU fundamental freedoms. Such uncertainties explain the fact that the decision has not been praised<sup>51</sup> –although it could have been, being one of the very first ECJ decisions to deal with the substantive dimension of the newly consecrated within the EU legal order HDP. It also is unsatisfying with respect to the constant ECJ stance on the necessity to strictly interpret the concept of public policy, for the HDP's (and maybe further, fundamental rights in general) assimilation to public policy necessarily leads to loosening the concept.<sup>52</sup> In that respect, the Omega is not to be seen as a mere application of the famous *Schmidberger* decision,<sup>53</sup> but more so as a re-opening of the *So Lange* issue altogether<sup>54</sup> –which, unquestionably, denotes the obfuscating dimension of the HDP.

*National law: HDP versus the right to refuse a medical treatment*

Because “there is a tendency... to use the concept of *Menschenwürde* [HDP in German] in a way that makes it coextensive with the principle of sanctity of life”,<sup>55</sup> it is interesting to look at whether the HDP is useful when legal reasoning applies to cases in which life is at stake. This can be done throughout further investigation on the scope of the right to refuse unwanted medical treatment, notably when survival is at stake; in this respect, French law is worth looking at for it has recently been confronted with cases that epitomize the shortcomings of the HDP.

Traditionally, in French law as in most legal orders, the patient's consent has been defined as the bottom-line for any physician-patient relationship. This solution was strongly affirmed in France as soon as the 1930s, and thus any action undertaken on a patient's body without his prior consent has been qualified as illegal and therefore hypothetically leads to compensation. When the first law of Bioethics was enacted by Parliament in 1994, it inserted a new provision within the French civil code (art. 16-3), that clearly states that an infringement of bodily integrity is legal only if (i) it has *a priori* been consented to by the patient and (ii) it pursues a therapeutical<sup>56</sup> end. As a

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<sup>51</sup> See for example M. K. Bulterman, H.R. Kranenborg, ‘What if Rules on Free Movement and Human Rights Collide? About Laser Games and Human Dignity: the Omega Case’, (2006) 31 E.L.Rev., 93, 101: “The ECJ could have done more than just paying lip service to the necessity and proportionality tests”. See also T. Ackerman, comment in (2005) 42 CMLR, 1107 who acknowledges the fact that despite its apparent inclusion of the HDP into EC law –throughout its appraisal as a matter of public policy -, what it really comes down to is “taking national value judgments as a basis as long as the underlying conceptions vary between Member States”.

<sup>52</sup> See for such an interpretation of the Omega decision T. Ackerman, above n. 51, 1116.

<sup>53</sup> C-112/00, *Schmidberger v. Austria*, 2003 ECR I-5659. For an analysis on the differences between the Omega and the Schmidberger decisions, see also M.K. Bulterman and H.R. Kranenborg, above n. 51.

<sup>54</sup> Indeed, although the ECJ in the Omega case made it clear that the HDP was a principle of European law –thus apparently exiting the *So Lange*-type debate, featured by the hypothetical conflict between *national* and *European* norms-, uncertainty remains for at least two reasons. First, the Court does not justify much nor convincingly the HDP's belonging to the European legal order. Second, it certainly falls short of giving a European meaning to the principle and merely ratifies the –specific- German meaning that was attached to it in the challenged decision. (I am not sure whether this criticism is justified. Indeed, the Court was just asked whether a national constitutional value could be the basis for restricting a common market freedom, and it said yes to that).

<sup>55</sup> D. Birnbacher, ‘Ambiguities in the concept of *Menschenwürde*’, in K. Bayertz ed., *The Sanctity of Life and Human Dignity* (Dordrecht: Kluwer Academic Publishers, 1996), 107, 109.

<sup>56</sup> Now medical finality.



matter of logic, if any infringement of bodily integrity is to be authorized by the patient, it should follow that the patient retains the possibility, at all times, to refuse such an infringement and thus refuse unwanted medical treatment. Since the French Civil code does not say any more than this (article 16-3 does not provide for any exception to the rule), it is to be considered that the legislator did not have any intention of reducing the possibility offered to the patient of either accepting *or refusing* medical treatment. But even if this is what the code says, it is not what a number of judges have said.

The controversy has recently been rejuvenated concerning litigation over the refusal of blood transfusions by Jehovah witnesses; but its roots are embedded in a deeper reluctance of French judges to accept the full consequences of the prior consent requirement (that includes the right to refuse medical treatment.<sup>57</sup> The *Senanayake* case judged in 1998 by the Paris administrative court of appeal<sup>58</sup> is highly illustrative of that trend. A Jehovah witness was admitted to a Parisian hospital in a critical condition; he and his wife clearly let the medical staff know that he opposed blood transfusion at all costs. But as his condition worsened, the medical team decided nonetheless to undertake such a course of action; unfortunately, the patient died anyway. His wife then sued the hospital on the grounds of the "moral damage" suffered for failing to respect her husband's will as to the medical treatment he wished to receive. As can be inferred from these few elements, the court could well have decided that the blood transfusion had been imposed on the patient against his will and that therefore compensation was due. But the court did not so decide and on the contrary, it judged that although it is a legal obligation for medical authorities to seek and obtain their patients' consent, it is an even greater obligation for them to save their patients' lives. The rationale of the court was derived from a specific conception of the HDP, which enabled it to discard the patient's will in this particular case. Here is what the *commissaire de gouvernement*<sup>59</sup> pleaded: « The French understanding of autonomy is much narrower than the Anglo-Saxon one ; it is inspired from Roman law but also from Rousseau and Kant : it is the capacity to define and respect universal duties, laws, towards others as well as towards oneself as member of Humanity. An autonomous being can not rationally wish to behave in a way that cannot be universalized. According to that conception, a person on a hunger strike, or a person who refuses life sustaining medical treatment is not autonomous, and that justifies the intervention of the State or that of a doctor (...). According to that conception, the notion of human dignity is not synonymous with autonomous freedom. It encompasses an objective dimension, founded in the belonging of the individual to humanity, and leads to giving a greater importance, whenever a human value is at stake, to the universal standard over singular preferences ».<sup>60</sup>

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<sup>57</sup> See for example earlier cases such as C.E., 27 January 1982, Benhamou (physician's compliance with a patient's refusal of treatment does not lead to liability because the survival of the patient was not at stake) or C.E., 29 July 1994, Garnier (a disciplinary sanction is not illegal although the physician was only respecting his patient's refusal of chemotherapy when prescribing homeopathic (illusory?) treatments). For a more thorough analysis, see S. Hennette-Vauchez, French Report, in M. Adams, J. Griffiths, H. Meyers, *Euthanasia and Law in Europe*, (Oxford: Hart Publishing, forthcoming 2008).

<sup>58</sup> C.A.A. Paris, 9 June 1998 [administrative court of appeal].

<sup>59</sup> The *commissaire du gouvernement* in the administrative courts in France delivers his opinion before the judges and gives his opinion (*conclusions*) as to what should be ruled.

<sup>60</sup> M. Heers, conclusions, C.A.A. Paris, 9 June 1998, (1998) 6 *Revue Française de Droit Administratif*, 1231-1242.

Two elements are particularly interesting in this case. First, the “human dignity” vocabulary is used as if it did have a specific and clear meaning at law, that is that human dignity is a behavioral standard that can be imposed on and opposed to individual choices. Second, this specific signification of the HDP is radically opposed to the explicit legislative formulations that require a patient’s clear and informed consent prior to any medical investigation or action that is clearly embedded in the civil law tradition. In other words, this case like others that were decided by other French courts in the following years,<sup>61</sup> illustrates a surprising phenomenon: that of a principle becoming normative and binding although its meaning is contrary to other legislative principles.<sup>62</sup> On this basis, it can be argued that the HDP leads to shortcomings more than it serves as a useful legal tool of litigation, since it has only made the law on the refusal of medical treatment more chaotic than anything else, leading to *contra legem* court decisions.

This examination of concrete use of the HDP in litigation or in general norms leads us to similar conclusions: its efficiency is not so great that it suffices to explain all these different legal orders’ infatuation with it. An alternative explanatory hypothesis must be formulated: that of reasons totally external to the principle itself. Indeed, if its success can not be satisfactorily explained by characteristics that are specific to the principle such as the values it conveys or the legal efficiency it proves, then other factors must be taken into account.

### **Scholarly Promotion of Legal Principles: Legal Scholarship as a Source of Law?**

The results of a research recently conducted<sup>63</sup> on the fate of the HDP in France will be presented, in order to test the hypothesis according to which the apotheosis the principle has recently experienced in a number of legal orders owes much to the fact that it has been promoted by critical trends of legal scholarship. First it must be stated that the recent period has been one in which the general axiological context was favourable to the HDP’s success. A generally positive connotation has been attached to the principle which has led political actors, more so today than decades ago, to articulate claims around the HDP, be they social rights, civil rights or even economic ones. As a result, if one looks at legal scholarship as a social activity, ie. as produced by a non-autonomous group of individuals (necessarily non-autarchic from the social context it evolves in) scholarly interest for the HDP appears both likely –probable- and normal. In other words, legal scholars have started paying attention to the HDP because everyone else did. That being said, there are different ways of paying attention to a shift in socio-political rhetoric. The argument here is that whatever the reasons for this quite recent interest, the outcome is twofold. Some parts of legal scholarship seem to have only just undergone this more general social interest for the human dignity paradigm. But others have seized it as a favourable occasion for promoting a *particular* meaning of the principle whose strategic asset was to convey or enable an otherwise quite despised jusnaturalist representation of legal orders. If most of the material from which the

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<sup>61</sup> See C.E., 26 octobre 2001 ; C.E., 16 août 2002.

<sup>62</sup> This is all the more striking since it appears that one of the legislator’s aims when passing the 4 march 2002 law was precisely to prevent such court decisions.

<sup>63</sup> See C. Girard, S. Hennette-Vauchez n 22 above.

present demonstration is drawn is extracted from French sources, I believe the political and theoretical issues at stake make it worthwhile for the global community of jurists, for it aims at explaining why it so happens that nowadays “human dignity is but rarely invoked in attempts to affect liberalizing change; rather it is often appealed to by those who seek to prevent change”.<sup>64</sup>

### ***Legal Scholarship under the Influence of the General Social Interest in Human Dignity***

Certainly a great number of legal scholars who have written about the HDP in France over the last decade were under the impression of not doing anything really new. A very striking feature of legal scholarship in this field is that although its consecration in explicit legal norms is recent, everyone seems to have had the impression it has always existed, as a foundational or otherwise important underpinning of French law. In a quantitatively striking manner, numerous scholars just write that “if the human dignity principle is not new, its usage in positive law is quite recent”;<sup>65</sup> or that “for the Constitutional Council, the point was not to consecrate a new right but to inscribe an already recognized right in the Constitution”.<sup>66</sup> Therefore, “the surprising thing here is not the emergence [in positive law of the HDP], but, in retrospect, the absence of its explicit formulation”, although “one can consider such a notion already played a part in legal norms”.<sup>67</sup> Quite clearly, many authors agree in considering that independently from any formal and explicit formulation, the HDP implicitly pre-existed in French law. The only novelty of the 1990s, according to this narrative, is the shift from implicit to explicit: although the idea of human dignity was already there, the word appears only then.

Interestingly, such presentations have in common the fact that they assign no precise signification to the HDP, often arguing that it is indefinable. More accurately, scholars who share this implicit genealogy of the principle give it an extraordinary variety of meanings and content. Among many examples, dignity can be presented as “what is human in mankind”,<sup>68</sup> “the very substance of administrative law”<sup>69</sup> or, more generally,

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<sup>64</sup> H. Kuhse, ‘Is there a tension between Autonomy and Dignity?’ in P. Kemp, J. Rendtorff, eds, *Bioethics and Biolaw*, vol. ii, *Four Ethical Principles* (Copenhagen: Rhodos International Science and Art Publishers and Centre for Ethics and Law), 61-74, 62. Kuhse actually speaks of invocation of the HDP in the bioethics literature, but I believe her analysis can validly be extended to other domains. For a similar analysis on the conservative political stance embedded in the HDP, see also D. Beyleveld and R. Brownsword, *Human Dignity in Bioethics and Biolaw* (Oxford: Oxford University Press, 2001), and S. Michalowski, ‘Health Care Law’, n. 42.

<sup>65</sup> B. Mathieu, M. Verpeaux, *Contentieux Constitutionnel des Droits Fondamentaux*, (Paris : Librairie Générale de Droit et de Jurisprudence, 2003, Coll. Manuels), 506. Unless otherwise specified, the translations are mine.

<sup>66</sup> G. Vedel, cited by L. Favoreu in his commentary of C.C., 94-343-344DC, 27 July 1994, in (1994) *Revue Française de Droit Constitutionnel*, 808.

<sup>67</sup> B. Jorion, ‘La Dignité de la Personne Humaine ou la Difficile Insertion d’une Règle Morale dans le Droit Positif’, (1999), 1 *Revue du Droit Public*, 198.

<sup>68</sup> M.-L. Pavia, ‘La Dignité de la Personne Humaine’, in R. Cabrillac, M.-A. Frison-Roche, T. Revet (eds), *Libertés et Droits Fondamentaux*, (Paris : Dalloz, 7th ed., 2001), 127.

<sup>69</sup> L. Weil, ‘La Dignité de la Personne Humaine en Droit Administratif’, in M.-L. Pavia, T. Revet (eds), *La Dignité de la Personne Humaine*, (Paris : Economica, 1999), 85.

“the protection of the human person”,<sup>70</sup> be it protection of a person’s bodily integrity or that of her economic and social rights. In this first trend of legal scholarship about the human dignity principle, its significations are infinite: everyone is supposed to be able to relate to it, everyone seems to seize this new word as a sesame: the HDP enables us to say a number of otherwise disparate or implicit things in a unified manner, a little bit like Roland Barthe’s “mot-mana”.<sup>71</sup> Basically, all branches of legal scholarship see the human dignity principle at their door; it can be referred to in a variety of meanings.<sup>72</sup> The causes the human dignity principle can lawyer for are infinite: social rights, end-of-life issues and then again a limit to physical searches and seizures: the HDP can be referred to as a foundation of most rights of man, or most claims of human rights.

This important part of legal scholarly discourse about the HDP thus can be seen as a teleologically non-unified one, the principle being used in many directions –yet always as a right (or a foundation for a right) that an individual may oppose to society or any kind of third party. However, there is another version of the scholarly discourse on the HDP that needs to be presented.

### ***Legal Scholarship as an (Active) Actor of General Social Interest in Human Dignity***

Another version of the scholarly production about the human dignity principle exists. Much more normative and /or authoritative, its ambit is to classify judicial or legislative uses of the HDP according to their compliance *or non-compliance* with the HDP’s [real] meaning. What is interesting and worth noticing in this second version of the scholarly discourse on the HDP is that it relies on two very specific assumptions: (i) a precise meaning of the HDP *exists* and (legal) scholars may cognitively access –and thus defend- it and (ii) all usages of the HDP that depart from it, be they normative, must be condemned as such. Significant strands of French scholarship on the matter have thus engaged in a process of celebrating and /or despising normative (eg. legislative, judicial...) usages of the HDP depending on whether they are correct or incorrect ones.

#### *A precise meaning for the HDP*

A little detour via substantive elements of French law may be of help at this point. An inquiry based on case law carried out in 2003 has shown that there are two main meanings of the HDP in judicial discourse.<sup>73</sup> Either the HDP serves as a right the individual may oppose to third parties or it serves as a right third parties may oppose to the individual. This latter configuration can be illustrated by the famous dwarf-throwing

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<sup>70</sup> See *Ethique, Droit et Dignité de la Personne. Mélanges offerts à Christian Bolze*, (Paris: Economica, 1999), a book in which the HDP is presented as foundational of numerous derivatives in labour law, social protection law, housing law, bioethics law, penal law...

<sup>71</sup> “word of ardent, multiform, indiscernible and somewhat sacred meaning. Gives the illusion that by that word one can answer anything”, cited by P. Wachsmann, ‘La Chambre Criminelle, la Convention Européenne des Droits de l’Homme et la Loi sur la Presse’, (2001) *Recueil Dalloz*, 3001.

<sup>72</sup> See O. Cayla, ‘Dignité Humaine : le Plus Flou des Concepts’, *Le Monde*, 30 janvier 2003.

<sup>73</sup> There are three meanings of the dignity principle in general (including the old *dignitas*), but only two have to do with the *human* dignity principle. See C. Girard, S. Hennette-Vauchez (eds), n 22 above, 107.

cases. By the early 1990s in some cities of France, dwarf-throwing shows were organized in discos. Shocked by the practice, some mayors took measures prohibiting these events; their decisions were challenged in court. After the first judges had ruled there existed no valid legal grounds for prohibiting such shows, the *Conseil d'Etat* decided that the mayors were right to outlaw the practice since human dignity is a component of the notion of "public order",<sup>74</sup> and their decisions to prohibit could be said to be motivated in order to preserve human dignity; they were confirmed.<sup>75</sup> Clearly here, the HDP is not a right the individual opposes to society<sup>76</sup> (or any other third party) but on the contrary, it serves as a basis for obligations society imposes on the individual:<sup>77</sup> in this case, society can require that members do not get involved in shows that are degrading to human dignity. Besides what could be said about the substantive issues at stake in such an understanding of the HDP,<sup>78</sup> the interesting point here is that although this specific understanding of the HDP has remained quite isolated in the judicial discourse, the scholarly one has a very different tonality, since it is totally articulated around and focused on that very specific –and, at law, marginal- signification of the HDP. Thus, despite the fact that it represents a very marginal strand of judicial discourse, this dwarf-throwing standard of human dignity has known a very unlikely fate, for it has become the central element of scholars' discourse about the HDP. 'Dwarf-throwing dignity' has become the very yardstick of the HDP, thus making commonplace the idea according to which the HDP is objective standard that can certainly found rights of the individual but moreover (and most interestingly) *restrict* them. In short, the mottos of this new HDP discourse are the following: 'dwarf-throwing dignity' is the *essence*<sup>79</sup> of human dignity; the aim of the HDP is to oppose human beings' exploitation, even if against their will<sup>80</sup> (many a Kantian reference are mobilized in this respect); the HDP is an absolute principle.<sup>81</sup> In other words, human

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<sup>74</sup> Note that all preventative administrative police measures in France are legally conditioned to their being oriented or guided by the notion of "ordre public".

<sup>75</sup> C.E., 27 octobre 1995, *Ville d'Aix en Provence et Commune de Morsang sur Orge*.

<sup>76</sup> And M. Wackenheim, the dwarf of the case, knows that better than anyone, since all his arguments articulated around the HDP, such as his demonstration that after years of economical instability due to dwarves being discriminated on the job market, he had finally found a means for a decent living, were rejected.

<sup>77</sup> A somewhat similar analysis of the HDP in the EU Charter of Fundamental Rights is given by S. Michalowski, 'Health Care Law', in S. Peers, A. Ward, *The EU Charter of Fundamental Rights. Politics, Law and Policy* (Portland: Hart, 2004), 287, 308: "The prohibitions [contained in art. 3] though formulated as if they were designed to shape the individual right to physical and mental integrity, in fact restrict the individual right to integrity in the name of an objective vision of human dignity". Therefore, she sees the HDP as a vector of policy statements that are often about asserting collective control over individual choices more than as a vector of individual rights.

<sup>78</sup> O. Cayla, 'Le Coup d'Etat de Droit', (1998) *Le Débat*, 108.

<sup>79</sup> Explicitly for example in C. Neirinck, 'La Dignité Humaine ou le Mauvais Usage Juridique d'une Notion Philosophique', in *Ethique, Droit et Dignité de la personne. Mélanges offerts à Christian Bolze*, n 50 above, 39.

<sup>80</sup> See B. Mathieu, 'De Quelques Moyens d'Evacuer la Dignité Humaine de l'Ordre Juridique', (2005) *Recueil Dalloz*, 1649 (section "tribune").

<sup>81</sup> See B. Mathieu, 'La Dignité de la Personne Humaine : Quel Droit ? Quel Titulaire ?', (1996) *Recueil Dalloz*, 282.

dignity is attached to man, but so intrinsically that he himself is obliged by it, so that he cannot alienate it,<sup>82</sup> his will is ineffective when his own dignity is at stake.

### *Condemning alternative usages of the HDP*

This first step of consolidating one particular meaning of the HDP being made,<sup>83</sup> French legal scholarship engaged in further ones, which included developing evaluative reading of all usages of the HDP (legislative, judicial...), so as to certify some as “good” or “correct” and others as “wrong” or “incorrect”. All usages of the HDP that convey an understanding of human dignity as a right of the individual that can be opposed to society are thus, generally speaking, presented as *false* interpretations of the founding principle. This is the case, for example, of certain decisions of the *Conseil constitutionnel* founding social rights, such as the right to decent housing, on the HDP.<sup>84</sup> It is also true of another decision of the same court, in which it established that the law authorizing abortion during the 12 first weeks of pregnancy was not contrary to the HDP.<sup>85</sup> Examples could be multiplied; but the rationale is always the same: supreme, central and foundational of legal orders, the HDP is objective and absolute and thus must not be commonly referred to since that only undermines its meaning. Let us read for example: “the extension of the HDP to social rights has been in our view unfortunately operated by the Constitutional Council (...). The HDP loses its specificity: it is diluted, disparaged to the level of other social rights with which is thus has to compete”.<sup>86</sup> My understanding of French legal scholarship’s assessment of the difference between “good” and “bad” usages of the HDP is that it really depends on whether the HDP is conceived of as a principle society opposes to the individual or as a right the individual opposes to society –the former case corresponding to “good” usages of the HDP, the latter to “bad” ones.

### **Conclusion: HDP as the Vector of Jusnaturalism?**

I believe that this unveiling of the strategic scholarly move to promote the HDP in the recent years enables to say that besides the politically conservative stance that it has been argued is embedded in the HDP, what such infatuation conveys is [also] a theoretical revival of jusnaturalist conceptions of law. Indeed, jusnaturalist options are implied in these trends of legal scholarship that simultaneously (i) give a definition of the HDP, (ii) erect it into the foundational principle of the legal order –or at least of fundamental rights (iii) distinguish, on the basis of compliance with that principle, between good and bad normative references to it. The very enterprise of attempting to

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<sup>82</sup> See N. Lenoir, ‘Eléments de Réflexion sur le Droit Comparé : les Juges Constitutionnels et la Bioéthique’, in *Mélanges en l’Honneur de Jacques Robert*, (Paris : Montchrestien, 1998), 376.

<sup>83</sup> For there are other competing understandings of the HDP, notably those who are mostly based on the concepts of empowerment, autonomy –and thus, rights (vs. obligations).

<sup>84</sup> C.C., 94-359DC, 19 janvier 1995, *Loi relative à la diversité de l’habitat* ; and commentary by B. Mathieu, n 61 above, 285.

<sup>85</sup> C.C., 2001-446DC, 27 juin 2001, *Interruption volontaire de grossesse II* ; and commentary by B. Mathieu, ‘Une Jurisprudence Selon Ponce Pilate’, (2001) *Recueil Dalloz*, 2534.

<sup>86</sup> B. Mathieu, n 61 above, 285.

define the HDP as a would-be central standard of the legal order inevitably comports a naturalist outlook on the law since what it comes down to is to ground or found the legal order altogether on a heteronymous principle, one that comes from elsewhere. My view is that it all seems to have occurred as if the HDP had proved to be a favourable occasion for such a theoretical shift to operate.<sup>87</sup> It was indeed strategically important to “find” a consensual vector for operating non-consensual moves –for jusnaturalist modes of reasoning were until recently quite marginalized especially in academic settings. The result is impressive, for French legal scholarship over the past decade is quite significantly characterized by its acceptance of ‘objective values’ not only in a symbolic role, but also for the purposes of creating a potential limitation of rights. More generally, the idea according to which Law has an anthropological function of defining and preserving the human dimension of mankind (and in any case against individual will) is much more commonly accepted today than it was decades ago.<sup>88</sup> Finally, it is worth mentioning that these trends of legal scholarship have proved efficient enough to achieve tangible results. The quite amazing mobilization of scholars after the first solemn wrongful birth case in 2000<sup>89</sup> is very instructive, since not only did large parts of the social reaction to the case very unusually come from law faculties,<sup>90</sup> but also that reaction proved very efficient for a couple of months later,<sup>91</sup> the French Parliament passed a law that intended to prohibit courts from accepting birth as wrongful in any case.<sup>92</sup> Although the findings presented here stem from a research that was conducted on French material, there is no reason to believe the HDP does not generally speaking have the same potential for conveying jusnaturalist modes of reasoning, if only because not only in France is it most often invoked “as a kind of ultimate article of faith... a conversation-stopper”.<sup>93</sup> However, the purpose of this paper has been to show that there is much more to the recent infatuation of Western legal orders with the HDP than mere legal reasoning and consensual viewpoints. Since that principle seems to be a foundational value according to the European Charter of Fundamental Rights, the theoretical and political issues at stake may be worth bearing in mind, for not only can

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<sup>87</sup> For further developments on this aspect, C. Girard, S. Hennette-Vauchez (2005), above n. 22.

<sup>88</sup> Supporting such theoretical representations of the legal order, see mostly A. Supiot, *Homo juridicus. Essai Sur la Fonction Anthropologique du Droit*, (Paris : Le Seuil, 2005). For a critique, see : D. de Béchillon, ‘Porter Atteinte aux Catégories Anthropologiques Fondamentales’, (2002) *Revue Trimestrielle de Droit Civil*, 47.

<sup>89</sup> Cour de Cassation, 17 november 2000, the “Perruche” case. Commentaries are far too numerous to be cited here, for it could well be one of the most commented judicial decision ever in France.

<sup>90</sup> The reaction was initiated by the publication of an article signed by many law professors in *Le Monde* (20 november 2000, “La Vie Humaine Comme Prejudice?”). A response written by (only) three other law professors was published in the same paper a little later (*Le Monde*, 21 décembre 2000, by D. de Béchillon, O. Cayla, Y. Thomas). But most importantly, the rather violent opposition was both inside and outside law faculties, and held public opinion concentrated on the topic for months. For tentative deconstructions of the anti-Perruche naturalist positions, see mostly O. Cayla, Y. Thomas (ed), *Du Droit De Ne Pas Naître*, (Paris: Gallimard, 2002, Coll. Le Débat).

<sup>91</sup> Law 2002-303 of 4 march 2002 on patients’ rights.

<sup>92</sup> Note that France was later condemned by the European Court of Human Rights on the grounds that the provision of the law that established that it should be applicable immediately (including to cases that were pending at the time) constituted a violation of legitimate expectations of compensation that some families could have; see ECHR, 2005, *Draon et Maurice c. France*.

<sup>93</sup> D. Birnbacher, ‘Ambiguities in the concept of Menschenwürde’, in K. Bayertz ed., *Sanctity of Life and Human Dignity* (Dordrecht: Kluwer Academic Publishers, 1996), 107.

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dignity be a fearsome competitor to liberty, its recent usages also show that legal scholars still need accepting that they are no longer oracles of the law.

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