Are Human Rights Helpful or Harmful?

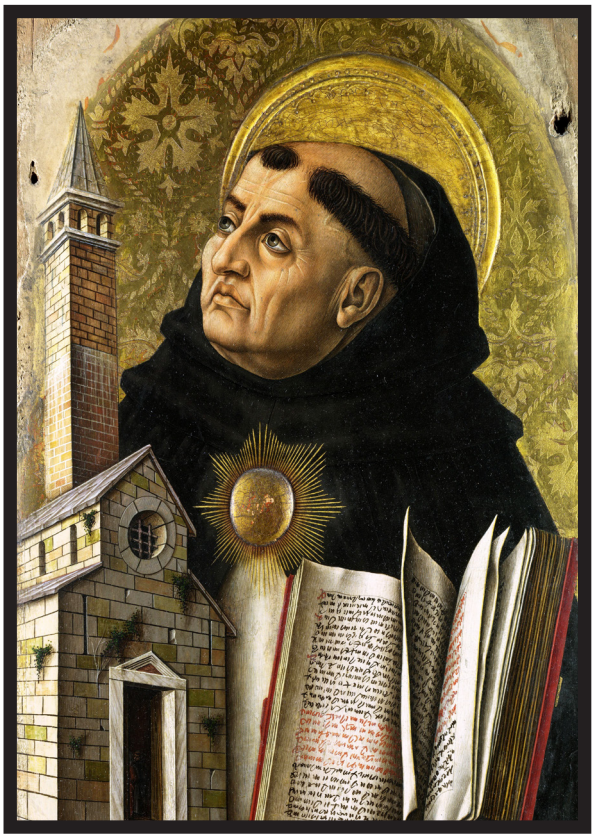
Christiaan Alting von Geusau

I cannot start a discussion of the topic of human rights without going back to one of the sources: Saint Thomas Aquinas. We need him—and many other sources that I will discuss—to be able to grasp the essence of this topic, because it is exactly the insufficient study and understanding of the sources of Western civilization by the educational, legal, and political establishment of modernity that has led us to the point where we have to ask the politically incorrect question: Whether human rights are helpful or harmful?

Saint Thomas says in Question 96, Article 4 of the *Summa Theologica*: "Laws formed by man are either just or unjust. If they be just, they have the power of binding in conscience, from the eternal law whence they are derived."

A just law is always directed at the common good, he goes on to say, and later quotes St. Augustine's well-known maxim that "a law that is not just, seems to be no law at all." Such laws do not bind in conscience because of their lawlessness. For many learned people, what is being quoted and explained here is obvious and in need of no further explanation. But this is certainly not so for the wider world and especially where it concerns the interpretation of human rights law, both on the national and international level. Here we are seeing a worrying trend of what I would like to call "legal relativism" or the "rule of desire" instead of the "rule of law", leading to a system of laws that is based on opinion and feelings rather than fact.

It is exactly the lack of formation by the majority of people in the sources of Western thought, and especially the foundations of law that has led us here. There is one contemporary thinker that has an especially keen understanding of this problem: Benedict XVI. He observes in his well-known discussion with the agnostic philosopher Jürgen Habermas in *The Dialectics of Secularization:* "The majority principle always leaves open the question of the ethical foundations of the law."



St. Thomas Aquinas, as painted by Carlo Crivelli in 1476.

It should be understood from this that majority does not equal truth and democracy does not equal God, the measure of all things. Already Plato understood this and—although not in any way familiar with the Judeo-Christian-tradition—said that "not man, but a god, must be the measure of all things." This idea, this concept, is eminently lost on the modern secular mind, if not outright rejected. This reality of secular doctrine is turning a system of human rights originally designed to defend life, dignity, and liberty into a system that is now increasingly threatening life, dignity, and liberty under the guise of those same human rights—especially the so-called "rights" to freedom of choice, privacy, and non-discrimination.

In order for us to understand better what is at stake here, and how we have come to this point, we will first have a look at the current practice of human rights in Europe and the United States. These examples show that the "tyranny of choice" in fact undermines human life and human rights. It also contradicts common sense.

Human Rights in Practice

Two recent judgments of leading European Courts shed a light on the reality of the application of human rights law. First, the ruling of the *Bundesverfassungsgerichtshof* (Federal Constitutional Court of Germany or BVerfG) on 11 January 2011 on the German Trans-sexuality Law has opened a whole new—and problematic—chapter in the enforcement of the constitutional human dignity principle, enshrined in Article 1 of the German Basic Law of 1949. The case concerned a person born as a male, but no longer wanting to be a man and therefore now taking on a female identity ("Mrs. L.I."). After having performed what is referred to as the "small solution" to alter his gender, namely the change of name in official documents, Mrs. L.I. subsequently entered into a relationship with a woman. The couple then wanted to conclude a same-sex civil partnership. The German Trans-sexuality Law, however, barred them from entering into this civil partnership

because the law requires that the person having changed its gender first undergoes an operation taking away the physical attributes of the original gender as well as the capacity to procreate (the so-called "big solution"). It also requires that the new gender identity is being lived by the person concerned and has led to public recognition of the new sex.

The reason for these requirements is to uphold the distinctive nature of same-sex civil partnerships—namely that it is a legal instrument exclusively meant for people of the same gender whereby the relationship itself logically excludes the natural possibility of procreation. The Court ruled however that the legal requirement to physically change the gender and remove the procreative capacity from the body before being allowed to enter into a same-sex civil partnership violated Mrs. L.I.'s constitutional right to the respect of human dignity and sexual self-determination as derived from Article 2, Section 1, in combination with Article 1, Section 1 of the Basic Law. The Court ruled this in spite of the fact that, legally speaking, the couple would have been able to enter into a civil heterosexual marriage since the law is exclusively based on the physical attributes of the gender of each of the partners, not their personal preferences.

This ruling is highly problematic for various reasons. First of all, the Court's decision undermines the same-sex civil partnership law itself. By nature of the specific relationships it is asked to govern, the law has to build upon a set of physical realities or prerequisites which are the reason why this law was introduced in the first place. These realities are that the persons involved are of the same sex and do not have procreative abilities as a couple. The constitutional human dignity argument is used, however, to claim that it is unfair to require the objective physical realities of such relationship to be decisive for the legal instrument as such, instead placing the subjective considerations of the persons involved on the foreground.

This reasoning cannot be considered as a solid basis for any law, let alone as an indicator of a violation of human dignity. The latter always relates to a concrete event—as the Court repeatedly says throughout its established case law—that is in disregard of the dignity of the human being (whereby the way the person feels or experiences this is not what counts, but rather the objective reality of how this person is affected). Requiring a person by law to undergo a gender-change operation would indeed be in violation of its human dignity. But this is not the case here. The law merely stipulates the conditions that need to be met in order to be able to conclude a certain form of civil partnership. Requiring that both partners in a same-sex civil partnership by law should have the physical attributes of the same gender is not a violation of their human dignity because it is the essence of this law without which there is no point in having such a law.

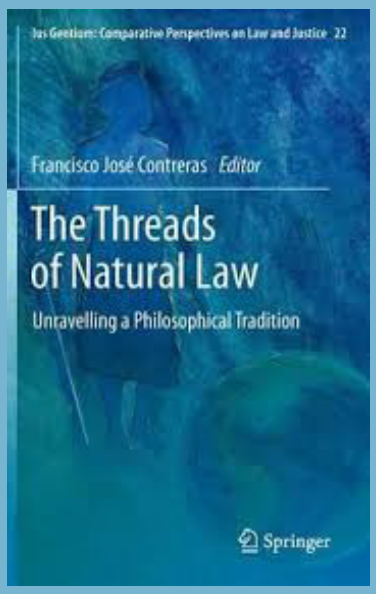
Although the Court seems to admit this, it still concludes that in this specific situation, the human dignity of the claimant was violated by applying that same law. This conclusion is contradictory as it recognizes on the one hand the need for the law to be based on certain objective factual prerequisites, while on the other hand concluding that in this case asking for these prerequisites to be met violates the claimant's human dignity principle.

It seems the Court in this case has again applied its well-known "principle of reasonableness" but has done so at the peril of undermining the law in a fundamental way. It is unclear how the Court sees it possible for this law to be effectively upheld in the future, now that it has denied the state the right to enforce its core provision of partners in a same-sex civil partnership needing to be of the same sex.

A second example is the Chamber Judgment in the Case of P and S v. Poland, the so-called "right to abortion" case. In this case, the European Court of Human Rights held on 30 October 2012 that a teenage girl who was raped should have been given unhindered access to an abortion in a Polish hospital because she had "a right" to a "lawful abortion." The Court in Strasbourg concluded, amongst other things, that there had been two violations of Article 8—the right to respect for private and family life—of the European Convention on Human Rights because of access being hindered to a "lawful abortion." Without in any way downplaying the utter drama and personal suffering of those involved in this specific case, it cannot be overlooked how the Court's decision in this matter represents a dangerous development towards making abortion a "human right." What sort of a legal system do we "enlightened" Europeans think we have that makes the deliberate killing of an innocent and defenseless human being into a "human right"?

A human rights practice that denies the principles of the created order, which are also the foundations of justice and rule of law, becomes totalitarian and a direct threat to human life and dignity, and thus to liberty, which it was supposed to protect. As Benedict XVI said it in his 2013 Message for the World Day of Peace, "[w]ithout the truth about man inscribed by the Creator in the human heart, freedom and love become debased, and justice loses the ground of its exercise."

This is exactly what is happening both in the debate about human rights and with the application of human rights as such: Our concept of justice is being morphed into a vague and individualistic concept of "personal choice." What counts is no longer that which is—namely reality—but rather what I feel today (since tomorrow I may feel different). This human tendency is



The Threads of Natural Law: Unravelling a Philosophical Tradition, edited by Francisco José Contreras (Springer, 2013): This collection of academic essays focuses on natural law and provides readers with a comprehensive examination of the origins, development, and influence of the concept over the centuries. Beginning with a consideration of the Greek polis, and exploring the seminal political ideas of Plato and Aristotle, the essays in this collection then explore how the concept of natural law was further elaborated by Cicero—before receiving systematic treatment and elaboration during the Scholastic Age. Looking at some of the seminal moments in history when natural law concepts were challenged and then defended, these essays explore how natural law ideas enabled moral, legal, and political dialogue between people of different traditions—and explores its impact on contemporary debates.

not new; St. Paul already lamented in his letter to the Philippians that for many "their God is their stomach."

We have seen how allowing this tendency to rule the application of law, especially where it concerns human rights, leads to "the law" becoming unruly, ultimately leading to chaos. Initially, this chaos is disguised as a "tolerant" or "inclusive" society that thinks itself to be truly enlightened. But under this rather thin disguise, we find in reality something very different: broken lives and families, guilt, addiction, loneliness, and a yearning for moral clarity.

Again, it is our now Pope Emeritus who formulates this problem and the answer to it so well: "There is a need to renounce that false peace promised by the idols of this world along with the dangers which accompany it, that false peace which dulls consciences, which leads to self-absorption, to a withered existence lived in indifference. The pedagogy of peace, on the other hand, implies activity, compassion, solidarity, courage, and perseverance."

When the "tyranny of choice" starts ruling us, then choice becomes a "supreme right" trumping all else—also the rule of law itself. This leads to the concept of human dignity, and the rights based on it, to become relative. The human rights claimed under such a tyranny are either being harmed or become harmful themselves, because human life, dignity, and liberty become mere "interests" to be weighed against other interests. The strongest then always reigns and the "rule of law" is replaced by the "rule of desire", the strongest desire. Therefore, we need to humanize human rights again and rediscover the true foundations of law. For that, we first need to understand the history of human rights.

Brief History of Human Rights

Human rights, it is generally agreed by scholars, find their origin in the American and French revolutions of 1776 and 1789—that is to say, in the formulation and proclamation of a catalogue of fundamental rights that, as the historian Lynn Hunt says, have three interlocking qualities: Rights must be natural, equal, and universal. All humans everywhere possess them equally because they are human beings. The 1776 Declaration of Independence and the 1789 Declaration of the Rights of Man and Citizens declared these three qualities specifically, in contrast to, for example, the 1689 English Bill of Rights that only spoke of "ancient rights and liberties."

But there is also a distinct difference that needs to be made between the Philadelphia and Paris declarations. We can trace the consequences of this difference to today: Whereas the Americans pointed explicitly to God the Creator as the origin of the inherent Rights of Man, the French did not. This caused an important turning point in European history as it led Man, and therefore the state, to believe that it was the guarantor, if not the giver, of these rights.

A great paradox lies here that exists until today: If we believe we have "inalienable" or "natural" rights, we therefore say they are a given, an attribute that exists automatically for every human being, independently of the state, and not given or taken by it or any other human being. This being the case, where do they come from? If one leaves out God, it can only be Man itself, even if it is not so expressed. If this is the case, these rights can therefore be taken away by Man, and thus lose their absolute character. This is paradoxical because the whole idea of human rights was for them to be absolute and non-negotiable. This dichotomy led to the enormous bloodshed immediately following the French Revolution during the Reign of Terror, where apparently those rights that where only recently proclaimed to be natural, equal, and universal, were not deemed to be applicable for all. The same

can be said for slavery in the US, which was retained even after the Declaration of Independence.

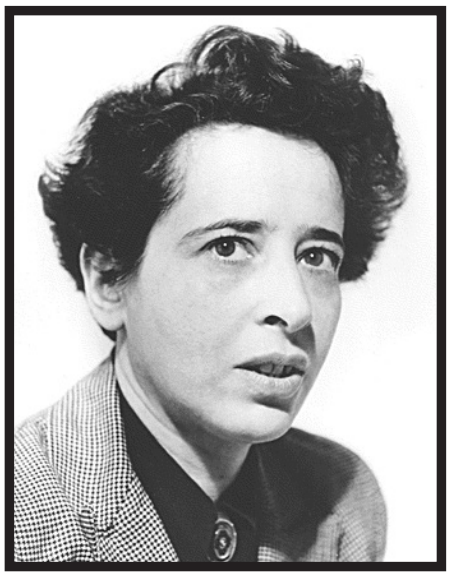
The reality was and is today that human rights are only attainable for those who participate in a political community. Those who have no voice, history shows us again and again, have no rights In spite of the lofty 18th century ideas about "natural rights", slavery continued for many years, as did all sorts of torture and killing on an ever larger scale. It needed the staggering cruelty and death caused by the Nazis and Communists in the 20th century to finally push the world to make a new effort in formulating and enforcing human rights: the 1948 Universal Declaration of Human Rights. This was then followed by a flurry of human rights documents, national and international.

What brought politicians across the board to endorse these often far-reaching—often supranational—legal instruments was the experience of human dignity being violated on a massive scale never before witnessed in the history of mankind. In the aftermath of World War II, politicians were confronted with all sorts of atrocities and millions of harrowing stories of men trampling on men under a wide array of ideologies and totalitarian systems: Nazism, Communism, Nationalism—and, yes, hedonism and individualism.

The following is but one of countless examples that show us how deep we humans can fall: The historian Martin Gilbert quotes a survivor of the Holocaust in his monumental book, The Holocaust: "When a transport with children up to three years old arrived[,] 'The workers were told to dig one big hole into which the children were thrown and buried alive. My husband recollected this with horror. He couldn't forget how the earth had been rising until the children suffocated'."

When we bring to mind such atrocities, and the safe comfort from which we can reject its incomprehensible madness, can we equally vehemently reject and push back the much larger scale of innocent and defenseless human life being destroyed today in full view of society—not in far-flung concentration camps behind barbed wire? Where are the lofty ideals of universal and inalienable human rights solemnly proclaimed in 1776, 1789, 1948, and as recent as 2009 with the Charter of Fundamental Rights of the European Union? Yes, much good has been achieved through these monumental documents, but immeasurable injustice remains.

The history of human rights



A portrait of a young Hannah Arendt.

has shown us two things, two harsh realities that have been part of every phase of human history, despite the best international treaties and solemn proclamations. The first of these realities is what the Croatian writer Slavenka Drakulić describes so well in her book, *They Would Never Hurt a Fly*, on the Balkan wars: "The mass killings of the 20th century, and the mass violations of human dignity, were not mostly performed by monsters as we like to see it comfortably—no, they were performed mostly by ordinary human beings to whom the mass killings actually made sense."

The second reality of human rights practice is highlighted by the Jewish political scientist Hannah Arendt in her masterful 1949 work, *The Origins of Totalitarianism*: "Human rights and their loudly asserted 'inalienable' character can only effectively be upheld for those who have a voice in a political community," she says. Once this voice has been lost, either directly or indirectly, no lofty proclamation can help. History, from 1776 to today, abounds with examples: the slaves, the Jews, the persecuted Christians and other religions around the world, the tortured prisoners, the approximately 40 million voiceless, unborn human beings killed annually around the world—all having died or suffered at the hands of other human beings who thought that such killing and inhuman treatment were justified.

This brings us to the problem of understanding man in secular society—or understanding human dignity. There is no lack of human rights instruments today, nor are those same documents per se harmful to human rights. As noted before, much good has been achieved. The problem does not lie with human rights themselves but with the anthropology, or rather lack of anthropology, that underpins them. In order to humanize the practice of human rights—to indeed let them be natural, equal, and universal—we need to re-introduce into secular society a correct understanding of Man—a correct Menschenbild as we would say in German—an understanding of human dignity and its roots.

The framers of the 1948 universal Declaration of Human Rights famously said "we agree about the rights but on condition no one asks why." This, combined with the relativistic mindset that accompanied the development of human rights discourse in Western society since the 18th century, has led to the current state of affairs where human rights can become harmful. The distinction between "inherent rights" and "personal choice" has been blurred under the banner of "non-discrimination",

"privacy", and "freedom of choice." All this should be clarified by taking the time and effort to explain the essence of what it means to be human. Only the Christian understanding of Man can offer a satisfactory explanation, but it need not be in overtly religious terminology. The truth of the human being can be understood by reason. It is embedded in human nature itself, accessible to all.

Allow me to give a few key elements of this for further reflection: First, Benedict XVI starts his Encyclical, *Caritas in Veritate*, with an explanation of what is the principal driving force behind authentic development of the human person, the force that leads to justice and peace: It is charity in truth; it is love. Understanding Man in secular society—really grasping his inherent human dignity in its true form, which is the only foundation for human rights that are truly human—requires a deep sense of charity and a selfless love that does not reject the truth, inconvenient as it often is.

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

Human dignity then, and the human rights based on it, cannot be upheld without love of neighbor, charity—indiscriminately applied.

Second, in order to understand Man, its dignity, and the way in which to protect it through the application of human rights, we need to be clear on the essence and role of the state. The state is not a person, it is not a source of values—as St. Edith Stein puts it so well in her treatise on the state—it is rather a community's tool devised to realize already existing values and principles. It is not the state which has a soul but the people who live in it. We need to understand this to keep the state from imposing its "proto-values" that do not serve the common good and which are not human. Each human soul, because it is created by God alone and not by any human structure, always stands above the state and is infinitely more valuable than the state. A single human soul is infinitely more important than the most powerful of states. The state is a product of humans, after all. Human dignity then, and the human rights based on it, can only be upheld when the elevated nature of Man is understood.

Mary Ann Glendon, professor at Harvard Law School and former US Ambassador to the Holy See. Photograph courtesy of the Lumen Christi Institute.

Third, we return here to St. Thomas who observes in Question 97, Part I of the *Summa*: "[T]he natural law contains certain universal precepts, which are everlasting." Whereas human law can be changed, natural law cannot. And so it is with Man's inherent dignity; it cannot be changed because it derives from the natural law, the order of creation. That is why St. Thomas says, "consequently we must say that the natural law, as to general principles, is the same for all."

Human dignity then, and human rights based on them, can only be upheld when they are considered unchangeable and always valid for every human being—no exceptions granted. Otherwise they become fully arbitrary.

Some Final Thoughts

As we come to the conclusion, again the question should be raised: Are human rights helpful or are they harmful? Not only is the term human rights itself becoming more problematic, the many new perceived "human rights" are actually undermining or effectively destroying the real human rights of Man: life, dignity, and liberty. This conclusion is not new. In 1991, the American jurist and diplomat Mary Ann Glendon already warned of this in her book, *Rights Talk*. In it she says the interplay between rights and responsibility, and freedom and order, has been lost. "Our rights talk," she says, "in its absoluteness promotes unrealistic expectations … in its relentless individualism, it fosters a climate that is inhospitable" for the weak, the losers in this battle for human rights, and leaves no room for dialogue.

Two examples illustrate this point: First, currently a real and open debate on whether or not to allow gays to marry is non-existent because an open dialogue is simply not being permitted. Whoever dares to question the validity of the argument of non-discrimination made by those wanting to redefine marriage to include people of the same sex is almost automatically labeled as homophobic or discriminatory, even though increasingly gays and lesbians themselves speak out against same sex "marriage."

Second: the language being used by abortion proponents, with its exclusive focus on women's privacy and "the right to choose", leaves no room for the weakest human being under the law, the unborn child. Why should the life of one human being automatically supersede the life of another human being? Relentless individualism simply leaves no room for real dialogue; and the victims are the innumerable aborted children who had nobody to speak for them. This is what Czech statesman Vaclav Havel warned about when he wrote that words—in this case, "human rights"—that were once "rays of light" have easily turned into "lethal arrows." This is what is happening today when we hear calls for a "right to abortion" or traditional marriage laws are called discriminatory.

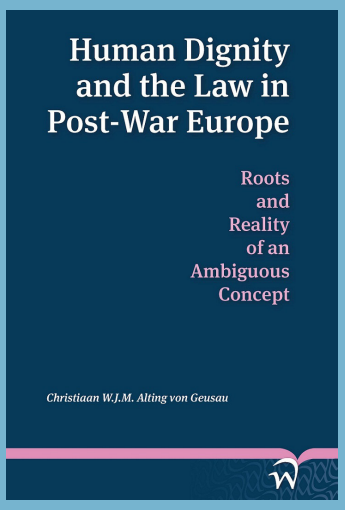
Human rights are not about the rights and freedom to do whatever I want or feel; they are about protecting what is and has always been and will always be—only to be found in the reality of the natural created order—visible and understandable to all, irrespective of religion or culture. It shows us how we were created, with what we have been endowed, and what this means in practice—a reality check, so to speak. What we have to do is to teach secular society to see, listen, and think again, and to draw logic conclusions from reality.

Let me give you a final reason why this is so important. In March 2013, the Irish government co-sponsored with the United Nations and Amnesty International an event at the UN where abortion activists and abortionists were portrayed as "human rights defenders", as "defenders working on reproductive rights, particularly abortion providers in their role in assisting women to alter their 'natural' roles as mother and caregiver." This reminds us of the "newspeak" described by George Orwell.

You might wonder why this fixation on abortion? Don't we have other problems and human rights issues? Yes, we do. But none of these will ever be solved if we don't get it right with the most fundamental of human rights: the right to life and dignity. It is the basis with which our entire human rights system stands or falls. Without a solid right to life, all other rights will eventually be violated or become irrelevant because they stem from human life itself.

The *Compendium of the Social Doctrine of the Church* says it well: "God places the human creature at the center and summit of the created order"—not its feelings and opinions but its being—its life. Transcendence needs to be made understood again in our secular society to make human rights truly helpful again. Perhaps we should remember the beautiful words of Psalm 8: "You have made him little less than the angels, and crowned him with glory and honor. You have given him rule over the works of your hands, putting all things under his feet." ■

Dr. Alting von Geusau, JD, LLM is General Counsel and Chief Development Officer at the International Theological Institute (ITI) in Trumau, Austria. This article is based on a lecture originally given at the ITI on 14 March 2013. It is based on his book, Human Dignity and the Law in Post-War Europe: Roots and Reality of an Ambiguous Concept, *published in March 2013 by Wolf Legal Publishers. It is published here with permission.*



Human Dignity and the Law in Post-War Europe: Roots and Reality of an Ambiguous Concept by Christiaan W.J.M. Alting von Geusau (Wolf Legal Publishers, 2013): This book considers the concept of human dignity as a worthwhile ideal not just for human rights lawyers, but for philosophers and politicans everywhere. Alting von Geusau provides a critical analysis of the legal norm of human dignity as codified in 2009 in the EU's Charter of Fundamental Rights. He assesses the philosophical and historical roots of the concept, an provides an assement of current legal applications and case law. Focusing on the roots of the concept of human dignity in post-war thinking, the author provides a critical examination of all those who have violated this dignity—arguing that the protection of human dignity is not just a distant legal concept but a reality that concerns every human being everywhere.