



## Treatise

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# Human Dignity between Competing Moral Traditions

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## Abstract

This article analyses competing understandings of human dignity in two rival traditions of moral enquiry. Since the end of World War II, human dignity has played a fundamental role in human rights and constitutional law. While initially, its understanding was significantly influenced by personalism, the liberal conception of dignity has been gradually gaining on importance. Post-war personalism was an influential offshoot of the Aristotelian-Thomistic tradition. It offers a specific conceptualisation of human dignity, which can be contrasted to a liberal one. In this paper, I will show how the conflict between the two traditions still persists revolving primarily around the adequate meaning of the concept of individual autonomy, which many liberal scholars associate with human dignity. According to the Aristotelian-Thomistic tradition, autonomy constitutes merely one part of a broader conception of human dignity, which is why we need to direct our attention elsewhere. The main goal of this paper is to clarify which meanings these competing perspectives ascribe to the concept of dignity; inevitably, this will lead us to analysing the clashes between their representatives over the proper interpretation of the concept. Finally, after delineating these intellectual disputes, I explore the grounds on which some agreement on the meaning of human dignity is possible between the adherents of these traditions.

**Keywords:** autonomy, human dignity, human rights, imago dei, liberalism, natural law, personalism, Thomism

## Introduction<sup>1</sup>

The order of values permeating the key document of the ‘New Age of Rights’, the *Universal Declaration of Human Rights*, rests on a concept of the dignity the human person.<sup>2</sup> Having witnessed the frontal assault on man’s humanity by the Nazi regime, contemporary elites considered it necessary to underscore that the humanity of man must be taken seriously by the law. As a person, every human being always finds herself enmeshed in a complex network of relationships, which is why one’s liberty must be subject to certain limitations; in other words, these relationships embody certain claims. A similar construal of human dignity also informs the other emblematic human rights-focused legal document underpinning post-war constitutionalism, the *Basic Law* of Germany, which speaks of ‘an autonomous person who develops freely within the social community.’<sup>3</sup> Accordingly, the Federal Constitutional Court has consistently opposed in its case law the understanding of man as an isolated, sovereign individual. This is because humans naturally depend on and have commitments to the community, even though this is consistent with preserving their individual value.<sup>4</sup>

The renowned American historian Samuel Moyn devoted one of his books to figuring out the origins of these specific features of post-war legal documents on human rights.<sup>5</sup> In his view, the centrality of human dignity as well as the post-war human rights discourse as such owed to the change of attitude of the Catholic Church towards human rights<sup>6</sup> as well as to *personalism*, a distinct tradition of thought which became influential in post-WWII philosophy. Personalists opposed both the collectivism of communists and the individualism of liberals, seeking to secure both the dignity of the human person and her bonds with the broader community. Having ties to the then-dominant Christian Democracy, the German constitutional lawyers who drafted the constitutional texts of the *Bundesländer* and the *Basic Law* itself reasoned in a way similar to prominent personalist philosophers (such as Jacques Maritain).

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<sup>1</sup> The article develops my previous research on human dignity published in Czech journals and monographs. It draws heavily from BAROŠ, Jiří. *Morální tradice a lidská důstojnost: ke sporu o základ lidských práv*. In AGHA, Petr (ed.). *Lidská práva v mezikulturních perspektivách*. Praha: Academia, 2018, pp. 35–54, and especially from BAROŠ, Jiří. *Dvě konkurenční tradice a lidská důstojnost*. In DUFÉK, Pavel. (ed.). *Liberální demokracie v době krize*. Praha: SLON, 2019, pp. 195–232.

<sup>2</sup> GLENDON, Mary Ann. *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*. New York: Random House, 2002, p. 174.

<sup>3</sup> KOMMERS, Donald P. *The Constitutional Jurisprudence of the Federal Republic of Germany*. Durham: Duke UP, 1997, p. 302.

<sup>4</sup> KOMMERS. *The Constitutional Jurisprudence*, p. 305.

<sup>5</sup> MOYN, Samuel. *Christian Human Rights*. Philadelphia: University of Pennsylvania Press, 2015.

<sup>6</sup> According to Moyn, the Catholic Church overcame its traditional distrust towards human rights only during the second world war. It could be however argued (see e.g., PINK, Thomas. Samuel Moyn – Christian Human Rights. *King’s Law Journal*, 2017, Vol. 28, No. 1, pp. 6–11) that many a human right (such as the right to marriage, education, association, private property or ensuring of basic living standards) were brought up already at the close of 19<sup>th</sup> century in the encyclicals by Pope Leo XIII (see CAROZZA, Paolo G. PHILPOTT, Daniel. The Catholic Church, Human Rights, and Democracy. Convergence and Conflict with the Modern State. *Logos*, 2012, Vol. 15, No. 3, p. 20) who might have built upon the tradition of anti-reformist Scholasticism, which in turn had roots in the Medieval canonist tradition (TIERNEY, Brian. *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law 1150 – 1625*. Grand Rapids: Eerdmans, 1997).

In the wake of the increasing present-day dominance of the liberal tradition, the personalist understanding of human dignity, mainstream as it was in the post-war period, has been nonetheless gradually crowded out by the *liberal* interpretation of dignity.<sup>7</sup> This is not to say that the personalist thread has been completely replaced by the liberal version; constitutionalist interpretations of human dignity certainly often retain the remnants of original personalist meanings. But it cannot be denied that nowadays, the majority of philosophers and constitutional judges appeal to the liberal conception of the dignity of man. This interpretation is founded on the value of autonomy, further severing the links to the post-war, personalist-influenced constitutional explication of dignity.

After a long period of relative disinterest, the concept of human dignity has moved within the last decade to the centre of attention of political and constitutional theorists. This could be explained in part by (1) the breakdown of the post-war personalist consensus, and (2) the replacement of the personalist interpretation of human dignity by the liberal conception. Within this new constellation, liberal theorists aim at novel and more convincing justifications of human dignity *qua* constitutional fundament. Accordingly, in this paper I focus on contemporary debates about how to approach the conceptualisation and philosophical justification of human dignity, by exploring the dispute between two established rival traditions of moral inquiry which govern the language and interpretation of key modern human rights documents. Unrelenting clashes over the most adequate explication of human dignity attests to the fact that it represents a case of an essentially contested concept. The common conceptual core seems to be the belief that the state exists for the benefit of the human being, rather than the other way round.<sup>8</sup> However, looking at the many competing moral traditions which interpret the concept in diverging ways, the possibility of a consensus on some universal conception of human dignity seems rather improbable. In the following, I contrast the liberal tradition which anchors reflection on human dignity in the value of autonomy, and the Aristotelian-Thomistic tradition, according to which autonomy constitutes merely one part of a broader conception of human dignity, which is why we need to direct our attention elsewhere. The latter tradition of moral inquiry also provided the intellectual basis of post-war personalism.

The paper is structured as follows. (1) First, I delineate the concept of a tradition that will be used throughout the text. My inspiration here is the Scottish philosopher Alasdair MacIntyre from whose work I will draw the distinction between the Aristotelian-Thomistic and liberal traditions. To a large extent, the contrast between the two corresponds with another distinction widely used in the history of political thought, namely that between the *Ancients* and the *Moderns*. The centrality of references to human dignity in post-war personalism demonstrates that the former way of thinking, represented here by the Aristotelian-Thomistic tradition, never ceased to be heard during modernity, even though it has certainly lost its

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<sup>7</sup> Moyn points out that the dominance of Christian Democratic thought vanished in the second half of the 1960s. In his view, the explosion of the modern human rights discourse immediately followed. Since the 1970s, argues Moyn, human rights have been perceived as a leftist secular project that replaced the collapsed social utopias of earlier times – revolutionary communism and nationalism. See MOYN, Samuel. *The Last Utopia: Human Rights in History*. Cambridge, Mass: The Belknap Press of Harvard UP, 2012.

<sup>8</sup> RODRIGUEZ, Philippe-André. Human Dignity as an Essentially Contested Concept. *Cambridge Review of International Affairs*, 2015, Vol. 28, No. 4, pp. 754.

prominent status as regards authoritative interpretations of human dignity. In this part of the paper, I criticise those approaches to human dignity which aim at disassociating the concept from all traditions of thought. This is because it could be argued that the sensitive nature of the topic is due to the contrasting approaches embraced by representatives of competing traditions. Accordingly, I will (2) discuss the differences in the interpretations of human dignity in the work of several authors belonging to one or the other tradition. The main goal is to understand which meanings these competing perspectives ascribe to the concept of dignity; inevitably, this will lead us to analysing the clashes between their representatives over the proper interpretation of the concept. I will focus primarily on how the two traditions approach the problem of the grounding of human dignity, even though towards the end of the paper I will also touch upon the ramifications the dispute has for constitutional law.

My aim here is not to pass a verdict on which of the analysed traditions provides the more convincing conception of the dignity of man. I merely try to highlight that the (constitutionally) significant fact of the existence of competing traditions within contemporary liberal democracies needs to be taken seriously. While I do not aspire to settle the dispute here, the paper's added value consists in the very raising of the awareness that unless we properly understand the embeddedness of specific conceptualisations of human dignity in the broader moral traditions, our grasp of present-day debates will remain superficial, or at least one-sided. Moreover, intellectual blindness to the differences in how the respective moral traditions interpret human dignity could have serious ramifications in real-world politics, in that a certain (larger or smaller) number of citizens will feel ever less at home in their constitutional democracies, simply because they will not be understood by others.

## 1. Moral traditions between the 'Ancients' and the 'Moderns'

### 1.1 Traditions and rival versions of moral inquiry

Perhaps the greatest post-war moral philosopher to assign a fundamental role to the concept of a tradition in his thought has been Alasdair MacIntyre. In his much-debated book *After Virtue*, MacIntyre criticised the fixed and static Burkean approach to tradition, one that conservatives contrast to both reason and conflict. MacIntyre claims that all reasoning always takes place 'within the context of some traditional mode of thought, transcending through criticism and invention the limitations of what had hitherto been reasoned in that tradition (...). Moreover, when a tradition is in good order it is always partially constituted by an argument about the goods the pursuit of which gives to that tradition its particular point and purpose.'<sup>9</sup> Continuous conflict as well as openness to new stimuli thus attest to the liveliness of the tradition. Such a live tradition can be construed as 'an historically extended, socially embodied argument, and an argument precisely in part about the goods which constitute that tradition.'<sup>10</sup>

In *Whose Justice? Which Rationality?*, MacIntyre notes that standards of rational justification are always grounded in a certain tradition. Although any argumentation cannot but build on

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<sup>9</sup> MACINTYRE, Alasdair. *After Virtue*. Notre Dame: Notre Dame UP, 2007, p. 222.

<sup>10</sup> MACINTYRE. *After Virtue*, p. 222.

the resources of a given tradition, it does not follow that fuller grasp of reality is necessarily beyond our reach.<sup>11</sup> However, the path towards such knowledge is beset with difficulties, requiring one to resolve numerous tensions that a tradition inevitably harbours. Besides that, a tradition must be able to accommodate to the changing external realities; thus, the necessity of progress and adaptation render a tradition open to conceptual innovations. Advocates of a certain tradition often attempt to transcend its supposed limitations, seeking to remedy the defects of earlier efforts to devise due standards of rationality.<sup>12</sup> It could be therefore argued not only that a tradition constitutes an integrated intellectual activity, but also that those who partake in it are fully aware of this fact and seek, via participation in the relevant debates, to refine its argumentative resources.

MacIntyre sees tradition as an ‘argument extended through time in which certain fundamental agreements are defined and redefined in terms of two kinds of conflict’, namely external (with critics and enemies who stand outside the tradition) and internal (concerning internal interpretative debates).<sup>13</sup> There are thus disputes not only within a particular tradition, but also between traditions. Although meaningful mutual communication is certainly possible to some extent, situations will arise in which their disagreement cannot be dealt with by referring to shared standards – precisely because these standards are themselves in dispute.<sup>14</sup> Despite this predicament, encounter between traditions in a particular moment in history may convince representatives of one of them that the other tradition offers a superior solution to the very problems they have been grappling with. This is how traditions may engage in mutual comparisons, leading to judgements about relative rational superiority of one over another.<sup>15</sup> This requires members of one tradition to be able to rationally reconstruct the conceptual apparatus of their competitor, which may not always come easy. Only upon such an insight can they ascertain that the other tradition offers better solutions to the same set of problems – or, more generally, that its criteria of rationality are more convincing even according to the standards embraced by their own tradition.

MacIntyre’s approach bears significantly upon human dignity, precisely because the concept has been employed by representatives of different traditions. Before embarking on a more detailed analysis, let me briefly outline which moral traditions will be the focus of this paper. I draw here on MacIntyre’s own classification in his follow-up book titled *Three Rival Versions of Moral Inquiry*.<sup>16</sup> MacIntyre’s trinity consists of the classical (Thomist), encyclopedic (liberal), and genealogical (Nietzschean) traditions.<sup>17</sup> All of them fundamentally participate in the

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<sup>11</sup> Cf. PORTER, Jean. Tradition in the recent work of Alasdair MacIntyre. In MURPHY, Mark C. (ed.). *Alasdair MacIntyre*. Cambridge: Cambridge UP, 2003, p. 46. I draw on Porter’s chapter extensively in this section.

<sup>12</sup> MACINTYRE, Alasdair. *Whose Justice? Which Rationality?* Notre Dame: Notre Dame UP, 1988, p. 7.

<sup>13</sup> MACINTYRE. *Whose Justice? Which Rationality?*, p. 12.

<sup>14</sup> MACINTYRE. *Whose Justice? Which Rationality?*, p. 351.

<sup>15</sup> PORTER. *Tradition in the recent work*, p. 48.

<sup>16</sup> In his previous book *Whose Justice? Which Rationality?*, MacIntyre distinguished four main traditions. In addition to the Aristotelian, Augustinian, and Scottish Enlightenment traditions, he also recognises the liberal one. Nevertheless, in the present paper I follow the more mature categorisation form MacIntyre’s later work.

<sup>17</sup> MACINTYRE, Alasdair. *Three Rival Versions of Moral Enquiry. Encyclopaedia, Genealogy, and Tradition*. Notre Dame: Notre Dame UP, 1990.

making up of the contemporary world and its elementary moral concepts. For the purposes of political and constitutional concepts, partial modification of MacIntyre's categories seems preferable, which is why I will henceforth speak of the Aristotelian-Thomistic, liberal, and radical traditions. While the second label remains unchanged, the first one now draws on the tradition's biggest names in antiquity and the medieval period. Although Thomist philosophers make up the majority of its representatives, other influential authors prefer Aristotle or Augustine as their main sources of inspiration.<sup>18</sup> Since this tradition makes room for theistic arguments (which renders it unique in contemporary discourse), I will include under this heading authors who employ such lines of reasoning. Finally, the adjective 'radical' highlights that the third tradition defines itself through radicalising the standpoints of modern (that is, liberal) philosophy. Sharing with the liberal tradition the modern ideals of equality and individual liberty, 'radicals' are more sensitive to the oppressive structures of power which block the full actualisation of these ideals.<sup>19</sup>

With respect to the overarching goal of this paper, we can narrow down the issue area to some extent by noting that disputes over the interpretation of human dignity are mainly between representatives of the Aristotelian-Thomistic and liberal traditions. The radical tradition has always maintained suspicion towards the concept; however, once engaged its representatives tend to side with liberals in such disputes, insofar as human freedom and autonomy are at stake. Typical of radicals is the desire to emancipate human freedom from the constraints associated with tradition (customs) or nature (i.e., any kind of essentialism). They see these constraints as linked to oppressive norms whose authority must be deconstructed. Since these norms are embedded in a complex network of power relations, it is necessary to recognise and promote various sites of freedom's resistance to power.

Numerous radical movements that have emerged throughout history can nevertheless be understood as a form of implicit protest against violations of human dignity, of life worthy of human dignity. Their specific historical contribution consisted in the interpretation of human dignity as a precondition of fulfilling fundamental human needs; their focus has

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<sup>18</sup> I will therefore also discuss at some length the theory of the American philosopher Nicholas Wolterstorff who sits closer to the Augustinian tradition. While Aquinas' thought was also extensively influenced by Augustinianism, Wolterstorff follows the thought of the European Reformation which sought to cut its ties to medieval scholasticism and took inspiration from the Bible and the Christian authors of the early centuries, among whom Augustine was a towering figure. Wolterstorff's theory is an Augustinianism that is deeply critical of contemporary liberalism.

<sup>19</sup> PORTER. *Tradition in the recent work*, p. 58. Radicals also seek to reconcile the classical liberal freedoms with the political conception of 'freedom as public autonomy'. One important author straddling the liberal and radical traditions who has also addressed dignity is Jürgen Habermas. In his view, human dignity translates the content of the morality of equal respect (for each individual) to the legal status of citizens. Their self-respect arises from the fact that they have been recognised by other citizens as bearers (subjects) of equal inalienable rights. As a legal concept, human dignity is linked to the status awarded to citizens within the legal order to which they have founded. Habermas thus combines the individual dignity of each person with the social recognition of her status at a particular time and place, a recognition he associates with democratic citizenship. HABERMAS, Jürgen. The Concept of Human Dignity and the Realistic Utopia of Human Rights. *Metaphilosophy*, 2010, Vol. 41. No. 4, pp. 464–480.

always revolved around the demand to improve the life conditions of lower social classes.<sup>20</sup> While the particular content of fundamental human needs can be again disputed in manifold ways, on the general level the concept/value has been accepted by representatives of other traditions, too – with exception of some liberal currents such as market anarchists or advocates of the minimal state.<sup>21</sup> This is another reason to focus on exchanges between the remaining two traditions, putting aside those debates which (mostly implicitly) relate human dignity to socio-economic rights, or those which revolve around the value of (social) justice.

## 1.2 The Ancients, the Moderns, and human dignity

In the following, I will thus confront the Aristotelian-Thomistic and liberal traditions, that is, ‘two *most* opposed political philosophies: namely the politics of the Moderns and the politics of the Ancients.’<sup>22</sup> In the 20<sup>th</sup> century political philosophy, the opposition between the *Ancients* and the *Moderns* which corresponds with the distinction between Aristotelian-Thomistic and liberal traditions<sup>23</sup> has been most closely associated with Leo Strauss and his disciples, who see classical political thought (i.e. that of ancient Greeks) an alternative to modern liberal rationalism. Classical political thought has been criticised for its anti-democratic character.<sup>24</sup> Because virtue is distributed unequally among people, Ancients believe that the ideal political regime cannot be egalitarian. Offices should be therefore filled according to people’s virtues. In contrast, Moderns claim that society needs to be founded on then ideal of moral and political equality. Moral equality stems from the natural equality of human beings which follows from their equal value. Political equality then stands for equal democratic participation, in the sense that all citizens should have the right to actively partake in public affairs. The contrast between the Ancients and the Moderns can be seen as unqualified: the thought of Ancients then proves irrelevant for the present era, grounded as it is in an egalitarian understanding of the dignity of man.

The intellectual transition from the Ancients to the Moderns can be nonetheless also understood in terms of a ‘passage from man defined as ‘nature’ to man defined as ‘freedom.’<sup>25</sup>

<sup>20</sup> LOHMANN, Georg. Human dignity and socialism. In DÜWELL, Marcus. BRAARVIG, Jen. BROWNSWORD, Roger. MIETH, Dietmar (eds.). *The Cambridge Handbook of Human Dignity. Interdisciplinary Perspectives*. Cambridge: Cambridge UP, 2014, pp. 126–134.

<sup>21</sup> See MACK, Eric. GAUS, Gerald F. Classical Liberalism and Libertarianism: The Liberty Tradition. In GAUS, Gerald F. KUKATHAS, Chandran (eds.). *Handbook of Political Theory*. London: Sage, 2004, pp. 115–130.

<sup>22</sup> MILBANK, John. Dignity Rather than Rights. In MCCRUDDEN, Christopher. *Understanding Human Dignity*. London: Proceedings of the British Academy, 2013, p. 205; emphasis in original.

<sup>23</sup> While it is true that many prominent representatives of the Aristotelian-Thomistic tradition (e.g., Jacques Maritain) have attempted to integrate various elements of the liberal tradition into their work, there has always existed – and since the publication of MacIntyre’s *After Virtue* has become prominent – a ‘post-liberal’ current which remains critical of liberalism and strives to revisit the distinctive sources of the Aristotelian-Thomistic tradition. Some authors therefore reject, among other things, the very embracing of the language of human rights, favouring instead other concepts such as human dignity, common good, or justice (besides MacIntyre, compare the works of authors such as John Milbank or Michel Villey).

<sup>24</sup> STRAUSS, Leo. *What is Political Philosophy? and Other Studies*. Chicago: The University of Chicago Press, 1988.

<sup>25</sup> MANENT, Pierre. *The City of Man*. Princeton: Princeton UP, 1998, p. 156.



The trajectory of modern thought followed the emphasis on free, unconstrained, autonomous choice of individuals, unbound by the natural order (including human nature) within which man has his specific place.<sup>26</sup> Many contemporary thinkers however refuse to come to terms with such a conception, and their dissenting voices are echoed in reflections on the basic building blocks of liberal democracies. As we shall see, the thought of the Ancients, carried in modern times by the Aristotelian-Thomistic tradition, still holds relevance for contemporary debates over human dignity. At the moment, however, I turn to authors whose theoretical assumptions lead them to deny that the antagonism between the Ancients and the Moderns has any purchase for these debates.

The *Ancients* too had their conception of dignity, according to which those who had greater dignity than others deserved more accolades and privileges. With their positions then came more responsibilities. The upshot is that there are different degrees of dignity. Although ideally, higher dignity of some should have been grounded in their intrinsic qualities, in reality it was the external traits which became important.<sup>27</sup> Political hierarchies characteristic of ancient societies, the medieval feudal society and the early modern *ancient régime*, were swept away by the democratic revolution which introduced a universalistic and egalitarian reading of human dignity. According to this conception, all individuals need to be respected equally.<sup>28</sup> James Whitman sees the roots of the European culture of dignity in the 17<sup>th</sup> and 18<sup>th</sup> centuries which gave birth to resistance to the fact that in monarchic and aristocratic societies, only persons of higher social status could claim protection before the courts. Gradually, protection of dignity only for some lost all credibility, paving the way for norms which secure respect for each person.<sup>29</sup>

Arguably the most sophisticated argument to this effect has been put forward by Jeremy Waldron.<sup>30</sup> In his view, dignity can be read through the lens of either law or morality. Although the latter approach – determine a philosophical account of dignity first, and then see how it is reflected in law – seems more natural, Waldron favours the former because it is in law rather than in ordinary moral debates that the concept of dignity normally appears. Some concepts have originated within law, which is why it makes sense to begin by examining their legal usage. Waldron explains that dignity expresses the idea of high and equal rank of all human beings, that is, special normative status that is granted to them equally, or without any discrimination. From a historical point of view, the modern account of dignity bestows the ‘aristocratic status’ upon the ordinary man. In pre-modern societies, the concept of dignity was linked to honour, privilege, and respect for rank or office, with the ruler, nobility, and clergy claiming special dignity. The point of the modern concept of dignity is the equalisation of this status. Drawing on Gregory Vlastos, Waldron argues that

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<sup>26</sup> DENEEN, Patrick J. *Why Liberalism Failed*. New Haven: Yale UP, 2018.

<sup>27</sup> BRENNAN, Andrew. LO, Y. S. Two Conceptions of Dignity: Honour and Self-Determination. In MALPASS, Jeff. LICKISS, Norelle (eds.). *Perspectives on Human Dignity*. Dordrecht: Springer, 2007, p. 44.

<sup>28</sup> TAYLOR, Charles. *Multiculturalism: Examining the Politics of Recognition*. Princeton: Princeton UP, 1994, pp. 37–38.

<sup>29</sup> WHITMAN, James Q. The Two Western Cultures of Privacy: Dignity Versus Liberty. *The Yale Law Journal*, 2004, Vol. 113, No. 6, p. 1166.

<sup>30</sup> WALDRON, Jeremy. *Dignity, Rank, and Rights*. Oxford: Oxford UP, 2012.

the contemporary society is essentially an aristocratic society which recognises only one rank: in this sense, the rank has been generalised.<sup>31</sup>

Accordingly, the purpose of law has largely switched to the protection of the high status of all human beings. Many human rights can be understood as special cases of this normative status. Some general legal norms are meant to establish it, other special norms prohibit its weakening or protect and promote it. The status-based conception of human dignity represents a shorthand for the list of individualised human rights; as such, the list is not arbitrary but makes sense precisely when read through the lens of human dignity. Moreover, through dignity human rights become a unified whole, so that each and every human right is meaningful as an expression of our status *qua* human beings. Still, human dignity need not be construed as the moral foundation of human rights.<sup>32</sup> Waldron brings out an analogy with ancient Athens where all free citizens recognised each other as equal, since such practice made possible a certain form of political community. Yet they did not have to believe that all people were in fact equal.

One could get the impression that the modern conception of dignity as generalised rank has completely overshadowed the pre-modern reading, as if the Ancients fully surrendered to the Moderns' onslaught. Stéphanie Hennette-Vauchez has however pointed out that some cases of the modern use of human dignity have a lot in common with the ancient conception of dignity (*dignitas*).<sup>33</sup> Taking as an example the case of dwarf-tossing, the prohibition of which despite express consent of the (tossed) individual was justified by the value of human dignity, we can see that human dignity as a constitutional principle introduces not only rights but also duties – even duties to oneself (other cases of the same class would include the prohibition of prostitution or of peep shows). Hennette-Vauchez argues that rather than dignity of the dwarf himself, the judgement's rationale related to the protection of humanity as a special rank pertaining to all members of the human species. Protection of this status trumps liberal values such as autonomy or consent, prioritising obligations (or prohibitions) arising from human dignity. According to Hennette-Vauchez, the idea also found expression in the image of the German *Basic Law* as an objective order of values founded upon the principle of human dignity, which is by itself hierarchically superior to all other values. Like the ancient *dignitas*, this principle is regarded as something inalienable – that is, independent of the will of its bearer. Such interpretation of dignity can be appealed to in order to justify restrictions of individual liberty. Because of the clash with the liberal understanding of dignity as autonomy, Hennette-Vauchez is ultimately critical of this older conception of dignity.

Recalling the earlier explication of the personalist roots of post-war human rights documents, the links Hennette-Vauchez's has discovered between the contemporary concept of human

<sup>31</sup> Critics have however pointed out that Waldron's assertion about the aristocratic status of all persons is overdrawn, because individuals have definitely not assumed all aristocratic privileges. Besides that, nobility itself has lost many of them. SIMMONS, John A. Human Rights, Natural Rights, and Human Dignity. In CRUFT, Rowan. LIAO, Mathew S. (eds.). *Philosophical Foundations of Human Rights*. Oxford: Oxford UP, 2015, p. 143.

<sup>32</sup> WALDRON, Jeremy. Is Dignity the Foundation of Human Rights? In CRUFT, Rowan. LIAO, Mathew S. (eds.). *Philosophical Foundations of Human Rights*. Oxford: Oxford UP, 2015, pp. 117–137.

<sup>33</sup> HENNETTE-VAUCHEZ, Stéphanie. A human dignitas? Remnants of the ancient legal concept in contemporary dignity jurisprudence. *I-CON*, 2011, Vol. 9, No. 1, pp. 32–57.

dignity and the ancient *dignitas* should not come as a surprise. The post-WWII discourse on human rights owed significantly to the Aristotelian-Thomistic tradition which in turn grounded contemporary personalism. Having adopted the liberal rhetoric of rights, its representatives proceeded to infuse it with a distinct content by linking it to the foundational principle of human dignity. Accordingly, as soon as human rights transformed into a secular project, the two traditions delved into an ever deeper conflict over the interpretation of human dignity. Noticing this dynamic, the political theorist Michael Rosen argues that the post-war consensus of several moral traditions over human dignity constituted an exception.<sup>34</sup> Already in that period, the breadth of the consensus concealed the latent disagreement which has only now become fully apparent. According to Rosen, the concept of human dignity thus rests on much more complex and adversarial foundations than the status-based conception of human dignity acknowledges.<sup>35</sup> All real-world disputes hark back to competing visions of the grounds of human dignity. Unlike the Aristotelian-Thomistic and liberal traditions, Waldron's status-based conception knowingly abandons any attempt at a philosophical grounding of the concept.<sup>36</sup> This, however, renders it unable to cope with moral disagreement typical of contemporary societies, and in turn incapable of providing a clear guidance with respect to the numerous contemporary legal disputes about the proper interpretation of human dignity. Contested conceptions of dignity originate precisely from these competing moral traditions.

## 2. Human dignity in the liberal and Aristotelian-Thomistic traditions

### 2.1 Sources of the liberal conception of human dignity

One of the most notable liberal approaches to grounding human dignity has been proposed by the American philosopher George Kateb.<sup>37</sup> In his view, human dignity not only serves to protect individual human rights, but also draws our attention to the dignity of the human species. As such, dignity rests on two pillars: (1) dignity of each and every human being which is equal in value to other human beings (i.e., the equal status of individuals); and (2) dignity of the human species in relation to other species (i.e., the special standing of the human species in nature). The dignity of the human species is reflected in the extraordinary achievements that only human beings are capable of. However, the abundance of horrific deeds that humanity has historically committed shows that this potential may go unfulfilled. In spite of this, human beings (and only them) are capable of purposeful 'stewardship' of nature on planet Earth. Although the recognition of the special standing of the human species emerged much earlier than recognition of equal dignity of individuals, they share basically the same justification. Here Kateb distinguishes between moral and existential

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<sup>34</sup> ROSEN, Michael. Dignity Past and Present. In: DAN-COHEN, Meir (ed.). *Dignity, Rank, and Rights*. Oxford: Oxford University Press, 2012, pp. 79-98.

<sup>35</sup> ROSEN. *Dignity Past and Present*, p. 82.

<sup>36</sup> SIMMONS. *Human Rights, Natural Rights, and Human Dignity*, p. 141.

<sup>37</sup> KATEB, George. *Human Dignity*. Cambridge, Mass.: The Belknap Press of Harvard UP, 2011; KATEB, George. The Concept of Human Dignity. A Summary Statement. In SEERY, John (ed.). *George Kateb: Dignity, Morality, Individuality*. London: Routledge, 2014, pp. 11-24.

values. While moral values concern exclusively human suffering, existential values have to do with the recognition of the identity of each human being as well as of the species. Kateb sees human dignity as belonging entirely among existential values. When the identity of a human person or species is at stake, their existence is at stake<sup>38</sup> – that is, their status and standing in nature. Kateb argues that this fact cannot be grasped in terms of morality because it encompasses more than just suffering. We can envision a hypothetical society that has erased all suffering but has no place for human liberty (à la Huxley's *Brave New World*). This is why in Kateb's view, human rights cannot be grounded in morality but require human dignity. Ultimately, Kateb founds the uniqueness of human beings and the human species in their capacities for free agency and for moral agency,<sup>39</sup> i.e., criteria intimately connected to the liberal tradition.

As pointed out by the American philosopher Nicholas Wolterstorff,<sup>40</sup> to link morality exclusively to suffering is a mistake because morality has much wider scope. We act immorally if we harm someone; suffering is merely one example of infringing upon morality. Morality's connection to law, says Wolterstorff, consists in that a given right always bears upon a particular life-good: it is because of this good that I must be treated in a certain way. The harm consists in others treating me in ways different from what my right requires. Wolterstorff then refines Kateb's claim that morality itself is insufficient to ground rights, arguing that it is the various life-goods which are in themselves incapable of doing so. In order to arrive at rights, we must always supplement these goods with human dignity. In the last analysis, to harm someone – i.e., to violate moral norms – is to act in a way that is incompatible with human dignity. Wolterstorff then inquires into the grounds of human dignity. Before examining his answer in the next subsection, I will briefly outline the presently prevailing, Kantian-inspired liberal justification of human dignity. To understand the specificity of the contemporary discourse, let me therefore spend a few words on Immanuel Kant.

The German philosopher desired to secure an 'enclave' of freedom in a world dominated by mechanical causality studied by science. To this end, he distinguished the *empirical self* located in the phenomenal realm (of sensations) and the *intelligible* or *transcendental self* participating in the order of reason. In order to achieve freedom, man's will must be determined by the formal and general law of reason. For then the principles of practical action will not be determined purely empirically but will be based in reason alone; that is, having been purged of contingent subjective conditions, they will be valid for the will of every rational being. Only then will man's will be free, since it will be determined by the law of reason, rather than by natural events (subject to the law of causality).<sup>41</sup> As a rational being, man gives this law unto himself, which means that in acting in accord with the law, he realises his autonomy. It is in autonomy that we should look for the absolute value, or dignity, of the human being. Kant distinguishes dignity from price which can be measured against equivalents. In contrast, dignity 'is elevated above all price, and hence allows of no

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<sup>38</sup> KATEB. *Human Dignity*, p. 10.

<sup>39</sup> KATEB. *Human Dignity*, pp. 134–135.

<sup>40</sup> WOLTERSTORFF, Nicholas. George Kateb, *Human Dignity* (review). *Ethics*, 2012, Vol. 122, No. 3, pp. 602–607.

<sup>41</sup> KANT, Immanuel. *Critique of Practical Reason*. Cambridge: Cambridge UP, 2015, p. 26.

equivalent.<sup>42</sup> As such, it becomes the source of honour and respect for the value of a human being.

Kant's conception has influenced the interpretation of human dignity in the jurisprudence of the Federal Constitutional Court which has applied the so-called object theory in several of its landmark decisions. According to this theory, disrespect to human dignity occurs if the individual is treated as a mere instrument of the state. The object formula has been derived from the second formulation of Kant's categorical imperative (the prohibition of instrumentalisation of persons) which states that man must never be treated merely as a means, but always at the same time as an end.<sup>43</sup> Michael Rosen has argued that it is not quite clear what it means to treat some people merely as means, as opposed to treating others at the same time as ends.<sup>44</sup> Does the prohibition on treating others merely as means require that we must take into consideration their interests? Does the imperative to treat others as ends imply respect for these others? If it does, what follows? Rosen thinks that Kant's conception of human nature provides no unambiguous norms for practical decision-making.<sup>45</sup> Many renowned experts on Kant's work<sup>46</sup> however concur that one practical implication of Kant's insistence on the capacity for rational volition and rational action is the principle of consent. It is others' consent which constitutes the criterion of whether

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<sup>42</sup> KANT, Immanuel. *Groundwork of the Metaphysics of Morals. A German-English Edition*. Cambridge: Cambridge UP, 2011, p. 97.

<sup>43</sup> Post-war personalists were thus able to accommodate several elements of Kant's thought, as can be seen in the philosophical work of Karol Wojtyła, a prominent representative of Thomistic personalism who later became Pope John Paul II. Wojtyła accepts Kant's prohibition of instrumentalisation of persons, with a slight modification: 'Whenever the person is an object of action in your conduct, remember that you may not treat him merely as a means to an end, as a tool, but [you must] take into account that the person himself has or at least should have his end' (WOJTYŁA, Karol. *Love and Responsibility*. Boston: Pauline Books, 2013 [1960], p. 11). Wojtyła recognises that persons can be often used as means to achieving others' goals (e.g., employees by their employer). Nonetheless, he stresses that a person 'must be regarded first and foremost as a free and intelligent subject with his own ends, and only secondarily as a means to the ends of another' (see WILLIAMS, Thomas D. *Who is My Neighbor? Personalism and the Foundations of Human Rights*. Washington: The CUA Press, 2005, p. 162). However, from Wojtyła's accommodation of this particular element of Kant's thought does not follow he accepts other aspects, too. According to Wojtyła, the value of man is not manifested in him being the legislator for himself, i.e., the source of all law and all justice. This could be true only if he were not created, that is, if he himself were his own ultimate cause (WOJTYŁA, Karol. *Love and Responsibility*, p. 233). This is why values and practical norms do not have their ultimate foundation in practical reason but in God, mediated by the natural law and revelation (WILLIAMS. *Who is My Neighbor?*, pp. 155–156). Kant, in contrast, sees all dignity originating in legislation itself, which for that very reason 'must itself have a dignity, that is, an unconditional, incomparable worth, for which the word *respect* alone provides a befitting expression of the estimation that a rational being is to give of it. *Autonomy* is thus the ground of the dignity of a human and of every rational nature' (KANT. *Groundwork of the Metaphysics of Morals*, p. 101).

<sup>44</sup> ROSEN. *Dignity Past and Present*, pp. 80–90.

<sup>45</sup> E.g., KORSGAARD, Christine. *Creating the Kingdom of Ends*. Cambridge, Mass.: Harvard UP, 1996; O'NEILL, Onora. *Constructions of Reason*. Cambridge: Cambridge UP, 1989.

<sup>46</sup> ROSEN, Michael. Dignity: The Case Against. In MCCRUDDEN, Christopher. *Understanding Human Dignity*. London: Proceedings of the British Academy, 2013, pp. 146–147.

I have treated them merely as means or not.<sup>47</sup> According to these authors, dignity ultimately belongs only to persons who possess the requisite rational capacities. However, we shall see that such conclusion stands in direct opposition to the Aristotelian-Thomistic tradition, to whose engagement with the liberal autonomy-centred discourse we now turn.

## 2.2 Liberal autonomy and the Aristotelian-Thomistic attempts to transcend it

The idea of autonomy has evolved substantially since its inception in Kant's thought. As the American bioethicist Leon R. Kass notes, autonomy today does not mean a life in conformity with a universalisable law. Rather, it has come to mean that as long as one does not harm others, she is free to live as she chooses.<sup>48</sup> This notion subsequently informs constitutional lawyers' thinking about human dignity. This ideal of autonomy had its moment of glory with the US Supreme Court's *Planned Parenthood v Casey* decision,<sup>49</sup> with the Court ruling that people have the right to decide on 'the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy.' Liberty is predicated on 'the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.' From these conceptions stem decisions on 'the most intimate and personal choices' which are crucial for one's life. A person thus decides for himself what is important in his life; which is why paternalist interests usually cannot outweigh the human freedom upon which human dignity rests.<sup>50</sup>

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<sup>47</sup> I leave aside Rosen's suggested alternative to these *voluntaristic* interpretations, according to which the rational capacities of man are the source of all morality. Rosen refutes this voluntarist interpretation of Kant by pointing to various examples in Kant's work (such as his opposition to extramarital sex or to suicide). Rosen notes that we treat even the dead with dignity, i.e., we do not acknowledge that we have duties only to persons. According to Rosen (2012b: 157), readers of Kant often overlook duties to ourselves as dignified beings, i.e., to our humanity as such. However, answering the question of what underlies this idea of humanity that we must respect in various life situations (e.g., as regards actions towards dead bodies) would require more extensive examination than that offered by Rosen. Critics have also noted that even Rosen's conception of dignity fails to provide unambiguous criteria for practical decisions, especially when it comes to divisive moral issues such as abortion, stem cell research, or torture (see GOODHART, Michael. Recent Works on Dignity and Human Rights: A Road Not Taken. *Perspectives on Politics*, 2014, Vol. 12, No., 4, p. 849).

<sup>48</sup> KASS, Leon R. *Life, Liberty and the Defense of Dignity. The Challenge for Bioethics*. New York: Encounter Books, 2002, p. 16.

<sup>49</sup> *Planned Parenthood v. Casey*. 505 U. S. 833 (1992). In this ruling, the US Supreme Court basically confirmed its earlier landmark *Roe v. Wade* (1973) decision on the legality of abortions, along with introducing some novel standards of judicial review.

<sup>50</sup> See BAROŠ, Jiří. K základům současných právních sporů o lidskou důstojnost. *Teologické texty*, 2009, vol. 20, no. 3, pp. 126–128.

Despite critical voices from within the Aristotelian-Thomistic tradition,<sup>51</sup> the liberal interpretation of human dignity has been gaining ever greater influence in the theory and practice of constitutional law. For example, the former President of the Israeli Supreme Court Aharon Barak locates the constitutional value of human dignity in the recognition of the fact that 'individual is a free person, who develops his body and spirit, according to his will. The will of a human being is the manifestation of his humanity.'<sup>52</sup> According to Barak, human freedom is expressed in the freedom of choice and the freedom to plan one's own life and realise oneself. The constitutional value of human dignity is thus grounded in the autonomy of individual will, which means that each individual controls her own life.<sup>53</sup> Respected experts in bioethics have views close to those of constitutional lawyers. Some<sup>54</sup> have found inspiration in Alan Gewirth's earlier conception of man as an agent possessing the capacity for rational, purposive action.<sup>55</sup> A newer version of the same kind of argument has been recently developed by the British philosopher James Griffin who grounds his justification of human rights in the concept of normative agency.<sup>56</sup>

For Griffin, normative agency expresses the basic interest of each individual in developing the capacity to create, revise, and realise his own life plans. Griffin distinguishes three dimensions of normative agency: autonomy, liberty (the capacity to pursue autonomously chosen goals), and a certain level of welfare. He understands autonomy as exercising the capacity to distinguish true values from false, and good reasons for action from bad.<sup>57</sup> However, normative agency is not merely about deciding what is worth doing, but also about actually doing it; this is the point of the idea of liberty. Finally, the realisation of both autonomy and liberty requires a minimum level of welfare. Nevertheless, the idea of human dignity is most closely linked to autonomy, which concerns deciding on what to do with one's own life. Autonomy is threatened by paternalist interference by others, because the shape of a conception of valuable life should be up to each person.

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<sup>51</sup> E.g., SCHINDLER, D.C. *Freedom from Reality. The Diabolical Character of Modern Liberty*. Notre Dame: Notre Dame UP, 2017, pp. 185–188. For his criticism of liberalism, Schindler reappropriates the classical distinction between act and potency. According to the Aristotelian-Thomistic tradition, the act has ontological, logical and in a certain sense also chronological priority over potency. By contrast, the liberal conception of freedom separates potency from actuality and gives potency primacy, because actuality is interpreted in relation to a prior and more elementary potency. The actuality of the good, which in the classical conception entails a claim on the will of individuals, becomes merely a set of choices whose quality depends on the determination of that will. The subordination of actuality to potency thus removes any reference to the order of reality.

<sup>52</sup> BARAK, Aharon. *Human Dignity. The Constitutional Value and the Constitutional Right*. Cambridge: Cambridge UP, 2015, p. 127.

<sup>53</sup> BARAK. *Human Dignity*, p. 129.

<sup>54</sup> BEYLEVELD, Deryck. BROWNSWORD, Roger. *Human Dignity in Bioethics and Biolaw*. Oxford: Oxford UP, 2002.

<sup>55</sup> GEWIRTH, Alan. *Human Rights: Essays on Justification and Application*. Chicago: The University of Chicago Press, 1982.

<sup>56</sup> GRIFFIN, James. *On Human Rights*. Oxford: Oxford UP, 2008.

<sup>57</sup> GRIFFIN. *On Human Rights*, p. 150.

Numerous authors have however pointed to hard cases (such as consensual cannibalism) which can be hardly resolved by simply bringing up autonomy.<sup>58</sup> Dignity of a person cannot be associated with autonomy alone which it is a mistake to absolutise and declare the foundation of all other values. Autonomy is merely an instrumental good and cannot be understood as the determining reason for action. As regards the theoretical basis of Griffin's argument, an intriguing criticism has been put forward by Nicholas Wolterstorff who also offers a well-developed alternative rooted in biblical and St. Augustine's thought. Wolterstorff notes that Griffin founds human rights not on 'the dignity of the status of being human' but on a specific type of activity, namely the exercise of normative agency which is assumed to be of special significance for human life.<sup>59</sup> However, it is not obvious why the life-good of normative agency deserves special protection, since, as Griffin acknowledges, there are other life-goods, too. Despite that, he sees the good of normative agency as the sole ground of human rights. Yet he provides no explanation wherein originates our moral *obligation* to respect human rights. In order to be able to give such explanation, argues Wolterstorff, Griffin would have to introduce the concept of the dignity of the rights-bearer as such, rather than limit his attention to her life-goods. This is why the capacity for rational agency cannot properly ground human rights.<sup>60</sup>

Although Wolterstorff acknowledges that the capacity for rational agency imparts its possessor with great value, the problem is that it comes in varying degrees among people. Moreover, there are people who lack this property entirely. While some (e.g., children) will acquire it later, others (people with progressive dementia, comatose individuals) will not. That the liberal approach cannot explain how they also possess human dignity is for Wolterstorff evidence of its failure. He then turns his attention to authors who emphasise that being a person encompasses more than just the capacity for rational agency. No matter how we delineate the requisite properties, however, the objection essentially remains: there are most likely human beings who do not possess them. Finally, Wolterstorff also rejects the argument that human dignity is based on human nature. With respect to the most impaired human beings, not all would accept that it is the nobility of human nature which justifies their dignity. Wolterstorff believes that the only way out of the predicament is to adopt a theistic justification of human dignity. This kind of grounding need not appeal to theological arguments; all that is needed is the assumption that God exists. Even atheists can ask, hypothetically, whether theism is a promising way of grounding human rights.<sup>61</sup>

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<sup>58</sup> E.g., FOSTER, Charles. *Human Dignity in Bioethics and Law*. Oxford: Hart Publishing, 2011, pp. 2–5; KASS. *Life, Liberty and the Defense of Dignity*, pp. 16–17; SANDEL, Michael. *Justice What's the Right Thing to Do?* New York: Farrar, Straus and Giroux, 2010, pp. 73–74; SPAEMANN, Robert. *Love and the Dignity of Human Life. On Nature and Natural Law*. Grand Rapids: Eerdmans, 2012, pp. 34–35.

<sup>59</sup> WOLTERSTORFF, Nicholas. *Understanding Liberal Democracy. Essays in Political Philosophy*. Oxford: Oxford UP, 2012, pp. 207–211.

<sup>60</sup> In the following I draw on WOLTERSTORFF. *Understanding Liberal Democracy*, pp. 186–193; see also WOLTERSTORFF, Nicholas. *Justice. Rights and Wrongs*. Princeton: Princeton UP, 2009, pp. 323–341.

<sup>61</sup> In the following I draw on WOLTERSTORFF. *Understanding Liberal Democracy*, pp. 193–200.



The belief that the creation of man in God's image (*imago dei*) is the source of dignity has been a part of Christianity throughout almost all of its history.<sup>62</sup> Christological debates about the nature of the second divine person, the incarnate Word, Jesus Christ, have revolutionised the understanding of the human person, since even the poorest people were now supposed to bear the mark of the divine.<sup>63</sup> Each individual member of the human species is regarded as a sacrament.<sup>64</sup> Wolterstorff maintains that *imago dei* cannot be associated with the capacity for rational agency or with exercising a certain role in God's creation. What suffices is standing in some relation to God, and that relation stems from God's desire for friendship with human beings. It is this friendship which bestows upon us the special worth which grounds others' respect to us. That God has chosen human beings is not arbitrary, because it is humans who have the potential to enter such a relationship.

The problem facing the theistic justification of dignity arises from its difficult acceptability by secular authors and citizens affiliated to the liberal tradition, for they reject, or at least abstract from, the central theistic axiom – the existence of God. If modern political philosophy has been built, for many authors, on the assumption that it can be valid even if God does not exist (*etsi Deus non daretur*), theistic justifications bring numerous questions of natural teleology and classical metaphysics back onto the stage. Needless to say, many proponents of the Aristotelian-Thomistic tradition have no issue with this, as they believe that concepts such as dignity and autonomy always entail specific – albeit unacknowledged and latent – metaphysical commitments.<sup>65</sup> Jeremy Waldron has however pointed out that *imago dei* may not provide the best foundation for an egalitarian conception of human dignity. This is because the argument introduces theological disputes concerning the correct understanding of dignity. According to some interpretations, dignity may allow of degrees: while Jesus Christ is the true image of God, the fallen man is more akin to the devil.<sup>66</sup> Some critics have questioned Wolterstorff's claim that the special value of humans arises from

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<sup>62</sup> SCHLAG, Martin. *La dignità dell'uomo come principio sociale : il contributo della fede cristiana allo stato secolare*. Roma: Edusc, 2013; KILNER, James F. *Dignity and Destiny: Humanity in the Image of God*. Grand Rapids: Eerdmans, 2015.

<sup>63</sup> HART, David B. *Atheist Delusions. The Christian Revolution and Its Fashionable Enemies*. New Haven: Yale UP, 2009.

<sup>64</sup> HITTINGER, Russell F. Toward an Adequate Anthropology. Social Aspects of Imago Dei in Catholic Theology. In HOWARD, Thomas A. (ed.). *Imago Dei. Human Dignity in Ecumenical Perspective*. Washington: The CUA Press, 2013, p. 42. Ronald Dworkin (DWORKIN, Ronald. *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom*. New York: Vintage, 1993) once worked out a *secular* conception of the sacrality of human life, even though its implications for constitutional law could not have been more different. In a later work, Dworkin (DWORKIN, Ronald. *Is Democracy Possible Here? Principles for a New Political Debate*. Princeton: Princeton UP, 2006) tried to demonstrate that human dignity concerns two principles. First, each human life has intrinsic value as potentiality; and second, each person has responsibility for realising the value in his/her life. Yet elsewhere, Dworkin (DWORKIN, Ronald. *Justice for Hedgehogs*. Cambridge, Mass.: The Belknap Press of Harvard UP, 2011) expresses the same idea using the principles of self-respect and authenticity. The former stands for the requirement that each person takes his/her own life seriously; the latter states that each person has a responsibility for creating that life according to standards that he/she himself/herself endorses.

<sup>65</sup> For similar views see SCHINDLER, David L. *Ordering Love. Liberal Societies and the Memory of God*. Grand Rapids: Eerdmans, 2011, pp. 73–76.

<sup>66</sup> WALDRON, Jeremy. *One Another's Equals. The Basis of Human Equality*. Cambridge, Mass.: The Belknap Press of Harvard UP, 2017, pp. 184–185.

God's desire for friendship with man. Finally, we can also ask whether, rather than man, the object of respect in Wolterstorff's account is God, for it seems that the ultimate source of moral commitments is respect for God.<sup>67</sup>

For all these reasons, other advocates of the Aristotelian-Thomistic tradition have sought to theorise human dignity independently of metaphysical and theological assumptions. Besides Aristotelians such as Martha Nussbaum<sup>68</sup> who inquires into the various desirable goods necessary for a life worthy of human dignity, this approach includes a number of Thomist authors belonging to the so-called *New Natural Law theory*. According to them, the sole path towards moral truths is ethical reflection. Natural law can be thus discovered and maintained by the very human capacity to deliberate, reflect, and choose. Even those who think there is no God can have good reasons for accepting human dignity and basic human rights,<sup>69</sup> for rational insight can provide us with fundamental moral truths. One such moral truth is the fact that people have a special kind of dignity, which is why other people must not murder them, must consider their welfare in their actions, and must treat them as they themselves wish to be treated by others.<sup>70</sup> The grounding of human dignity requires no characteristics other than man's humanity. What makes a person human is his/her rational nature. Thus, the humanity of man can be defined on the basis of the natural human capacity for conceptual thinking, deliberation, and free choice. These traits express our natural ability to shape our own life. All human beings possess them, even though some cannot presently exercise them. What matters is that these capacities are inherent in a certain class of beings possessing rational nature. Put differently, Lee and George locate the criterion of dignity in the fact that a certain being has a substantial nature which carries with it the given capacities. Whether these capacities are indeed developed and to what degree is a contingent matter, which is why it cannot constitute a condition of ascribing equal dignity to this or that being. Only a specific type of substantial nature can provide such a condition.<sup>71</sup>

New Natural Law theory (NNLT) has prompted strong responses among traditional Thomists.<sup>72</sup> NNLT proponents are said to have misinterpreted the notion of the common

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<sup>67</sup> REDMOND, David. Against Wolterstorff's Theistic Attempt to Ground Human Rights. *Journal of Ethics & Social Philosophy*, 2017, Vol. 12, No. 1, pp. 127–134.

<sup>68</sup> Although Nussbaum accepts numerous elements of the liberal tradition, she links her understanding of human dignity primarily to Aristotle (NUSSBAUM, Martha. *Frontiers of Justice: Disability, Nationality, Species Membership*. Cambridge, Mass.: Harvard UP, 2006, pp. 159–160). This is because she rejects the one-sided focus on rationality and the undervaluation of emotions and basic physical needs she attributes to Kant and his followers. Despite that, we can distinguish her conception from those members of the Aristotelian-Thomistic tradition who equate the grounds of human dignity with the very biological membership in the *Homo sapiens sapiens* subspecies (see SPAEMANN, Robert. *Essays in Anthropology. Variations on a Theme*. Eugene: Cascade, 2010).

<sup>69</sup> GEORGE, Robert P. Natural Law, God, and Human Dignity. In DUKE, George. GEORGE, Robert P. (eds.). *The Cambridge Companion to Natural Law Jurisprudence*. Cambridge: Cambridge UP, 2017, p. 67.

<sup>70</sup> LEE, Patrick. GEORGE, Robert P. The Nature and Basis of Human Dignity. *Ratio Juris*, 2008, Vol. 21, No. 2, pp. 173–193.

<sup>71</sup> A more detailed analysis of expected objections and replies to them would require delving into classical metaphysics (especially Aristotelian-Thomistic realism), which is beyond the scope of this paper.

<sup>72</sup> LONG, Steven A. Fundamental errors of the new natural law theory. *The National Catholic Bioethics Quarterly*, 2013, Vol. 13, No. 1, pp. 105–131.

good (as the central concept of the Aristotelian-Thomistic tradition) which then taints their understanding of dignity. Traditional Thomists see dignity as a property possessed by a certain subject, on the basis of which the subject can receive and enjoy other goods.<sup>73</sup> Dignity which underpins them has then two aspects. While *ontological* dignity is common to all human beings due to their nature, *moral* dignity refers to the perfection that a person pursues in his actions.<sup>74</sup> NNLT authors then miss the proper relation between these two dignities.

The Thomist philosopher Charles De Koninck argues that dignity cannot be equated with freedom (i.e., the capacity to determine one's actions) because freedom, rather than being an end in itself, always points towards a certain end.<sup>75</sup> That end consists in what is naturally best for man. Human beings thus derive their dignity primarily from the end they pursue. Ontological dignity expresses a minimum threshold below which no human being can fall, and is determined by the very membership in the *Homo sapiens sapiens* subspecies.<sup>76</sup> Yet ontological dignity is imperfect dignity, since it relates to a further end the reaching of which constitutes the achievement of moral dignity. It is in this sense that dignity is unequally distributed in our world, because higher dignity belongs to those persons who hold positions or offices of responsibility, or have achieved higher moral dignity. In De Koninck's view, the ultimate foundation of moral dignity is man's capacity to reach the supreme end of the universe – that is, to know and love God. This end constitutes the common good because human beings can share it with others who participate in it. The common good is better than the private good, because it spreads more and causes more good; man can achieve it only if he/she shares it with other people. In both social and private life, the key element is the proper hierarchy of goods towards which human desires are directed. The more virtuous a person is, the more he/she desires the common good of the universe. But how are we to understand the dignity of people who, due to some defect, cannot participate in some of the goods that are otherwise inherent in human beings? Adherents to the Aristotelian-Thomistic tradition think that the ordering of the person's nature to the common good suffices as a basis of personal dignity. The person must be provided with all the assistance necessary to participate in the good to the extent he/she is able, even though this means merely the good of their very existence as a rational being.<sup>77</sup>

## **Conclusion: from cultural wars to a potential consensus?**

The practical conclusions derived by those working in the Aristotelian-Thomistic tradition with respect to various hard cases decided by constitutional courts have been quite similar,

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<sup>73</sup> WALSH, Sebastian. *The Primacy of the Common Good as the Root of Personal Dignity in the Doctrine of Saint Thomas Aquinas*, Roma: Pontifical University of St. Thomas Aquinas, 2006, p. 279.

<sup>74</sup> WILLIAMS. *Who is My Neighbor?*, p. 156.

<sup>75</sup> MCINERNEY, Ralph (ed.). *The Writings of Charles De Koninck. Volume II*. Notre Dame: University of Notre Dame Press, 2008.

<sup>76</sup> SPAEMANN. *Essays in Anthropology*, p. 60.

<sup>77</sup> WALSH. *The Primacy of the Common Good*, p. 290.

save for a few exceptions.<sup>78</sup> To the extent that they address moral controversies, the majority of the involved authors conspicuously converge in their views on (1) issues of life and death (such as assisted suicide, euthanasia, cloning, abortions, embryonic stem cell research); (2) the understanding of marriage (nowadays this concerns primarily same-sex marriage); and (3) the status of religion in the public square (including the problem of religious exceptions, or the justification of religious liberty as such).<sup>79</sup> Authors belonging to the liberal tradition who build on the modern understanding of autonomy arrive at more or less opposite conclusions. All three issue areas have been the focus of the so-called *culture wars* which, sparked originally by disputes over sexual morality, have gradually spilled over to the other areas.<sup>80</sup> In many a case, the result has been conceptual innovations and transformation of basic social institutions. Critics see these changes as indicators of the crisis of liberal democracy. In their view, chaos in society is caused by the destruction of settled meanings of terms; the confusion in people's minds eventually leads to societal disruption. In contrast, advocates of these changes perceive their struggle as arising from their moral commitments to values such as equality and freedom. Social change then represents just another step towards greater human emancipation. The continuation of the debate between both sides of the barricade becomes extremely difficult.

Returning to the original question framing this paper – that is, the possibility of a consensus on the concept of human dignity despite the ongoing dispute between two competing moral traditions –, the possibilities seem to be fairly limited. The liberal and Aristotelian-Thomistic traditions not only clash over the grounding of this fundamental value of constitutional orders, but also diverge with respect to how their preferred conceptions of dignity speak to the solutions of numerous moral and legal issues. The very presence of these conflicts pushes some representatives of the respective traditions towards strong, compromise-blocking conclusions. For example, the influential Anglican theologian John Milbank has been led to argue that the liberal and Aristotelian-Thomistic traditions pursue incompatible conceptions of rights and democracy. The radically different philosophical assumptions of the Ancients and the Moderns entail completely antagonistic politics and policies. Accordingly, Milbank

<sup>78</sup> The differences are most pronounced with authors such as Nussbaum (see NUSSBAUM, Martha. *Hiding from Humanity: Disgust, Shame, and the Law*. Princeton: Princeton UP, 2004; NUSSBAUM, Martha. *From Disgust to Humanity: Sexual Orientation and Constitutional Law*. Oxford: Oxford UP, 2010) who find their inspiration solely in Aristotle while accommodating elements of the liberal tradition.

<sup>79</sup> See e.g., GEORGE, Robert P. *The Clash of Orthodoxies. Law, Religion, and Morality in Crisis*. Wilmington: ISI Books, 2001.

<sup>80</sup> Whereas Aristotelian-Thomistic authors claim that human life is good in itself, they see liberals as ultimately – and often contrary to their own official commitments – ascribing only instrumental value to life. This means that liberals are willing (typically in cases concerning life and death) to balance the right to life against other human rights (such as autonomy or privacy), or, in the last analysis, to dispute the legitimacy of interests of persons who have not developed (any) rational capacities. The second domain of friction concerns sexual morality, with the same-sex marriage question being especially charged. The Aristotelian-Thomistic tradition sees procreation as a necessary though not sufficient condition for marriage (understood as a union of mutually self-sacrificing persons); liberals on the other hand tend to perceive marriage as an arrangement the main purpose of which is the satisfaction of emotional ties between persons. With respect to religious liberty, while many members of the Aristotelian-Thomistic tradition directly link the liberty to human dignity, liberals are wont to dissolve religious liberty within other constitutionally protected rights such as those to liberty of conscience, assembly, association, or speech.

suggests abandoning the notion of rights in favour of dignity and associated concepts such as the good, solidarity, and subsidiarity. This solution thus amounts to a return to personalism and its corporatist pendant.<sup>81</sup> In contrast, Brian Leiter merely reproduces commonly held belief among contemporary liberal philosophers when he labels present-day Thomism as a ‘bankrupt’ philosophical sect.<sup>82</sup> The majority of liberals do not even attempt to engage the arguments of Aristotelian-Thomistic authors, apart from handful of exceptions (such as the abovementioned Jeremy Waldron, George Kateb, or Michael Rosen).

In the face of these clashes over human dignity, are there any resources pointing towards convergence on this central value of the constitutional order? Leaving for the moment disputes in political and constitutional theory and setting our sights at constitutional realities, we can follow Paolo Carozza in pointing out that human experience has eventually settled around a practical consensus on a minimal core of human dignity shared by all traditions. Thus, extrajudicial executions, arbitrary deprivations of personal liberty, systematic discrimination, disappearances, torture, or inhumane prison conditions must be considered illegitimate.<sup>83</sup> The nature of their vocation leads political and constitutional theorists to focus on controversies and ultimate justifications of the respective positions, thus overlooking this minimal consensus. However, the consensus should not be underestimated, argues Carozza, because we cannot guarantee that even mature liberal democracies will always succeed in keeping at bay the evil that lies dormant in human heart. Nevertheless, our analysis of the dispute between the Aristotelian-Thomistic and liberal traditions suggests one important practical lesson to be drawn for constitutional jurisprudence:<sup>84</sup> Should judges push their controversial moral beliefs rooted (without honest acknowledgement) in either of these competing traditions, they will alienate a part of society from the project called liberal democracy. Under certain conditions, and in conjunction with other factors (economic, geopolitical, or social), the ramifications of such alienation may prove inimical to the legitimacy of liberal democracies, or even a source of their crisis.

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<sup>81</sup> MILBANK. *Dignity Rather than Rights*, p. 205.

<sup>82</sup> LEITER, Brian. *Why Tolerate Religion?* Princeton: Princeton UP, 2014, p. 90.

<sup>83</sup> CAROZZA, Paolo G. Human Dignity and Judicial Interpretation of Human Rights: A Reply. *The European Journal of International Law*, 2008, Vol. 19, No. 5, p. 936.

<sup>84</sup> For details see CAROZZA, Paolo G. Human Dignity in Constitutional Adjudication. In GINSBURG, Tom. DIXON, Rosalind. *Comparative Constitutional Law*. Cheltenham: Edward Elgar, 2011, pp. 467–468.