

### **III.**

## **Human Dignity**



# Human Dignity: An undefined idea?

## In search of the concept's many facets through the path of history and philosophy

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“What is man, that you keep him in mind? The son of man, that you take him into account?”

(Psalms 8:5)

### Part I: inherent dignity and its facets

#### 1. Introductory remarks.

The present paper deals with the concept of human dignity and with the fundamental question it raises in our pluralistic societies. We examine whether it is still possible to identify a common understanding of inherent dignity or if we should agree with the scholars who consider it an empty idea.<sup>2</sup>

Since dignity is strictly connected with human rights, we may start our investigation by considering three fundamental charters: *the Declaration of the Rights of Man and of the Citizen* (French Revolution, 1789), *the Declaration of Independence* (American Revolution, 1776), and *the Universal Declaration on Human Rights* (U.N.O. Declaration, 1948).

*The Declaration of the Rights of Man and of the Citizen* (1789) contends that “men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good”<sup>3</sup>. According to Hannah Arendt, the French Declaration was a turning point in history because it meant that man rather than God’s command or hierarchies of historical custom should be the source of human law. “Man himself was their [the Rights of Man’s] source as well as their ultimate goal.”<sup>4</sup> Because they were seen as “inalienable”, no higher authority was needed; being in themselves the higher authority, the whole legal system was supposed to rest on them and on the sovereignty of the citizens’ own decisions. At the same time, however, this source of government was the

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<sup>1</sup> L. Violini wrote “First Part: The inherent dignity and its facets”. M. Maddalena Giungi “Second Part: Three current readings of human dignity”.

<sup>2</sup> C. McCrudden, *Human dignity and judicial interpretation of human rights*, in *European Journal of International Law*, 2008, 19 (4), pp. 655-724; against the skeptical position see P. Carozza, *Human Dignity in Constitutional Adjudication*, in T. Ginsburg and R. Dixon, *Research Handbook in comparative constitutional law*, Edward Elgar 2011, pp. 459-472.

<sup>3</sup> Declaration of the Rights of Man and of the Citizen (1789), Art. 1.

<sup>4</sup> H. Arendt, *The Origins of Totalitarianism*, Andre Deutsch, 1986, p. 277 ss.

people of a particular territory, who could exercise sovereignty not individually but collectively. Therefore, it became clear that the so-called inalienable rights of man could only find their guarantees in the collective rights of the people to sovereign self-government<sup>5</sup>.

In a different perspective, the *American Declaration of Independence* states: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness”<sup>6</sup>. Here the centrality of man and also of his/her inalienable rights emerge, but this human being is understood as deeply connected with his/her Creator because he/she is created in His own image.

*The Universal Declaration of Human Rights* (1948) assumes both these perspectives by introducing a new juridical concept, the concept of human dignity: the Preamble of the Declaration opens with the statement that “the recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.

Comparing these three documents, human dignity seems, at first glance, only a recent addition to human rights discourse, an addition made out of the concern that freedom and equality were insufficient to guarantee justice and peace in the world. This insight was deeply rooted in the drafters’ understanding of the U.N. Declaration: they faced the tragedies of totalitarianism and war, and they were well aware of the fact that mankind needed something more consistent and fundamental than a simple list of rights. Mankind needed a clear statement with solid moral roots to be recognized by all the civilized states, a common basis to reconstruct a more human universal society.

Despite the high moral inspiration that underlies the idea of human dignity, the concept itself needs to be continuously understood and clarified in our changing cultural world. Its complexity is undeniable as revealed by its historical, philosophical and legal roots<sup>7</sup>.

In this paper, we will examine some of the many historical and philosophical perspectives of dignity through their connections with dignity’s legal aspects. For the sake of simplicity, we will reduce the complexity of the concept to two facets that reflects

<sup>5</sup> Cf. B. Cotter, Hannah Arendt and “the Right to Have Rights”, in Anthony F. Lang & John Williams (ed.), *Hannah Arendt and International Relations: Readings Across the Lines*, Palgrave Macmillan, 2005, pp. 95-112; Jeffrey C. Isaac, *A New Guarantee on Earth: Hannah Arendt on Human Dignity and the Politics of Human Rights*, *The American Political Science Review* Vol. 90, No. 1 (Mar., 1996), pp. 61-73.

<sup>6</sup> The American Declaration of Independence (1776), Preamble.

<sup>7</sup> “Since the mid-twentieth century, the idea of human dignity has emerged as the single most widely recognized and invoked basis upon which to ground the idea of human rights. Simultaneously dignity is also used as an exceptionally widespread tool in legal discourse which concerns the content and scope of specific rights. It has become a pervasive part of the fabric of constitutional law worldwide”. P. Carozza, *Human dignity in constitutional adjudication*, in Tom Ginsburg and Rosalind Dixon, Eds., *Research Handbook in Comparative Constitutional Law*, Edward Elgar publishing Ltd, 2011, pp. 459 - 471; N. Rao, *Three concepts of dignity in constitutional law*, *Notre Dame Law Review*, Vol. 86, n. 1, 2011, pp. 183-271.

the two main sides of the human person, who is in himself both an *individuum* and a network of relations<sup>8</sup>. Legal cases, philosophical texts, and even historical perspectives, show that dignity as well endows an express facet, related to the equal belonging of each person to the human family, and an implied facet, rooted in his nature. As we will see, different understandings of the human person affect the legal understanding of dignity as well as the protection of rights in our contemporary legal discourse.

## 2. *The dual facets of dignity in the historical origins of the concept.*

The two facets of dignity mentioned above may be identified in the very origins of the idea of human dignity in the western culture that dates back to the Roman legal tradition. Accordingly, only persons with a particular status were worthy of *dignitas*. The Latin term means the position of a person as belonging to a specific social group. It was well defined in its characteristics and specifically referred to a distinct group of people<sup>9</sup>.

In the same era, though, Cicero and the Stoics made reference to the dignity of human beings as human beings, irrespective of a legal definition of the status. In other words, this understanding of *dignitas* did not depend on any particular legal status in the community but rather on the fact that a human being was born free (not as a slave), and was rational. For this reason, nature and not legal power was considered the basis for human dignity<sup>10</sup>.

Since its beginning, the Christian tradition<sup>11</sup> developed this second understanding of dignity, by extending it to every person according to St. Paul assumption: “For as many of you as have been baptized in Christ, have put on Christ. There is neither Jew nor Greek: there is neither bond nor free: there is neither male nor female. For you are all one in Christ Jesus” (Galatians 3:27-28; cf. 1 Corinthians 12:13). Once again, not the legal system but rather nature is here considered the origin of the dignity of men and his/her rights.

As modern times approached, the French revolution imported both the ideas of liberty and equality into the conception of rights, as it is stated in *The Declaration of the*

<sup>8</sup> M. Cartabia, *The Age of “New Rights”*, <http://www.nyustraus.org/pubs/0910/docs/Cartabia.pdf>.

<sup>9</sup> It is still possible to find traces of that idea of dignity as *status* in international law, where States and ambassadors enjoy a “particular” status due to their specific diplomatic role bound to the sovereignty of the State. An interesting current perspective which connects human dignity and *status* is present in J. Waldron, *Dignity, Rank and Rights*, Oxford University Press, 2012.

<sup>10</sup> For a complete historical overview of human dignity see, U. Vincenti, *Diritti e Dignità Umana*, Laterza, 2009. See also, O. Sensen, *Human Dignity in historical perspective: The contemporary and traditional paradigms*, *European Journal of Political Theory* January 2011 vol. 10, no., pp. 1 71-91; G. Kateb, *Human Dignity*, Harvard University Press, 2011; D. Kretzmer, E. Klein, *The Concept of Human Dignity in Human Rights Discourse*, Kluwer Law International, 2002.

<sup>11</sup> Cf. M. Novak, *The Judeo-Christian Foundation of Human Dignity*, *Journal of Markets & Morality* 1, n. 2 (October 1998), 107-121; R. Spaeman, *Personen. Versuche über den Unterschied zwischen “etwas” und “jemand”*, Klett-Cotta, Stuttgart 1996; É. Gilson, *El Espíritu de la Filosofía Medieval*, Ediciones Rialp, 2004, pp. 177-212.

*Rights of Man and of the Citizen* (1789). The French ideas of liberty and equality were in some way a new understanding of the two facets of dignity even though dignity was not explicitly mentioned<sup>12</sup>. The Declaration understands liberty as man's freedom from every social and political restriction (implied facet)<sup>13</sup> and equality as related to the equal legal value of every member of the community (express facet)<sup>14</sup>.

It was not until the important cultural transition from the 19<sup>th</sup> to the 20<sup>th</sup> century that equality became something more than a legal concept. The general public opinion, at that time, started to perceive the state's obligation toward its citizens as wider than the protection of their individual liberties; the state's commitments were extended to guarantee an equal distribution of economic resources to different strata of society and weaker social groups. As a result of this shift new sets of rights were created (i.e. social rights which address situations of social weakness by requiring the state to provide services to ensure not only formal but also material equality) and old sets of rights extended (i.e. political rights, which ensure people's ability to participate in the civil and political life of the state without discrimination or repression)<sup>15</sup>.

The path of rights, from a liberal state to a social state, was not without difficulties and impediments. In the 20<sup>th</sup> century, the entire world was subjected to two World Wars, several totalitarianisms and to the use of nuclear weapons. These dramatic events revealed that disregard for rights and liberties was one of the main dangers for peace and the people's welfare. As a result, after the war, the United Nations General Assembly drafted the Universal Declaration of Human Rights in 1948. The aim of the Declaration was to reformulate fundamental rights in light of a principle of human dignity. This is expressed in the Declaration's first article: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood". Mary Ann Glendon states that at the very end of the drafting process, and without much discussion, the Commissioners made a statement about the basis of human rights in the Preamble. As a consequence of this fundamental agreement, the word "dignity" appears in many key points of the

<sup>12</sup> See J. Habermas, *The Concept of Human Dignity and the Realistic Utopia of Human Rights*, *Metaphilosophy*, Vol. 41, No. 4, July 2010m pp. 465 – 480.

<sup>13</sup> The evidence of this new perspective was expressed in the *Declaration of Human and Civic Rights* of 26 August 1789, art. 4: "Liberty consists in being able to do anything that does not harm others: thus, the exercise of the natural rights of every man has no bounds other than those that ensure to the other members of society the enjoyment of these same rights. These bounds may be determined only by Law".

<sup>14</sup> The French Declaration marked the rise of the Liberal State from the ashes of the Absolutist State. Customary laws were no longer the basis of social order. Instead, written laws, made by parliaments, replaced them. Indeed, in France the new written law became the main actor of the legal order. Medieval customary law had to be made to suit the generality and abstract criteria that characterized parliament's written law an expression of equality among its citizens. The characteristics of generality and abstractness of the written law in Revolutionary France ensured the separation between State and society and wide spheres of individual liberty, which the legal system had to recognize and protect. Cf. P. Grossi, *Mitologie giuridiche della modernità*, Giuffrè, 2001.

<sup>15</sup> Cf. G. Bognetti, *La Divisione dei Poteri. Saggio di Diritto Comparato*, Giuffrè, 2001.

Declaration so that many scholars believe it represents the Declaration's ultimate value<sup>16</sup>. It is worth noting that in the Declaration itself the concept of dignity encompasses both the individual status of the person and his claim to be recognized as an equal member of the human family as a whole<sup>17</sup>.

### 3. *Making widespread the use of the concept from international to constitutional law.*

In emphasizing the weight of Universal Declaration on Human Rights within the international legal order, Christopher McCrudden states that: "the Universal Declaration on Human Rights was pivotal in popularizing the use of dignity or human dignity in human rights discourse. In the following years dignity became a commonplace in legal texts which provide human rights protections"<sup>18</sup>. After the Second World War, between 1945 and 1950, three nations, which had an important role as liable of war's horrors, incorporated dignity in their new constitutions<sup>19</sup>. The dignity language became prominent in the 70's due to the fall of the dictatorships in Greece, Spain and Portugal and in the early 90's as a result of the fall of the Berlin Wall and of the transition to democracy in Central and Eastern Europe<sup>20</sup>. The German constitution and its interpretation by the German Court deeply influenced the drafting of these constitutions; a such influence became also apparent beyond Central and Eastern Europe playing an important role in the drafting of the new post-apartheid South African constitution and of Israel's Basic Law on Human Dignity. Moreover, if we consider the International level, dignity is now regularly integrated in human rights charters, both general and specific.<sup>21</sup> Therefore, McCrudden concludes that "Dignity's appearance strongly suggests a remarkable degree of convergence on the perception of it as central organizing principle"<sup>22</sup>.

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<sup>16</sup> See M. A. Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, Random House 2001.

<sup>17</sup> "Eschewing—in its quest for universality — explicit reliance on Divine inspiration or on Natural Rights, the Declaration provided the idea of human rights with a universally acceptable foundation, an ur principle, human dignity"; L. Henkin, *Human Rights: Ideology and Aspiration, Reality and Prospect*, in Samantha Power and Graham Allison (eds.), *Realizing Human Rights: Moving from Inspiration to Impact*, St. Martin's Press, New York 2000, Ch. 1. See also on the concept of equality: E.W. Böckenförde, *Geschichte der Rechts- und Staatsphilosophie. Antike und Mittelalter*, Tübingen: Mohr Siebeck, 2002.

<sup>18</sup> McCrudden, Human dignity and judicial interpretation of human rights, in *European Journal of International Law*, 2008, 19 (4), p. 655.

<sup>19</sup> In 1946 Japan, in 1948 Italy, and in 1949 West Germany incorporated dignity into their constitutional documents.

<sup>20</sup> McCrudden, *Supra* note 18, p. 673.

<sup>21</sup> See the preamble of the Slavery Convention of 1956, which refers to the UN Charter's, the International Labour Organization (ILO) Conventions, the International Covenants on Civil and Political rights, on Economic Social and Cultural Rights and on the Elimination of All Forms of Racial Discrimination (1966).

<sup>22</sup> McCrudden, *Supra* note 18, p. 671.

Dignity has also come to be used widely in judicial interpretation and the application of human rights texts in many different ways and meanings. In *Dawood v. Minister of Home Affairs*, a South African Constitutional Court decision, this attitude of constitutional jurisprudence on dignity is described in this way: “Human dignity [...] informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. [...] Dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.”<sup>23</sup>

#### 4. *Clarifying the meaning of human dignity through philosophy and legal cases: an introduction to the metaphysical argument.*

The different legal understandings of dignity, which the decision quoted above clearly identified, were deeply influenced, throughout history, by diverse philosophical views of what it means to be a human being.

A prime example of this phenomenon is the evolution of capital punishment in Ancient Israel under the conception that man is made in the image of God. This understanding of human being derived its normative meanings from that statement: “Whoever sheds the blood of man by man shall his blood be shed, for in God’s image did He make man” (Genesis 9: 1-8). This verse expresses a paradox: on one hand, it is referred to the supreme worth of man and the sanctity of his life, and on the other hand it justifies the death penalty.

The early rabbinic exegesis resolved the paradox of the quoted biblical passage concluding that “the death penalty is not to be applied, for every damage inflicted upon the divine image (i.e., murder) cannot justify additional damage to that image (by capital punishment).”<sup>24</sup>

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<sup>23</sup> *Dawood and Another v Minister of Home Affairs and Others ; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* (CCT35/99) [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837 (7 June 2000).

<sup>24</sup> “In the past the question of image had specific legal consequences, for instance as to the way the State had to execute criminals; in ancient Israel, for example, murders were executed in a manner such that serious damage was not inflicted upon the victim’s body. We can consider some examples: the Tannaim replaced the Biblical capital punishment of burning with internal burning whereby a flaming wick was thrown into the mouth of the convict [...] likewise, the biblical punishment of stoning that crushes the convict’s body was changed to the convict being pushed from a limited height (twice the height of a male person); thereby again limiting the corporal damage inflicted”. Cf. Loberbaum, *Blood and Image of God: on the sanctity of life in biblical and early rabbinic law, myth, and ritual*, in D.



This idea that man is made in the image of God and therefore capital punishment is something that can destroy his image, in some way survives today in the attitude of many western countries that consider death penalty against human dignity and so abolish it by law. In other countries many court cases have struck down the death penalty without waiting for legislative decision. In 1991 the Canadian Supreme Court wrote: "If corporal punishment, lobotomy and castration are no longer acceptable and contravene section 12 then the death penalty cannot be considered to be anything other than cruel and unusual punishment. It is the supreme indignity to the individual, the ultimate corporal punishment, the final and complete lobotomy and the absolute and irrevocable castration. As the ultimate desecration of human dignity, the imposition of the death penalty in Canada is a clear violation of the protection afforded by section 12 of the Charter. Capital punishment is *per se* cruel and unusual".<sup>25</sup> The Hungarian Constitutional Court stated a similar argument in a decision in 1990.<sup>26</sup> The judges considered that capital punishment imposes a limitation of the essential content of the fundamental rights to life and human dignity. The Court stressed the relationship between the right to life and dignity and the absolute nature of these two rights taken together as a source of all rights<sup>27</sup>.

The "*imago dei*" argument<sup>28</sup>, which is an example of a metaphysical understanding of dignity, is not only important to show the connections among law, philosophy and anthropology (that we will explore in the next paragraphs), but also to reveal the two

Kretzmer and E. Klein (edited by), *The Concept of Human Dignity in Human Rights Discourse*, The Hague London -New York, Kluwer Law International, 2002, pp. 55-85.

<sup>25</sup> *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779; On November 15, 1983, Joseph Kindler was found guilty in the state of Pennsylvania of first degree murder, conspiracy to commit murder and kidnapping. Following his conviction, the jury recommended the death penalty. Before the sentence was imposed, Kindler escaped prison and fled to Canada. In April 1985, Kindler was arrested in Quebec and was charged with offences under the Immigration Act and the Criminal Code.

In July 1985, the United States made a request for the extradition of Kindler pursuant to the Extradition Treaty between Canada and the United States of America. The extradition judge allowed the extradition application and committed Kindler to custody. Kindler's application for habeas corpus to review the extradition judge's decision was dismissed. The Minister of Justice then ordered Kindler's extradition pursuant to s. 25 of the Extradition Act without seeking assurances from the U.S. that the death penalty would not be imposed. The Trial Division and the Court of Appeal of the Federal Court dismissed applications by Kindler to review the Minister's decision.

<sup>26</sup> Hungarian Constitutional Court, (23/1990), (X.31).

<sup>27</sup> The same idea is present in the South African jurisprudence when the 6th June 1995, the Constitutional Court declared the death penalty to be incompatible with the prohibition of "cruel, inhuman or degrading treatment or punishment" under the country's interim constitution (*Makwanyane and Mchunu v. The State*, paragraphs 95, 146). Eight of the eleven judges also found that the death penalty violated the right to life. The judgment had the effect of abolishing the death penalty for murder. *State v. Makwanyane and Mchunu*, 1995 (6) BCLR 665 (CC).

<sup>28</sup> For an interesting reflection on imago dei argument see J. Waldron, *Human Rights in Judaic-Christian Thought*, 2009, in [http://www.law.nyu.edu/ecm\\_dlv4/groups/public/@nyu\\_law\\_website\\_news\\_media/documents/documents/ecm\\_pro\\_063948.pdf](http://www.law.nyu.edu/ecm_dlv4/groups/public/@nyu_law_website_news_media/documents/documents/ecm_pro_063948.pdf); *The Image of God: Rights, Reason, and Order* (November 30, 2010). NYU School of Law, Public Law Research Paper No. 10-85. Available at SSRN: <http://ssrn.com/abstract=1718054>.

facets of human dignity. The biblical paradox, that we have analyzed above, expresses on one hand the implied facet of dignity, that means man as such has an undeniable worth and his life is sacred and inviolable; on the other hand, it expresses the Bible verse from Genesis, justifying the death penalty, is related to the express facet of dignity; in other words man's undeniable worth is preserved by the community life codified through the legal system.

5. *Philosophy and case law: the humanistic perspective. The rise of autonomy of man and its undeniable limits.*

In an attempt to identify the source of human dignity, the humanists (i.e. Grotius) established man as the sole creature endowed with reason, liberty and free will. In *The Truth of the Christian Religion*, Grotius's most important book on religion, published after *The Law of War and Peace*, he demonstrates his persistence in the tradition of Renaissance and Christian Humanism by stating: "The almighty [...] created [...] Man [...] endowed with liberty of action"<sup>29</sup>. "Man is endowed with excellency of understanding, and liberty to choose what is morally good and evil"<sup>30</sup>. At the same time he starts to underline the separation between man's and God's power giving more weight to men's capacities ("Dominion was given to men over his action"<sup>31</sup>).

This concept of human dignity, as a synthesis of reason and liberty, grounds the central existential claim of modernity: man's autonomy, the right to self-determine his life, the right of privacy and the duty of the State to not interfere with the free expression of man's will. A similar idea appears in the *Prolegomena of De Iure Belli ac Pacis*<sup>32</sup>. Here Grotius lays, by his famous expression "*etiamsi daremus*", the starting point of a new "secular and modern"<sup>33</sup> understanding of natural law. In other words, according to his perspective, we achieve the principles that lead our actions (ethical life) and our social life (political and juridical life) by virtue of our nature, that is rational, ("the mother of rights is human nature"<sup>34</sup>) rather than under our dependence, as creature, on God: "What we have been saying would have a degree of validity even if we were to grant [*etiamsi daremus*] that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to him"<sup>35</sup>. "[...]The law of nature is a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or

<sup>29</sup> Hugo Grotius, *The Truth of Christian Religion: in Six Books*, printed in English for Rich, Roystone, Bookseller to His Most Sacred Majesty, at Angel in Amen Corner, London 1680, vol. I, sec.VII, pp. 15-16.

<sup>30</sup> *Ibi*, vol. II, sec. X, p. 62.

<sup>31</sup> *Ibi*, vol. I, sec. XXIII, p. 44.

<sup>32</sup> H. Grotius, *De Iure Belli ac Pacis libri tres*, trans. W.K. Kelsey, Oxford University Press, 1925.

<sup>33</sup> J. Finnis, *Natural Law Natural Rights*, Oxford University Press, 2011, p. 43.

<sup>34</sup> Grotius, *supra* note 32, par. 16.

<sup>35</sup> *Ibi*, par. 11.

enjoined”<sup>36</sup>. Therefore, even if God is not still completely eliminated in Grotius’s view on man, however he strongly affirms that “autonomy of human action is not entirely managed by the will of God because not even God can change the binding nature of natural law”<sup>37</sup>.

We can find a similar meaning of human dignity, as expression of individual autonomy, in many decisions of the US Supreme Court on abortion. In American law, the Supreme Court has afforded constitutional protection to a range of personal decisions relating to marriage, procreation, contraception, abortion and family relationships among others. Yet these decisions, being grounded in privacy, protect individual freedom from an undue state’s interference but grant very poor attention to the link between this personal decision and the community life.<sup>38</sup>

For instance, in the case *Thornburgh v. American College of Obstetricians and Gynecologists* (1986)<sup>39</sup>. Justice Blackmun’s opinion emphasized women’s rights by arguing: “Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman’s decision – with the guidance of her physician and within the limits specified in *Roe* – whether to end her pregnancy. A woman’s right to make that choice freely is fundamental.”

An analogous idea of individual autonomy is identifiable in another case *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992)<sup>40</sup>, which challenged the constitutionality of several Pennsylvania State limitations regarding abortion, the Supreme Court of the United States’ plurality opinion upheld the constitutional right to have an abortion but lowered the standard for analyzing restrictions of that right, invalidating one regulation – spousal consent – but upholding the others (24 hours waiting before performing the abortion, consent of the parents for teenagers). The Court stated: “Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, childrearing and education. These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the XVth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of universe and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood, were they formed under compulsion of the State [...]”.

Despite the fact that, from the American point of view, rights can be exercised mainly according to the values that the single person has recognized, case law never

<sup>36</sup> *Ibi*, I, i, x, pars 1.

<sup>37</sup> J. Miller, *Hugo Grotius*, The Stanford Encyclopedia of Philosophy (Fall 2011 Edition), Edward N. Zalta (ed.), <http://plato.stanford.edu/archives/fall2011/entries/grotius>. See also, S.J.B. Elshtain, *Sovereignty: God, State and Self*, Basic Books, New York (NY) 2008.

<sup>38</sup> E.J. Eberle, *Dignity and Liberty: Constitutional Visions in Germany and the United States*, Praeger, 2002, p. 125 e ss.

<sup>39</sup> *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

<sup>40</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

considered individual autonomy as absolute. Even in the *Roe v. Wade*<sup>41</sup> decision, the most liberal expression of the right of woman to have an abortion, overturning a Texas interpretation of abortion law and making abortion legal in the United States, judges admitted that some types of limitation may legally be placed by law to that right as a matter of measure and not of quality. The Court wrote: “Most of these courts have agreed that the right of privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant.”

As we have seen, even when the most extreme importance is given to the autonomy as the deepest source of human dignity<sup>42</sup>, community values remain present confirming the idea that human dignity keeps its complexity and it is never unilaterally definable.

### 6. Kant's definition of human dignity and the Aviation Security Act case.

Kant granted to the idea of human dignity its “current canonical expression”<sup>43</sup>. As a general point of reference, when we look for a secular, temporal justification of the basis of human dignity, independent of any metaphysical justification, we can ascertain that dignity is understood as a value which is vested in each individual human being: “The dignity of man in the sense of absolute value of self-legislation and of the position in the kingdom of ends (the earlier understanding of the Groundwork)<sup>44</sup>, refers, just as dignity of man in the sense of “End-in Oneself-ness” (the later understanding of the Doctrine of Virtue)<sup>45</sup>, exclusively to the inner obligation by the moral law. This obligation only encompasses the core of the inner moral “acting” or obligation and is prior to all external freedom to act to which politics and law are restricted, according to Kant’s liberal Enlightenment philosophy”<sup>46</sup>.

Accepting this understanding of dignity, mainly as implied dignity, it seems that Kant’s humanism precludes embracing any ideology that can reduce man to a means in order to fulfill the ends of a collective community. Kant’s target is the utilitarian view which makes the man slave of external determination (state, community, other men, [...]). According to this perspective every man is expendable for the sake of the major

<sup>41</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>42</sup> See L. Violini, A. Osti, *Le linee di demarcazione della vita umana*, in M. Cartabia (edited by), *I diritti in azione*, Il mulino 2007, pp. pp. 185-238; Violini, *Bioetica e laicità*, in A. Pace (edited by), *Problemi pratici della laicità agli inizi del secolo XXI* (Atti del XXII Convegno nazionale dell’Associazione Italiana dei Costituzionalisti, Napoli, 26-27 ottobre 2007), Padova, Cedam, 2008, pp. 221-274.

<sup>43</sup> Habermas, *Supra* note 12, p. 465.

<sup>44</sup> I. Kant, *Groundwork of the Metaphysics of Morals*, M. Gregor (Editor) and C. M. Korsgaard (Introduction), Cambridge University Press, April 28, 1998.

<sup>45</sup> Kant, *The Metaphysics of Morals*, M. J. Gregor (Editor) and R. J. Sullivan (Introduction), Cambridge University Press, May 31, 1996.

<sup>46</sup> D. Von der Pfordten, *On the Dignity of Man in Kant, Philosophy*, 84, 2009, p. 371 e ss.

utility. Therefore, it follows that the intrinsic value of a person is secondary, if it is compared to the consequences of his actions. Kant intends to reestablish the centrality of man as such, who is free from all kinds of external determinations and who can give law to himself in virtue of his reason. So, man has an intrinsic value which makes him irreducible to every end (in this view we can recognize echoes of Grotius's conception of dignity). This understanding of human dignity, that is mainly referred to the dignity of the individual, doesn't exclude the express facet of dignity, that means its relational character. The Kantian categorical imperative, points out how men have to treat each other (not as means but as ends) by universalizing the value of men as such ("act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end"<sup>47</sup>). In this way it seems that Kant deduces the basis of a community life (express facet) from the fundamental value of the absolute worth of human being (implied facet).

We can still find this "unmistakable echo of Kant's categorical imperative"<sup>48</sup> in a case decided by the Federal Constitutional Court of Germany<sup>49</sup>. In 2006, the court's first senate expressed that the *Aviation Security Act (Luftsicherheitsgesetz)* was incompatible with the Basic Law and hence invalid. Previously, in January 2003, a mentally confused sport pilot threatened to crash his plane into a skyscraper of the city of Frankfurt am Main, provoking the approbation by the German parliament of the *Aviation Security Act* which allowed German military forces to legally intercept aircraft. The Act established that in order to prevent a severe incident, the armed forces should be authorized to compel aircrafts out of German airspace, to force down aircrafts and to threaten the use of force by firing aircrafts, was only permissible if the respective aircraft was intended to be used as a weapon against human lives. Under Section 13 of the *Aviation Security Act* the defense minister can command to shoot down a civilian aircraft if "in the circumstances, it can be assumed" that the aircraft was to be used against human life. Immediately after that *The Aviation Security Act* came into effect in 2005, it was challenged by four lawyers, a patent attorney, and a flight captain, who successfully lodged a constitutional complaint against it.

This case involved the following fundamental questions: "whether the law can empower an official to lawfully sacrifice the lives of innocent people for the presumptive sake of the public's safety; whether the state can legally decide upon the life of those in the plane; whether there is a constitutional duty for the state to protect its citizens, which, in turn, may require such a power; whether the death of those innocent citizens in the aircraft can be justified with the presumptive rescue of those on the ground, which otherwise would have to die, if the hijacked airplane were to be allowed to hit its

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<sup>47</sup> See *Supra* note 44.

<sup>48</sup> *Supra* note 42.

<sup>49</sup> BVerfGE 115, 118, 1 BvR 357/05, 15 February 2006.

target; indeed whether the state, in a case of emergency, is allowed to weigh the lives of those in the plane against those in the target areas<sup>50</sup>.

According to the Court, the section 14 of the *Air-transport Security Act* showed no respect for the well-being of the innocent people on the airplane and though it is incompatible with Article 1 of the Basic Law, which says that “human dignity is inviolable”. The legislature, effectively, decided to sacrifice the passengers’ lives in the name of the public safety, if the aircraft becomes a weapon. Such a legal treatment handles the people on the aircraft as part of it rather than considering their constitutional status of individuals, bearers of dignity and of inalienable rights. In other words, “when the law takes their death – the death of innocent passengers – into account as unavoidable damage for the benefit of other objectives, it transforms persons into things and delegalizes them. In this way the state denies the protection of the law to those who, as passengers in the aircraft, ought to be protected. Doing this, the Court reasoned, the law denies to those on board the value the constitution attributes to every human being<sup>51</sup>.”

Jeremy Waldron described this case as a “clear example of the legal use of the Kantian conception of dignity as a simple conception of human worth precluding trade-offs”<sup>52</sup>. This idea is very clear in the following court’s argument: “[...] the assessment that the persons who are on board a plane that is intended to be used against other people’s lives within the meaning of § 14.3 of the *Aviation Security Act* are doomed anyway cannot remove its nature of an infringement of their right to dignity from the killing of innocent people in a situation that is desperate for them which an operation performed pursuant to this provisions as a general rule involves. Human life and human dignity enjoy the same constitutional protection regardless of the duration of the physical existence of the individual human being. Whoever denies this or calls this into question denies those who, such as the victims of a hijacking, are in a desperate situation that offers no alternative to them, precisely the respect which is due to them for the sake of their human dignity.”<sup>53</sup>

In conclusion, Kant’s conception of human dignity is connected to the idea of an inner, unconditional and incomparable value of human being. At the same time is deeply egalitarian in its characterization of dignity as something that belongs to all human beings<sup>54</sup>.

<sup>50</sup> See O. Lepsius, *Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-terrorism Provision in the New Air-transport Security Act*, German Law Journal, Vol. 07, No. 09, 2006, p. 763.

<sup>51</sup> *Ibi*, p. 767.

<sup>52</sup> J. Waldron, *Dignity, Rank, and Rights: The 2009 Tanner Lectures at UC Berkley*, Public Law Research Paper No. 09-50. Available at SSRN: <http://ssrn.com/abstract=1461220>.

<sup>53</sup> Bundesverfassungsgericht, Feb. 15, 2006, 115 BVerfGE 118, [http://www.bverfg.de/entscheidungen/rs20060215\\_1bvr035705en.html](http://www.bverfg.de/entscheidungen/rs20060215_1bvr035705en.html).

<sup>54</sup> Cf. M. Rosen, *Dignity its history and meaning*, Harvard University Press, 2012, pp. 19-31; M. Sandel, *On Justice*, Penguin, 2010 pp. 103-139.

7. *Kant and his critics: the rise of the skeptical understanding of human dignity.*

Kant's philosophy, though it seems very attractive and practicable in constitutional jurisprudence, offering a strong concept of human dignity and an apparently simple application of it, has been severely criticized by succeeding generations of philosophers.

The Kantian idea of human dignity, as absolute worthiness of a human being, appeared abstract and incoherent, so that Arthur Schopenhauer, in *The basis of morality* (1837), wrote: "[...] this expression 'Human Dignity', once it was uttered by Kant, became the shibboleth of all perplexed and empty-headed moralists. For behind that imposing formula they concealed their lack, not to say, of a real ethical basis, but of any basis at all which was possessed of an intelligible meaning; supposing cleverly enough that their readers would be so pleased to see themselves invested with such a 'dignity' that they would be quite satisfied"<sup>55</sup>.

The later generation of philosophers understood that the man, who Kant and later Hegel and their followers described, was an "unencumbered self"<sup>56</sup>, namely a man free from determinations deriving from the historical and social transformations. According to this view, Karl Marx, denouncing the use of the phrase "dignity of man" by another German socialist, affirmed that the reference to human dignity is a "refuge from history in morality"<sup>57</sup>.

From an analysis of these perspectives emerges a discontent related to the absoluteness of human dignity's historically situated and determined connection with social life. This understanding of dignity seemed not to consider its connection with social life that is historical situated and determined. Therefore, it seems that if the two facets of dignity (its express and implied facets) are separated and one of them were to override the other one (Kant stressed the implied facet), the integral understanding of what is a man and what is his inherent dignity is compromised as we can find in Friedrich Nietzsche: "every human being [...] only has dignity in so far as he is a tool of the genius, consciously or unconsciously; from this we may immediately deduce the ethical conclusion, that man in himself, the absolute man possesses neither dignity, not rights, nor duties; only as a wholly determined being serving unconscious purposes can man excuse his existence"<sup>58</sup>. Here we are confronted with the opposite side of Kant's view ("every human being ... only has a dignity in so far as he is a tool of the genius") and dignity is only an external negative determination attributed to man.

<sup>55</sup> A. Schopenhauer, translated with an introduction and notes by A.B. Bullock (2005). *The Basis of Morality* (Mineola, N.Y.: Dover Publications), Part II, Critique of Kant's Basis of Ethics.

<sup>56</sup> M. Sandel, *The Procedural Republic and the Unencumbered Self*, Political Theory Vol. 12, No. 1 (Feb., 1984), pp. 81-96.

<sup>57</sup> K. Marx, *Moralizing Criticism and Critical Morality, A Contribution to German Cultural History Contra Karl Heinzen*, Deutsche-Brüsseler-Zeitung Nos.86,87,90,92 and 94; October 28 and 31; November 11, 18 and 25, 1847.

<sup>58</sup> F. Nietzsche, *On the Genealogy of Morality, "The Greek State"*, K Ansell-Pearson and Carol Diethelme (eds), 176 at 185 (CUP, 1994).

All the thinkers quoted above are considered the dark side of the western philosophy. Their criticisms, even if they showed a side of the truth, lead to the disintegration of the concept of human dignity. Today, we can find a similar nihilist attitude toward the current legal use of human dignity. More precisely, though many emphasize the fundamental value of human dignity for the protection of rights, others have a more critical position as to the possibility of identifying a proper meaning of the concept. E. Kretzmer and D. Klein in the foreword of their book stated: “while the concept of human dignity now plays a central role in the law of human rights there is surprisingly little agreement on what the concept actually means”<sup>59</sup>. The Swiss theologian Dietrich Ritschl doesn’t consider human dignity a legal concept nor strictly speaking, an ethical concept; he assumes that “derivations from broad concepts in theological and philosophical ethics as well as in jurisprudence present special difficulties”<sup>60</sup>. According to Ruth Macklin, “dignity is also a useless concept in medical ethics and it can be eliminated without any loss of content”<sup>61</sup>. Steven Pinker, writing against the *Report on Human Dignity* issued by the Presidential Council on Bioethics in 2008, stated: “So is dignity a useless concept? Almost. The word does have an identifiable sense, which gives it a claim, though a limited one, on our moral consideration”<sup>62</sup>.

Consequently, at present, we can identify, in the most recent legal literature, two opposite attitudes towards human dignity. The first one considers dignity a basis for an international “*ius commune*”<sup>63</sup> of human rights that is present across different countries and jurisdictions, bearing a substantial moral meaning<sup>64</sup>. According to those scholars “dignity as a common basis in the human rights context is an attractive idea because it shows that different jurisdictions share a sense of what dignity requires, and this enables a dialogue to take place between judges in interpretation of human rights norms, based on shared assumptions”<sup>65</sup>.

The second one, which is *ex multis* Christopher McCrudden’s perspective, refuses to accept human dignity as a universal value, since it would be impossible to identify a common conception of human dignity in any particular jurisdiction or transnationally<sup>66</sup>.

<sup>59</sup> D. Kretzmer, E. Klein (eds.), *The concept of human dignity in human right discourse*, Kluwer Law International, The Hague, the Netherlands, 2002, p. vi.

<sup>60</sup> Dietrich Ritschl, *Can Ethical Maxims be Derived from Theological Concepts of Human Dignity?*, in D. Kretzmer, E. Klein (eds.), *The concept of human dignity in human right discourse*, Kluwer Law International, The Hague, the Netherlands, 2002, pp.87-98.

<sup>61</sup> Ruth Macklin, *Dignity is a useless concept*, British Medical Journal 2003.

<sup>62</sup> Steven Pinker, *The Stupidity of Dignity*, New Republic 28 may 2008.

<sup>63</sup> “[...] the concept of human dignity, in virtue of its purchase on universality, serves as a common currency of transnational judicial dialogue and borrowing in matters of human rights”; in P. Carozza, *Human Dignity and Judicial Interpretation of Human Rights: A Reply*, The European Journal of International Law Vol. 19 no. 5, 2008, p. 932. See also, ID. *My Friend Is a Stranger: The Death Penalty and the Global Ius Commune of Human Rights*, Texas Law review, vol. 81, 2003, pp. 1079-1082.

<sup>64</sup> J. Habermas, *supra* note 12.

<sup>65</sup> McCrudden, *supra* note 18, p. 695.

<sup>66</sup> “The concept of human dignity plays an important role in the development of human rights adjudication, not in providing an agreed content to human rights but in contributing to particular methods of



We can still note how the nihilist view about the legal use of human dignity stigmatizes its reliance on a particular community with its own values rooted in the history. Following this trend human dignity wastes its strength within the plurality of existing cultures. Conversely, scholars, who understand human dignity as a basis of human rights, emphasize the universal character of the concept: could this two side of the coin (implied and express facet) be reunited?

8. *Human dignity as a collective fundamental value: between Aristotle and communitarianism*<sup>67</sup>.

While humanist, Kant and his contemporary followers<sup>68</sup> have a very individualistic approach to human dignity (underlining the implied facet of dignity), a further approach to the concept especially stresses the boundaries between dignity and community according to Aristotle's ideas that men has a social nature<sup>69</sup> and his pursuit of virtue, that is individual excellence, can make a real political community. At the present, according to Henry, it is the communitarianism<sup>70</sup> that emphasizes dignity con-

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human rights interpretation and adjudication"; See McCrudden, *supra* note 18; "Dignity cannot create a synthesis of goods that essentially represent different things, further different goals, and reflect different values and conceptions of the good life"; See also N. Rao, *Three concepts of dignity in constitutional law*, Notre Dame Law Review, Vol. 86, n. 1, pp. 183-271, 2011; McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, Oxford Journal of Legal Studies, Vol. 20 n. 4, 2000, pp. 499-532.

<sup>67</sup> L. M. Henry, *The Jurisprudence of Dignity*, University of Pennsylvania Law Review, Vol. 160, pp. 169-233.

<sup>68</sup> One of the most famous Kant's contemporary followers is John Rawls. He believes that the "history of moral philosophy culminates in Kant and more or less comes to an end in the Kantian-inspired moral philosophy that Rawls's own work exemplifies. His interpretation of Kant in the *Lectures on the history of moral philosophy*, based on a close and sympathetic reading, sheds light on Rawls's considered judgment about the extent to which liberalism's moral foundations are secured by reason. [...] he emphasizes the centrality to Kant's philosophy of 'the fact of reason.' This is the fact that, as reasonable beings, we are conscious of the moral law as the supremely authoritative and regulative law for us and in our ordinary moral thought and judgment we recognize it as such." P. Berkowitz, *The Ambiguities of Rawls's Influence*, Perspective on Politics, Vol. 4, N.1, March 2006. Rawls was also the main target of communitarianism criticisms, in particular because of his description of the original position as an 'Archimedean point', an understanding of men individualistic and abstract. See J. Rawls, *A theory of justice, revised edition*, Cambridge: Harvard University Press, 1999; Rawls, *Kantian constructivism in moral theory*, Journal of Philosophy, 77 (9), 1980, 515-72; Rawls, *Lectures on the history of moral philosophy*, ed. Barbara Herman. Cambridge: Harvard University Press, 2000.

<sup>69</sup> "[...] the city belongs among the things that exist by nature, and [...] man is by nature a political animal" (1252b30-1253a3); Aristotle, *The Politics*, translated and with an introduction by Carnes Lord. Chicago: University of Chicago Press, 1984, p. 37.

<sup>70</sup> Modern-day communitarianism began in Anglo-American academia as a critical reaction to John Rawls' landmark book *A Theory of Justice*. However, these critics of liberal theory never did identify themselves with the communitarian movement (the communitarian label was pinned on them by others, usually critics), much less offer a grand communitarian theory as a systematic alternative to liberalism. The core arguments meant to contrast with liberalism's devaluation of community recur in the works of four theorists such as Alasdair MacIntyre, Michael Sandel, Charles Taylor and Michael Walzer. We can, therefore, distinguish between claims of three sorts: methodological claims about the importance of tradition and social context for moral and political reasoning, ontological or metaphysical claims about

ceived as a “collective virtue”, underlining Aristotelian social nature of man. “Accordingly, dignity as collective virtue is expressed when people behave and are treated in ways worthy of humans, not beasts”<sup>71</sup>.

Following Henry’s quotation, we may gather that treating a person inhumanly is wrong not only for the consequence it has on that individual (implied facet), but also for the effects it has on the community (express facet). “For example, critics of torture seek to prohibit the practice not simply because it violates the autonomy of the tortured individuals and subjects them to extreme pain and suffering, but also because torture is anathema to civilized societies bound by law. When society treats people in ways that are inhumane, or when people engage in activities that are de-humanizing, dignity as a collective diminishes”<sup>72</sup>.

As we showed above, there are several perspectives on dignity rooted in the very essence of the human being as an individual (implied facet). On the contrary, when individuals engage in undignified conduct, their acts may threaten dignity as a collective virtue (express facet). Consider the famous French dwarf-tossing case. In that case, “the French *Conseil d’État* granted police power to prevent any public activities that failed to respect human dignity. Accordingly, two municipalities banned the spectacle of dwarf-tossing in local clubs. Manuel Wackenheim, one of the dwarfs, challenged the ban by arguing that he freely participated in the activity, was paid, and that the ban would result in his un-employment. The *Conseil d’État* ruled that using humans as projectiles was degrading to all members of society because it violated an overriding sense of human dignity”<sup>73</sup>.

The dwarf-tossing case shows that dignity is also a collective virtue which can defeat arguments in favor of the primacy of autonomy and at the same time it can limit individual liberties (in this case the liberty of self-determination) for the good of society. The Court affirmed: “[...] that the authority holding the municipal police power has jurisdiction to adopt any measure to prevent a breach of public order; that respect for the dignity of the human person is one of the elements of public order; that the authority holding the police power may, even in the absence of special local circumstances, ban a show which undermines respect for the dignity of the human person.

“[...] that the dwarf-tossing show [...] leads to using as a missile a physically handicapped person who is presented as such; that, by its very object, such a show

the social nature of the self, and normative claims about the value of community. Cf. S. Avineri, , DE-A. Shalit, (eds), *Communitarianism and Individualism*, Oxford: Clarendon Press, 1992; B. Bell. *Communitarianism and Its Critics*, Oxford: Clarendon Press, 1993; ID., “Communitarianism”, *The Stanford Encyclopedia of Philosophy (Spring 2012 Edition)*, Edward N. Zalta (ed.), <http://plato.stanford.edu/archives/spr2012/entries/communitarianism/>; A. Berten, , P. da Silveira, and H. Pourtois, (eds), *Liberaux et Communautariens*, PUF, 1997.

<sup>71</sup> Henry, *Supra* note 67, p. 221.

<sup>72</sup> *Ibidem*. See also Waldron, *supra* note 8 and M. Rosen, *Replies to Jeremy Waldron: Dignity, Rank and Rights Tanner Lectures, Berkeley*, April 21-23, 2009, in [http://scholar.harvard.edu/files/replies\\_to\\_jeremy\\_waldron\\_0.pdf](http://scholar.harvard.edu/files/replies_to_jeremy_waldron_0.pdf).

<sup>73</sup> Henry, *Supra* note 67, p. 222.

undermines the dignity of the human person; that hence the authority holding the municipal police power may ban it, even in the absence of particular local circumstances, and even where protective measures are in place to ensure the safety of the person concerned and this person lends himself willingly and for reward to this activity<sup>74</sup>.

So, for instance, we can find a similar attitude of the court in the Peep Shows case according to which the German Federal Administrative Tribunal stated: “this violation of dignity is not excluded or justified by the fact that the woman performing in a peep show acts voluntarily. Human dignity is an objective, indisposable value, the respect of which the individual cannot waive validly<sup>75</sup>.”

Therefore following Henry’s perspective we could conclude that in both these cases the community defines dignity as a value shared by the whole community and which the community has to protect<sup>76</sup>. “This is consistent with the communitarian view that moral judgment depends on the actual beliefs, practices, and institutions that create communities at specific times and places. Prohibited conduct considered offensive and degrading in one society might not be in another<sup>77</sup>.”

Even though many scholars<sup>78</sup> defined the dwarf tossing case and the peep shows case as examples of a paternalistic use of human dignity which allows the state, as the

<sup>74</sup> *Conseil d’État statuant au contentieux*, n.143578, lecture du 27 octobre 1995, in [http://www.utexas.edu/law/academics/centers/transnational/work\\_new/french/case.php?id=1024](http://www.utexas.edu/law/academics/centers/transnational/work_new/french/case.php?id=1024). The mayor of the small French town of Morsang-sur-Orge prohibited dwarf tossing. The case went through the appeal chain of administrative courts to the *Conseil d’État*, which found that an administrative authority could legally prohibit dwarf tossing on grounds that the activity did not respect human dignity and was thus contrary to public order. The question raised legal questions as to what was admissible as a motive for an administrative authority to ban an activity for motives of public order, especially as the *Conseil* did not want to include “public morality” in public order. The ruling was taken by the full assembly and not a smaller panel—proof of the difficulty of the question. The *Conseil* ruled similarly in another case between an entertainment company and the city of Aix-en-Provence.

The UN High Commissioner on Human Rights judged on September 27, 2002, that the decision was not discriminatory with respect to dwarfs. It ruled the ban on dwarf tossing was not abusive, but necessary to protect public order, including considerations of human dignity.

Nevertheless, dwarf tossing is not prohibited outright in France. The *Conseil d’État* decided that a public authority could use gross infringement on human dignity as a motive of public order to cancel a spectacle, and that dwarf tossing constituted such a gross infringement. However, it is up to individual authorities to make specific decisions regarding prohibition.

<sup>75</sup> 1981 BVerwGE 64, 274 (Federal Administrative Court).

<sup>76</sup> “The German legal system [...] has been largely shaped by ordinary legislation at the *Bund* and the *Länder* levels. However, the contribution made by the *Grundgesetz*, as interpreted and enforced by the Constitutional Court, in directing, correcting, and streamlining this legislation, has been considerable and it is a contribution which has been greatly influenced by the concept of human dignity. The concept is stated in the first sentence of Article 1 of the *Grundgesetz* and is held to posit a *Grundwert*, a basic value, supreme within the system (Dürig)”. G. Bogner, *The Concept of Human Dignity in European and U.S. Constitutionalism*, in G. Nolte (Ed.), *European and U.S. constitutionalism*, Council of Europe Publishing, 2005, p. 81. See also E. J. Eberle, *Dignity and Liberty, Constitutional visions in Germany and the United States*, Praeger, 2002.

<sup>77</sup> *Ibidem*.

<sup>78</sup> See C. McCrudden, *Human dignity and judicial interpretation of human rights*, in *European Journal of International Law*, 2008, 19 (4), pp. 655-724; J. Waldron, *Dignity, Rights and Responsibilities*,

representative of community and of its values, to limit the liberty of man who freely chooses to have a degrading conduct towards himself, we can also see in these cases the dual nature of human dignity at work in its fullest sense. It means that though acknowledging the dwarf's right to self-sustainment within the doctrine of autonomy, the Court nevertheless used the collective facet of dignity to check what had become an unbridled exercise of a right. We could, accordingly, speculate whether using only the implied facet of dignity as self-determination and autonomy may break the link between individual (implied facet) and the community (express facet). The effect of this separation seems to leave men as a monads among other monads. Conversely, as dwarf tossing case pointed out, the individual, as member of a community, shares, within the community, values which instantiate the idea of common good, or *ordre public*<sup>79</sup>. Therefore, it seems that we can't take human dignity seriously unless we don't consider both side of the coin.

### 9. From Hobbes to the rediscovery of natural law.

The consequence of an overrated attention to the individual facet of human dignity is well illustrated in Thomas Hobbes' political philosophy<sup>80</sup>. According to him, man in the state of nature have a liberty right to preserve themselves which is called "the right of nature". For the first time in the history of political philosophy Hobbes uses the concept of *ius* (right) with the meaning and the function of a subjective right: right is a claim, i.e. the right of someone to something that he can claim. The right of nature, indeed, "is the liberty each man hath to use his own power as he will himself for the preservation of his own nature; that is to say, of his own life; and consequently, of doing anything which, in his own judgement and reason, he shall conceive to be the aptest means thereunto"<sup>81</sup>. Therefore, Hobbes offers to us a perspective according to which man is selfish and so he is concerned for what is good for himself. It is obvious that the consequence of this individualistic view is a "state of war" among man, fighting each other in the name of their individual claims. However, on one hand, man can overcome the state of nature, that is a state of war, in virtue of their highest concern for self-preservation: "the imperative of self-preservation would therefore yield a subsidi-

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43 Arizona State Law Journal, p. 1107 ss. (2011); A. Henette-Vauchez, *A Human Dignitas? The Contemporary Principle of Human Dignity as a Mere Reappraisal of an Ancient Legal Concept* (July 2008), EUI Working Papers LAW No. 2008/18. Available at SSRN: <http://ssrn.com/abstract=1303427> or <http://dx.doi.org/10.2139/ssrn.1303427>; L.R. Barroso, *Here, there, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse*, Boston College International & Comparative Law Review, Vol. XXXV Spring 2012 No. 2, pp. 331-394; G. Gemma, *Liberal-Democratic Constitutionalism and Imposed Dignity*, *Ragion Pratica*, n.1, 2012, pp. 129-142; V. Pacillo, *The «Reverse of Dignity» and the Dignity of Law*, *Ragion Pratica*, n.1, 2012, pp. 143-160.

<sup>79</sup> R. George, *Making Man Moral*, Clarendon Press, 1993.

<sup>80</sup> M. Rhonheimer, *La filosofia politica di Thomas Hobbes. Coerenza e contraddizioni di un paradigma*, Armando, 1997.

<sup>81</sup> T. Hobbes, *Leviathan*, a critical edition by G.A.J. Rogers, Karl Ss Schuhmann, Thoemmes Continuum, 2003, 2 v.

ary imperative, to seek peace with everyone else on terms that everyone could accept”<sup>82</sup>. On the other hand, as MacCormick said: “Any peace agreement [...] would itself be precarious if there were no force to back it up. So the agreement would have to contain some provisions that would make it enforceable. This could be done if the ‘social contract’ instituted a sovereign to whom (or to which – it might be an assembly of persons, not an individual) everybody transferred all their “natural right” to use force. In return they would have to accept the protection, but also the burden, of law imposed and enforced by this sovereign”<sup>83</sup>. Therefore “enacted law, in the Hobbesian picture, is the only standard of objective justice available to humans among themselves. There can be no independent criteria of justice whereby to criticize laws for failing in justice”<sup>84</sup>. A further consequence of this perspective regards “dignity”. Hobbes stated, indeed: “To the sovereign therefore it belonged also to give titles of honour, and to appoint what order of place and dignity each man shall hold, and what signs of respect in public or private meetings they shall give to one another”<sup>85</sup>.

In light of these assumptions, we could argue that human dignity is simply created by the State that entitles man of dignity (the express facet of dignity). However, we also should ask ourselves if we have reasons to think, conversely, that human dignity is something inherent to human nature (the implied facet of dignity) which the state cannot create but only recognize.

If we consider the European Court of Human Rights jurisprudence on bioethical issues like abortion and the beginning of life, we can see that a ultimate answer about what is the role of the state and whether there is a hard core of rights forbidding the state from interfering is not so clearly identifiable. In the case *Vo v. France* (2004)<sup>86</sup>, a doctor was responsible for the death of Mrs. Vo’s child in utero for an error due to homonymy. His conduct was not classified by the Court of Cassation as an unintentional homicide because a fetus is not considered a person under the French criminal law. Therefore, Mrs. Vo applied to the ECtHR, maintaining that France failed to comply with article 2 of the Convention (right to life) that gives protection to “everyone”. The Court did not find a violation of art. 2 of the Convention and in deciding the case, the Grand Chamber evaded the controversial issue of whether the fetus is a person for purposes of article 2 ECHR (right to life) and deferred to national legislation the decision, invoking the *margin of appreciation*. The Judges stated that it is up to the state to decide also what kind of sanction should be given in order to protect life, in the case that it decides to protect it. We can see different approach of the Court in another case *A, B, and C v. Ireland* (2010)<sup>87</sup>. In this case the three applicants went to the United Kingdom to have an abortion because Irish legislation does not consent to it unless the

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<sup>82</sup> N. MacCormick, *Institutions of Law*, Oxford University Press, 2009, pp. 192-193.

<sup>83</sup> *Ibidem*.

<sup>84</sup> *Ibidem*.

<sup>85</sup> T. Hobbes, *Supra note 82*.

<sup>86</sup> European Court of Human Rights *Vo v. France*, n. 53924/00, 8 July 2004.

<sup>87</sup> European Court of Human Rights *A, B and C v. Ireland*, n. 25579/05, 16 December 2010.

life of the women is at stake. In consideration of C's position (she had been undergoing chemotherapy for cancer for 3 years and when she discovered the pregnancy the cancer went into remission), Ireland was condemned for violation of article 8 (right to respect for private and family life) ECHR. Therefore if the Court invoked the margin of appreciation as regards applicant A and applicant B in favor of the choice of the legislator, with respect to C's case it didn't.

As we can see, matters that involve the beginning of life and the dignity of the unborn are really problematic and the Court tends to leave the question concerning the dignity of the fetus open. Sometimes it allow the state to make this decision, sometimes it does not. Are questions like when life starts or whether the fetus has a dignity really solved by legal instruments like the margin of appreciation or the doctrine of consensus?

The cases quoted above show that there is something lacking in State's determinations, something that slips away any kind of ultimate definition. This is the reason that led, after the Second World War, to a revival of interest of natural law in opposition to the view that the State creates of rights according to which the express facet of dignity becomes absolute and loses its link with the real essence of human being (implied facet). This is also the reason why human dignity was recognized as the basis of the Universal Declaration of Human Rights. There was a general agreement on the fact that it was not the state's power to be the source of right. This implied rethinking about the existence of natural law against pure positivism. As H.L.A. Hart observed in 1961<sup>88</sup>: "Indeed, the continued reassertion of some form of natural law doctrine is due in part to the fact that its appeal is independent of both divine and human authority, and to the fact that despite a terminology with much metaphysics, which few could now accept, it contains certain elementary terms of importance for the understanding of both morality and law. These we shall endeavor to disentangle from their metaphysical setting and restate here in simpler terms". Even if Hart doesn't clearly recognize, along his work, the existence of objective moral values, and he doesn't reject the legal positivism at all, he identifies one possible natural right: "the equal right to be free"<sup>89</sup>. However, objective moral truths remained in his thought mere facts which are hostage of change (historical, social changes): "the core of moral values are rooted in fairly banal facts about physical nature and our world, facts that both law and morality reflect"<sup>90</sup>.

John Finnis developed the connection between natural law and fundamental rights and reestablished the concept of dignity as inherent. According to Hart's account, the main interest of mankind is the human survival and the freedom of choice. Therefore the legislator has the duty to preserve citizens by protecting their rights as expression of

<sup>88</sup> H.L.A. Hart, *Essays on Bentham. Studies in Jurisprudence and Political Theory*, Clarendon Press, Oxford, 1982.

<sup>89</sup> Hart, *Are there natural rights*, in J. Waldron (eds.), *Theories of Rights*, Oxford University Press, Oxford, 1984.

<sup>90</sup> G. Byrne, *Taking the Minimum Content Seriously: Hart's Liberalism and Moral Values* (May 7, 2012). Available at SSRN: <http://ssrn.com/abstract=2053148> or <http://dx.doi.org/10.2139/ssrn.2053148>.

individual choice. Finnis stated: “the core of the notion of right is neither individual choice nor individual benefits but basic or fundamental individual needs: in my terminology, basic aspects of human flourishing”<sup>91</sup>. The natural law theorist pointed out that basic aspects of human flourishing are the core of rights. These basic aspects inherent to human nature and therefore something that belongs to every human beings. They are not the result of a pure reflection on what is human nature but we become aware of them by acting in our daily life. Every day we try to fulfill our integral human flourishing by pursuing basic human goods like life, knowledge, play, aesthetic experience, sociability (friendship), practical reasonableness, and religion. Therefore the conception of dignity is here connected with the integral human flourishing (human nature), that is both individual and collective. The drafters of U.N. declaration were aware of this peculiarity of natural law view. They understood that human rights were based on the unalienable nature of human being that is individual and social, in other words that fundamental rights are based on human dignity.

## Part II: Three current readings on dignity

### 1. Introduction

In the mid-twentieth century, the western world sustained two world wars, totalitarianism horrors, and the use and abuse of weapons of mass destruction such as the atomic bomb. Moreover, the Cold War, between the powers of the western world – led by the United States and its NATO allies – and the Communist world – led by the Soviet Union and its satellite states and allies – was beginning. In the midst of all this, the *Universal Declaration of Human Rights* was written as a *manifesto* of the human person’s fundamental rights, rights which were so deeply disregarded during World War II<sup>92</sup>. The Declaration was written with a distinctive perspective of dignity<sup>93</sup> recogniz-

<sup>91</sup> Could we say that rights are derived directly from these basic aspects of human nature? Finnis is persuaded that positive law is the product of man’s technique as such. Due to its nature, law is the result of *determinationes* (specifications or concretizations) from moral principles (natural law). The legislator creates different schemes (*determinationes*) in order to instantiate a basic human good and he has to choose among them. So every scheme doesn’t fully fulfill a particular human good but it is only a limited opportunity of its instantiation. Then the potentiality of natural law theory is its incapacity to be wholly determined by law. J. Finnis, *Natural Law and Natural Rights*, Oxford University Press, 2011, p. 205. See also Finnis, *Philosophy of Law*, Oxford University Press 2011; R. P. George, *In defence of Natural Law*, Oxford University Press 2004; A. Somoncini, L. Violini, P. Carozza, M. Cartabia, *Elementary experience and law*, Fondazione per la Sussidiarietà 2012; M.M. Giungi, *Robert P. George e la New Natural Law Theory: una nuova rotta per il concetto di legge naturale* (II), in *Neoscolastica*, n.3, 2011, pp. 497-516.

<sup>92</sup> As Neil MacCormic stated: «Fidelity to the rule of law is one condition for the protection of liberty against unwarranted incursions by agencies of government. Insistence on the charter of Rechtsstaat or law-state is a way of stipulating that the force of the state must always and only be deployed under general rules that can be interpreted quite strictly and in universalistic ways that preclude unjust discriminations. But this does not itself seem enough. General Rules can confer extremely wide discretion on particular officials – a case in point is the law under which Hitler was granted the power to rule by decree in Germany after 1934. Examples of abusive grants of broad discretionary powers abound in

able in many key points of the text, especially in the preamble, as we already showed in the first part of this article. According to Henkin, the Declaration provided the idea of human rights with a universally acceptable foundation and principle: “human dignity.”<sup>94</sup> By recognizing this principle, the European doctrine considered the human rights experience in a new light and reformulated the rights theory. Nevertheless, even if the San Francisco declaration was a central instrument for spreading the use of such a concept, identifying human dignity as a ground for rights is not without difficulties<sup>95</sup>. Today, “the use of human dignity does not offer a universal ground for legal thought, and it does not seem useful to the judges in order to solve a controversy; the meaning of dignity is context specific, and varies significantly from jurisdiction to jurisdiction and (often) over time within particular jurisdictions. Moreover, it seems that “dignity” is becoming a commonplace term in the legal texts providing for human rights protections in many jurisdictions. It is used frequently in judicial decisions; for example, to justify the removal of restrictions on abortion in the United States, to impose limitations on dwarf throwing in France, to overturn laws prohibiting sodomy in South Africa, and to consider physician-assisted suicide in Europe”<sup>96</sup>. As the French philosopher Jacques

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other states both in Europe and beyond it, though few as egregious as that of the Nazi terror. [...] Taken by itself the rule of law, albeit essential, seems likely to be some context insufficient to protect against evil doing by agencies of the state. It is a real virtue but, taken on its own, a formal one. Perhaps we need also some substantive limits as well as purely formal limits to state power? Recognition of fundamental rights is one candidate for providing such limits. It is one which has gained great contemporary prestige as result of various international instruments and national constitutional safeguards adopted in aftermath of the World War of 1939 to 1945, and devised in response to the horrors revealed by that period of human history». N. McCormick, *Institutions of Law*, Oxford University Press, 2009, pp. 190-191.

<sup>93</sup> See Mary Ann Glendon :«The idea of human dignity got a fresh look, however in May 1945 when the first photographs from the concentration camps appeared, and the world began to come to terms with the atrocities committed in the course of the National Socialist extermination program. That program, we now know, began with forced sterilization measures modeled on those promoted by the American eugenics movement. It proceeded in stages—from sterilization to killing the mentally ill, then to “impaired” inmates of concentration camps, and finally to mass killings of those inmates. When the full horrors implicit in the idea of “life unworthy to live” (Lebensunwertesleben) came to light, the concept of the dignity of human life began to receive serious attention from opinion shapers.[...] The concept of human dignity became the hermeneutical key of constitutions like the German Basic Law of 1949, which opens with the statement that: “The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority”». M.A. Glendon, *The Bearable Lightness of Dignity*, 2011, <http://www.firstthings.com/article/2011/04/the-bearable-lightness-of-dignity>.

<sup>94</sup> Louis Henkin, *Religion, Religions, and Human Rights*, The Journal of Religious Ethics, Vol. 26, No. 2 (Fall, 1998), pp. 229-239.

<sup>95</sup> According to M. A. Glendon: «Among the proponents of these hopeful new charters, however, there was already a certain uneasiness about whether the concept of human dignity could really do all work it was expected to do. For one thing, dignity was nowhere defined in these documents. Rather, as Adam Shulman has pointed out, the statesman who drafted them seem to have used the word as “a placeholder for whatever it is about human beings that entitles them to basic human rights and freedoms”». M. A. Glendon, *The Bearable Lightness of Dignity*, 2011.

<sup>96</sup> C. McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*. European Journal of International Law, Forthcoming; Oxford Legal Studies Research Paper No. 24/2008. Available at SSRN: <http://ssrn.com/abstract=1162024>; see also M.A. Glendon, *Supra* note 93; G. Bognetti, *The*



Maritain noted in 1949, the Declaration needed some ultimate value “whereon those rights depend and in terms of which they are integrated by mutual limitations”<sup>97</sup>. Accordingly, Mary A. Glendon concluded “that value, explicitly set forth in the Declaration, is human dignity. But as time went on, it has become painfully apparent that dignity possess no more immunity to hijacking than any other concept”<sup>98</sup>.

The opening line of Preamble of the Universal declaration of Human Rights invokes the “inherent dignity” of human beings. However, “no account was given about what constitutes this inherent dignity; any account would have proven controversial. But there was consensus on the claim that all members of the human family have inherent dignity and human rights are grounded in that dignity”<sup>99</sup>. Otherwise, “there is more than one way to make use of the idea of human dignity in developing a theory of human rights”<sup>100</sup>.

This paper intends to consider three current readings on human dignity in order to show different sides of the contemporary debate about it. We will introduce the interpretations of three famous scholars who are working on human dignity from both legal and philosophical perspectives.

First of all, we will examine Habermas’ perspective on dignity as a unifying concept in the historical and continuing development of human rights. He rejects “the idea of a philosophical derivation of the substantive content of human rights in favor of an approach that stresses the equal right of everyone to participate in the political determination of a full set of rights”<sup>101</sup>. Habermas uses the concept of human dignity to link different concrete struggles for human rights. That is, “the specific meaning of human dignity, and so the need for particular human rights, only becomes apparent the violation of dignity in particular cases, as experienced by, for instance, marginalized classes, disparaged and discriminated against minorities, illegal immigrants, asylum seekers, and so forth”<sup>102</sup>.

Secondly, I will consider also Jeremy Waldron’s view, in which dignity is rooted in the law. As he stated: “Dignity is a “constructive idea, with a foundational and explicative function like utility”<sup>103</sup>. So dignity doesn’t need to be treated in the first instance

*Concept of Human Dignity in European and U.S. Constitutionalism*, in G. Nolte (Ed.), *European and U.S. constitutionalism*, Council of Europe Publishing, 2005, p. 81. See also E. J. Eberle, *Dignity and Liberty, Constitutional visions in Germany and the United States*, Praeger, 2002.

<sup>97</sup> J. Maritain, in UNESCO (ed.), *Human Rights: Comments and Interpretations*, Allan Wingate, 1949, pp. 9-17.

<sup>98</sup> M.A. Glendon, *International Law: Foundations of Human Rights. The Unfinished Business*, in Michael A. Scaperlanda, Teresa Stanton Collett (Ed.), *Recovering Self-Evident Truths: Catholic Perspectives on American Law*, CUA Press, 2007, p. 330.

<sup>99</sup> N. Wolterstorff, *Justice: Rights and Wrongs*, Princeton University Press, 2010, pp. 311-322.

<sup>100</sup> Cf. J. Flynn, *Human Rights, Humanitarianism, and the Politics of Human Dignity*. APSA 2011 Annual Meeting Paper. Available at SSRN: <http://ssrn.com/abstract=1899837>.

<sup>101</sup> *Ibi*, p. 13.

<sup>102</sup> *Ibi*, pp. 11-12.

<sup>103</sup> J. Waldron, *Dignity, Rank and Rights*, Oxford University Press, 2012, p. 82.

as a moral idea but it should be seen as a juridical one. “The phrase ‘human dignity’ – indeed – is related to the recognition that all human beings share a high-ranking legal, political and moral status”<sup>104</sup>. As we will see, this juridical understanding of human dignity is explicative of all those cases in which human beings are degraded and humiliated by torture.

Finally, I will face Robert George and Patrick Lee’s argument, who worked on inherent dignity concept. “They assume that the sanctity of life view is often accompanied by a set of claims about human dignity, namely, that human beings possess essential, underived, or intrinsic dignity. That is, they possess dignity, or excellence, in virtue of the kind of being they are; and this essential dignity can be used summarily to express why it is impermissible, for example intentionally to kill human beings”<sup>105</sup>. Robert George’s approach to human dignity embraces a natural law theory perspective and shows an intimate connection between the inherent nature of every human being and human rights. In particular, I will compare this view on human dignity with the interpretation of dignity offered by the European Court of Justice in the case *Brüstle v. Greenpeace* (2011).

The aim of this article is to answer whether inherent dignity is excluded from the juridical and political view of human rights. We will examine whether Habermas and Waldron’s views are compatible with or in contrast to George and Lee’s view, and what effect this has on the Declaration of Human Right’s assertion of inherent dignity. Each reflection on dignity will be examined within the context of a legal case since it is within legal reasoning that the fruit of human dignity, i.e. human rights, is protected. In the first part of this article we have showed the dual identity of inherent dignity: dignity is in the same time individual (implied facet) and also a network of relations with other human beings (express facet). In this second part we will face the concept of inherent dignity trying to answer to the question whether this inherent dignity, that is both implied and express, is a political, a legal concept or something beyond these two understandings.

## 2. Jürgen Habermas: a political conception of human rights.

Jürgen Habermas defends the thesis that “an intimate, if initially only implicit, conceptual connection between human rights and dignity has existed from the very beginning”<sup>106</sup>. However, we find that a juridical use of dignity began only as a result of the human rights declarations of the XVIII century. Following this assumption, Habermas is persuaded that “human rights have always been the product of resistance to

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<sup>104</sup> M. Rosen, *Replies to Jeremy Waldron: Dignity, Rank and Rights, Tanner Lectures*, Berkeley, April 21-23, 2009, in [http://scholar.harvard.edu/michaelrosen/files/replies\\_to\\_jeremy\\_waldron.pdf](http://scholar.harvard.edu/michaelrosen/files/replies_to_jeremy_waldron.pdf).

<sup>105</sup> C. O. Tollefsen, *Capital Punishment, Sanctity of Life, and Human Dignity*, September 16th, 2011, in <http://www.thepublicdiscourse.com/2011/09/3985/>.

<sup>106</sup> According to Habermas the appeal to human rights feeds off the outrage of the humiliated at the violation of their human dignity. See J. Habermas, *The Concept of Human Dignity and the Realistic Utopia of Human Rights*. *Metaphilosophy* 41 (4), 2010, pp. 464-480.

despotism, oppression, and humiliation”<sup>107</sup>. Let us think, for instance, of the history of the abolition of slavery. Thanks to the achievement of the individual rights that the American and French revolutions promoted, the insight into the inhumane conditions in which slaves lived caused a few states to forbid the slave trade and afterwards all to abolish slavery itself. Accordingly, it is understandable why the German philosopher is convinced that only social and political struggles make such violations of human dignity evident<sup>108</sup>: “The features of human dignity specified and actualized in this way can then lead both to a more complete exhaustion of existing civil rights and to the discovery and construction of new ones”<sup>109</sup>. Habermas, indeed, uses the concept of human dignity to link these concrete struggles for human rights<sup>110</sup>.

The intimate relation between human rights and human dignity shows the distinguishing factor of dignity: its moral content. Dignity is outlined within the context of human rights in order to actualize the moral values of the egalitarian universalism into positive law. In this perspective human dignity becomes the key that explains the moral and juridical ambivalence embedded in human rights. Therefore “human rights are in actuality the result of the synthesis between rationally justified morality, founded on the Kantian individual conscience, and the positive law that served absolutist rulers and traditional assemblies of estates as an instrument for constructing the institutions of the modern state and a market”<sup>111</sup>. In other words, the idea of human dignity appears “the conceptual hinge that connects the morality of equal respect for everyone with positive law and democratic lawmaking in such a way that their interplay could give rise to a political order founded upon human rights”<sup>112</sup>. So that, this concept has a “mediating function in the shift of perspective from moral duties to legal claims”<sup>113</sup>.

However, there is another fundamental conceptual element of dignity: the idea of dignity as a “social honor that belongs to the world of hierarchically ordered traditional societies”<sup>114</sup>. When this specific understanding of dignity, as the status that a men or a group are entitled to by the community, is universalized, it loses the characteristics of a corporative ethos by extending the connotation of a self-respect that depends on an equal social recognition to all persons. So, this advancement of the concept of dignity,

<sup>107</sup> *Ibi*, p. 466.

<sup>108</sup> “Increasing the protection of human rights within nation-states or pushing the global spread of human rights beyond national boundaries has never been possible without social movements and political struggles, without courageous resistance to oppression and degradation”. *Ibi*, p. 476

<sup>109</sup> *Ibi*, p. 468.

<sup>110</sup> Cf. J. Flynn, *Supra* note 100.

<sup>111</sup> Habermas’ most extensive remarks on human rights are found in J. Habermas, *Kant’s Idea of Perpetual Peace: At 200 Years’ Historical Remove*, in Id., *The Inclusion of Other: Studies in Political Theory*, MIT Press, 2001; Id., *The Postnational Constellation: Political Essays*, MIT Press, 2001; Id., *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, MIT Press, 1996; see also Flynn, *Habermas on Human Rights: Law, Morality, and Intercultural Dialogue*, *Social Theory and Practice*, Vol. 29, N. 3 (July 2003), pp. 431-457.

<sup>112</sup> Habermas, *Supra* note 106, p. 469.

<sup>113</sup> *Ibi*, p. 471.

<sup>114</sup> *Ibi*, p. 472.

on one hand, preserves the feature which connects it with the status of a member of an organized community on space and in time; on the other hand, this status must be equal for everybody. Following, then, the path of this concept, it is notable that the fundamental function of the concept of human dignity is transferring “the content of a morality of equal respect for everyone to the status order of citizens who derive their self-respect from the fact that they are recognized by all other citizens as subjects of equal actionable rights”<sup>115</sup>. Therefore, the concept of dignity doesn’t appear as a mere generalization of the “status – dependent dignities” belonging to particular honorific function and social group. But this meaning of human dignity, which depends from the social recognition, has to be connected to the idea of democratic citizenship: only the members of a political community based on the constitution are able to protect and guarantee equal rights and dignity to everybody<sup>116</sup>.

This understanding of human dignity as the status of citizens which includes the individual in the social and political community might be seen in the concept of human dignity in racial discrimination cases. In particular, in the notion that the law should not be responsible for disadvantageous and subordinated positions of different social groups. In the case *Heart of Atlanta Motel, Inc. v. United States* (1964), regarding the Atlanta Motel’s refusal to rent rooms to black patrons in direct violation of the Civil Rights Act, justice Goldberg stated that “The primary purpose of the Civil Rights Act of 1964, however, as the Court recognizes, and as I would underscore, is the vindication of human dignity, and not mere economics. The Senate Commerce Committee made this quite clear: The primary purpose of ... [the Civil Rights Act], then, is to solve this problem, the deprivation of personal dignity that surely accompanies denials of equal access to public establishments. Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color”<sup>117</sup>. This case, as did *Law v. Canada* (Minister of Employment and Immigration 1999)<sup>118</sup> or *President of Republic of South Africa v. Hugo* (1997)<sup>119</sup>, declared racial discrimination illegal and promoted formal equality and inclusion in a democratic society.

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<sup>115</sup> *Ibidem*.

<sup>116</sup> “As a modern legal concept, human dignity is associated with the status that citizens assume in the self-created political order. As addressees, citizens can come to enjoy the rights that protect their human dignity only by first uniting as authors of the democratic undertaking of establishing and maintaining a political order based on human rights”; *ibi*, p. 473.

<sup>117</sup> *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241 (1964). This important case represented an immediate challenge to the *Civil Rights Act* of 1964, the landmark piece of civil rights legislation which represented the first comprehensive act by Congress on civil rights and race relations since the *Civil Rights Act* of 1875. For much of the 100 years preceding 1964, race relations in the United States had been dominated by segregation, a system of racial separation which, while in name providing for “separate but equal” treatment of both white and black Americans, in truth perpetuated inferior accommodation, services, and treatment for black Americans.

<sup>118</sup> *Law v. Canada* (Minister of Employment and Immigration), [1999] 1 S. C. R. 497.

<sup>119</sup> *President of Republic of South Africa v. Hugo* 1996 (4) SA 1012 (D).

In light of this argument, which is the role of the inherent dignity invoked by the Universal Declaration? Habermas argues that the ideas of inherent dignity and natural law do not juridical but only moral value and he pretends that the conception of dignity as connected to the status of citizens is more suitable. In other words, human dignity fulfills its juridical function when “human rights are most clearly represented by basic rights legally institutionalized within constitutional democracies, since such basic rights are the only rights that fully realize both the legal and the moral sides of the concept of human rights”<sup>120</sup> as determined by human dignity. Beyond this level, human dignity and therefore human rights “remain only a weak force in international law and still await institutionalization within the framework of a cosmopolitan order that is only now beginning to take shape”<sup>121</sup>. So, “in contrast to standard derivations of the content of human rights from a core idea such as human dignity” a political theory of human rights, as Habermas suggested, “captures the active component of human dignity by making it central to its account of moral and political constructivism of the content of human rights”<sup>122</sup>.

### 3. *Jeremy Waldron the extendibility of dignity as a status.*

According to Jeremy Waldron, if we consider European and regional jurisprudence, the connection between human dignity and the right to life is not so simple and constant. On the contrary, it seems almost impossible to find a common approach in the jurisprudential use of human dignity, especially when we consider cases regarding ethical issues. Therefore, he suggests we change perspective and search for “a way in which the law protects a deeper dignity, one that is more pervasive, and more intimately connected with the true nature of law”<sup>123</sup>.

To this end he argues that our basic duty to respect and sustain human life is not really connected to dignity: “The preciousness or sacredness of human life is not really a dignitarian idea”<sup>124</sup>. In his view, “dignity is a sort of status-concept: it has to do with

<sup>120</sup> Flynn, Habermas on Human Rights: Law, Morality, and Intercultural Dialogue, p. 435.

<sup>121</sup> Habermas, Kant’s Idea of Perpetual Peace, p. 192.

<sup>122</sup> Flynn, *Supra* note 100, pp. 13-14.

<sup>123</sup> J. Waldron, *How law protects dignity?*, (2012). New York University Public Law and Legal Theory Working Papers, Paper 317, [http://lsr.nellco.org/nyu\\_plltwp/317](http://lsr.nellco.org/nyu_plltwp/317), p. 1.

<sup>124</sup> *Ibi*, p. 5. Waldron argue that there are “absolute worth” account and there are “ranking status” accounts. He favors the second. The sort of conception that he is developing in his works presents dignity as a rank or status that a person may occupy in society, display in his bearing and self-presentation, and exhibit in his speech and action. Dignitary provisions, as he understand them, are particularly important for those who are completely at the mercy of others. His view doesn’t preclude the independent operation of a principle of sacred value of all human life. He believe that we should give an account of how human dignity applies to infants and to profoundly disabled. For this reason, his own view is that this concern should not necessarily shift us away from a conception that involves the active exercise of a legally defined status. It can be addressed by the sort of structure that John Locke introduced into his theory of natural rights, when he said of the rank of equality that applies to all humans in virtue of their rationality: “Children, I confess, are not born in this full state of equality, though they are born to it.” Like heirs to an aristocratic title, their present status looks to a rank that they will

the standing (perhaps the formal legal standing or perhaps, more informally, the moral presence) that the person has in a society and in her dealing with others”<sup>125</sup>. In other words: “Dignity is the status of a person predicated on the fact that she is recognized as having the ability to control and regulate her actions in accordance with her own apprehension of norms and reasons that apply to her; it assumes she is capable of giving and entitled to give an account of herself (and of the way in which she is regulating her actions and organizing her life), an account that others are to pay attention to; and it means finally that she has the wherewithal to demand that her agency and her presence among us as a human being be taken seriously and accommodated into the lives of others, in others’ attitudes and actions towards her, and in social life generally”<sup>126</sup>. Therefore, dignity corresponds to the juridical concept of status extended to all persons and is considered as a standard of legislation.

Undoubtedly, the meaning of dignity that Waldron offers us is related to a controversial use of this concept. He intends to propose an understanding of “dignity” as status rather than as a fundamental value: “the respect which a person can exact as a human being from every other man, and that respect is no longer simply the quivering awe excited in a person by his own moral capacity but a genuine making room for another on a basis of a sure footed equality and acting toward another as though he or she too were one of the ultimate ends to be taken into account”<sup>127</sup>.

We might better understand Waldron’s idea of dignity as status if we consider that “rules against degradation and outrages upon personal dignity are sometimes used to vindicate the human interest in elementary aspects of adult self-presentation (care of self, taking care of elemental physical needs), and to protect against forms of humiliation which impinge on this interest”. This idea, we mean the idea of being recognized and treated as being capable of self-control, is connected to the idea of dignity as status. Let us consider, for instance, within the profuse ECHR jurisprudence regarding violations of article 3 of the European Convention of Human Rights, the case *Tekin v. Turkey* (2001).

Mr. Tekin applied to the Commission on 14 July 1993. He alleged that he had been ill-treated while being held in detention at gendarmerie headquarters in Derinsu and Derik from 15–19 February 1993 and that this event had not been adequately investigated by the State authorities. He relied on Articles 2, 3, 5 § 1, 6 § 1, 10, 13, 14 and 18 of the Convention. According to the court decision the conditions in which Mr. Tekin had been held and the manner in which he must have been treated to leave wounds and bruises on his body amounted to inhuman and degrading treatment in violation of Article 3. The court “recalls that, in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct dimin-

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occupy (or are destiny to occupy); but it does not require us to invent a different sort of dignity for them in the meantime. See also J. Waldron, *Dignity, Rank and Rights*, Oxford University Press, 2012.

<sup>125</sup> *Ibi*, p. 2.

<sup>126</sup> *Ibi*, pp. 2-3.

<sup>127</sup> *Ibidem*.

ishes human dignity and it is in principle an infringement of the right set forth in Article 3.” In other words, humiliated, outraged and tortured people are in a subordinated and disadvantageous status compared to other human beings. They are deprived of the respect that is due to them by virtue of equality principle.<sup>128</sup>

May we find here traces of the idea of inherent dignity? Not yet. According to Waldron dignity has not to be treated as a moral idea but as a juridical one. Dignity is not inherent to the nature of human being but to the nature of law which treats everybody as bearer of equal status before the law. Therefore, its violation is especially visible when this status that entitles every person of dignity is disregarded generating deep inequalities.

#### 4. Robert George and Patrick Lee: *The nature and basis of human dignity.*

In 2008, Robert P. George, one of the most important natural law theorists, participated in drafting the report of Council on Bioethics by writing, with Patrick Lee, the article “The Nature and Basis of Human Dignity”<sup>129</sup>. The article is a reflection about the concept of “inherent dignity” as the main meaning of dignity, as opposed to the meaning related to the concept of privacy and self-determination assigned it by the U.S. jurisprudence on abortion, artificial fertilization and euthanasia. In the article, Robert George argues that “all human beings have a special type of dignity which is the basis for the obligation all of us have not to kill them, the obligation to take their well-being into account when we act, and even the obligation to treat them as we would have them treat us, and indeed, that all human beings are equal in fundamental dignity”. Therefore, he offers us arguments to oppose the position that only some human beings, because of their possession of certain characteristics in addition to their humanity (for example, an immediately exercisable capacity for self-consciousness, or for rational deliberation), have full moral worth. We would like to connect this perspective with Böckenförde’s reflection on the concept of person. He argues that the current concept of a person serves the function of distinguishing human life from personal life and of understanding personality – that is, being a person – as a narrower concept than the concept of a human being. Not every human life, but only one with certain characteristics and distinguished qualities can be the life of a person and can consequently be called a person. The concept of person in this way is used to limit what is protected by the law which respects human dignity: neither every men, nor every stage of human life participate of human dignity<sup>130</sup>.

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<sup>128</sup> “It seems that in domestic and international jurisprudence it is possible identify a common judgment about cases of tortures, a sort of universal condemn, I would almost venture to say that there is a *ius commune* regarding these matters”. P. Carozza, *Human Dignity and Judicial Interpretation of Human Rights: A Reply*. European Journal of International Law, Vol. 19, p. 931, 2008; Notre Dame Legal Studies Paper No. 09-14. Available at SSRN: <http://ssrn.com/abstract=1393744>.

<sup>129</sup> R.P. George, P. Lee, *The Nature and Basis of Human Dignity*, Ratio Juris, Vol. 21 N. 2, June 2008, pp. 173-193.

<sup>130</sup> E.W. Böckenförde, *Dignità umana e bioetica*, Morcelliana, 2009.

Instead, according to George, being a person derives from the kind of substantial entity one is, a substantial entity with a rational nature, consistent with the Boethius definition (“*persona est rationalis naturae individua substantia*”). Possession of full moral worth follows upon being a certain type of entity or substance, namely, a substance with a rational nature, despite the fact that some persons (substances with rational nature) have a greater intelligence, or are morally superior (exercise their power for free choice in an ethically more excellent way) than others. In other words, possession of full moral worth follows upon being a person (a distinct substance with a rational nature) even though persons are unequal in many respects (intellectually, morally, etc.). Since basic rights are grounded in being a certain type of substance, it follows that having such a substantial nature qualifies one as having full moral worth, basic rights, and equal personal dignity. Therefore, human beings are intrinsically valuable as subjects of rights at all times that they exist; that is, they do not come to be at one point, and acquire moral worth or value as a subject of rights only at some later time. From this substantial interpretation of human dignity which derives from Jewish-Christian *imago dei* tradition – in other words, from the idea that human being is created in the image of God and consequently has an inherent human dignity not reducible to the manifestation of their own capacities – it follows that embryos and fetuses are also subject to rights and deserve the full moral respect from individuals and from the political community. It also follows that a human being remains a person, and a being with intrinsic dignity and a subject of rights, for as long as he or she lives: there are no sub-personal human beings. Indeed, according to George, embryo-destructive research, abortion, and euthanasia involve killing innocent human beings in violation of their moral right to life and to the protection of the law. This meaning of dignity includes all human beings, regardless of age, size, stage of development, or immediately exercisable capacities.

Robert George’s interpretation offers a fundamental qualification to the concept of human dignity, which he relates especially to the right to life and which he reconstructs in opposition to the conception of dignity, characterizing American jurisprudence, as expression of freedom of choice and of privacy. However, if we consider that this intrinsic value of a human person continues over the different stages of his own development, we may turn to the most recent jurisprudence of Luxemburg Court<sup>131</sup>. The European Court of Justice ruled on October 18, 2011 in an important decision in the case C-34/10 *Oliver Brüstle v. Greenpeace e.V.* to limit embryonic stem cell patents in Europe. The German Federal Court of Justice decided to refer several questions, regarding the quarrel between Brüstle and Greenpeace, to the European Court of Justice for a preliminary ruling. The more controversial issue was whether the technical teaching of Brüstle’s patent was excluded from patentability under § 2 II 1 No. 3, of the *German Patent Act*, according to which: “Patents shall not be granted in respect of the uses of

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131 L. Violini, Il divieto di brevettabilità di parti del corpo umano: un uso specifico e non inutile del concetto di dignità umana, in Quaderni costituzionali, 1/2012, pp. 145-148.



human embryos for industrial or commercial purposes.” The answer to this question depended on the interpretation that should be given to Article 6 (2) (c) of the *EU Biotechnology Directive* 98/44/EC, which states: “Inventions shall be considered unpatentable where their commercial exploitation would be contrary to public order or morality [...] in particular uses of human embryos for industrial or commercial purposes [...] shall be considered unpatentable.”<sup>132</sup>

The first question that the *Bundesgerichtshof* asked the European Court of Justice regarded the interpretation of the term “human embryos” because the EU Directive itself, as the primary legal source, does not offer a definition of the term “human embryo.” So, the Court pointed out that: “The lack of a uniform definition of the concept of human embryo would create a risk for the authors of certain biotechnological inventions being tempted to seek their patentability in the Member States which have the narrowest concept of human embryo and are accordingly the most liberal as regards possible patentability, because those inventions would not be patentable in the other Member States.” Thus, it affirmed that “the context and aim of the Directive show that the European Union legislature intended to exclude any possibility of patentability where respect for human dignity could thereby be affected. It follows, in the view of the Court, that the concept of ‘human embryo’ must be understood in a wide sense”. Therefore, the Court considers that “any human ovum must, as soon as fertilized, be regarded as a ‘human embryo’ if that fertilization is such as to commence the process of development of a human being”. Moreover, “[...] a non-fertilized human ovum into which the cell nucleus from a mature human cell has been transplanted and a non-fertilized human ovum whose division and further development have been stimulated by parthenogenesis” must also be classified as a “human embryo” because “although those organisms have not, strictly speaking, been the object of fertilization, due to the effect of the technique used to obtain them they are capable of commencing the process of development of a human being just as an embryo created by fertilization of an ovum can do so”<sup>133</sup>.

## 5. Conclusion

Charles Malik, one of the drafters of The Universal Declaration of Human Rights, wrote that during the drafting works of the declaration there was a fundamental issue not always present to the mind of the Commission. “It was nevertheless there, at the

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<sup>132</sup> “§ 2 II 1 No. 3, of the German Patent Act is derived from this EU Directive. EU Directives harmonize law within the EU, and the Member States have to implement the legal meaning of the Directive into their national statutes – in this case into the German Patent Act – a process that leaves space for interpretation, legal uncertainties and disputes such as this one. Article 6 (2) (c) of the Directive does not allow the Member States any discretion regarding the fact that the processes and uses listed therein are not patentable. In other words, § 2 II of the German Patent Act – in particular its concept of embryo – cannot be interpreted differently from that of the corresponding concept in Article 6 (2) (c) of the Directive”; C. Langer, *The European Court of Justice Bars Stem Cell Patents In Landmark Decision*, Berkeley Tech. L.J. Bolt (January 5, 2012), <http://btlj.org/?p=1646>.

<sup>133</sup> C-34/10, *Olivier Brüstle c. Greenpeace e V.*, Gr. Sez., 18 ottobre 2011.

base of every debate and every decision. It was the question of the nature and origin of these rights. By what title does man possess them? Are they conferred upon him by the State, or by Society, or by the United Nations? Or do they belong to his nature so that apart from them he simply ceases to be man?"<sup>134</sup>

It seems to me that the three scholars' accounts agree with the fact that human dignity is the basis of human rights. However, they define dignity using very different proverbial tools: Habermas the political, Waldron the juridical, and George and Lee the metaphysical.

Jürgen Habermas connects human dignity with the demand for recognition<sup>135</sup>. He understands that the juridical concept of dignity is also a political concept which is the key for an equal inclusion in a political community. His view shows that once humans have achieved a degree of material equality in their private lives, they will then want to live in a world ordered by Hanna Arendt's<sup>136</sup> notion of equal participation, defending the liberty of all against the threat of domination by any group or individual. The moral value of dignity, indeed, is the result of a recognition of political struggles overcome in the history, so that dignity is both a history and political concept connected to the idea of equality.

Therefore, "human rights are debated and decided upon in particular political communities and are not in themselves inherent in nature. However this requires a universal safeguard of human dignity; humankind's right to belong to a genuine political community in order to resolve issues of rights"<sup>137</sup>. This perspective is well suited with cases involving discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability.

However, dignity as connected to the demand of recognition concept is essentially distinct from inherent dignity. These two types of dignity emphasize different aspects of personhood.<sup>138</sup> Inherent dignity focuses on the universal attribute of individuals as

<sup>134</sup> C. Malik, *International Bill of Human Rights*, 1948, <http://www.udhr.org/history/ibrmalik.htm>.

<sup>135</sup> The desire to be recognized, to have the political and social community acknowledge and respect one's personality and dignity, derives from the idea that individuals are constituted by their communities and therefore their self-conception depends on their relationship to the greater social whole. See N. Rao, *Three Concepts of Dignity in Constitutional Law*. Notre Dame Law Review, Vol. 86, No. 1, pp. 183-271, 2011; George Mason Law & Economics Research Paper No. 11-20. Available at SSRN: <http://ssrn.com/abstract=1838597>.

<sup>136</sup> See H. Arendt, *The Origins of Totalitarianism*, Harcourt, , 1951; Id., *The Human condition*, The University of Chicago Press, 1958; Id., *What is freedom?*, in H. Arendt, *Between Past and Future: Six Exercises in Political Thought*, The Viking Press, 1961, pp. 143-172

<sup>137</sup> See J. Helis, *Hannah Arendt and Human Dignity: Theoretical Foundation and Constitutional Protection of Human Rights*, *Journal of Politics and Law*, Vol. 1, N. 3, September 2008.

<sup>138</sup> "Inherent dignity focuses on the universal attribute of individuals as human agents, able to choose and direct their own lives. Recognition dignity focuses on the individual, but finds that the dignity of a person exists not only in making choices, but also in having those choices validated and accepted by the state and other members of the community. These forms of dignity, both focused on the individual, will sometimes run in the same direction. But they can just as easily conflict, for example when recognition and respect for one person requires constraints on another person's speech or expres-

human beings. Instead, according to Habermas, dignity as demand of recognition is political because it involves the democratic deliberation of a political community so that it is connected to the idea of relational attitudes of the individual.

Waldron's approach to human dignity is also addressed not towards a foundational concept as a basis for human dignity but he believes it should be understood as a "high-ranking legal, political, and social status" that is equally accredited to everyone. According to Waldron's view dignity is understood neither as inherent and universal attributes of human beings, nor as political community recognition (inclusion) of groups and individuals. Dignity as we saw above has its natural habitat in the law because it is a "constructive idea with foundational and explicative function"<sup>139</sup>. Therefore, dignity is not a moral idea but a juridical one. The best evidence that dignity is an autonomous legal concept is that it is originally legal. It is a matter of status and status is a legal conception. Many of the forms of social interaction characteristic of high status when the latter was part of a hierarchical society were forms of deference and submission. Waldron "has given us several vivid and persuasive examples of ways in which the law may be used to defend the high rank or dignity of the ordinary person by protecting her from degradation, insult, and contempt"<sup>140</sup>. Michael Rosen offered us very interesting criticisms to Waldron arguments.

First of all, he believes that the history of the concept of status reveals deep conceptual ambiguities and tensions, tensions that require clarification: "the agreement that came about at the end of the second world war represented a moment of precarious though precious compromise – but it is an agreement that has subsequently, unsurprisingly, fallen apart when the compromise proved incapable of playing the foundational role for which it hoped"<sup>141</sup>.

Secondly, if the foundational concept is understood as a "high-ranking legal, political and social status" that is accredited to everyone, "will this bold proposal bring peace to the battlefield of (moral) metaphysics? [...] Who is "everyone"? Does it include zygotes, embryos, fetuses, the severely mentally handicapped, and those in persistent vegetative states?"<sup>142</sup>. If there was an answer to this question in Waldron's account of human dignity, it wasn't clear. Moreover, it seems to me that if every individual belongs to this status the borders which separate this conception from the natural law theory of inherent dignity are not so divergent. The wall between an anthropological interpretation of dignity and a juridical one does not appear so strong.

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sion, or when recognition and preferences for some racial groups means exclusion of particular individuals from selective opportunities". *Supra* note 136, pp. 268-269.

<sup>139</sup> J. Waldron, *Dignity, Rank and Rights*, Oxford University Press, 2012.

<sup>140</sup> M. Rosen, *Replies to Jeremy Waldron: Dignity, Rank and Rights Tanner Lectures*, Berkeley, April 21-23, 2009, p. 18. Available at [http://scholar.harvard.edu/files/replies\\_to\\_jeremy\\_waldron\\_0.pdf](http://scholar.harvard.edu/files/replies_to_jeremy_waldron_0.pdf).

<sup>141</sup> M. Rosen, *Dignity Past and Present*, in J. Waldron, *Dignity, Rank, and Rights*, Oxford University Press, 2012, p. 84.

<sup>142</sup> *Supra* note 140.

Finally, the connection between dignity as status and legal cases regarding degradation of human beings shows us that the notion of human dignity is related to the conception of “respect”. Article 3 of the European Convention on Human Rights prohibits torture, and “inhuman or degrading treatment or punishment”. We can find the same prohibition reading article 5 of the Universal Declaration of Human Rights: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. Thus, “what degradation, insult and contempt have in common is that they are expressive or symbolic harms, ones in which the elevated status of human beings fails to be acknowledged”<sup>143</sup>. Rosen agrees with this understanding of dignitary harm but also notes that this understanding of dignity as requiring “respect-as-respectfulness” has a very important consequence. “If we take the view that dignitary harms are essentially symbolic – failures to express respect for status – then we must believe either that all violations of fundamental human rights are essentially symbolic or that dignity cannot fulfill the role assigned to it in our basic human rights documents – to provide a foundation for the rights embodied in them”<sup>144</sup>.

This last criticism links us to Robert George’s and Patrick Lee’s lecture of inherent human dignity. Their account tries to provide a basic foundation of human rights by showing the core of dignity: “all human beings have a special type of dignity which is the basis for the obligation all of us have not to kill them, the obligation to take their well-being into account when we act, and even the obligation to treat them as we would have them treat us, and indeed, that all human beings are equal in fundamental dignity”<sup>145</sup>. On one hand, human beings needs recognition or respect of their integrity (physical and moral). On the other hand, there is something more original than these “fundamental needs”: the idea of something inherent, an inherent inviolability of a human being as a human being. This conception is neither only juridical nor only moral and it is deeply connected to cases regarding the right to life. In this paper, I also quoted the European Court of Justice case *Brüstle v. Greenpeace* (2011) which does not involve the right to life but the opportunity to patent embryonic stem cells. However, it seems to me that the court confers to human dignity an ultimate value in order to protect the human embryo, or, in other words, in order to preserve human life in all stages of its development from a commercialization of it. This interpretation of dignity doesn’t exclude Habermas’ and Waldron’s views, on the contrary it points out the core, the origin of the dynamism of dignity (fundamental needs of recognition and respect) that shows in the same time the root and the complexity of integral human flourishing. The importance of inherent dignity is exceptionally explained by Charles Malik, one of the

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<sup>143</sup> *Ibi*, p. 19.

<sup>144</sup> Michael Rosen doesn’t believe that symbolic harms are not real harms but they cannot, surely, be the most fundamental. After all, as he wrote, the worst of the Nazi state did to the Jews was not the humiliation of herding them into cattle truck and forcing them to live in conditions of unimaginable squalor; it was to murder them; *Id.*, *Dignity Past and Present*, 2012,

<sup>145</sup> R. George, P. Lee, *The Nature and Basis of Human Dignity*, *Ratio Juris*. Vol. 21 No. 2 June 2008, p. 173.

drafters of Universal Declaration of Human Rights. He stated that “if human rights simply originate in the State or Society or the United Nations, it is clear that what the State now grants it might one day withdraw without thereby violating any higher law. But if these rights and freedoms belong to man as man, then the State or the United Nations, far from conferring them upon him, must recognize and respect them, or else it would be violating the higher law of his being. This is the question of whether the State is subject to higher law, the law of nature, or whether it is a sufficient law unto itself. If it is the latter, then nothing judges it: it is the judge of everything. But if there is something above it which it can discover and to which it can conform, then any positive law which contradicts that transcendent norm is by nature null and void. Finally, if my fundamental rights and freedoms belong to me by nature, then they are not a chance assemblage of items: they must constitute an ordered whole. Responsible inquiry must then exhibit their inner articulation.

The deepest formulation of the present crisis in human rights is not that these rights have been brutally violated in the recent war; nor is it that there is not enough clamor demanding their proper establishment and protection; nor certainly is it that the United Nations has done nothing about them. There is more talk today about human rights than ever before, and the United Nations has a full-fledged Commission wholly dedicated to that cause.

The real crisis in human rights does not lie along any of these lines. It consists rather in the fact that people today do not believe they have natural, inherent, inalienable rights. You should see and hear modern man argue about his rights! Can you suggest to him that he is originally and by nature possessed of his fundamental rights? The merest suggestion that there is nature, reality, truth, peace and rest, an unchanging order of things which it is our supreme destiny to know and conform to, is anathema to modern man. He seeks his rights not in and from that order, but from his government, from the United Nations, from what he calls ‘the existing world situation’ and ‘the last stage in evolution.’ Destitute and desolate, he goes about begging for his rights at the feet of the world, and when the Commission votes an article by 10 to 8, he rejoices that there, there he is granted a right! Having lost his hold on God, or more accurately, having blinded himself to God’s constant hold on him, he seeks for his rights elsewhere in vain. The spectacle of a being having lost his proper being – can there be anything more tragic?”<sup>146</sup>

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<sup>146</sup> C. Malik, *International Bill of Human Rights*, 1948, <http://www.udhr.org/history/ibrmalik.htm>. Cf. also R. Spaemann, *Love and dignity of human life*, Wm. B. Eerdmans Publishing Co., 2012. F. Botturi, *Dignità e Rispetto Reciproco*, Catholic Muslim Forum 4<sup>th</sup>-6<sup>th</sup> November 2008.

Therefore inherent dignity is irreducible either to a political term or to a juridical one. It includes both these expressions of its nature but it is not identifiable with just one of them. In some way it includes and at the same time it overcome its political and juridical determinations.